

Congratulations, you just won at trial! Now, what's next?

Immediate steps you must take once the verdict is announced

By Rowena J. Dizon

Obtaining a verdict in favor of your client is an amazing feeling. While of course you should take a moment to enjoy the success, also be aware of what comes next. This article highlights some of the immediate steps to be aware of post-verdict and provides tips to ensure your verdict survives.

Before the jury is dismissed

Control your emotions and look closely at whether the verdict is ambiguous or inconsistent before the jury is dismissed. Listening to a verdict being read is fraught with emotion. Don't get carried away. You only have a few minutes to correct any errors if there are any, in the verdict form while the jury is still empaneled.

One of the ways to attack a verdict is to show the verdict is defective because it is ambiguous or inconsistent. Normally, the trial court who first reviews the verdict before it is read out loud by the clerk would ask the jury to correct any defects in the way the form is filled out. (Code Civ. Proc., § 619 ["When the verdict is announced, if it is informal or insufficient, in not covering the issue submitted, it may be corrected by the jury under the advice of the Court, or the jury may be again sent out"].) However, if the trial judge does not find any ambiguities or inconsistencies on their own, it is still your job to spot those ambiguities or inconsistencies and ask the trial judge for clarification.

"A special verdict is inconsistent if there is no possibility of reconciling its findings with each other. If a verdict appears inconsistent, a party adversely affected should request clarification, and the court should send the jury out again to resolve the inconsistency. (*Singh v. Southland Stone, U.S.A., Inc.* (2010) 186 Cal.App.4th 338, 357-358, internal citations omitted.) Failure to request clarification before the jury is excused will result in waiver of any challenge based on an inconsistent verdict. "It is well established by numerous authorities that when a verdict is not in proper form and the jury is not required to clarify it, any error in said verdict is waived by the party relying thereon who at the time of its rendition failed to make any request that its informality or uncertainty be corrected.'" (*Bisnett v. Hollis* (1962) 207 Cal.App.2d 142, 150.)

When the verdict is being read, you probably won't have a copy of the verdict, so you should be ready with a blank copy of the same verdict form and fill it out as the clerk reads out the verdict. Although there may be a lot of anxiety and joy during these moments, you need to be studying the verdict for possible inconsistencies or errors that the jury may be able to cure before being discharged. The time to point out potential errors to the judge is before the judge thanks and dismisses the jury.

For example, if you have two causes of action and they both have similar-looking elements, and the jury votes "yes" in one cause of action and "no" in the other, you might have an inconsistency. Ideally, when preparing the verdict forms, you would have run scenarios of how the jury might misunderstand the questions and prepared the forms to avoid those problems. You would have already done the research as to whether two different answers to similar-looking elements is problematic on a verdict. Only you would know whether the jurors' different answers to each cause of action creates an inconsistency that needs to be resolved before the jury is dismissed. You won't have any time to research the issue when the verdict is being announced. Prepare for the reading of the verdict so you can ask for clarification before the jury is dismissed.

Sometimes the jury's math is incorrect, and they might allocate more in percentages such that it goes over 100% total liability; in that case, the jury needs to be sent back to the jury room. Other times, they don't fill out the damages portion correctly and they incorrectly add the sums and/or enter them in the incorrect lines. For example, the jury might put down the total sum of noneconomic damages where the grand total of both economic and noneconomic damages should be. It is prudent to ask the judge to have the jury go back and write the correct sums in the correct lines.

Poll the jury

After the clerk announces the verdict, the judge will ask if counsel "would like to poll the jury." This means each juror will be asked whether they voted for each item in the verdict form. For example, if a question in the verdict form asks whether the defendant was negligent, polling the jury will tell you how many jurors voted in favor and how many voted against.

Polling the jury is very important. In addition to informing the judge and the parties whether the jurors voted with the required minimum of nine votes in a civil case, (Code Civ. Proc., § 618), it can be very useful later on when you are opposing a motion for new trial. It also gives you time to study the verdict for any ambiguities or inconsistencies before the jury is thanked and dismissed.

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The polling information is typically recorded by the court reporter in the transcript or in the clerk's minutes.

If the defendants raise an issue about incorrect jury instructions that misled the jury, and even if a 9-3 vote alone suffices to show a jury was misled, the defendants can still try to argue that a jury vote of 9-3 on a question in the verdict form indicates the jury was misled by instructional error. (See *Mitchell v. Gonzales* (1991) 54 Cal.3d 1041, 1055 [nine-to-three and 11-to-1 verdicts against defendants on negligence, and 10-to-2 verdict finding no causation, were inconsistent given the record in the case and strongly suggested prejudice from the failure to instruct on "substantial factor" causation]; *Sandoval v. Bank of America* (2002) 94 Cal.App.4th 1378, 1389 [nine-to-three finding on special verdict supports finding instructional error prejudicial].) On the other hand, if there is no instructional error, you can argue that an 11-1 vote is "a clear victory" for the plaintiff. (*Pool v. City of Oakland* (1986) 42 Cal.3d 1051, 1072.)

If the defendant moves for a new trial based on insufficient evidence, having information that the jury voted unanimously against the defendant helps you to argue that the jury soundly rejected the defendant's contrary evidence. For example, if in a motor-vehicle crash the issue is whether your client was comparatively negligent, and the defense produced biomechanics and accident-reconstruction experts to prove their theory, a unanimous verdict can help you convince the trial court that none of the jurors believed the defense's evidence and the verdict should not be disturbed.

Control the deadlines for post-trial filings

Code of Civil Procedure section 664.5 subdivision (a) provides that "the party submitting an order or judgment for entry shall prepare and serve, a copy of the notice of entry of judgment to all parties who have appeared in the action or proceeding and shall file with the court the original notice of entry of judgment together with the proof of service."

It is the entry of the judgment that triggers the deadline to file your memorandum of costs (Cal. Rules of Court, rule 870 (a)(2)), and the deadlines associated with post-trial motions for new trial, (Code Civ. Proc., § 659 (a)(2)), and for judgment notwithstanding the verdict. (Code Civ. Proc., § 629 (b).)

A notice of intention to move for a new trial, (Code Civ. Proc., § 659) or a motion for judgment notwithstanding the verdict, (Code Civ. Proc., § 629), may be filed with the court clerk and served on each adverse party "[b]efore the entry of judgment." (Code Civ. Proc., § 659, subd. 1.) Otherwise, they must be brought by the earliest of three deadlines: (1) within 15 days of "the date of mailing notice of entry of judgment by the clerk of the court pursuant to Section 664.5"; (2) within 15 days of service on the moving party "by any party of written notice of entry of judgment"; or (3) "within 180 days after the entry of judgment." (Code Civ. Proc., §§ 629, 659, subd. (b).)

Notice that the shorter 15-day deadline for these post-trial motions is triggered when a copy of the conformed judgment is served. Note also that the document served can be either a document titled "Notice of entry of judgment" or a copy of the conformed "judgment." A party's service of a *file-stamped copy of the judgment* on the moving party satisfies the requirement of giving notice of entry of judgment. (*Palmer v. GTE Calif., Inc.* (2003) 30 Cal.4th 1265, 1267.)

The same 15-day deadline applies to file and serve your memorandum of costs. Note that you must wait until a judgment is entered before filing your memorandum of costs. Otherwise, any costs awarded are unauthorized. "[T]he procedures for obtaining costs are technical and mandatory." (*Boonyarit v. Payless Shoesource, Inc.* (2006) 145 Cal.App.4th 1188, 1193.)

To obtain costs, a party must comply with the applicable rules of court. (See § 1034, subd. (a) ["Prejudgment costs . . . shall be claimed and contested in accordance with rules adopted by the Judicial Council"].) Rule 870 of the California Rules of Court provides as here relevant: "A prevailing party who claims costs shall serve and file a memorandum of costs within 15 days after the date of mailing of the notice of *entry of judgment or dismissal* by the clerk under Code of Civil Procedure section 664.5 or the date of service of written notice of *entry of judgment or dismissal*, or within 180 days after *entry of judgment*, whichever is first." (Cal. Rules of Court, rule 870(a)(2), italics added.) Thus, rule 870 contemplates the entry of a dismissal or judgment as a predicate to a costs award. (See also Weil Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2006) ¶ 11:38, p. 11-22 ["Ordinarily, a judgment or order must be entered upon which a costs award must be based"].) (*Ibid.* at 1192, Italics in original.) (Since, *Boonyarit*, Rule of Court 870 has been renumbered to Rule 3.1700.)

Because there can be a lot of work and waiting entailed in collecting all the bills from the various experts, law-enforcement witnesses, and trial providers, it may be advisable to not submit a proposed judgment right away and not serve a copy of the judgment until you are confident you will be able to timely complete your costs memorandum. If you miss entering a cost in your original costs memorandum and you fail to file an amended costs memorandum by the same 15th-day deadline, the trial court will likely find that you waived recovery of that cost because of the mandatory terms of Rule 3.1700. (*Cf. Anthony v. City of Los Angeles* (2008) 166 Cal.App.4th 1011 ["Fifteen-day time limit for claiming costs did not apply to employee's request for expert witness fees incurred in Fair Employment and Housing Act (FEHA) retaliation action, since employee was not entitled to those fees as a matter of right; such fees could not be immediately entered by the clerk, and instead

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necessitated an exercise of discretion by the trial court."].)

On the other hand, you may want to avoid delay in submitting the proposed judgment because the signed judgment will start the clock on the defense's filing of post-trial motions. Perhaps you are aware of potential juror misconduct issues and want to expedite the signing of the judgment to trigger the post-trial deadlines, knowing that it may be difficult for defense to obtain necessary juror declarations.

Finally, be aware that the 75 days during which the trial court has jurisdiction to rule on a new trial motion or JNOV motion is similarly linked to the clerk's mailing or a party's service of written notice of entry of judgment. (Code Civ. Proc., § 660 subd. (c) [" the power of the court to rule on a motion for a new trial shall expire 75 days after the mailing of notice of entry of judgment by the clerk of the court pursuant to Section 664.5 or 75 days after service on the moving party by any party of written notice of entry of judgment, whichever is earlier, or if that notice has not been given, 75 days after the filing of the first notice of intention to move for a new trial"].)

Obtain and organize your bills for the memorandum of costs

A memorandum of costs (summary) requires you to sign it under penalty of perjury. For this reason, you are not required to attach all of the bills and invoices supporting your costs memorandum. However, since you are required to fill in and attach the memorandum of costs (worksheet), you must have all the supporting documents ready to back up each item you request, under penalty of perjury. (See Judicial Council Forms MC-010 and MC-011.)

These Judicial Council Forms are created after the list found in Code of Civil Procedure section 1033.5, which define "allowable" and "not allowable" costs, as well as costs that the trial judge may award at their discretion.

As soon as you obtain a successful verdict, you should assign a staff member to collect all the bills and contact all providers who have not submitted a final bill. Because of the Rule 3.1700 deadline, you don't want to have hundreds or even thousands of dollars not included in the costs memorandum that you've filed. Contact the court reporter so they can prepare their bill, and the experts as you can get their fees as 998 costs. If you had law enforcement officers testify, their agency might send you a bill in the hundreds of dollars for the time they were in court, in addition to the usual witness fee. Call them to make sure.

If your trial was in another county and you found that it was better to stay in a hotel (hopefully somewhere modest and not the Ritz), don't hesitate to ask for reimbursement of hotel bills, food and office supplies. The trial courts are authorized to award them at their discretion. When the defense files a motion to tax these costs, oppose the motion by including a declaration that explains why counsel and even a paralegal had to stay in a hotel during trial. You should show that being on time for court every day is important and having office supplies in your hotel/makeshift office was necessary for the conduct of the trial. You should cite the trial court's discretionary authority under Code of Civil Procedure section 1033.5, subdivision (c) and *Doe v. Dep't of Children & Family Servs.* (2019) 37 Cal.App.5th 675, 695, which explained it this way:

> In this case, the meal expenses at issue were incurred during trial, which was located approximately 90 miles from defense counsel's office in Oxnard. Accordingly, there was no abuse of discretion. Doe also challenges the court's allowance of travel expenses incurred by a Sacramento-based legal assistant, who Doe asserts was not reasonably necessary to the litigation and who could have been replaced by a local legal assistant. However, Defendants explained the legal assistant was defense counsel's paralegal, and had been involved in the case from the outset. Indeed, she assisted with the preparation, organization, and management of exhibits, documents, and witnesses. She also helped finalize and file documents prepared during trial. Once again, we find the trial court acted within its discretion in concluding her presence at trial was reasonably necessary to conduct the litigation and in allowing recovery of her meals and lodging expenses.

(*Id.* at 695-96.)

Your declaration should mirror what the Court found acceptable in *Doe*, especially if you brought along support staff that helped you organize exhibits and provide technology assistance for presentation of exhibits and argument, which may have been necessary for the efficient presentation of evidence to the jury at trial.

Check your 998 offer

Review your 998 offer to see if you can recover and include expert fees and prejudgment interest in your costs memorandum. The law determining the validity of statutory offers to compromise under section 998 of the Code of Civil Procedure fills book chapters and is beyond the scope of this article. Assuming you made a valid 998 offer that was rejected, you can ask for reimbursement of your expert fees and prejudgment interest.

The Judicial Council Forms MC-010 and MC-011 will guide you on where to enter your expert fees; just be careful as these forms separate out where you enter the expert witness fee you pay when you depose the opposing experts and entered in Item 4 as "Deposition costs" and the expert fees you have to pay your own experts, which you can recover as expert fees in Item 8.b.

Prejudgment interest based on 998

Prejudgment interest based on 998 must be stated in the memorandum of costs. Don't risk waiving your prejudgment interest. You must include it in your memorandum of

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costs. (See *Jones v. John Crane, Inc.* (2005) 132 Cal.App.4th 990, 1012, [prejudgment interest under § 3291 "is not an element of damages and must be claimed by memorandum of costs"].)

The amount of prejudgment interest must be claimed in the memorandum of costs (summary) Form MC-010 under Item 16 "Other" and in an attached page to the worksheet you should explain how you arrived at your calculation. Prejudgment interest runs from the plaintiff's first offer. When a plaintiff makes several unsuccessful section 998 offers in a personal-injury case, and the judgment exceeds the offers, plaintiff is entitled to prejudgment interest from the date of the *first* offer. (*Ray v. Goodman* (2006) 142 Cal.4th 83, 87, 91.) By statute, "the judgment shall bear interest at the legal rate of 10 percent per annum calculated *from the date of the plaintiff's first offer* pursuant to Section 998 …" (Civ. Code, § 3291, italics added.)

Make it difficult to challenge and make it easy for the judge to award your prejudgment interest. Spell out how you calculated your prejudgment interest. To make a record of the amount you are requesting, it is recommended that you reduce the total amount to the amount of the daily interest. This helps with the calculation when the judge awards it at the future hearing on the defendant's motion to tax.

The following is some sample language that may be effective, which you can customize according to your verdict amount and relevant date of your section 998 offer. Keep in mind that the prejudgment interest is accruing while you file the costs memo up to the date the court rules on a motion to tax. You need to pick a date so you can put an amount of prejudgment interest accrued as of a certain date. Let's assume the date of your first 998 offer is January 15, 2020, and for ease of calculation, let's assume your verdict is $1,000,000. Let's further assume that you are filing your costs memorandum on November 1, 2023. You can provide the following explanation of your calculation in the Attachment for Item 16 "Other" to the Worksheet:

MEMORANDUM OF COSTS
WORKSHEET ATTACHMENT
16 ITEM 16 "OTHER"
Prejudgment Interest On Plaintiff's Rejected 998 Offer = $ 379,722.42 or $273.97 per day until judgment is paid.
"[T]he judgment shall bear interest at the legal rate of 10 percent per annum calculated from the date of the plaintiff's first offer pursuant to Section 998 of the Code of Civil Procedure which is exceeded by the judgment, and interest shall accrue until the satisfaction of judgment." (Civ. Code, § 3291.)
Jane Doe's 998 Offer is dated January 15, 2020.
Judgment for Jane Doe against Defendant John Smith is $1,000,000.
Judgment multiplied by .10 annual interest is $100,000.
Daily interest is calculated by dividing $100,000 by 365 = $ 273.97.
From date of offer January 15, 2020 to November 1, 2023 = 1,386 days.
Prejudgment interest accrued up to November 1, 2023 = $273.97 x 1,386 days = $379,722.42 (this is the amount you will enter in the Summary Item 16 "Other.")

Draft the proposed judgment carefully

Typically, the verdict signed by the foreperson will spell out the amounts a defendant will have to pay. However, if there is an allocation of fault and an award of noneconomic damages, you may have to detail in the proposed judgment how much each defendant must pay plaintiff.

In the following example, the plaintiff sued a negligent employee and his employer. The Special Verdict asked the jury to find that the employee was acting in the course and scope of his employment and asked for an award against the negligent employee only. Since the employer's liability is vicarious, there was no need for a separate amount against the employer. The jury also allocated 80% of the fault to the negligent employee and awarded $300,000 in economic damages and $700,000 in noneconomic damages.

The following sample of a proposed judgment spells out how much can be recovered against the defendants, including the employer because of the jury's apportionment of fault and how much can be recovered under Code of Civil Procedure section 1431.2:

Plaintiff Jane Doe is entitled to recover 100% of her economic damages against Defendant John Smith and his employer Acme Radio Company, in the amount of $ 300,000. Plaintiff Jane Doe is entitled to recover 80% of her non-economic damages against Defendant John Smith and his employer Acme Radio Company in the amount of $ 560,000.

Judgment is hereby ordered in favor of Plaintiff Jane Doe against Defendant John Smith and his employer Acme Radio Company for the total amount of $860,000, with interest thereon at the rate of 10% per annum from the date of entry of the Judgment until paid, together with costs and disbursements in the amount of $_____.

New trial motion/JNOV motion

Take time to schedule any potential opposition to a new trial or JNOV motion. Oppositions are due 10 days from service of the points and authorities. (Code Civ. Proc., § 659a.) You can get an extra maximum of 10 days to file your opposition "for good cause shown by affidavit or by written stipulation of the parties." (*Ibid.*) A typical good cause reason is if you don't have all of the reporter's transcripts necessary to oppose the motion. The court reporters typically will notify you when the opposing party has ordered a transcript, and the reporter will ask if you want a copy. Make sure to read the motion right away so you can determine whether you have all of

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the transcripts necessary to oppose the motion. Don't assume the defendant ordered all the transcripts you will need, and you may need to order other portions of the transcript. If so, you may need extra time for the reporter to prepare the additional transcripts. Ask opposing counsel if they will stipulate to the additional statutory 10 days for you to file your opposition. If they stipulate, you must file it with the Court as a Stipulation and Proposed Order as the Court has to order the extension. If the defendant refuses to stipulate, you have to file an ex parte right away to get relief. These must be done before your original 10-day deadline.

Here's a sample Joint Stipulation and Proposed Order:

JOINT STIPULATION AND PROPOSED ORDER TO EXTEND PLAINTIFFS' DEADLINE TO FILE THEIR OPPOSITION TO DEFENDANTS' MOTION FOR NEW TRIAL PURSUANT TO C.C.P. SECTION 659(a); PROPOSED ORDER TO THE COURT, ALL PARTIES AND THEIR ATTORNEYS OF RECORD HEREIN:

WHEREAS, Plaintiff JANE DOE's deadline to file her Opposition to Defendants' JOHN SMITH and ACME RADIO COMPANY's Motion for New Trial is __(date)_____.

WHEREAS, to oppose the new trial motion Plaintiff needs a transcript of testimony given on __(date)____ morning/afternoon session from the court reporter Gloria Doe and Plaintiff has requested it through the (Los Angeles Superior Court/Court Reporting Company).

WHEREAS, the court reporter may not be able to provide the transcript to Plaintiff in time for Plaintiff to file her Opposition on ___(date)____.

IT IS HEREBY STIPULATED between counsel for Plaintiff JANE DOE and counsel for Defendant JOHN SMITH and ACME RADIO COMPANY, that good cause exists to extend Plaintiff's opposition filing deadline by the 10 days allowed by Code Civ. Proc. § 659a.

IT IS HEREBY STIPULATED THAT Plaintiff's deadline is extended by 10 days, up to _____to file her Opposition to Defendants' Motion for New Trial.

_____

Signatures of Counsel

ORDER

Good cause appearing therefor, Plaintiffs' deadline to file their Opposition to Defendants' Motion for New Trial is extended to _____.

DATE: _____

_____

Judge of the Superior Court

Conclusion

While it is impossible to cover all the situations that can occur after a verdict, the basic steps above are important to protect your verdict so you can enforce your judgment.



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