KINSEY LAW OFFICES
SEAL BEACH, CA

JURY AND NON-JURY TRIALS

If your case doesn't settle or it is not dismissed and you decide to proceed to a final resolution of the issues, the Court will have to resolve them for the parties in a trial.

The following is a general discussion of the law and procedures our office may have to deal with in your case.

Preparation For Trial

In a broad sense, trial preparation begins before a lawsuit is filed when decisions are made as to whether to proceed with litigation and continues through the filing and response to the initial complaint, through the discovery phase of the case (interrogatories, document production, depositions, etc.), often through a series of motions (to compel responses to discovery, for physical examinations, etc.), through efforts to settle, sometimes through arbitration, and continues until the day the trial commences.

When a case doesn't settle, the trial preparation process is often very tedious and time-consuming.

Right To Jury Trial

"In actions for the recovery of specific, real, or personal property, with or without damages, or for money claimed as due upon contract, or as damages for breach of contract, or for injuries, an issue of fact must be tried by a jury, unless a jury trial is waived, or a reference is ordered as provided in this Code. Where in these cases there are issues both of law and fact, the issue of law must be first disposed of. In other cases, issues of fact must be tried by the Court, subject to its power to order any such issue to be tried by a jury, or to be referred to a referee, as provided in this Code." [Ca Civ Pro § 592]

Exception - Small Claims Actions: Small claims hearings are required to be "informal" (Ca Civ Pro § 116.510). Therefore, there is no right to a jury trial either in small claims actions or on appeal of a small claims judgment to the superior court. [See Ca Civ Pro § 116.770(b); Crouchman v. Sup.Ct. (El Dorado Investors) (1988) 45 Cal.3d 1167, 1173, 248 Cal.Rptr. 626, 628]

In civil cases, *"the jury shall consist of 12 persons or a lesser number agreed on by the parties in open court."* [Ca Const. Art. I, § 16; see Ca Civ Pro § 220] The parties may stipulate "in open court" to a jury of less than 12 members in superior court civil cases. [Ca Const. Art. I, § 16; L.A. Sup.Ct. Rules 8.20(c)]

Exception – Equitable Actions: "As a general proposition, the jury trial is a matter of right in a civil action at law, but not in equity." [C & K Engineering Contractors v. Amber Steel Co., Inc. (1978) 23 Cal.3d 1, 8, 151 Cal.Rptr. 323, 326]

To determine whether an action is "Legal" or "Equitable", the court must make a historical analysis. The constitutional right to jury trial is "the right as it existed at common lawin 1850 when the (California) Constitution was first adopted . . ." [C & K Engineering Contractors v. Amber Steel Co., Inc., supra, 23 Cal.3d at 8, 151 Cal.Rptr. at 326 (emphasis and parentheses added)] The common law at the time the California Constitution was adopted includes the common law of England at that time . . . both "the lex non scripta and the written statutes enacted by Parliament." [People v. One 1941 Chevrolet Coupe (1951) 37 Cal.2d 283, 286-287, 231 P.2d 832, 835]

"Gist Of The Action": A jury trial must be granted where the "gist" of the action is legal rather than equitable in nature. [C & K Engineering Contractors v. Amber Steel Co., Inc. (1978) 23 Cal.3d 1, 9, 151 Cal.Rptr. 323, 327; Arciero Ranches v. Meza (1993) 17 Cal.App.4th 114, 125, 21 Cal.Rptr.2d 127, 134; Jefferson v. County of Kern (2002) 98 Cal.App.4th 606, 614, 120 Cal.Rptr.2d 1, 6]

Hybred Actions: Sometimes, legal and equitable issues are raised in the same cause of action (e.g., lien foreclosure proceedings); or in separate pleadings (e.g., equitable defenses to legal claims). If the legal and equitable issues are severable, the judge will decide the equitable issues, while the right to jury trial is preserved for the legal issues. If the issues are not severable, the right to a jury is determined under the "gist of the action" test (above). [Unilogic, Inc. v. Burroughs Corp. (1992) 10 Cal.App.4th 612, 622-623, 12 Cal.Rptr.2d 741, 746] If the equitable and legal issues are tried separately, the order in which they are tried becomes significant. The judge's findings of fact on equitable issues affect the jury's determination of the legal issues.

Actions Classified As Legal (To Be Tried By A Jury): The actions noted below are recognized to be "legal" in nature and hence triable by jury. (This is, by no means, a complete list)

- To recover specific real or personal property with or without damages. [Ca Civ Pro § 592]
- To recover money due on a contract. [Ca Civ Pro § 592]
- To recover money due under common count theories
- To recover damages for breach of contract. [Ca Civ Pro § 592]
- To recover damages for fraud
- To recover a fraudulent conveyance of a determinate sum of money.
- For restitution of benefits paid under a contract following rescission thereof. Here, the relief sought is legal although measured by equitable doctrines.
- To recover damages for negligence. [Ca Civ Pro § 592]
- To recover damages on a cross-complaint for equitable indemnity.
- To recover damages for injury to real or personal property. [Ca Civ Pro § 592]
- To recover damages for violation of a statute.

- To recover a secret profit obtained in breach of fiduciary duties.
- To compel a trustee to pay monies immediately and unconditionally due to a beneficiary.

Actions Classified As Equitable (To Be Tried By A Judge): The actions noted below are recognized to be "equitable" in nature and hence triable by a judge and not a jury. (Again, this is, by no means, a complete list)

- For injunctive relief.
- For specific performance of a contract.
- To compel arbitration.
- For "quasi specific performance" of a testamentary contract (e.g., to enforce oral agreement between testators who devise estates to each other and agree survivor will leave everything to plaintiffs).
- To establish a constructive trust.
- For an accounting.
- For equitable restitution.
- For cancellation of an instrument.
- Reformation of a contract or other instrument.
- Rescission of a contract or instrument.
- To quiet title where there is no issue as to right of possession.
- For damages or other relief under the doctrine of promissory estoppel.
- Shareholder's derivative action.
- Claims for breach of fiduciary duty.
- Alter ego liability actions
- Foreclosure of mortgage or lien on real or personal property.
- Paternity actions.
- Tax collection actions.
- Action to set aside judgment for extrinsic fraud or mistake.
- Action seeking payment from trust estate for services rendered to the estate.
- Interpleader actions in which the rights of the parties as between themselves are governed by principles of equity.
- To recover amounts paid as a "penalty" for breach of contract (invalid liquidated damages provisions).
- Contempt proceedings

- Ca Corp § 709 claims: Actions to determine corporate governance issues under Ca Corp § 709 (e.g., the validity of corporate director elections or appointments and the validity of the issuance of shares)
- Proceeding for apportionment of settlement proceeds of wrongful death action.
- Equitable defenses (e.g., res judicata, equitable estoppel, etc.)
- Declaratory Relief: But Note: right to jury trial exists in a declaratory relief action "where such a right would be guaranteed if the proceeding were coercive rather than declaratory in nature." [State Farm Mut. Auto. Ins. Co. v. Sup.Ct. (Corrick) (1956) 47 Cal.2d 428, 432, 304 P.2d 13, 15]

Order Of Trial Of Legal And Equitable Issues

Where both legal and equitable issues or claims are to be tried, the order of trial becomes significant because findings of fact on the issues first tried may affect the issues tried later. The order of proof at trial is generally discretionary with the trial judge. [Ca Evid § 320--"Except as otherwise provided by law, the court in its discretion shall regulate the order of proof"]

In actions involving both legal and equitable issues, most courts will try the equitable issues first without a jury because this may obviate the necessity for jury trial of the legal issues. I.e., the court's rulings on the equitable issues may establish rights or defenses that leave nothing further to be tried.

Securing Trial By Jury

Assuming the action or issues are jury triable and that a jury is desired, proper steps must be taken to secure and maintain the right to trial by jury, including:

Timely Demand For Jury: Trial by jury is waived unless a jury demand is made "at the time the cause is first set for trial, if it is set upon notice or stipulation, or "within five days after notice of setting if it is set without notice or stipulation." [Ca Civ Pro § 631(d)(4)]

Posting Jury Fees: At least 25 days before the date set for trial (5 days in unlawful detainer actions), a party must deposit with the clerk or judge an advance jury fee not to exceed "one hundred fifty dollars ($150) . . . " [Ca Civ Pro § 631(b)]

Final Status Conference

On or before the trial date, the Judge may set a "final Status Conference" between the judge and trial counsel at which final orders are made governing the scope and conduct of trial.

Several purposes may be served by the final status conference and in-chamber conference:

- to clarify and narrow the issues to be tried;
- to encourage stipulations that will expedite the trial, especially concerning foundation for admission of documentary evidence;
- to rule on any objections and pretrial motions (including motions in liminie);

- to set the "ground rules" for trial on such matters as voir dire, exchange and premarking exhibits and other "housekeeping" considerations;
- to encourage stipulations for a verdict by a reduced number of jurors if necessary;
- to explore the possibility of last-minute settlement.

Local "fast track" rules typically require one final status conference shortly before trial. (These final status conferences are intended to shorten the traditional in-chambers conference by resolving many matters earlier.) [L.A. Sup.Ct. Rule 7.9(h)--no more than 10 days; S.D. Sup.Ct. Rule 2.1.15--"trial readiness conference" 4 weeks before trial; Orange Sup.Ct. Rule 450--"issue conference" involving counsel only at least 10 days before trial]

Pretrial Motions

Depending on the particular procedural and factual scenario of the case, the parties may consider bringing one or more pretrial motions.

Motion In Liminie: A motion in limine is a motion "at the threshold" of trial to exclude evidence deemed inadmissible and prejudicial by the moving party. Its purpose is to "avoid the obviously futile attempt to 'unring the bell'" when highly prejudicial evidence is offered and then stricken at trial.

Motions in limine serve other purposes as well: They permit more careful consideration of evidentiary issues than would take place in the heat of battle during trial. They minimize sidebar conferences and disruptions during trial. Finally, by resolving critical evidentiary issues at the outset, they enhance efficiency of the trial process and promote settlements.

The most common use of a motion in limine is to prevent opposing parties from any use of certain prejudicial evidence. Unless the court is willing to reconsider, the evidence is permanently excluded from the trial. In addition to excluding highly prejudicial evidence, the court may instruct opposing counsel to avoid any mention of the evidence in question during trial or in argument to the jury; and to direct persons under their control (counsel's associates, clients, witnesses, etc.) likewise to avoid such mention.

Pursuant to the California Rules of Court (Ca Rules of Court Rule), the trial judge has discretion to set the "timing and place of filing and service" of a motion in limine. [See Ca Rules of Court Rule 312(d)] In some courts using a "direct calendar" system (same judge handles cases throughout), motions in limine generally are heard at the final status conference before trial (normally 10 days before trial). [See L.A. Sup.Ct. Rule 7.9(h)] In other courts using a "direct calendar" system, motions in limine generally are set for hearing on the date set for trial, although the motion papers are ordinarily exchanged and filed before trial. [See Orange Sup.Ct. Rule 450--motions in limine exchanged at "issue conference" 10 days before trial; S.D. Sup.Ct. Rule 2.1.18--filed 5 court days (served 2 court days) before trial call]

Typical Plaintiff's Motions In Liminie: The following matters are typical of those which may be challenged by plaintiffs before trial by motion in limine:

Collateral Source Payments: Evidence that plaintiff has been reimbursed or received payments from a "collateral source" is generally inadmissible in personal injury cases.

Subrogation: Where an action is filed in plaintiff's name, evidence that the claim is really owned (in whole or in part) by an insurance company as subrogee is generally inadmissible in a liability action.

Evidence Of Remarriage: Evidence that the widow or widower has remarried (or has marital prospects) is inadmissible to minimize damages in a wrongful death case.

Tax Consequences Of Personal Injury Award: Evidence that plaintiff's recovery will not be subject to income taxation is inadmissible in a personal injury case.

Unfavorable Irrelevant Evidence: Anything unfavorable to plaintiff may be excluded if irrelevant to the issues in the case (see Ca Evid § 350). For example, such things as plaintiff's:

- criminal record;
- traffic citation received in accident (without a guilty plea or conviction);
- status as illegal immigrant;
- dishonorable discharge from military service;
- failure to file tax returns (or under-reporting income, etc.);
- drinking, drug use or sex habits if not relevant to injuries or other issues in case;
- retention of counsel on a contingency fee basis.

Facts Likely To Curry Sympathy For Defendant: Facts helpful to the defendant may be excluded if irrelevant to the issues in the case. For example, such things as defendant's:

- poor financial condition;
- poor health;
- defendant did not receive a traffic ticket in the accident;
- lack of prior accidents with the product or instrumentality causing plaintiff's injuries.

Typical Defendant's Motions In Liminie: The following are typical matters defendants may seek to exclude by motion in limine:

Settlement Offers To Prove Liability: Although admissible for other purposes, settlement offers are not admissible to prove defendant's liability for the loss or damage involved. [Ev.C § 1152]

Prior Accidents To Prove Liability: A motion in limine can be used to exclude evidence of prior similar accidents (e.g., involving same instrumentality) to show causation or liability for the present accident.

Post Accident Repairs To Prove Liability: Evidence that defendant changed or repaired the property or product involved after the accident is generally inadmissible in liability cases to prove defendant's fault. [See Ca Evid § 1151]

Liability Insurance Coverage: Evidence that a party carries liability insurance is inadmissible to prove his or her negligence or other wrongdoing. [See Ca Evid § 1155]

Defendant's Net Worth On Punitive Damages Claims: On motion of any defendant, evidence of that defendant's net worth or its profits from the allegedly-wrongful conduct is inadmissible until plaintiff has first proved a prima facie case of liability for punitive damages under Civil Code § 3294 ("malice, oppression or fraud"). [Ca Civil § 3295(d)]

In Liminie Motions Which May Be Made By Either Side: The following matters are not necessarily plaintiff or defense-oriented. Either side could object to them at trial and may seek to exclude them beforehand by motion in limine:

Scientific Tests Or Studies Not Shown To Be Reliable: [People v. Kelly (1976) 17 Cal.3d 24, 32, 130 Cal.Rptr. 144, 149 ("voice print" identification)]

Witness Nonfelony Criminal Record: A witness' criminal record, other than a felony conviction relating to veracity, is inadmissible to attack the witness' credibility (Ca Evid § 787)

Evidence Barred By Discovery Rules: A motion in limine may be used to prevent reference to evidence barred by discovery rules or discovery orders in the case. For Example:

- Experts not disclosed in response to Ca Civ Pro § 2034.210 et seq. demand:
- Evidence barred by "evidence sanction"
- Witnesses not listed on witness list
- Evidence lacking foundation
- Testimony based on posthypnotic memory
- Expert opinion based on improper matter
- Unqualified medical expert
- Evidence excludible under Ca Evid § 352: A motion in limine can be used to ask the court to exercise its discretion under Ca Evid § 352 to exclude photographs, physical evidence, or other materials whose "probative value is substantially outweighed" by the probability their admission will necessitate undue consumption of time or create substantial danger of undue prejudice, confusing the issues or misleading the jury. [Ca Evid § 352]

- Expert impeachment testimony offering conflicting opinion rather than attacking foundational fact: A motion in limine may be used during trial to prevent a party from calling an undisclosed impeachment expert witness simply for the purpose of offering a contrary opinion. [See Ca Civ Pro § 2034.310]

- Statements made in mediation

Motion To Sever Or Bifurcate: Motions to sever or bifurcate ask for separate trials on various parts of a single case, or to split up several cases previously consolidated for trial. A motion to "sever" asks the court to order separate trials of issues, causes of action, or parties joined in a single action. The purpose of severence is to avoid prejudice, to promote convenience, or to permit greater expedience and economy. [Ca Civ Pro § 1048(b)] A motion to "bifurcate" is a type of severance motion. It asks for a separate trial on the issue of liability before trial of damages.

"Separate trials" does not necessarily mean trials by different juries. In most cases, the court has discretion to impanel a different jury or allow the same jury that heard the first trial to hear the second trial as well. (Exception: The same jury must hear both phases of a bifurcated punitive damages trial.) [Ca Civil § 3295(d)]

Motion To Consolidate Or Coodinate: When separate lawsuits have common issues of law or fact, the court may order them consolidated or coordinated for trial. (Consolidation involves cases pending in the same court; coordination involves cases pending in different courts.)

Motion For Judgment On The Pleadings: A motion for judgment on the pleadings is in effect a general demurrer to the opposing party's pleadings but is made after the time for demurrer has expired. Except as provided by statute (Ca Civ Pro § 438), the rules governing demurrers apply.

Motion To Amend Pleadings: The court may permit amendments to the pleadings on the eve of trial or even during trial. [Ca Civ Pro §§ 473(a)(1)]

Motion To Disqualify Opposing Counsel: Trial courts have inherent power to disqualify counsel when necessary "for the furtherance of justice."

Exclusion Of Witnesses From Courtroom: On the motion of any party or sua sponte, the court may order witnesses excluded so that they cannot hear the testimony of other witnesses. [Ca Evid § 777; see L.A. Sup.Ct. Rule 8.84] "The purpose . . . is to prevent tailored testimony and aid in the detection of less than candid testimony."

Motion To Exclude Spectators: By statute, court proceedings are presumptively open to the public. The presumption of openness can be overcome upon a proper showing after hearing.

Motion For Voluntary Dismissal: Plaintiff may move to dismiss the entire lawsuit, or any cause of action or any defendant, without prejudice prior to commencement of trial. [Ca Civ Pro § 581(b)(1)] (The same rule applies to dismissal of cross-complaints.)

Motion to Alter Order of Trial or Examination of Witnesses: The order of trial and of examining witnesses is set by statute, subject to modification by the court:

Jury Selection

Trial begins with the selection of the jury.

As each prospective juror is called, the clerk directs him or her to sit in seats designated 1 through 12, starting with seat number 1, and continuing until the jury box is filled. The judge normally will ask the panel whether it would be difficult or impossible for anyone to serve the estimated time of trial. If anyone responds affirmatively, the judge will consider whether to excuse that juror for "undue hardship" within the meaning of Ca Civ Pro § 204(b).

"Voir dire" then commences. This term refers to the process by which prospective jurors are questioned to determine their competency to serve. Literally translated from Norman French, "voir dire" means "to speak the truth."

Voir dire serves several recognized purposes. The primary purpose of voir dire is to select a fair and impartial jury. [Ca Civ Pro § 222.5; Ca Rules of Court Rule 228]. Another purpose is to assist counsel in the intelligent exercise of both peremptory challenges and challenges for cause. [Ca Civ Pro § 222.5] However, it is not the function of voir dire to "educate the jury panel to the particular facts of the case, to compel the jurors to commit themselves to vote a particular way, to prejudice the jury for or against a particular party, to argue the case, or to indoctrinate the jury in matters of law." [Rousseau v. West Coast House Movers (1967) 256 Cal.App.2d 878, 882, 64 Cal.Rptr. 655, 658]

Both the trial judge and counsel participate in the voir dire process. It is the trial judge's duty to conduct the initial examination of prospective jurors. [Ca Civ Pro § 222.5; Ca Rules of Court Rule 228] The judge's questions are usually general in nature. After the court's questioning, "counsel for each party shall have the right to examine, by oral and direct questioning, any of the prospective jurors . . ." [Ca Civ Pro § 222.5] Alternatively or in addition thereto, counsel may propound additional questions in writing for the judge to ask the prospective jurors. [Ca Rules of Court Rule 228]

The scope of counsel's voir dire examination may be limited so long as counsel's right to conduct a "liberal and probing examination to discover bias and prejudice within the circumstances of each case" is not restricted. Also, whether the jurors are questioned separately or in groups, or everyone on the panel questioned simultaneously, lies within the trial judge's sound discretion.

To expedite the examination, many judges ask prospective jurors to complete written questionnaires before commencement of voir dire. The questions may be drafted by the judge, counsel or both. (The parties usually stipulate to their use before they are submitted to the panel.) After the jurors complete the questionnaires, a recess is taken to provide counsel the opportunity to review the jurors' answers. When court is reconvened and voir dire begins, the questionnaire answers can be utilized by the judge and counsel while examining individual jurors.

Voir dire questions must be phrased in a "neutral, nonargumentative form." Whether leading questions are permitted on voir dire is discretionary with the court. Hypothetical questions may be permitted on voir dire. E.g., prospective jurors may be asked to assume certain facts in order to determine their attitudes regarding such facts and their willingness to apply relevant principles of law. But if the question is unfocused and abstract, the court has discretion to exclude it.

The length of questioning permitted for attorney voir dire is subject to reasonable limitation by the trial judge. [Ca Rules of Court Rule 228; and see Ca Civ Pro § 222.5] Time limits on voir dire are proper so long as not "unreasonable or arbitrary."

Challenges For Cause: Prospective jurors individually may be challenged for cause for one of the following reasons:

General disqualification--that the juror is disqualified from serving in the action on trial. All persons are qualified for jury service except those who are:

- not citizens of the U.S.;
- under age 18;
- not domiciled in California (as determined by the Elections Code for voting purposes);
- not residents of the jurisdiction in which they are summoned to serve;
- convicted of a felony or malfeasance in office and whose civil rights have not been restored;
- the subject of conservatorships;
- presently serving as grand or trial jurors in other state courts; or
- not possessed of sufficient knowledge of the English language. [Ca Civ Pro § 203(a)]

Actual Bias: the existence of a state of mind on the part of the juror in reference to the case, or to any of the parties, which will prevent the juror from acting with entire impartiality, and without prejudice to the substantial rights of any party." [Ca Civ Pro § 225(b)]

Implied Bias: The law presumes a prospective juror is biased and thus disqualified to serve (Ca Civ Pro § 225(b)(1)(B)) if any of the following conditions exists:

- Related by blood or marriage to party or witness
- Other relationship to party: A prospective juror is also disqualified by implied bias because of any of the following relationships to a party or officer of a corporate party:
    - "member of the family of either party" (thus including nonblood relatives--e.g.,
    - stepchildren, adopted children, etc.);
    - business partner of either party;
    - surety on a bond or obligation of either party;
    - stockholder or bondholder of a corporation that is a party;
    - attorney for either party during the year before the action was filed;

- client of the attorney for either party during the year before the action was filed;
- any of the following relationships with a party or officer of a corporate party (or being the parent, spouse or child of someone standing in such relationship):

guardian and ward,

conservator and conservatee,

master and servant,

employer and clerk,

landlord and tenant,

principal and agent, or

debtor and creditor. [Ca Civ Pro § 229(b)]

- Prior juror or witness in litigation involving party: A prospective juror may be challenged for implied bias if he or she served "as a trial or grand juror or on a (coroner's) jury of inquest . . . or been a witness on a previous . . . trial between the same parties, or involving the same specific offense or cause of action or "as a trial or grand juror . . . within one year previously in any criminal or civil action . . . in which either party was the plaintiff or defendant . . ." [Ca Civ Pro § 229(c)]
- Interest In Litigation: nterest in litigation: A prospective juror is disqualified by "interest . . . in the event of the action, or in the main question involved in the action." [Ca Civ Pro § 229(d)
- Unqualified opinion as to merits based on knowledge of material facts: A prospective juror is disqualified where he or she has "an unqualified opinion or belief as to the merits of the action founded upon knowledge of its material facts or of some of them." [Ca Civ Pro § 229(e)]
- Enmity or bias: "The existence of a state of mind in the juror evincing enmity against, or bias towards, either party." [Ca Civ Pro § 229(f)]

Peremptory Challenges: Each side is entitled to a certain number of peremptory challenges to the prospective jurors seated in the jury box. A "peremptory" challenge is one for which no cause or reason need be given. Except where bias is shown, the trial judge is required to remove a juror so challenged.

A peremptory challenge allows counsel to remove persons believed to be unsympathetic or prejudiced even though counsel cannot prove specific grounds for a challenge for cause. However, peremptory challenges cannot be exercised for systematic exclusion of persons of a particular race, gender or other cognizable group from jury service in civil or criminal cases.

Peremptory challenges are made after voir dire is complete and all challenges for cause have been made and determined (and any replacement jurors examined and "passed" for cause). [Ca Civ Pro §§ 231(d), 226(c)]

Where there are only two parties, each party is entitled to six peremptory challenges. [Ca Civ Pro § 231(c)] Where there are more than two parties, the court must divide the parties into two or more sides according to their respective interests in the issues, normally the court allows eight peremptory challenges for each side. If there are more than two sides, "the court shall grant such additional peremptory challenges to a side as the interests of justice may require" . . . provided that the peremptory challenges of one side shall not exceed the aggregate number of peremptory challenges of all other sides. [Ca Civ Pro § 231(c)]

After all parties have passed the jurors for cause and passed consecutively on exercise of peremptories, the jury selection process is complete. The court will then swear the jurors, unless for good cause it orders otherwise. [Ca Civ Pro § 231]

Opening Statement

The opening statement is that stage at the beginning of trial when each side tells the jury what it intends to prove. Opening statement allows counsel to outline the facts he or she intends to prove at trial. Its purpose is "to prepare the minds of the jury to follow the evidence and to more readily discern its materiality, force and effect."

Each party clearly has the right to make an opening statement. [See Ca Civ Pro §§ 607, 631.7] Each party is entitled to make only one opening statement. Plaintiff normally goes first; then defendant. There is no opportunity, therefore, for plaintiff to "rebut" statements made by defendant in its opening.

The amount of time allowed for opening statements rests within the trial judge's sound discretion. During the pretrial in-chambers conference, the judge normally asks each counsel for an estimate of the time required for his or her opening statement. The judge usually allows the time requested so long as it is within reason.

Neither party is required to make an opening statement and may waive the right to do so. The Defendant may either waive the opening statement or reserve it until the Plaintiff has completed his/her case.

It is misconduct to state to the jury during opening statement:

- matters which counsel knows or should know are inadmissible at trial
- matters which counsel knows or should know he or she will be unable to prove at trial;
- matters as being within counsel's personal knowledge or belief unless counsel plans to testify as a witness.
- Likewise, opening statement may not be used to "argue" the case to the jury

An opening statement is not evidence and jurors may not accept it as proof of the matters stated. Furthermore, an opening statement may not be used to argue the case to the jury. Thus, for example, it is improper to discuss issues of law.

In both jury and nonjury trials, plaintiff normally opens first. Then, defendant has the opportunity to make an opening statement; or defendant may elect to "reserve" opening statement until after the presentation of plaintiff's case-in-chief. [See Ca Civ Pro § 607(1),(2) (relating to jury trials); and Ca Civ Pro § 631.7. However, the court may direct a different order of presentation for opening statements if it finds "special reasons" for doing so. [Ca Civ Pro § 607]

Where there are several plaintiffs or defendants who are separately represented, the court generally asks them to agree among themselves on the order in which their opening statements will be made. If they are unable to agree, the court will specify the order of opening statements by the parties on each side.

Direct Examination

"Direct examination" is the first examination of a witness upon a matter not within the scope of a previous examination of the witness. [Ca Evid § 760] Basically, it is the process by which a party first elicits testimony from witnesses in support of the party's own claims or defenses.

There is no required form of questioning on direct. But the court has discretion over the "mode of interrogation of a witness so as to make such interrogation as rapid, as distinct, and as effective for the ascertainment of the truth, as may be . . ." [Ca Evid § 765(a)]

In the exercise of such discretion, various forms of questions may be objectionable on direct examination, including questions that:

- are leading and suggestive;
- are compound;
- call for inadmissible opinions or conclusions;
- call for cumulative testimony;
- call for narrative answers.

No Leading Questions On Direct Examination: Except as discussed below, leading questions are improper on direct (or redirect) examination. [See Ca Evid § 767(a)(1)] A leading question is one that asks the witness to acknowledge facts stated or suggested in the question. In effect, the questioner is doing the testifying and simply asking the witness to affirm what the questioner has stated. [See Ca Evid § 764--leading question "suggests to the witness the answer the examining party desires"] The problem with a leading question is that it substitutes the lawyer's description of the events in dispute for that of the witness.

Exception: The court has the power to make direct examination "as rapid, as distinct, and as effective as possible for the ascertainment of the truth . . ." (Ca Evid § 765(a)). Moreover, the Code specifically provides that leading questions are permissible "under special circumstances where the interests of justice (so) require." [Ca Evid § 767(a)] Thus, the trial court has broad discretion to permit leading questions on direct where it is the most efficient manner of obtaining relevant evidence and the danger of improper suggestion is minimal.

Exception: Either party may call the opposing party or someone "identified with" the opposing party as an "adverse witness" and examine such witness "as if under cross-examination" (i.e., using leading questions). [Ca Evid § 776]

Following cross-examination, the direct examiner may further question the witness on "redirect examination." [Ca Evid § 762] Ordinarily, redirect examination is limited to matters covered on cross-examination. In any event, the trial judge has discretion to permit redirect even on matters not covered on cross-examination . . . in effect permitting the reopening of direct examination. [Ca Evid § 772(c)]

Cross-Examination

"Cross-examination" is questioning by a party other than the one who called the witness to testify, on matters within the scope of the witness' testimony on direct examination. [Ca Evid § 761. he right of cross-examination is also secured by statute: "(A) witness can be heard only in the presence and subject to the examination of all the parties to the action, if they choose to attend and examine." [Ca Evid § 711]

Cross-examination normally follows the direct examination of each witness. [Ca Evid § 772(a),(b)] However, for "good cause" shown, the court may permit a party to postpone cross-examination until a later point in the trial (e.g., a busy doctor whose schedule requires that he or she be excused immediately after direct examination). [See Ca Evid § 772(b)] The court also has discretion to allow cross-examination of a witness before the direct examination is concluded. [See Ca Evid § 772(b)]

Where there are several plaintiffs or defendants, witnesses are cross-examined "in such order as the court directs." [Ca Evid § 773(a)] Judges usually approve whatever order of cross-examination is agreed upon by coparties with similar interests.

The scope of cross-examination is limited to matters raised on direct examination, which includes the witness' credibility. [Ca Evid §§ 761, 773(a), 785] The scope of cross-examination is committed to the sound discretion of the trial court. Most courts interpret "scope of the direct" liberally and permit questioning on any subject touched upon during direct examination.

The court has discretion to expand the scope of permissible cross-examination, and may permit the witness to be examined "not within the scope of a previous examination of the witness." [Ca Evid § 772(c)] Courts are usually quite liberal in allowing cross-examination beyond the scope of the direct. Doing so is viewed as a matter of efficiency because it may avoid the need to recall the witness later in the trial. However, where the court permits the cross-examiner to go outside the scope of the direct, the cross-examiner's right to use leading questions is limited. The expanded inquiry is in the nature of direct examination and that form of questioning is required.

The cross-examiner is not bound by the witness' answers. Impeachment is permitted: "The credibility of a witness may be attacked or supported by any party, including the party calling him." [Ca Evid § 785].

Leading questions are generally permissible on cross-examination (or re-cross). [Ca Evid § 767(a)] Indeed, the key to successful cross-examination is the ability to control the witness' answers through use of leading questions. One of the "canons" of cross-examination is to use leading questions wherever possible.

Following redirect examination (Ca Evid § 762), the cross-examiner may further question the witness on "recross examination." [Ca Evid § 763] Ordinarily, recross examination is limited to new matters brought out on redirect. The cross-examiner is not entitled to question the witness again on matters covered during the original cross-examination. But the court has discretion to permit questioning on other matters as well. [See Ca Evid § 772(c)]

Examination Of Expert Witnesses

Expert witnesses may give testimony in the form of an opinion if:

- the witness is qualified to testify as an expert;
- the expert witness' testimony is related to a subject matter that is sufficiently beyond common experience;
- the expert's opinion would assist the trier of fact;
- the expert witness' testimony is based on matters perceived by or made known to the expert (either before or at the hearing);
- the expert witness' testimony is based on matters reasonably relied upon by experts in forming such opinions. [Ca Evid § 801]

Expert opinion testimony may even embrace the ultimate issue to be decided by the jury. [Ca Evid § 805]

The admissibility of expert opinion is determined by the court as a matter of law. But the weight to be given expert opinion testimony is normally determined by the trier of fact (jury). A jury is generally not bound to accept an expert's opinions and may reject them if, in their judgment, the expert's reasoning is unsound. [See Kastner v. Los Angeles Metropolitan Transit Auth. (1965) 63 Cal.2d 52, 58, 45 Cal.Rptr. 129, 132; Daum v. SpineCare Med. Group, Inc. (1997) 52 Cal.App.4th 1285, 1304, 61 Cal.Rptr.2d 260, 270]

An expert witness may state on direct examination both the reasons for his or her opinion and the matters on which it is based. [Ca Evid § 802] The opinion may be based on matters "perceived by . . . the witness . . . before the hearing, whether or not admissible" if of a type upon which experts reasonably rely in forming such opinions. [Ca Evid § 801(b)] Expert witnesses are specifically permitted to state on direct examination that they have reviewed, considered and relied on inadmissible evidence of a type upon which experts reasonably rely. But such inadmissible evidence does not itself thereby become admissible. Nonetheless, the court may exclude from an expert's testimony any hearsay matter whose irrelevance, unreliability or potential for prejudice outweighs its proper probative value. [Ca Evid § 352]

When an expert has relied on privileged material to formulate an opinion, the court may exclude his or her testimony as necessary to enforce the privilege. [Fox v. Kramer (2000) 22 Cal.4th 531, 539, 93 Cal.Rptr.2d 497, 502]

Subject to Ca Evid § 721(b), an expert witness may be cross-examined to the same extent as any other witness; e.g., bias, prior inconsistent statements, etc.. In addition, expert witnesses may be cross-examined on:

- their qualifications;
- the subject matter of the expert testimony;

- the matters on which the expert opinion is based; and
- the reasons for the opinion. [Ca Evid § 721(a)]

It is "well established" that wide latitude should be allowed in cross-examining experts on their qualifications and the reasons given for the opinions expressed. [Grimshaw v. Ford Motor Co. (1981) 119 Cal.App.3d 757, 796, 174 Cal.Rptr. 348, 373] "Once an expert offers his opinion . . . he exposes himself to the kind of inquiry which ordinarily would have no place in the cross-examination of the factual witness. The expert . . . may be subjected to the most rigid cross-examination concerning his qualifications, and his opinion and its sources." [Grimshaw v. Ford Motor Co., supra, 119 Cal.App.3d at 796, 174 Cal.Rptr. at 373, fn. 7]

A "broader range of evidence" may be used on cross-examination to test and diminish the weight to be given the expert opinion than is admissible on direct examination to fortify the opinion. The following materials are sources that may be used to cross-examine an expert witness:

- the expert's own deposition;
- depositions of key witnesses;
- textbooks, rules and regulations, and other secondary sources;
- documents utilized in relation to the litigation;
- discovery responses; and
- information provided by your own expert.

Where an expert witness testifies his or her opinion is based in whole or in part upon the opinion or statement of another person, that other person may be called and examined as if under cross-examination concerning such opinion or statement. [Ca Evid § 804(a)]

An expert witness may be impeached by showing the falsity of any matter upon which the expert based his or her opinion (i.e., foundational facts). Sometimes this is done on cross-examination but, more frequently, contradiction is shown by calling other expert witnesses to testify to the nonexistence or error in the data upon which the expert relied.

Motions During Trial

As the trial progresses, it may be necessary to make on or more motions. Some - but by no means all - such motions are discussed below.

Motion For Mistrial: A mistrial terminates the trial midproceedings for error (e.g., misconduct by counsel, by jurors or by the court) that has prejudiced a party's right to a fair trial and that cannot otherwise be remedied. No matter how far the trial has progressed, a mistrial means the case must be retried from the beginning. Some recognized grounds for mistrial are:

Mandatory Mistrial - Judge As A Witness: The judge presiding at the trial may not testify as a witness if any party objects thereto. If called as a witness and an objection is made, the judge must declare a mistrial and order the case assigned for trial before a different judge. [Ca Evid § 703(b)]

Mandatory Mistrial - Juror As A Witness: A juror impaneled in the trial of an action may not testify as a witness over the objection of any party. Upon such objection, the trial judge must declare a mistrial and order retrial before a different jury. [Ca Evid § 704(b)]

Mandatory Mistrial - Jury Unable To Reach A Virdict: A mistrial must be ordered when the jury is discharged because unable to reach a verdict (e.g., because hopelessly deadlocked) or is "prevented from giving a verdict because of accident or other cause." [Ca Civ Pro § 616]

Mandatory Mistrial - Insufficient Number Of Jurors: Sometimes, a number of jurors are excused during trial (for illness or other reason) and there are not enough alternate jurors to take their places. In such cases, a mistrial must be ordered unless the parties stipulate that a lesser number of jurors may render a verdict.

Judge Unable To Complete A Nonjury Trial: In nonjury trials, the facts must be decided by the judge who heard the evidence. If that judge dies or otherwise becomes unavailable before signing and filing the statement of decision (findings and conclusions), the case must be retried by another judge.

Other Discretionary Grounds: Except in the particular situations discussed above where mistrial is mandatory, all other grounds for mistrial are discretionary with the court. There is no specific statutory authority for discretionary mistrials but the court's power to order a mistrial for prejudicial misconduct is clear. The three most common discretionary grounds upon which a court may order a mistrial are:

- Attorney misconduct;
- Judicial misconduct; and
- Juror misconduct during trial.

Motion For Nonsuit: "Only after, and not before, the plaintiff has completed his or her opening statement, or after the presentation of his or her evidence in a trial by jury, the defendant, without waiving his or her right to offer evidence in the event the motion is not granted, may move for a judgment of nonsuit." [Ca Civ Pro § 581c(a)]

A motion for nonsuit operates as a "demurrer" to plaintiff's evidence. It allows defendant to challenge the legal sufficiency of plaintiff's claims at an early stage of trial without waiving the right to present a defense if the motion is denied. Defendant in effect concedes the truth of plaintiff's evidence (or the facts asserted in plaintiff's opening statement where the motion is made after opening statement). The nonsuit motion challenges whether these facts are sufficient as a matter of law to prove a prima facie case.

Because a nonsuit deprives plaintiff of the right to have his or her case determined by a jury, it is proper only under very restrictive circumstances: i.e., only where interpreting the evidence most favorably to plaintiff's case and most strongly against the defendant and resolving all presumptions, inferences and doubts in favor of plaintiff a judgment for the defendant is required as a matter of law. The motion lies only if there is no substantial conflict in the evidence. In

ruling on the motion, the court may not weigh the evidence or consider the credibility of witnesses.

A nonsuit may be granted on some or all of plaintiff's claims: If it appears that the evidence presented, or to be presented, supports the granting of the motion as to some but not all of the issues involved in the action, the court shall grant the motion as to those issues and the action shall proceed as to the issues remaining.

In response to a motion for nonsuit, plaintiffs have the right, upon request, to reopen to remedy defects raised by the nonsuit motion: "(I)t is the trial court's duty, if so requested, to permit the plaintiff to reopen his case and introduce further evidence. The right to present further evidence is waived unless plaintiff requests leave to reopen and makes an offer of proof describing the evidence and explaining how it would cure the deficiencies.

Motion For Directed Verdict: "Unless the court specified an earlier time . . . after all parties have completed the presentation of all of their evidence in a trial by jury, any party may, without waiving his or her right to trial by jury in the event the motion is not granted, move for an order directing entry of a verdict in its favor." [Ca Civ Pro § 630(a)]

A motion for directed verdict, like a motion for nonsuit, operates as a demurrer to the evidence. It challenges the legal sufficiency of the opposing party's evidence--i.e., whether such evidence makes out a prima facie case of the claim or defense asserted.

However, a motion for directed verdict differs from a motion for nonsuit in several ways:

Motion For Voluntary Dismissal: Plaintiff retains the right to dismiss any cause of action or any defendant even during trial. However, any dismissal during trial must be with prejudice . . . unless all parties consent to a dismissal without prejudice or the court so orders on a showing of good cause. [Ca Civ Pro § 581(e)]

Motion To Amend Pleadings To Conform To Proof:: The trial judge has discretion to permit amendment of pleadings even during trial. [See Ca Civ Pro §§ 576, 473] Although it is normally the complaint that is sought to be amended, the court may grant leave to amend any pleading

Motion To Reopen Case In Chief: Under certain circumstances, a party may move to reopen its case-in-chief to introduce new evidence on elements of a cause of action or defense. [See Ca Civ Pro § 607(6)] The motion may be made orally or in writing at any time prior to entry of judgment.

Motion For Recess Or Continuance Of Trial: For "good cause" shown (e.g., illness of party or counsel), the court may grant a recess or continuance during trial. [See Ca Rules of Court Rule 375(a); and Standards of Judicial Admin. § 9, Ca Rules of Court Rule Appendix Div. I]

Contempt Proceedings: On its own motion, or on motion of any party, the court may cite any person before it for contempt during trial. Contempt is any act, in or out of court, that tends to impede, embarrass or obstruct the court in the performance of its duties.

Closing Argument

The statutory order of proceedings is for the parties to argue the case to the jury "when the evidence is concluded" and before the court instructs the jury. [Ca Civ Pro § 607(7),(9)] But the statute expressly authorizes the court to alter the order of proceedings "for special reasons." [Ca Civ Pro § 607 (first para.)]

Each party has the absolute right to present closing argument in civil jury trials. A party employing several lawyers at trial does not have the right to be heard by each of them. The court may (discretionary) limit closing argument to one or more lawyers appearing for that party. Where parties on the same side are represented by separate counsel, each counsel is generally permitted to present closing arguments to the jury on behalf of his or her client.

Neither party is required to make a closing argument. Plaintiff may elect to waive either or both opening and rebuttal argument; and defendant may also elect to waive argument.

Neither party is required to make a closing argument. Plaintiff may elect to waive either or both opening and rebuttal argument; and defendant may also elect to waive argument. Therefore, the general order of argument is:

1. plaintiff's (opening) argument;
2. defendant's argument; and
3. plaintiff's rebuttal

The judge usually discusses the length of closing argument with counsel in chambers before argument is due, and may then set time limits for the argument. The court has discretion to limit the amount of time for closing argument. [See L.A. Sup.Ct. Rule 8.49] This basically means counsel may be restricted to a discussion of matters relevant to the case and restrained from wasting time by useless repetition. [See Center v. Kelton (1912) 20 Cal.App. 611, 615, 129 P 960, 961]

Counsel have wide latitude in deciding what to include and to exclude in oral argument, and particularly in deciding what to emphasize. Counsel are entitled to state their views as to what the evidence shows and the conclusions to be drawn therefrom. "Opposing counsel cannot complain if the reasoning be faulty and the deductions illogical, as such matters are ultimately for the consideration of the jury." [People v. Sieber (1927) 201 Cal. 341, 355-356, 257 P 64, 70; People v. Eggers (1947) 30 Cal.2d 676, 693, 185 P.2d 1, 10-11; Cassim v. Allstate Ins. Co., supra, 33 Cal.4th at 795, 16 Cal.Rptr.3d at 383]

Despite the broad scope of permissible argument noted above, certain types of arguments are improper. For example:

- Arguments based on matters ordered excluded from evidence;
- Arguments based on matters not in evidence, or matters of common knowledge or unsupported inferences;
- Arguments misstating evidence or otherwise misleading the jury;
- Argument misstating the law;
- Appeals to jurors' passions or prejudices;

- Comments on witness' claiming privilege;
- Claims of evidence "suppression";
- Claiming personal knowledge of facts;
- Arguments in plaintiff's rebuttal on matters not raised in defendant's closing argument.

In addition to the limitations on closing argument generally, plaintiff's concluding argument should be confined to rebutting arguments raised during the defendant's closing argument. It is improper to raise for the first time during plaintiff's final closing argument matters not raised in either the opening or defense argument.

Jury Instructions

Jury instructions provide jurors with the law applicable to the claims and defenses presented in a particular case. The jury is then bound to accept and apply this "law" to the facts (as it determines from the evidence) in arriving at a verdict. [See Ca Civ Pro § 608] In civil trials, parties have the right to have the jury instructed on all theories of their case supported by the pleadings and evidence. [See Ca Civ Pro §§ 607a, 608]

To invoke the right to jury instructions, a party must submit proposed instructions that are proper both in content and in form. Jury instructions should be:

- an accurate statement of the law;
- as brief and concise as possible;
- understandable to the average juror; and
- neutral, unslanted and free of argument.

The Judicial Council of California Civil Jury Instructions ("CACI") are the official instructions for use in state trial courts and were designed to "accurately state the law in a way that is understandable to the average juror." [Ca Rules of Court Rule 855(a)] Use of the Judicial Council instructions is "strongly encouraged." [Ca Rules of Court Rule 855(e)]

A book entitled "California Jury Instructions, Civil" (commonly referred to as the "Book of Approved Jury Instructions" or "BAJI" (9th Ed.)) contains standard jury instructions for use in civil jury trials. The BAJI instructions were drafted by "The Committee on Standard Jury Instructions, Civil" of the Los Angeles Superior Court. However, the Los Angeles Superior Court no longer maintains BAJI. Instead, BAJI is maintained and updated by "The Civil Committee on California Jury Instructions" (judges and lawyers, including several who were members of the former Los Angeles Superior Court Committee).

Jury instructions based on the language of relevant state or federal statutes are proper. Statutory language should be quoted verbatim rather than restated or reworded. Paraphrasing can result in an erroneous instruction.

Appellate court opinions are another source for jury instructions. However, the practice of using verbatim excerpts from appellate court opinions is often criticized. Reason: It tends to produce instructions which are "repetitive, misleading and inaccurate statements of the law as to the particular case" (i.e., the law stated in the appellate opinion may not apply to a different fact situation). [Williams v. Carl Karcher

Enterprises, Inc. (1986) 182 Cal.App.3d 479, 489, 227 Cal.Rptr. 465, 470; see also Tait v. City & County of San Francisco (1956) 143 Cal.App.2d 787, 792, 300 P.2d 74, 77]

Proposed jury instructions must be submitted to the court and served within the time periods set forth in Ca Civ Pro § 607a (below) or such other periods as are required under local rules or practice. Proposed jury instructions must comply with statutory requirements and Judicial Council Rules regarding form and format. [Ca Civ Pro § 607a; Ca Rules of Court Rule 201 & 229(b)-(d)] Consider using copies of the printed Judicial Council instructions as modified to fit your case. The instructions are available at the California Courts Web site (www.courtinfo.ca.gov). Many courts stock and sell copies of the BAJI forms at nominal cost. Where printed forms are not available, typewritten copies may be submitted instead.

Before final argument begins, the trial court must, on counsel's request:

- decide whether to give, refuse or modify the parties' proposed instructions;
- decide what additional instructions, if any, will be given; and
- inform counsel of all instructions to be given. [Ca Civ Pro § 607a]

Counsel have the right to discuss the applicable "law" during final argument. Therefore, the court is under a duty to resolve any uncertainty regarding which instructions will be given, refused or modified before final argument commences. If necessary, the court must delay argument until the uncertainty is resolved and counsel so advised.

Traditionally, the court "charges" the jury (i.e., reads the instructions to them) after final argument by counsel has concluded and just before the jury retires to begin deliberations. However, the trial court has discretion to reorder trial proceedings "for special reasons." [Ca Civ Pro § 607] Indeed, it is becoming common practice for courts to instruct jurors at various times during trial. Many judges routinely instruct on introductory matters at the outset of trial and on substantive law matters before closing argument begins.

Jury Deliberations

After submission of the case, the jurors must be "kept together, in some convenient place, under charge of an officer" (bailiff or court attendant) until they arrive at a verdict or are discharged by the court. [See Ca Civ Pro § 613] All courts are equipped with jury deliberation rooms enabling jurors to discuss the case and endeavor to arrive at a verdict in complete privacy. [See Ca Civ Pro § 216--board of supervisors required to provide jury deliberation room(s).

Ordinarily, one of the first orders of business is selection of a "presiding juror" (jury foreperson). The court may instruct the jurors that when they go to the jury room, the first thing they should do is "choose a presiding juror" who "should see to it that . . . discussions are orderly and that everyone has a fair chance to be heard." [CACI 5009; see BAJI 15.50-15.52--upon retiring, "select one of your number to act as foreperson" . . . and "your foreperson shall preside over your deliberations".

During deliberations, jurors may require additional information in order to arrive at a verdict; e.g., they may want some portion of the testimony reread, or they may wish to be instructed on some point of law. The procedure for handling jury requests for information during deliberations is set forth in Ca Civ Pro § 614. Jurors wanting to

hear testimony reread or further instructions by the court "may require the officer to conduct them into Court." [Ca Civ Pro § 614] The court must consider the jury's request for additional information in open court (see Ca Civ Pro § 614) and on the record (Ca Civ Pro § 269).

Jurors often find themselves in disagreement as to what a particular witness said at trial and may request to have that testimony read by the court reporter. [See Ca Civ Pro § 614] The parties or counsel often ask for reading of testimony in addition to that requested by the jurors. They usually argue that the other testimony is necessary to make the requested part "understandable"; or that it would not be "fair" to consider only that requested portion by itself, etc. However, counsel have no right to designate additional testimony. It is entirely within the court's discretion to determine whether it is fair to read only the segment requested by the jury or whether additional portions should be read to avoid a "misleading" or "incomplete" understanding of the testimony. [Asplund v. Driskell (1964) 225 Cal.App.2d 705, 714, 37 Cal.Rptr. 652, 657]

The court may order a juror discharged during deliberations "(if) a juror becomes sick, or upon other good cause shown to the court, is found unable to perform his or her duty . . ." [Ca Civ Pro § 233]

Except for limited communications with the bailiff (below), it is misconduct for deliberating jurors to communicate with anyone other than their fellow jurors until they reach a verdict or are discharged by the court. [See Ca Civ Pro §§ 611, 613]

A juror's statements and conduct during trial or deliberations may disclose a bias concealed on voir dire examination. This includes false answers to voir dire questions which if answered truthfully would have been a basis for challenge for cause (e.g., questions regarding juror's experience or knowledge of facts pertinent to the case). Such misconduct violates the parties' right to trial by a fair and impartial jury.

"Jurors cannot, without violation of their oath, receive or communicate to fellow jurors information from sources outside the evidence in the case . . ." Also, juror experiments during deliberations are misconduct if they result in the juror's discovering information outside the scope of the evidence received in court. Rationale: All evidence must be taken in open court and thus subject to challenge by the parties.

Jurors are sworn to follow the court's instructions. One of those instructions is to base their verdict solely on the evidence at trial. It is therefore misconduct for jurors to consider facts or matters outside the record in arriving at a verdict. [Tapia v. Barker (1984) 160 Cal.App.3d 761, 766, 206 Cal.Rptr. 803, 806; McDonald v. Southern Pac. Transp. Co. (1999) 71 Cal.App.4th 256, 263, 83 Cal.Rptr.2d 734, 738]

The jurors' agreement (express or implied) to disregard the court's instructions and to include nonrecoverable items in an award constitutes misconduct warranting a new trial. [See Krouse v. Graham (1977) 19 Cal.3d 59, 81, 137 Cal.Rptr. 863, 875]

Jurors are required to follow the court's instructions (see CACI 5000; BAJI 1.00). Thus, a juror who refuses to follow the law as instructed is not performing his or her duty and may be removed from the jury. [People v. Williams (2001) 25 Cal.4th 441, 463, 106 Cal.Rptr.2d 295, 311; People v. Brown (2001) 91 Cal.App.4th 256, 271, 109 Cal.Rptr.2d 879, 890; see also People v. Merced (2001) 94 Cal.App.4th 1024, 1028, 1030, 114 Cal.Rptr.2d 781, 784, 786]

It is misconduct constituting ground for a new trial for the jury to arrive at its verdict or make findings on questions submitted to it by the court "by a resort to the determination of chance . . ." [Ca Civ Pro § 657, subd. 2]

Procedure in Nonjury Trials

A case is triable by the court, rather than by a jury, where either:

- The claims involved are "equitable" (rather than "legal") in nature so that there is no right to a jury trial; or
- The right to jury trial has been expressly or impliedly waived by the parties (and the court is unwilling to grant relief from the waiver if such relief is sought).

Unless the judge directs otherwise, nonjury trials proceed in the same order as jury trials (Ca Civ Pro § 607);. [Ca Civ Pro § 631.7]

- Plaintiff begins with an opening statement;
- Defendant makes an opening statement or, alternatively, may reserve its statement until the opening of the defense case in chief;
- Plaintiff then produces evidence on his or her case in chief;
- If defendant has reserved its opening statement, it then presents such statement;
- Defendant then produces evidence on its case in chief;
- The parties, beginning with plaintiff, then offer rebuttal evidence only (unless the court, for good reason and in furtherance of justice, permits them to "reopen" their case in chief to offer additional evidence);
- The evidence is then closed and plaintiff commences with argument;
- Defendant then offers its closing argument;
- Plaintiff then has the right to conclude the argument and the case is submitted for decision. [Ca Civ Pro § 607]

Closing argument is discretionary in nonjury trials. The statutory provision for closing argument in jury trials (Ca Civ Pro § 607, para. 7) does not apply in nonjury trials. Oral argument in a civil proceeding tried before the court is a privilege, not a right, which is accorded the parties by the court in its discretion.

The principal difference between jury and nonjury trials is the judge's role as trier of fact. In jury trials, the judge's function is basically limited to determining the admissibility of evidence and other questions of law. In nonjury trials, however, it is the judge's duty to weigh the evidence, determine credibility of witnesses, and decide questions of fact, as well as issues of law. [Ca Civ Pro § 631.8(a)]

Because the court gets to "weigh the evidence," judges in nonjury trials often admit evidence that would be excluded in a jury trial. Also, judges in nonjury trials are more likely to ask questions of witnesses than they would in a jury trial. But, improper questions from a judge are as objectionable as improper questions from counsel.

The court may render a judgment at the close of the trial or take it under submission and notify the parties of the court's decision later. However, if a case remains pending and undetermined for 90 days or more after its submission for decision, a judge may not receive his or her salary. [Ca Const. Art. VI, § 19; Ca Govt § 68210].

Upon request of any party in a nonjury trial, the judge "shall issue a statement of decision explaining the factual and legal basis for its decision as to each of the principal controverted issues . . ." [Ca Civ Pro § 632] The statement of decision serves several purposes. It maforce the court to reconsider its tentative decision. It my facilitate a motion for new trial by forcing the trial court to state the precise facts upon which its decision is made. It facilitates appellate review by exposing the exact ground on which the judgment rests. On the other hand, it may discourage futile appeals for the same reason. And, a statement of decision facilitates determination of the matters adjudicated for purposes of res judicata and collateral estoppel.

A statement of decision is not required unless requested by one of the parties (see Ca Civ Pro § 632). Absent such request, appellate review is effectively limited to questions of law: The appellate court will presume the trial court made whatever findings of fact are necessary to support the judgment.

The timeliness of the request depends on the length of the trial. [Ca Civ Pro § 632] In trials completed in one calendar day, or within less than eight hours over several days, a request for statement of decision must be made before the matter is submitted for decision. [Ca Civ Pro § 632; see Ca Rules of Court Rule 232(h)] For court trials lasting longer than a day (or more than eight hours over several days), a request for a statement of decision must be made "within 10 days after the court announces a tentative decision." [Ca Civ Pro § 632]

A proposed statement of decision is normally prepared and opportunity given for objections thereto before it is signed by the judge. Where a statement of decision has been timely requested, the trial court can either prepare the statement of decision itself or designate a party (i.e., the prevailing party) to prepare the statement of decision and judgment. [Ca Rules of Court Rule 232(a),(c)]

Any party affected by the judgment may serve and file objections to the statement of decision on the ground it omits findings on critical issues controverted at trial, or that its findings as to such issues are ambiguous. [See Ca Civ Pro § 634; Ca Rules of Court Rule 232(d)] The losing party has 15 days after service of the court's proposed statement of decision to serve and file objections thereto. [Ca Rules of Court Rule 232(d)]

The court may order a hearing on proposals or objections to a proposed statement of decision; or may rule on such matters without a hearing. [See Ca Rules of Court Rule 232(f)]

Where a statement of decision is timely requested, judgment is entered only after hearing any objections to the statement or after expiration of the time for such objections. Once the statement of decision is signed and filed by the judge, the court clerk is required to enter judgment in conformity to the statement of decision "immediately." [See Ca Civ Pro § 664]

Verdicts

A jury will be asked to return one of the following types of verdicts:

- General verdict--whereby the jury decides all issues in favor of one party or the other;
- General verdict with special interrogatories--whereby, in addition to the verdict itself, the jury is asked to answer certain questions designed to test the validity of the verdict; or
- Special verdict--whereby the jury makes factual findings from which the court draws legal conclusions and renders judgment based thereon.

A general verdict is "that by which (jurors) pronounce generally upon all or any of the issues, either in favor of the plaintiff or defendant . . ." [Ca Civ Pro § 624] A general verdict is the most common type of jury verdict. The jury simply renders a decision in favor of one party or the other on all issues submitted to them. A general verdict is the most common type of jury verdict. The jury simply renders a decision in favor of one party or the other on all issues submitted to them.

A general verdict with special interrogatories combines the above verdict forms by instructing the jury to return a general verdict while simultaneously answering specific questions of fact. [See Ca Civ Pro § 625] This allows the jury to decide directly which party should win while the special interrogatories test the validity of the general verdict by determining that all facts essential to the verdict were established to the satisfaction of the jury.

A special verdict is one "by which the jury finds the facts only, leaving the judgment to the Court." [Ca Civ Pro § 624] A special verdict must present conclusions of fact (i.e., ultimate facts) established by the evidence rather than the evidence itself. Those ultimate facts must be presented so that "nothing shall remain to the Court but to draw from them conclusions of law." [Ca Civ Pro § 624] Unlike a general verdict that implies findings in favor of the prevailing party, a special verdict requires the jury to determine every controverted fact issue. A "partial special verdict" may be entered where the jury has decided all the ultimate facts necessary on a "separate and severable" cause of action. The remaining causes of action must be retried, of course, before a final judgment can be entered.

A party requesting a general verdict with special interrogatories or a special verdict by the jury must present the proposed questions of fact to the judge before closing argument (unless otherwise ordered) "in proper form for submission to the jury." [Ca Rules of Court Rule 230] The parties have no right to submit special interrogatories to the jury along with a general verdict. The procedure is discretionary with the trial court. [Ca Civ Pro § 625]

In civil cases, three-fourths of the jurors (i.e., 9 out of 12) must agree upon the verdict. [Ca Const. Art. I, § 16; Ca Civ Pro § 618] It is not necessary for the same nine jurors to agree on all elements of the verdict. Thus, where a special verdict is submitted to the jury (or special interrogatories with a general verdict), all jurors participate in answering each question. The identical nine need not agree on each answer. [Resch v. Volkswagen of America (1984) 36 Cal.3d 676, 679, 205 Cal.Rptr. 827, 828]

Where a general verdict is used, at least nine of the 12 jurors must agree that each element of the cause of action alleged was proved by a preponderance of the evidence.

When the jury foreperson states (to the bailiff or courtroom attendant) that a verdict has been reached, the jury must be conducted into court. The judge will direct the foreperson to hand the verdict to the bailiff or courtroom attendant, who will deliver it to the judge. [See Ca Civ Pro § 618] The judge will then examine the verdict to determine whether it is in proper form ("in writing, signed by the foreman") and sufficient (covering the issues submitted). If the verdict appears sufficient, the judge will hand it to the clerk to read to the jury and the parties in open court. The clerk will then read the verdict out loud and ask the jurors if it is their verdict.

At this point, either party may require that the jury be polled, which is done by the clerk asking each juror, by name, if it is his or her verdict. ("Is the verdict as read your personal verdict?"; or where a special verdict or special interrogatories are used, "Is the response to that question your personal response?") [See Ca Civ Pro § 618; L.A. Sup.Ct. Rule 8.56] If at least three-fourths of the jurors express agreement with the verdict, the clerk will enter it in the court's minutes. The entry consists of the verdict itself (set out at length), together with the names of the jurors and witnesses, and the time of trial. [See Ca Civ Pro § 628]

In a nonjury trial, after trial of any fact question, the court will announce its tentative decision, either orally (which must be entered in the minutes) or by written statement filed with the court clerk. [Ca Rules of Court Rule 232(a)] The tentative decision is not a judgment and is not binding on the court. The judge may modify or change it at any time (but any such modification must also be mailed to all parties who appeared at trial). [Ca Rules of Court Rule 232(a)] If a statement of decision has been timely requested, the court in its tentative decision (above) may state whether the statement of decision will be prepared by the court or a designated party. Alternatively, it may direct that the tentative decision "shall be" the statement of decision unless, within 10 days, one of the parties proposes issues not covered by the tentative decision. [Ca Rules of Court Rule 232(a)]

Judgments

The "entry of judgment" is a clerical act. In most courts, judgments are "entered" by the clerk's filing of the judgment (i.e., file-stamping the original judgment signed by the court and placing it in the court file) without regard to the time the judgment is recorded. [Ca Civ Pro § 668.5] Until judgment is so "entered," it is not effective for any purpose. [Ca Civ Pro § 664] In a jury trial, the entry of judgment follows routinely after the clerk's entry of the verdict. The judgment is not effective until entered. [Ca Civ Pro § 664]

In a nonjury trial where a statement of decision is timely requested, judgment is entered only after hearing any objections to the statement or after expiration of the time for such objections The court clerk is required to enter judgment in conformity to the statement of decision "immediately" after it is signed and filed by the judge. [Ca Civ Pro § 664]

The trial judge usually directs the prevailing party to prepare, serve and submit a proposed form of judgment concurrently with the statement of decision. [Ca Rules of Court Rule 232(c)] Except as noted below, the party submitting the judgment for entry is required to:

- serve notice of entry of judgment on all parties who have appeared in the action;
- file the original notice with the court; and

- file proof of service. [Ca Civ Pro § 664.5(a)]

Where the prevailing party is in pro per, the court clerk is required to mail notice of entry of judgment to all parties who have appeared in the action "promptly upon the entry of judgment." [Ca Civ Pro § 664.5(b)] In marital status actions (marriage dissolution, legal separation, or nullity proceedings), it is the clerk's responsibility to mail notice of entry of judgment. [See Ca Civ Pro § 664.5; Ca Rules of Court Rule 1247] Notwithstanding the prevailing party's duty to serve notice of entry of judgment, the court may order such notice to be given by the clerk. [See Ca Civ Pro § 664.5(d)]

Costs Of Suit

The right to recover costs of suit is determined entirely by statute. [Ca Civ Pro § 1032 et seq.] The right to recover costs is purely statutory, and, in the absence of an authorizing statute, no costs can be recovered by either party. The procedures for obtaining costs are governed by Judicial Council Rules. [Ca Rules of Court Rule 870, 870.2, 870.4; see also Ca Rules of Court Rule 27, 135--costs on appeal]

Except as noted below, the "prevailing party" is entitled as a matter of right to recover costs of suit in any action or proceeding. [Ca Civ Pro § 1032(b)] The "prevailing party" is defined by statute to include:

- The party with a net monetary recovery (plaintiff or defendant);
- A defendant who is dismissed from the action;
- A defendant where neither plaintiff nor defendant recovers anything; and
- A defendant as against those plaintiffs who do not recover any relief against that defendant. (E.g., plaintiffs lose against D although they win against codefendants).) [Ca Civ Pro § 1032(a)(4)]

  If the party does not fall into one of these four express categories, the court may exercise its discretion to award or deny costs. [See Lincoln v. Schurgin (1995) 39 Cal.App.4th 100, 105, 45 Cal.Rptr.2d 874, 876]

  The prevailing party's right to recover costs is not absolute. The following limitations apply:

- Only "allowable" costs items, "reasonably necessary" to the conduct of the litigation and "reasonable" in amount are recoverable;
- Costs "penalties" apply if the prevailing party rejected a pretrial Ca Civ Pro § 998 offer "more favorable" than the recovery at trial;
- The court has discretion to deny costs if the amount recovered is less than the court's minimum jurisdictional limit.
- The right to costs can be waived by failure to timely apply

Where other than monetary relief is recovered "and in situations other than as specified", the "prevailing party" is determined by the court and the award of costs is discretionary. [Ca Civ Pro § 1032(a)(4)] The court may (discretionary) allow costs where a party obtains relief in the form of a permanent injunction rather than damages. Costs are also discretionary where parties prevail on declaratory relief claims without recovering damages.

Ca Civ Pro § 1032(a)(4) allows apportionment of costs, in the court's discretion, "only under those comparatively unusual circumstances when the court must determine which party prevailed." [Smock v. State of Calif. (2006) 138 Cal.App.4th 883, 889, 41 Cal.Rptr.3d 857, 861]

Where a party has demanded a trial de novo after judicial arbitration and the judgment obtained at trial is less favorable to that party than the arbitration award, he or she cannot recover costs. [Ca Civ Pro § 1141.21(a)] In addition, that party must pay the following fees and costs unless the court finds that it "would create such a substantial economic hardship as not to be in the interest of justice" (Ca Civ Pro § 1141.21(a)):

- the arbitrator's fees;
- items allowable as costs under Ca Civ Pro § 1033.5 incurred after the party demanded a trial de novo; and
- reasonable expert witness fees incurred in preparation for trial of the action. [Ca Civ Pro § 1141.21(a)]

  The following items are allowable costs if incurred (whether or not paid) by the prevailing party (Ca Civ Pro § 1033.5(c)(1)):

- Filing, motion and jury fees;
- Juror food and lodging;
- Transcripts and videotape of "necessary" depositions (including original and one copy of those taken by claimant, and a copy of others) plus travel expenses to attend depositions;
- Service of process (including service by publication if authorized);
- Attachment expenses (including keeper fees);
- Necessary surety bond premiums;
- "Ordinary" witness fees;
- Fees for court-ordered expert witnesses;
- Court-ordered transcripts of court proceedings;
- Attorney fees authorized by contract, statute or "law";
- Court reporter fees;
- Models, blowups of exhibits, and photocopies of exhibits if "reasonably helpful to aid the trier of fact"; and
- "Any other item . . . required to be awarded by statute as an incident to prevailing in the action at trial or on appeal". [Ca Civ Pro § 1033.5(a)(1)-(13)]

Costs recoverable under § 1032 are restricted to those that are both reasonable in amount; and reasonably necessary to the conduct of the litigation. [Ca Civ Pro § 1033.5(c)(2) & (3)] Costs "merely convenient or beneficial to its preparation" are disallowed. [Ca Civ Pro § 1033.5(c)(2)] The court has power to disallow even costs

allowable as a matter of right if they were not "reasonably necessary"; and to reduce the amount of any cost item to that which is "reasonable."

Except as otherwise provided by law, the following costs are disallowed (Ca Civ Pro § 1033.5(b)):

- Expert witness fees not ordered by the court;
- Treating physician's reasonable and customary hourly or daily fees which must be paid to take the physician's deposition (see Ca Civ Pro § 2034.430);
- Investigation expenses for trial preparation;
- Postage, telephone, and photocopying charges (except for exhibits);
- Costs in investigating jurors or preparing for voir dire;
- Transcripts of court proceedings not ordered by the court. [Ca Civ Pro § 1033.5(b)]

An item neither specifically allowable under Ca Civ Pro § 1033.5(a) nor prohibited under § 1033.5(b) may nevertheless be recoverable in the court's discretion.

If plaintiff turns down defendant's statutory § 998 offer and fails to obtain a "more favorable" judgment at trial:

- Plaintiff cannot recover court costs incurred after the offer was made (preoffer costs are still recoverable, however, if plaintiff is the prevailing party);
- Plaintiff must pay defendant's postoffer court costs (if these exceed plaintiff's verdict, a judgment will be entered against plaintiff for the balance); and
- The court has discretion to order plaintiff to pay reasonable expert witness fees incurred by defendant in preparing for and/or during trial (or arbitration) of the case. [Ca Civ Pro § 998(c),(e)]

If defendant rejectes plaintiff's Ca Civ Pro § 998 offer and fails to obtain a "more favorable" judgment, plaintiff is entitled to statutory costs and fees as the prevailing party (Ca Civ Pro § 1032, plus:

- In personal injury actions, plaintiff is also entitled to 10% interest on the judgment from the date of the offer (except against public entities or employees for acts in the course of their public employment). [Ca Civil § 3291]
- Also, the court may (discretionary) order defendant to pay reasonable fees for plaintiff's expert witnesses in preparation for and/or during trial (or arbitration) of the case. [Ca Civ Pro § 998(d)]

To obtain an award of costs, the prevailing party must serve and file a memorandum of costs (normally referred to as a "costs bill"). [Ca Rules of Court Rule 870(a)] The Judicial Council has adopted a "worksheet" (for itemization) and "summary" forms to be used in claiming costs. The costs memorandum must be served and filed within the earlier of:

- 15 days after the clerk's mailing of notice of entry of judgment or dismissal (under Ca Civ Pro § 664.5; or
- 15 days after any party's service of such notice; or
- 180 days after entry of judgment. [Ca Rules of Court Rule 870(a)(1)]

The time limit is mandatory and failure to timely file and serve a cost bill may result in waiver of costs. However, the trial court has discretionary power to grant relief under Ca Civ Pro § 473(b) for "inadvertence" or "excusable mistake."

The losing party may dispute any or all of the items in the prevailing party's costs memorandum by a motion to strike or tax costs. [See Ca Rules of Court Rule 870(b)] Technically, a motion to strike challenges the entire costs bill (e.g., on the ground the claimant is not the "prevailing party"), whereas a motion to tax challenges particular items or amounts. But the terms are often used interchangeably and there is no difference in the procedural rules. [See Ca Rules of Court Rule 870(b)(2)] A motion to strike or tax costs must be served and filed within 15 days after service of the costs memorandum. This period is extended as provided by Ca Civ Pro § 1013 if the costs memorandum was served by mail. [Ca Rules of Court Rule 870(b)(1)] Delay in challenging (or failure to challenge) a costs bill waives any objection to the costs claimed thereon. Even so, the court has discretion to grant Ca Civ Pro § 473(b) relief for "inadvertence" or "excusable neglect" to consider late-filed motions.

Attorney Fees As Costs

When authorized by contract, statute or "law," reasonable attorney fees are "allowable costs." [Ca Civ Pro § 1033.5(a)(10)(A)] Hundreds of California statutes authorize court awards of attorney fees in specific types of actions. Some statutes make fee awards to a successful party mandatory. Other statutes make fee awards discretionary.

The court may make an additional award for attorney fees incurred in post-trial proceedings (e.g., in opposing a motion for new trial or on appeal). If the underlying judgment includes an award of contract attorney fees, attorney fees incurred by the judgment creditor in enforcing the judgment are also recoverable as costs. [Ca Civ Pro § 685.040]

Post Trial Motions

Judgment Notwithstanding The Verdict: This procedure was known at common law as a motion for judgment non obstinate veredicto and therefore is often called a "JNOV motion." "The court . . . either of its own motion . . . or on motion of a party against whom a verdict has been rendered, shall render judgment in favor of the aggrieved party notwithstanding the verdict whenever a motion for directed verdict . . . should have been granted had a previous motion been made . . ." [Ca Civ Pro § 629]

A JNOV motion challenges the legal sufficiency of the opposing party's evidence ("a demurrer to the evidence"). I.e., it challenges whether that evidence was sufficient to prove the claims or defenses asserted by the opposing party and now embodied in the jury's verdict. It thus has the same function as a motion for nonsuit or directed verdict, the only difference being that the JNOV motion lies after a verdict for the opposing party has been rendered.

Thus, JNOV motions by a party (as distinguished from motions by the court sua sponte) must be made:

- Before entry of judgment (rare because judgment must be entered within 24 hours after verdict; see Ca Civ Pro § 664); or
- Within 15 days after the clerk's mailing of notice of entry of judgment, or 15 days after service by a party of written notice of entry of judgment, or expiration of 180 days, whichever occurs first; or
- Within 15 days after any other party moves for a new trial. [Ca Civ Pro §§ 629, 659]

Motion For New Trial: A motion for new trial asks the trial court to reexamine one or more issues of fact or law after a trial and decision by judge or jury. [See Ca Civ Pro §§ 656, 657] Courts have no inherent power to grant a new trial. "The right to a new trial is purely statutory. The principal statutory authority for new trial motions is Ca Civ Pro § 657. Other relevant statutes are Ca Civ Pro §§ 655-663.2 and 914.

A new trial motion must be based on one or more of the following statutory grounds:

Irregularity In The Proceedings: Irregularity in the proceedings of the court, jury or adverse party, or any order of the court or abuse of discretion by which either party was prevented from having a fair trial." [Ca Civ Pro § 657(1)

Fair Trial: Ca Civ Pro § 657(1) also authorizes new trials based on "any order of the court or abuse of discretion by which either party was prevented from having a fair trial."

Jury Irregularity: "Irregularity in the proceedings of the jury" - The precise meaning and scope of this phrase has never been judicially determined.

Party Or Attorney Irregularity: "Irregularity in the proceedings of the adverse party or counsel"

Jury misconduct (Ca Civ Pro § 657(2)): This refers to such things as concealed bias, misconduct during deliberations, etc.

Accident or surprise (Ca Civ Pro § 657(3)): A new trial may be granted upon the ground of "Accident or surprise, which ordinary prudence could not have guarded against."

Newly-discovered evidence (Ca Civ Pro § 657(4)): "Newly discovered evidence, material for the party making the application, which he (or she) could not, with reasonable diligence, have discovered and produced at the trial."

Excessive damages (Ca Civ Pro § 657(5)): This ground in effect asks for a limited new trial--i.e., a new trial limited to the issues of damages (findings re liability, etc. to be kept intact).

Inadequate damages (Ca Civ Pro § 657(5)): "Inadequate damages" is likewise ground for a new trial motion. Again, this ground asks for a limited new trial--i.e., a new trial limited to the issues of damages (findings re liability, etc. to be kept intact).

Insufficient evidence (Ca Civ Pro § 657(6)): "6. Insufficiency of the evidence to justify the verdict or other decision . . ." This is one of the most frequent grounds

for new trial motions. It is also one as to which the trial judge has the broadest power.

Verdict or decision "against law" (Ca Civ Pro § 657(6)): Another ground for new trial is: "6. . . . (T)he verdict or other decision is against law."

"Error in law" during trial (Ca Civ Pro § 657(7)): The final ground for a new trial is: "7. Error in law, occurring at the trial and excepted to by the party making the application."

The party intending to move for a new trial must file and serve the required moving papers either:

- "before the entry of judgment; or
- "within 15 days of the date of mailing notice of entry of judgment by the clerk of the court . . . or service upon him by any party of written notice of entry of judgment, or within 180 days after the entry of judgment, whichever is earliest"; or
- if another party files the first motion for new trial, "each other party shall have 15 days after the service of such notice upon him to file and serve a notice of intention to move for new trial." [Ca Civ Pro § 659]

The above time limits are jurisdictional and cannot be extended either by stipulation or court order. [Ca Civ Pro § 659]

Motion to Vacate Judgment: The trial court is empowered to set aside a judgment on either of two grounds "materially affecting the substantial rights of the (moving) party and entitling the party to a different judgment." [Ca Civ Pro § 663] This motion to vacate may only be used to set aside a judgment based on a decision by the court (nonjury trial); or a jury's special verdict. [Ca Civ Pro § 663]

Section 663 provides two grounds for a motion to vacate a judgment:

1. "Incorrect or erroneous legal basis for the decision, not consistent with or not supported by the facts . . ."; [Ca Civ Pro § 663, subd. 1]
2. "A judgment or decree not consistent with or not supported by the special verdict." [Ca Civ Pro § 663, subd. 2]

Motion to Correct Judgment for Clerical Error: The court has power either on motion of a party or sua sponte to "correct clerical mistakes in its judgment . . . so as to conform to the judgment . . . directed." [Ca Civ Pro § 473(d)]

Motion to Set Aside VOID Judgment: A court also has power to set aside "void" judgments. [Ca Civ Pro § 473(d)]

Motion for Relief From Judgment: A court has power within 6 months after judgment entry to grant relief from the judgment on the grounds of "mistake, inadvertence, surprise or excusable neglect." [Ca Civ Pro § 473(b)] Relief under Ca Civ Pro § 473 is generally discretionary. But it is mandatory where the moving party's attorney files a "mea culpa" affidavit attesting to his or her mistake, inadvertence, surprise or neglect (need not be excusable neglect).

Motion for Stay of Enforcement of Judgment: A court has power to stay execution on a judgment for a limited period of time: no longer than 10 days after the deadline

for an appeal (which is usually 60 days after the notice of entry of judgment is served). [Ca Civ Pro § 918(b)]

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