The Strategic Use of Motions During and After Trial

Reference Materials
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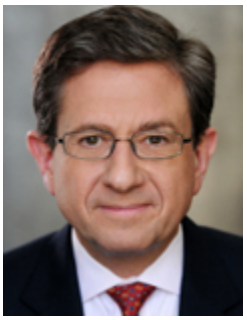
About the Panelists

JUDGE STEPHEN P. FRECCERO, Superior Court of California, County of Marin, was appointed to the bench in 2015. Prior to his appointment, Judge Freccero was a partner at the San Francisco office of Morrison & Foerster. In 1989, Judge Freccero left Morrison & Foerster and joined the U.S. Attorney's Office for the Northern District of California, where his long and distinguished term of service included an array of high profile and high stakes cases. Judge Freccero earned his bachelor's degree from Wesleyan University, and his law degree from the University of California, Berkeley, Scchool of Law.



EUGENE G. ILLOVSKY, Illovsky Law Office, Oakland, is a nationally-recognized former prosecutor with decades of broad experience. He has tried many criminal and civil cases before juries and judges and has argued more than a dozen cases before the U.S. Court of Appeals. He has conducted internal investigations for companies and boards in matters involving securities violations, accounting irregularities, stock option backdating, intellectual property theft, export controls, and antitrust issues. Eugene has represented executives at all levels in corporate internal investigations, as well as in grand jury and SEC investigations. Before spending over 15 years as a partner in the major international law firm of Morrison & Foerster LLP, Eugene served as an Assistant United States Attorney for the Eastern District of California (Sacramento) from 1992–1998, where he investigated and prosecuted a wide array of white-collar crimes, including investment frauds, money laundering, political corruption, intellectual property crimes, and tax evasion. He received his J.D. from Yale Law School.

STUART C. PLUNKETT, Baker Botts, San Francisco, is a partner with over 19 years of experience representing clients in complex antitrust and commercial litigation matters across the country. His clients include companies and individuals in a broad range of industries, including high tech, financial services, energy, and healthcare. Mr. Plunkett also has significant experience in consumer and financial services class actions, securities fraud litigation, and intellectual property matters, including trademark and trade dress disputes. He regularly speaks and writes on these topics. Mr. Plunkett received his J.D. from Northwestern University School of Law.

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PROGRAM SERIES SUBHEAD

The Strategic Use of Motions During and After Trial

November 2016
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Key Motions During and After Trial

TACTICS AND STRATEGIC CONSIDERATIONS

HON. STEPHEN P. FRECCERO, MARIN COUNTY SUPERIOR COURT
STUART PLUNKETT, BAKER BOTTS LLP
EUGENE ILLOVSKY, ILLOVSKY LAW OFFICE

FOCUS OF PROGRAM

- Motions for Nonsuit and for Judgment
- Motions for Directed Verdict/JNOV
- Motions for Mistrial
- Motions to Amend Pleadings to Conform to Proof

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Motions for Nonsuit: General

- CCP Section 581c
  - Often called a "Demurrer to the evidence"
  - Purposes: Eliminate unmeritorious cases/remedy correctable defects
  - Partial nonsuit—judgment not entered
    - Some but not all causes of action
    - Some but not all defendants
- "Sufficient substantiality" standard

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Motions for Nonsuit: Making

- Timing in Jury trials (not in Court trials)
  - After plaintiff's opening statement
    - Cause of action not stated
    - Affirmative defense established
  - After plaintiff's close of evidence
- Oral (outside jury's presence) or written

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Motions for Nonsuit: Responding

- Must point to evidence that is of "sufficient substantiality" to avoid a nonsuit; evidence creating a mere conjecture or surmise is insufficient
- Stand on or supplement opening statement or evidence?
  - If evidence is closed, move to reopen to offer additional evidence
  - Be prepared with an offer of proof and explanation of how that evidence fixes the defect
  - Motion to reopen should be granted unless the defect in the case clearly cannot be fixed
  - Order denying motion to reopen reviewable only on appeal from the judgment
- If a defendant in multi-defendant case prevails on nonsuit motion, plaintiff's counsel should promptly move (outside jury's presence) for an order under CCP Section 581c(d) that prevents remaining defendants from shifting blame to the dismissed defendant.
- A judgment of nonsuit operates as an adjudication on the merits, unless the Court specifies otherwise in its order
  - Ask the Court not to find an adjudication on the merits?
  - Would be waived if you don't ask.

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Motions for Judgment: General

- CCP Section 631.8
  - Available only in Court trials (eliminates nonsuit)
  - Court can
    - decide issues of credibility
    - weigh the evidence
    - make findings of fact
    - reject an expert's opinion
- Court can grant partial or total judgment

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Motions for Judgment: Making

- May be brought by either party (not just defendant)
- Timing: at the close of the non-moving party's case
- Court must allow opposing party to supplement evidence
- Oral or written?

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Motions for Judgment: Responding

- Take the opportunity to make a proffer and seek to admit additional evidence
- Craft any proffer with an understanding of how the Court is weighing the evidence
- Standard of review is substantial evidence
- A "prevailing party" under CCP Section 1032(b) recovers costs

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Motions for Directed Verdict: General

- CCP Section 630
  - Available to any party
  - Purpose: asks the Court to instruct the jury to return a verdict against the nonmoving party
  - Can apply to entire case or to specific issues
  - Similar standard to nonsuit motion: "sufficient substantiality" of evidence, taking it as true
  - Previous denial of nonsuit does not preclude directed verdict motion

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Motions for Directed Verdict: Making

- Timing in Jury trials (not in Court trials)
  - "after all parties have completed the presentation of all of their evidence" — CCP §630(a)
  - Can also be filed after trial, if the jury has been discharged without rendering a verdict — CCP §630(f)
    - Must be filed within 10 days after jury is discharged.
    - Court's power to act expires 30 days after jury is discharged
- Oral (outside jury's presence) or written

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Motions for Directed Verdict: Responding

- Always operates as adjudication on the merits
- Consider whether to stand on evidence or supplement
  - Waiver if no request to supplement
  - Error to deny if non-moving party requests
  - If evidence is closed, move to reopen to offer additional evidence
  - Be prepared with an offer of proof and explanation of how that evidence fixes the defect
  - Motion to reopen should be granted unless the defect in the case clearly cannot be fixed
  - Order denying motion to reopen reviewable only on appeal from the judgment
- Must point to evidence that is of "sufficient substantiality" to avoid directed verdict
  - Evidence creating a mere conjecture or surmise is insufficient
  - Directed verdict inappropriate when evidence substantially conflicts
- A judgment of nonsuit operates as an adjudication on the merits, unless the Court specifies otherwise in its order
  - Ask the Court not to find an adjudication on the merits?
  - Would be waived if you don't ask.

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Motion for Judgment Notwithstanding the Verdict (JNOV)

- CCP Sec. 629(a)
- Motion for directed verdict not a prerequisite, and not preclusive
- Used after verdict rendered, but when directed verdict should have been granted if made
- May be granted only when no substantial evidence supports verdict (all facts supporting verdict presumed true)
- Usually move for JNOV and new trial simultaneously; both have same deadlines
- Written motion required

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Motions for Mistrial: General

Seeks to end the trial before its conclusion because of *error* or *irregularity* too substantial to correct

Must be conduct that is *irreparably prejudicial*

- CCP Section 233 (discharge of juror)
- CCP Section 616 (jury's failure to return verdict)
- Evid. Code Sections 703, 704 (judge or juror as witness)
- CCP Section 657(1) and (2) (same as grounds for new trial)

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Motions for Mistrial: Making

Object *immediately* on the record—request to be heard outside the presence of the jury

- State whether error or misconduct (or both)
- Specifically identify the grounds for mistrial
- ***Request curative instruction***

Any delay in objecting, or the failure to specifically identify the basis, or to request curative admonition, may constitute waiver

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Motions for Mistrial: Responding

Argue waiver when motion does not immediately follow claimed error or irregularity.

Propose alternatives to cure any claimed prejudice.

- Generally a prompt admonition is sufficient to cure any prejudicial effect

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Motions to Amend: General

Amend the pleadings when there is a *variance* between proof at trial and what has been pleaded.

Same liberality as governs pre-trial amendments, motions granted unless prejudice to the rights of parties. (Counsel must affirmatively seek relief, no court duty to amend *sua sponte*)

- CCP Section 576 – amendment of pleadings at any time "*in the furtherance of justice*"
- CCP Section 475 – no variance deemed material "*unless it has actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits*"

General rule is that amendments are limited to cause of actions stated in the complaint, although a *new* cause of action or new defense may be permitted if based on same general set of facts.

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Motions to Amend: Making

Must be made promptly—delay may be grounds for denial

Generally made by written motion along with submission of amended pleading

- Cal. R. Ct 3.1324
- specifically identify the amendments (line by line changes)
- minor alterations may be done by clerk with court's permission

Demonstrate that variance is not prejudicial

- adverse party had notice of issue
- issue was litigated on the merits
- does not alter the presentation of evidence

Show amendment is "in furtherance of justice"

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Motions to Amend: Responding

When proof is offered that differs from the pleadings—object
- If no motion for amendment, move for nonsuit at close of opponent's case

Failure to object to variance may be waiver of objection to subsequent amendment
- Variance can be disregarded when action has been fully tried on merits as if no variance

Demonstrate prejudice (alters the scope of proof)

Request recess or to reopen case to permit introduction of additional evidence

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Motions for New Trial: General

A "re-examination of an issue of fact in the same court after a trial and decision by a jury, court, or referee." CCP Section 656

Statutory grounds contained in CCP Section 657:
- (1) Irregularity in proceedings such that party "prevented from having a fair trial"
- (2) Jury misconduct
- (3) Accident or surprise
- (4) Newly discovered evidence
- (5) Excessive or inadequate damages
- (6) Insufficiency of evidence to justify verdict
- (7) Error in law

New trial *only* granted when "error complained of resulted in a *miscarriage of justice*" Cal. Const. Art. VI, Section 13

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Motions for New Trial: Making

Strict deadlines (CCP Section 659):

Notice stating grounds must be filed (1) after decision but before judgment, or (2) within 15 days of mailing of notice of entry of judgment (*cannot* be extended)

Notice must state statutory grounds for motion

Jurisdictional limit on court's power to grant motion—can only be done within 60 days of mailing of notice of entry of judgment

Contents:

Demonstrate previous objection to error or irregularity

Court has broad power to reweigh evidence as "13th Juror"

Inadequate or excessive damages—court has power to conditionally grant new trial unless defendant consents to additional damages (additur) or plaintiff consents to lesser damages (remittitur)

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Motions for New Trial: Responding

Deadlines (CCP Section 659a):

Opposition must be filed within 10 days (can be extended for another 10 days max. by court order)

Moving party then has 5 days to reply

Contents:

Argue waiver for failing to object or file motion for mistrial

Move to strike inadmissible portions of moving party's papers

Submit counteraffidavits

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Thank You!

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Motions During Trial

Randall B. Christison

Reprinted from California Trial Practice: Civil Procedure During Trial (3d ed Cal CEB), with April 2016 update. To order this book, call 1-800-232-3444, or visit CEB's website at ceb.com.

I. SCOPE OF CHAPTER

§18.1 A. Motions covered

This chapter discusses the following motions that may be made during trial:

- Motion for nonsuit. See §§18.7–18.34.
- Motion for directed verdict. See §§18.35–18.56.
- Motion for continuance (temporary or indefinite recess) during trial. See §§18.57–18.64.

- Motion to reopen case. See §§18.65–18.81.
- Motion for mistrial. See §§18.82–18.102.
- Motion to amend pleadings to conform to proof. See §§18.103–18.123.

When the motion can be made orally, suggested wording appears in boldface type under the procedures for making the particular motion. See, *e.g.*, form language in §18.25 (nonsuit) and 18.50 (directed verdict). Forms of motions that may be submitted to the court in written form appear in §§18.124–18.134.

Except for the motion for directed verdict and, rarely, the motion for mistrial, the motions discussed in this chapter can be made during a bench trial as well as a jury trial. The motion for judgment under CCP §631.8, which is made exclusively in a bench trial after the close of a party's evidence, is discussed in the bench trial chapter. See §§24.14–24.29.

Evidentiary motions in limine are covered in chap 7. Motions to continue (postpone) the trial before it begins are discussed in §§6.6–6.25. Other pretrial motions are discussed in chap 6. On posttrial motions made after a verdict is rendered, see chap 25.

§18.2 B. Chart: Trial motions

This chart lists motions that can be made during trial, with cross-references to sections in this book and other books where each motion is discussed. Several motions that are ordinarily made well before trial or in limine, but can also be made during trial under certain circumstances, are discussed in the places indicated.

Motion to determine good faith of settlement with joint tortfeasor (CCP §877.6)	Ordinarily a pretrial motion, this motion can be made on shortened notice for good cause if the settlement occurs during trial. CCP §877.6(a). See California Civil Procedure Before Trial, chap 50 (4th ed Cal CEB).
Motion for judgment on the pleadings	See §§6.94–6.98. Ordinarily a pretrial motion (see Civ Proc Before Trial, chap 27), this motion can be made any time before final determination of an action.
Plaintiff's request for voluntary dismissal (CCP §581)	See §§6.79–6.86.
Motion to disqualify counsel	See §6.109 on moving to disqualify counsel who will be or has been called as a trial witness.
Motion in limine to exclude or limit evidence	See chap 7.
Motion to strike evidence at trial	See §15.44. See also California Trial Objections, chap 52 (Cal CEB).
Motion to establish preliminary facts	See §§7.25–7.36.
Motion to prohibit mention of claim for punitive damages or inquiry into defendant's financial records before plaintiff establishes prima facie case	See §§8.12, 8.28.
Motion to preinstruct jury	See §§20.47–20.50.
Motion to allow jury to take instructions into jury room	See §§16.26, 17.21.
Request for use of special verdict or special findings	See §§16.39, 18.6–18.14.
Motion for interpreter	See §§11.28–11.43.
Motion to exclude witnesses and admonish them not to discuss testimony	See §§6.105–6.108.
Motion for jury view	See §12.48. Ordinarily made in limine, the motion is not subject to a timing restriction under CCP §651.

Motion for continuance (postponement) of trial	See §§6.6–6.25.
Motion for continuance (temporary or indefinite recess) during trial	See §§18.57–18.64.
Motion for nonsuit	See §§18.7–18.34.
Motion for directed verdict	See §§18.35–18.56.
Motion for judgment in bench trial	See §§24.14–24.29.
Motion to reopen case	See §§18.65–18.81.
Motion for mistrial	See §§18.82–18.102.
Motion to amend pleadings to conform to proof	See §§18.103–18.123.
Motion to appoint expert witness (Evid C §730)	See Jefferson's California Evidence Benchbook, chap 30 (4th ed CJA-CEB 2009).
Motion to produce writing used to refresh memory (Evid C §771)	See Evidence Benchbook, chap 28.
Motion to reexamine witness (Evid C §774)	See Evidence Benchbook, chap 28.
Motion to recall excused witness (Evid C §778)	See Evidence Benchbook, chap 28.
Motion to exclude privileged information (Evid C §916(a))	See Evidence Benchbook, chap 37.
Motion for judgment when jury has been discharged without verdict (CCP §630)	See §§18.40–18.41.
Motion to quash or modify subpoenas (CCP §1987.1)	See §4.45.

II. PROCEDURES FOR MAKING TRIAL MOTIONS

A. Form of motion

§18.3 1. Usually oral; when written papers advisable

Because it is often impossible to anticipate the need for a trial motion, the motions discussed in this chapter are usually made orally. Formal notice of a motion is not customarily given or required for motions made during trial. See, *e.g.*, *Morel v Morel* (1928) 203 C 417, 418 (motion for judgment on pleadings; notice not required for motion made in open court after trial has commenced).

If the issues are complicated, counsel can ask the court for a brief recess in which to prepare written authorities. Most judges are reluctant to protract a trial but, if the motion is critical, may grant counsel's request for a reasonable time to prepare argument or may set a later date for arguing the motion while the trial proceeds on other issues.

Although time may not permit the drafting of an extensive written memorandum to support a trial motion, counsel should organize a concise argument and cite to relevant authorities. When key cases are dispositive, it is a good idea to furnish copies to the court and opposing counsel.

If counsel can anticipate a trial motion, providing the court with written supporting papers may substantially advance the client's position. This written material can take the form of a portion of the trial brief, an early motion in limine, or a memorandum of law presented to the judge when making the motion that may or may not include the motion itself in writing. The court may be more inclined to take even abbreviated papers seriously, and those documents may also protect the record on appeal.

Any written memorandum in support of a motion should conform as much as possible to generally accepted format and filing rules. See Cal Rules of Ct 3.1110–3.1116, 3.1300, 3.1302. On drafting motion papers, see California Civil Procedure Before Trial, chaps 11–13 (4th ed Cal CEB).

NOTE► Although use during a trial is unlikely, it may be possible in a given situation to make a telephone appearance motion. Cal Rules of Ct 3.670.

In bench trials, the motion can be made in open court at the appropriate time. In jury trials, counsel may make certain motions in open court and then ask permission to approach the bench so that argument may be heard out of the jury's hearing or, in cases of extended discussion, in chambers or in the courtroom after the jury has been excused.

PRACTICE TIP► Local rules can significantly vary the procedure for motions made during trial. Some local rules of court require that specified motions be made as well as argued outside the jury's hearing. See, *e.g.*, Los Angeles Ct R 3.99 (motions for judgment on the pleadings, directed verdict, and mistrial must be made and argued outside jury's hearing). Even when no such requirement exists, it is a good practice to ask to approach the bench for the purpose of making a motion in order to avoid an adverse effect on the jury if the motion is denied. It is also a good idea to become familiar with the particular judge's preferences in these matters. Information about courtroom procedures may be requested during the chambers conferences before trial. For a checklist for covering trial motion procedures and other useful points with the trial judge, see §6.5.

§18.4 2. Making a Record

When the motion is made orally, special care should be taken to communicate both for the court and for the record the specific grounds for the motion, or to state that written papers containing this information are being filed with the clerk. Any supporting documents should indicate that the motion was made orally on the record at a particular time and date. Even though the trial court exercises considerable discretion in ruling on motions during trial, a favorable ruling may be reversed for lack of sufficient basis in the record to support the order. See, *e.g.*, §18.34 (nonsuit). For further discussion on protecting the record, see chap 15.

It is good practice to request a minute order from the clerk after the judge rules on the motion or, if written authorities have been drafted, to prepare a written form of order for the judge to sign before filing it with the court. Otherwise, counsel may not recall certain orders later in the trial, and it may not be feasible to search the court transcript for the ruling.

In camera hearings during trial to limit testimony, or to test privileges, are a well-recognized and useful adjunct to trial proceedings. The fact such a proceeding is used, however, does not relieve counsel from the duty to make and protect the record.

PRACTICE TIP► Be alert to making a record and requesting the reporter's presence. Individual judges vary in their preferences on hearing motions at the sidebar, in chambers, or in open court with the jury excused. Counsel should ensure that the motion itself is part of the record. If argument takes place later in chambers, it may be necessary to repeat for the record a motion previously made at the bench outside the court reporter's hearing. If a written motion is presented, let the record reflect that the motion is being submitted in writing and consider summarizing its main points in the court reporter's presence. Ensure that the court's ruling is memorialized in a minute order or in the reporter's transcript.

§18.5 B. Timing

Failure to make trial motions at the proper time can waive the right to raise the point on appeal. The time for making some trial motions, such as motions for nonsuit or directed verdict, is dictated by statute or customary practice.

Other motions, such as motions for continuance, require a showing that counsel made them as soon as the grounds for the motion became known and must be made in a timely fashion. *County of San*

Bernardino v Doria Mining & Eng'g Corp. (1977) 72 CA3d 776, 783. Otherwise, counsel waives the right to make the motion later in the trial or to raise the point on appeal.

§18.6 C. Opposing party's options

Although trial motions are not easy to anticipate, opposing counsel may be able set out a legal opposition before trial in a memorandum of law to be produced when the need arises. Counsel's trial notebook or even the trial brief sometimes addresses the same issues as the motion and contains legal authorities that can be used to oppose it.

As an alternative, counsel can ask the court for a brief recess to prepare an argument, and perhaps written authorities, in opposition to the motion. See §18.3.

III. MOTION FOR NONSUIT

§18.7 A. Checklist: Procedures for making or opposing motion

Moving Party

___ 1. Request hearing outside presence of jury but on record. See §18.24.

___ 2. Make oral statement of specific grounds. See §18.25.

___ 3. Identify absence of material element or existence of fact constituting opponent's failure to establish a prima facie case. See §18.15.

___ 4. Ensure that record shows that opponent had opportunity to request reopening. See §18.28.

___ 5. Ensure that record reflects that opponent had opportunity to request amending pleadings, if appropriate. See §18.16.

___ 6. Consider preparation of written memorandum in support of motion. See §18.26.

___ 7. Consider possible negative reaction by trial court and appellate courts' reluctance to affirm judgments of nonsuit. See §18.20.

___ 8. Consider using nonsuit motion to challenge only some causes of action or some parties. See §18.11.

Opponent

___ 1. Identify substantial evidence creating issue. See §18.19.

___ 2. Request expansion of opening statement or reopening of evidence. See §§18.27–18.28.

___ 3. Request amendment to pleadings. See §18.16.

___ 4. Consider limiting motion to some cause of action or some parties. See §18.11.

___ 5. If motion granted, move to have order not granted on merits. See §18.10.

___ 6. If motion granted, move to preclude reference to a dismissed party. See §18.29.

B. Nature of Motion

§18.8 1. Nonsuit is equivalent to involuntary dismissal

A nonsuit order dismisses a party's action (or cross-action) when, after the opening statement or the presentation of evidence, the party fails to establish a prima facie case. CCP §581c; *Doria v AFL-CIO* (1961) 196 CA2d 22, 32.

A motion for nonsuit is sometimes termed a demurrer to the evidence because it concedes the truth of the facts of the plaintiff's proposed or admitted evidence, and any inferences reasonably drawn from

them, but contends that those facts, as a matter of law, do not sustain the plaintiff's case. *Stein-Brief Group, Inc. v Home Indem. Co.* (1998) 65 CA4th 364, 369.

§18.9 2. Purpose: to eliminate nonmeritorious actions or remedy correctable defects

The primary purpose of the motion is to eliminate the time and expense of presenting the defendant's evidence when the plaintiff's case has no merit. *Howard v General Petroleum Corp.* (1951) 108 CA2d 25, 29.

In addition to the goal of ending a nonmeritorious case promptly, a nonsuit motion following the opening statement is designed to call attention to correctable defects. *Hamilton v Gage Bowl, Inc.* (1992) 6 CA4th 1706, 1710.

§18.10 3. Court decides whether nonsuit judgment is adjudication on merits

The court has discretion to determine whether the nonsuit judgment is an adjudication on the merits. Unless the court specifies otherwise, the judgment is deemed to be on the merits. CCP §581c(c); *Paddleford v Biscay* (1971) 22 CA3d 139, 142.

The court's failure to specify may be error, although a court of appeal may correct the judgment. *American Broad. Co. v Walter Reade Sterling, Inc.* (1974) 43 CA3d 401, 406.

C. Partial nonsuit

§18.11 1. Dismisses action on some issues

The court may grant a motion for nonsuit on some issues in the action; the trial then proceeds on the remaining issues. CCP §581c(b). Final judgment is entered at the end of trial, based both on the matters determined at trial and the court's ruling on the motion for nonsuit. CCP §581c(b).

PRACTICE TIP► Partial nonsuit is a practical remedy for a defendant when the plaintiff asserts several legal theories but produces evidence supporting only one or two causes of action. For example, nonsuit was used to advantage in *Rokos v Peck* (1986) 182 CA3d 604, 611 (nonsuit granted after opening statement against one of two plaintiffs on one of three causes of action when plaintiff's counsel unable to augment statement of facts in response to the motion).

The court may grant a nonsuit for one party without affecting the other parties. *Kidron v Movie Acquisition Corp.* (1995) 40 CA4th 1571, 1582 (nonsuit as to one defendant); *Brimmer v California Charter Med., Inc.* (1986) 180 CA3d 678, 683 (nonsuit granted for three of four defendants).

If the court grants nonsuit to a codefendant in a personal injury or property damage action, the remaining defendants may not, over the plaintiff's objection, defend the action by asserting the fault of the former codefendant. CCP §581c(d).

§18.12 2. Preparing written order after judgment of partial nonsuit

If a judgment of partial nonsuit under CCP §581c(b) has been granted on some but not all of the issues, request the court to state its ruling fully, if appropriate, and prepare a written order for the judge's signature on those issues.

Although it is usually a better practice for prevailing counsel to draft the order when a motion for partial judgment is granted, counsel can instead request the court to issue a minute order of its ruling, which may then be incorporated into the order of final judgment at the end of trial. See §18.32.

§18.13 3. Allows appellate review only after final judgment

Issues on which partial nonsuit is granted or denied are not subject to appellate review until final judgment is entered. CCP §581c(b).

NOTE► This was not true for cases decided under the former statute, which was amended in 1980. See former CCP §581c(b).

D. Test for granting motion: "Sufficient substantiality"

§18.14 1. No evidence of "sufficient substantiality" to support judgment

Courts have established rules to protect plaintiffs from the drastic effect of granting motions for nonsuit. *Timmsen v Forrest E. Olson, Inc.* (1970) 6 CA3d 860, 868. A judgment of nonsuit after the opening statement is warranted only when the court concludes from all the asserted facts and inferences that no evidence of "sufficient substantiality" will support a judgment in favor of the plaintiff. *Willis v Gordon* (1978) 20 C3d 629, 633; *Timmsen v Forrest E. Olson, Inc., supra*.

The court must accept as proved all facts that counsel says will be proved and must "indulge every legitimate inference in favor of the plaintiff.… The evidence offered in the opening statement … must be substantial evidence, sufficient to support a judgment." *Hays v Vanek* (1989) 217 CA3d 271, 288. See *Cole v State* (1970) 11 CA3d 671, 678. When the motion is made after opening statement, the court must assume the plaintiff will be able to prove all favorable facts alleged. *Aspen Enter., Inc. v Bodge* (1995) 37 CA4th 1811, 1817.

NOTE► Presumptions (which are not evidence) favoring the defendant (*e.g.*, presuming that defendant obeyed the law) may not be considered. See Evid C §600; *Engelman v Consolidated House Movers* (1955) 135 CA2d 237, 243.

§18.15 2. Make motion when opening statement either does not state cause of action or establishes affirmative defense

A defendant should make a motion for nonsuit if the opening statement of the facts that the plaintiff expects to prove:

- Does not state a cause of action; or
- Establishes an affirmative defense as a matter of law.

See, *e.g.*, *Olivia N. v National Broad. Co.* (1981) 126 CA3d 488 (plaintiff's opening statement failed to allege facts establishing "incitement" needed to state personal injury cause of action for broadcast negligence); *Russell v Soldinger* (1976) 59 CA3d 633, 642 (contract described in opening statement was contrary to public policy).

Courts have traditionally considered a nonsuit at the close of an opening statement to be a disfavored motion. *Galanek v Wismar* (1999) 68 CA4th 1417, 1424 (recognizing opening statement may not present full version of plaintiff's case). Nevertheless, a nonsuit order at this stage is sometimes appropriate. See, *e.g.*, *Hoff v Vacaville Unified Sch. Dist.* (1998) 19 C4th 925, 930. See also *Jensen v Hewlett Packard Co.* (1993) 14 CA4th 958, 971 (nonsuit after opening statement was proper when there was neither a showing of causation of an injury nor of a libelous statement).

If the plaintiff's theory in the opening statement does not give rise to liability as a matter of law, the defendant is entitled to a judgment of nonsuit. See, *e.g.*, *Calrow v Appliance Indus.* (1975) 49 CA3d 556, 559 (defendant's employer could not be liable under factual circumstances described in opening statement). Before such a motion is granted, however, it must be clear that counsel has stated all the facts that the plaintiff expects to prove and has had full opportunity to enlarge or reopen the opening statement. *Rodin v American Can Co.* (1955) 133 CA2d 524, 535.

§18.16 3. Make motion when variation between pleading and proof

Unlike a motion for judgment on the pleadings (see §§6.94–6.98), a motion for nonsuit tests the sufficiency of the evidence rather than the sufficiency of the pleadings. *Nelson v Specialty Records, Inc.* (1970) 11 CA3d 126.

A motion for nonsuit should be made, however, if there is a material variance between the pleading and the proof. *Lewis v South San Francisco Yellow Cab Co.* (1949) 93 CA2d 849, 852 (judgment of nonsuit affirmed when plaintiff's cause of action based on set of facts different in general scope or meaning from that pleaded; no request to amend complaint to conform to proof). Compare *CC-California Plaza Assocs. v Paller & Goldstein* (1996) 51 CA4th 1042, 1051 (error to grant motion for nonsuit where there is substantial conflict in evidence).

NOTE► It is the responsibility of trial counsel to bring any substantial conflict in the evidence to the court's attention.

The court may then grant the opposing party's motion to amend the pleadings to conform to proof. See §18.104. If the evidence was presented, notice was given to the parties and the trial court, and the issue was clearly tendered, the motion for nonsuit may be properly denied and a motion to amend the pleadings granted. *Pierce v PG&E* (1985) 166 CA3d 68, 81.

§18.17 4. Make motion after presentation of evidence when evidence insufficient

A defendant's motion for nonsuit after presentation of evidence should be granted if:

- The plaintiff presents insufficient evidence on any essential element of the case.

EXAMPLE► *Miller v Los Angeles County Flood Control Dist.* (1973) 8 C3d 689, 703 (by neglecting to produce expert testimony on standard of care required, plaintiff failed to establish prima facie showing of negligence).

EXAMPLE► *Unilogic, Inc. v Burroughs Corp.* (1992) 10 CA4th 612, 627 (nonsuit properly granted when plaintiff failed to show substantial evidence of actual loss or unjust enrichment from misappropriated trade secrets, even though other elements of claim were established).

EXAMPLE► *Helm v K.O.G. Alarm Co.* (1992) 4 CA4th 194 (nonsuit properly granted when plaintiff failed to proffer expert testimony to effect that had a malfunctioning alarm installed by defendant worked properly, plaintiff's damages would have been mitigated because police would have interrupted burglary and arson of plaintiff's home). But see *Mast v Magpusao* (1986) 180 CA3d 775, 778 (expert testimony unnecessary when case was one of ordinary negligence supported by matters of common knowledge).

EXAMPLE► *Brimmer v California Charter Med., Inc.* (1986) 180 CA3d 678, 684 (no probative evidence presented that defendant psychiatrists had participated in decision to involuntarily detain plaintiff).

EXAMPLE► *Mikialian v City of Los Angeles* (1978) 79 CA3d 150, 163 (plaintiff's evidence failed to establish necessary element of duty of care in negligence action).

EXAMPLE► *James v St. Elizabeth Community Hosp.* (1994) 30 CA4th 73 (nonsuit properly granted when plaintiff's expert on standard of care found unqualified to render opinion).

EXAMPLE► *Castaneda v Bornstein* (1995) 36 CA4th 1818, 1825, disapproved on other grounds in *Bonds v Roy* (1999) 20 C4th 140, 149 n4 (when expert opinion erroneously excluded, propriety of nonsuit turns on whether exclusion ruling was also erroneous).

- An affirmative defense is established that defeats the cause of action.

EXAMPLE► *Nally v Grace Community Church* (1988) 47 C3d 278, 291 (action against clergyman for malpractice in failing to prevent suicide; defendant held to have no duty to victim on which to base liability for his death).

EXAMPLE► *Williams v Foster* (1989) 216 CA3d 510, 522 (trial court error to deny nonsuit; law imposed no duty on adjacent owner to remedy sidewalk defect).

§18.18 5. Court may not weigh evidence when ruling on motion

When ruling on a motion for nonsuit (unlike a motion for new trial), a judge may not weigh the evidence or consider the credibility of the plaintiff's witnesses. The judge is not bound, however, to accept testimony that is inherently improbable. *Neblett v Elliott* (1941) 46 CA2d 294, 305.

The court must also disregard unfavorable evidence introduced by the defendant under Evid C §776. *Miller v Dussault* (1972) 26 CA3d 311, 316. In ruling on a motion for nonsuit, the question of what inferences may permissibly be drawn from the facts is a question of law for the court. An inference may not be illogically or unreasonably drawn, nor can an inference be based on mere "possibility, suspicion, imagination, speculation, supposition, surmise, conjecture or guesswork." *Kidron v Movie Acquisition Corp.* (1995) 40 CA4th 1571, 1580.

NOTE► The judge is not permitted to consider presumptions, which by definition are not evidence. See Evid C §600; 7 Witkin, California Procedure, *Trial* §410 (5th ed 2008).

§18.19 6. Opposing party must ensure that evidence is adequate to support verdict

To avoid a judgment of nonsuit, the plaintiff's attorney must present evidence that is of "sufficient substantiality" to support a verdict. *O'Keefe v South End Rowing Club* (1966) 64 C2d 729, 733; *Goldstone v Merchants' Ice & Cold Storage Co.* (1899) 123 C 625, 627.

When the evidence creates nothing more than a mere conjecture or surmise, it is insufficient. *Abreu v Svenhard's Swedish Bakery* (1989) 208 CA3d 1446, 1457.

A "scintilla of evidence" is not sufficient to allow a case to go to the jury. See *Nally v Grace Community Church* (1988) 47 C3d 278, 291; *Mikialian v City of Los Angeles* (1978) 79 CA3d 150.

A motion for nonsuit will not be granted when:

- There is a substantial conflict of evidence, some evidence tends to sustain the plaintiff's case, or different conclusions can reasonably be drawn from the plaintiff's evidence. See *Golceff v Sugarman* (1950) 36 C2d 152, 153. If, however, the evidence shows that one of two defendants is culpable, but fails to show which one, a judgment of nonsuit should be granted because there is insufficient evidence to support a verdict. *Garcia v Joseph Vince Co.* (1978) 84 CA3d 868, 873.
- The plaintiff's evidence reasonably supports an inference that would give rise to the defendant's liability if accepted by the jury. See *Leonard v Watsonville Community Hosp.* (1956) 47 C2d 509, 515. However, when the plaintiff relies without direct proof on an inference that a fact exists, and clear uncontradicted evidence shows that the fact does not exist, the nonexistence of the fact is established as a matter of law, and nonsuit may be granted. To dispel the plaintiff's inference, the evidence must be "clear, positive and uncontroverted." *Dimond v Caterpillar Tractor Co.* (1976) 65 CA3d 173, 185.

§18.20 7. Consider appellate consequences; courts reluctant to affirm nonsuit motions

The appellate courts are reluctant to affirm judgments of nonsuit after opening statements. See, *e.g.*, *Lingenfelter v County of Fresno* (2007) 154 CA4th 198, 209; *Baber v Napa State Hosp.* (1989) 209 CA3d 213, 216; *Loral Corp. v Moyes* (1985) 174 CA3d 268, 272.

Likewise, the trial courts are understandably reluctant to take a case from the jury by granting a motion for nonsuit. See, *e.g.*, *Campbell v General Motors Corp.* (1982) 32 C3d 112, 117 ("courts traditionally have taken a very restrictive view of the circumstances under which nonsuit is proper"); *Kopfinger v Grand Cent. Pub. Mkt.* (1964) 60 C2d 852, 855 (error to grant nonsuit if evidence was sufficient to support verdict in plaintiff's favor).

If there is reasonable doubt that the plaintiff's evidence may be sufficient to make a case, the court must let the case go to the jury. *Golceff v Sugarman* (1950) 36 C2d 152; *Agnew v Parks* (1959) 172 CA2d 756, 774.

Counsel should make such a motion only after careful consideration of the consequences on appeal if it is granted. See, *e.g.*, *Mahannah v Hirsch* (1987) 191 CA3d 1520, 1526 (judgment of nonsuit affirmed when plaintiff produced no substantial evidence that defendant pathologists had violated any legal duty to plaintiff); *Freeman v Lind* (1986) 181 CA3d 791, 807 (judgment of nonsuit reversed for one defendant and affirmed for others).

§18.21 8. Failing to grant judgment may be reversible error

Judicial reluctance to grant judgments of nonsuit should not be interpreted as an obligation to deny such motions. If the defendant's motion specifies a ground for a judgment of nonsuit, and the plaintiff is unable to correct the defect, the court has a duty to grant a judgment of nonsuit.

To do otherwise would needlessly incur the cost and delay of proceeding further with a case of no merit. See *O'Keefe v South End Rowing Club* (1966) 64 C2d 729, 746; *McGoldrick v Porter-Cable Tools* (1973) 34 CA3d 885, 888; *Howard v General Petroleum Corp.* (1951) 108 CA2d 25, 29. The failure to grant a judgment of nonsuit that should have been granted is reversible error. *Williams v Foster* (1989) 216 CA3d 510, 522.

E. Timing

§18.22 1. Jury trial: Motion can be made after either opening statement or presentation of evidence

A defendant may move for a judgment of nonsuit only after, and not before, the completion of plaintiff's opening statement, or after the presentation of plaintiff's evidence. CCP §581c(a). If the motion is denied, the defendant has not waived the right to present evidence. CCP §581c(a).

Although it is not ordinary practice, motions for nonsuit also have been made at other times during trial. See, *e.g.*, *Lucas v County of Los Angeles* (1996) 47 CA4th 277, 284 (motion allowed after all evidence and before argument to the jury); *King v Hercules Powder Co.* (1918) 39 CA 223, 224 (motion made after presentation of plaintiff's evidence and renewed after presentation of both parties' evidence). Older cases permitting a nonsuit motion during presentation but before completion of plaintiff's evidence are no longer valid. See CCP §581c(a).

§18.23 2. Bench trial: Motion can be made only after plaintiff's opening statement

In a bench trial, a motion for nonsuit may be made only after the plaintiff's opening statement. CCP §581c(a). See *Lingenfelter v County of Fresno* (2007) 154 CA4th 198, 204. The appropriate motion for a defendant to make after the completion of the plaintiff's evidence in a bench trial, when that evidence is insufficient, is a motion for judgment under CCP §631.8. See §§24.14–24.29.

When the issue is a close one, it may be inadvisable to move for nonsuit in a bench trial. On appellate courts' reluctance to affirm judgments of nonsuit, see §18.20. A judge who will grant a motion for nonsuit may be likely to decide in the defendant's favor in any event. The motion should be made, however,

when the plaintiff's opening statement clearly shows a lack of liability and the time and expense of the trial justifies the motion.

F. Procedures for moving party

§18.24 1. Make motion outside jury's presence

In jury cases, counsel should ask the court for permission to approach the bench in order to make the motion. Counsel should check local rules, which may require a motion for nonsuit and any argument to be made outside the jury's hearing.

The court then may excuse the jury from the courtroom, hear the motion in chambers, or in rare instances permit argument at side bar outside the hearing of the jury. Counsel should be certain that the court reporter is present and able to hear what is said. On making a record, see §18.4.

§18.25 2. Oral motion: Specify grounds

Counsel must specify the grounds on which the motion is made, in order to afford the plaintiff the opportunity to cure any defects. *Loral Corp. v Moyes* (1985) 174 CA3d 268, 272.

Even if the trial court grants the motion, it may be reversed on appeal if counsel or the court has not stated on the record the specific elements lacking in the plaintiff's case. *Timmsen v Forrest E. Olson, Inc.* (1970) 6 CA3d 860, 868 (inadequate statements of grounds by defendant, *e.g.:* it is too general to say, "The evidence is insufficient to prove the allegations in the complaint").

A ground not advanced will generally not be considered on appeal. *Loral Corp. v Moyes* (1985) 174 CA3d 268, 273. See *Lawless v Calaway* (1944) 24 C2d 81, 94. For further discussion, see §18.33.

An oral motion for nonsuit may be stated as follows:

> Defendant, _ _ _[*name*]_ _ _, moves for a judgment of nonsuit. The motion is made on the grounds that _ _ _[*specify deficiency of opening statement or evidence*]_ _ _.

If more than one defect in the plaintiff's case will provide independent grounds for a judgment of nonsuit, the following form can be used:

> Defendant, _ _ _[*name*]_ _ _, moves for a judgment of nonsuit. This motion is made on _ _ _[*e.g., three*]_ _ _ grounds, each of which independently entitles defendant to the granting of the motion: _ _ _[*Specify grounds*]_ _ _.

§18.26 3. Draft written supporting papers when issues complicated

A motion for nonsuit is usually made orally, although it may also be submitted in writing. It is sometimes difficult for trial counsel to prepare a written motion for nonsuit before the close of the plaintiff's evidence or opening statement because counsel does not know what proof the plaintiff will offer.

In many instances, however, defense counsel can anticipate the grounds for a motion for nonsuit based on the known weaknesses of the plaintiff's case and can prepare a written memorandum for submission at the appropriate time. Often the motion itself is made orally, accompanied by written supporting papers. Although oral citation of authorities can suffice when arguing the motion, a written supporting memorandum is more likely to convince the trial judge to grant the motion when the legal questions are complicated and to protect the record on appeal. See §§18.19–18.20.

G. Procedures for opposing party

§18.27 1. Supplement opening statement; waiver

When a defendant has made a motion for nonsuit after the plaintiff's opening statement, the plaintiff's counsel may elect to stand on the opening statement as presented, arguing that the grounds for the motion are insufficient. The plaintiff also has the right to supplement the opening statement with any additional facts counsel expects to prove during trial, unless the plaintiff clearly cannot state a case. See *Cole v State* (1970) 11 CA3d 671, 674 (court gave plaintiff "full opportunity to state all facts he expected to prove"); *Rodin v American Can Co.* (1955) 133 CA2d 524, 534 (nonsuit reversed when plaintiff was denied opportunity to expand opening statement).

PRACTICE TIP► If plaintiff requests that the opening statement be reopened or enlarged and the trial court denies this request, plaintiff's counsel should make sure a reporter is present to record the request and denial. The appellate court will presume a motion was properly granted if the record does not show the error. *Hodges v Mark* (1996) 49 CA4th 651, 657.

A plaintiff's attorney who fails to request an opportunity to enlarge or reopen the opening statement, however, waives this right. *John Norton Farms v Todagco* (1981) 124 CA3d 149, 162 (no error in trial court's ruling without expansion of opening statement when plaintiff did not ask to enlarge it; case reversed on other grounds). On motion to reopen, see §§18.65–18.81.

§18.28 2. Move to reopen after presentation of evidence; waiver

In response to a motion for nonsuit after the close of the plaintiff's evidence, counsel may stand on the evidence as presented or move to reopen the case to offer new evidence. On motion to reopen, see §§18.65–18.81.

It is reversible error for the court to grant a motion for nonsuit after refusing the plaintiff the opportunity to reopen for introduction of further evidence to remedy any deficiencies. *Eatwell v Beck* (1953) 41 C2d 128, 134. See *Charles C. Chapman Bldg. Co. v California Mart* (1969) 2 CA3d 846, 858 (motion for judgment under CCP §631.8).

Counsel must affirmatively seek such an opportunity, however, or the court may assume that the plaintiff has no further evidence to offer. *Consolidated World Inv. v Lido Preferred, Ltd.* (1992) 9 CA4th 373, 381 (although court errs if it fails to permit reopening of evidence, any error is waived if plaintiff fails to make an offer of proof of additional evidence that would be presented or how that evidence would cure defects). See also *Carrier & Braddock, Inc. v S.W. Straus & Co.* (1931) 213 C 508, 513; *John Norton Farms v Todagco* (1981) 124 CA3d 149, 162. On offers of proof, see §§15.50–15.60.

A party who indicates that the court need not consider a given issue waives the right to raise this issue on appeal. *Carmichael v Reitz* (1971) 17 CA3d 958, 968.

PRACTICE TIP► In evaluating any additional evidence that could be offered, distinguish whether the new material is merely cumulative (which is insufficient) or would actually help cure the stated deficiencies. When the plaintiff chooses to stand on the previous presentation, counsel's principal argument to the court is that the case has sufficient support to go to the jury.

Even if the court denies the plaintiff's motion to reopen, the plaintiff's counsel should ensure that the case is supported by evidence that is not merely speculation or conjecture. *Abreu v Svenhard's Swedish Bakery* (1989) 208 CA3d 1446, 1457. On ensuring that evidence is adequate to support a plaintiff's verdict, see §18.19.

§18.29 3. If motion granted, request court order: Remaining parties cannot shift blame to dismissed party

Code of Civil Procedure §581c(d) effectively prevents defendants in multiple party actions from shifting blame to a party no longer in the action. When one of several defendants obtains a dismissal by a motion for nonsuit based on lack of liability in an action for property damage or personal injury, the plaintiff can, by objecting, prevent the remaining defendants from commenting or attempting to attribute fault to persons dismissed from the case.

If a defendant prevails on a motion for nonsuit, plaintiff's counsel should move immediately for an order precluding any reference to the dismissed party rather than wait to object under CCP §581c(d) when another defendant attempts to shift blame to the dismissed defendant. Such a motion should be made outside the jury's hearing.

H. Effect of granting motion; costs; appeal

§18.30 1. Operates as adjudication on merits

Unless the court otherwise specifies in its order, a judgment of nonsuit operates as an adjudication on the merits. CCP §581c(c). When the motion is granted, the judgment is made by written order, signed by the judge, and filed like any other dismissal of an action. CCP §581(d).

Compare: Unlike a judgment under CCP §631.8 in a bench trial (see §§24.14–24.29), a statement of decision is not required and cannot be requested after a judgment of nonsuit. See *Nelson v Specialty Records, Inc.* (1970) 11 CA3d 126, 142; *Cullen v Spremo* (1956) 142 CA2d 225, 231.

§18.31 2. Prevailing party entitled to costs

A defendant who has been granted a judgment of nonsuit is entitled to costs and necessary disbursements under CCP §§1031–1034. *Matson v Fortuna High Sch. Dist.* (1921) 54 CA 586. On recovering costs, see chap 27.

§18.32 3. Appeal from judgment after motion granted

A dismissal order following nonsuit is a final judgment, depriving the court of the power to change it except by motions to vacate (see §§25.72–25.77) or for new trial (see §§25.22–25.71).

The trial court's order granting a motion for nonsuit is not appealable, but an appeal may be taken from the written judgment of dismissal filed in the action. *Graski v Clothier* (1969) 273 CA2d 605, 607.

§18.33 4. Upholding judgment correctly decided on merits

To prevent reversal on technical grounds, a reviewing court ordinarily will uphold the trial court's judgment if it was correctly decided on the merits, even though the reasons relied on by the court were wrong. *Lawless v Calaway* (1944) 24 C2d 81, 93.

A judgment of nonsuit will not be upheld, however, if a party neglected to specify the grounds for the motion, thereby denying the opponent the opportunity to correct defects during the trial. See §18.25. Any unspecified grounds will be considered only if the defect could not have been remedied even though the moving party had called it to the plaintiff's attention. *Carson v Facilities Dev. Co.* (1984) 36 C3d 830, 839.

§18.34 5. Reversal if sufficient evidence supports judgment for plaintiff

When reviewing conflicting evidence after a jury has rendered a verdict, the appellate court must affirm the trier of fact's decision if any substantial evidence supports the prevailing party. When consider-

ing the same conflicting evidence after a judgment of nonsuit, the appellate court must reject any contradictory evidence against the plaintiff and reverse the judgment of nonsuit if any sufficient evidence supports a judgment for the losing party (the plaintiff). See *Carson v Facilities Dev. Co.* (1984) 36 C3d 830, 839; *Stonegate Homeowners Ass'n v Staben* (2006) 144 CA4th 740, 745.

Because of this standard of review, motions for nonsuit granted after opening statement or after presentation of the plaintiff's evidence are more likely to be reversed on appeal than verdicts reached by the trier of fact. Before a judgment of nonsuit can be disturbed, however, there must be some substance to the plaintiff's evidence over which reasonable minds could differ; proof that raises mere speculation, suspicion, surmise, guess, or conjecture is not enough to sustain the burden. *Abreu v Svenhard's Swedish Bakery* (1989) 208 CA3d 1446, 1457. See §18.19.

NOTE► A nonsuit granted for the wrong reason but correct on other grounds will be affirmed. *Devins v United Servs. Auto. Ass'n* (1992) 6 CA4th 1149, 1156.

IV. MOTION FOR DIRECTED VERDICT

§18.35 A. Checklist: Procedures for making or opposing motion

Moving Party

___ 1. Determine legal basis for motion, including local rules. See §18.36.

___ 2. Request hearing outside presence of jury but on record. See §18.49.

___ 3. Identify absence of material element of claim or defense or facts establishing claim or complete defense. See §18.36.

___ 4. Make oral statement of specific grounds. See §18.50.

___ 5. Consider preparation of written supporting memorandum. See §18.51.

___ 6. Consider motion directed to some causes of action or some parties. See §18.39.

___ 7. Consider whether record should reflect that opponent has opportunity to reopen evidence. See §18.53.

Opponent

___ 1. Identify substantial evidence creating jury issue. See §18.42.

___ 2. Request reopening of evidence. See §18.53.

___ 3. Request amendment to pleadings. See §18.104.

___ 4. Request that ruling be made only regarding specified parties or specified causes of action. See §18.39.

___ 5. If granted, request that finding not be made on merits. See §18.54.

B. Nature of Motion

§18.36 1. Make motion when evidence insufficient to support other party's case

A motion for directed verdict asks the court to instruct the jury to return a verdict against the nonmoving party. Either the plaintiff or the defendant may make the motion at the close of the other party's evidence. A party does not waive the right to a jury trial by making a motion for directed verdict. CCP §630(a). In a voluntary expedited jury trial, the parties agree to waive the right to bring a motion for a directed verdict. CCP §630.08(a).

The motion for directed verdict is particularly useful in cases in which the law favors the moving party, but the jury's sympathy may favor the other side. After the motion is made, the trial court's function is to

determine whether there is sufficient evidence to support a verdict for the nonmoving party. If the only reasonable conclusion is that the evidence is insufficient, the court should grant the motion. *Dailey v Los Angeles Unified Sch. Dist.* (1970) 2 C3d 741, 745; *Estate of Lances* (1932) 216 C 397, 400.

Directed verdict motions are well established in practice (see *Bias v Reed* (1914) 169 C 33, 38), and they are specifically authorized by CCP §630(a). Under CCP §630(b), the court is authorized to grant a motion for directed verdict on some issues before proceeding to trial on the remaining issues. On partial directed verdict, see §18.39.

NOTE► California no longer has a requirement comparable to Fed R Civ P 50, which provides that a motion for directed verdict is a prerequisite to a motion for judgment notwithstanding the verdict. See *People v Mapp* (1983) 150 CA3d 346, 350.

§18.37 2. Compared with motion for nonsuit

A motion for directed verdict, like a motion for nonsuit, is equivalent to a demurrer to the evidence. *Hilliard v A. H. Robins Co.* (1983) 148 CA3d 374, 394. The court's power to direct a verdict is the same as its power to grant a nonsuit. The test for granting each motion is the same, and decisions that discuss the standard for granting nonsuits also apply to motions for directed verdicts. *Estate of Lances* (1932) 216 C 397, 400. On motion for nonsuit generally, see §§18.7–18.34.

Unlike a nonsuit motion, a directed verdict motion may be made by any party for a verdict to be directed in the moving party's favor. A previous denial of nonsuit does not prevent the court from later granting a defendant's motion for directed verdict. *Fuchs v Southern Pac. Co.* (1935) 5 CA2d 409, 412.

§18.38 3. Jury's obligation to return verdict

If the jury refuses the court's instruction to return a verdict, the court may enter judgment without the jury's assent. *Umstead v Scofield Eng'g Constr. Co.* (1928) 203 C 224, 226.

The court may also accept a verdict signed by the foreperson alone (*Gaskill v Pacific Elec. Ry.* (1916) 30 CA 593, 598) or by any juror under a court order (*Reay v Reay* (1929) 97 CA 264, 271). The court may hold any uncooperative jurors who refuse to return the appropriate verdict in contempt. *Estate of Sharon* (1918) 179 C 447, 460.

NOTE► Granting a motion for directed verdict can violate the constitutional right to trial by jury if the evidence is sufficient to permit the jury to decide on a legitimate question of fact. *Singleton v Hartford Fire Ins. Co.* (1930) 105 CA 320, 326; *Butler-Veitch, Inc. v Barnard* (1926) 77 CA 709, 716.

§18.39 C. Motion for partial directed verdict

Under CCP §630(b), if the evidence supports the granting of a motion for directed verdict for some but not all of the issues in the action, the court must grant the motion on those issues, and the action must proceed on the remaining issues.

No final judgment may be entered before completing the rest of the case, but the final judgment must reflect the directed verdict ordered by the court. CCP §630(b).

D. Motion for judgment under CCP §630(f) after discharge of jury

§18.40 1. Judgment based on directed verdict test

If the jury has already been discharged, the court can order judgment in favor of a party on its own motion or a party's motion as long as the test for a motion for directed verdict is met. CCP §630; *Miesen v*

Bolich (1960) 177 CA2d 145, 155 (hung jury discharged; §630 motion properly granted, under directed verdict standard); *Thompson v Atchison, T. & S.F. Ry.* (1950) 96 CA2d 974, 977 (same).

§18.41 2. Time requirements: Notice within 10 days of jury's discharge

A motion, either by a party or by the court sua sponte, under CCP §630 must be noticed within 10 days after the jury is discharged. The court's power to act expires 30 days after the jury is discharged. CCP §630(f).

Failure of the court to act timely operates as a denial of the motion. For forms regarding this motion, see §§18.127–18.128.

E. Test for granting motion

§18.42 1. Other party's evidence not "sufficiently substantial"

The grounds for granting a motion for directed verdict are the same as those for granting a motion for nonsuit. See *Estate of Lances* (1932) 216 C 397, 400. See also *Metzenbaum v ROS Assocs.* (1986) 188 CA3d 202, 208 (directed verdict for defendant affirmed).

The court may grant a defendant's motion when no evidence of "sufficient substantiality" supports a verdict for the plaintiff, disregarding conflicting evidence and giving the plaintiff's evidence, and every legitimate inference drawn from it, all the weight to which it is entitled. *Center Found. v Chicago Ins. Co.* (1991) 227 CA3d 547, 551; *De La Rosa v City of San Bernardino* (1971) 16 CA3d 739, 743 (directed verdict for defendant reversed).

A plaintiff's motion for directed verdict may be granted when the evidence supports the plaintiff's case and no substantial evidence exists to support the defense. *Walters v Bank of Am. Nat'l Trust & Sav. Ass'n* (1937) 9 C2d 46, 49 (directed verdict for plaintiff affirmed); *Kostecky v Henry* (1980) 113 CA3d 362, 377 (partial directed verdict for plaintiff affirmed).

PRACTICE TIP► Make a motion for directed verdict when the issue is resolvable as a matter of law. If the issue on the proffered facts is resolvable as a matter of law, the court is under a duty to grant a directed verdict. *Blanchard v State Farm Fire & Cas. Co.* (1991) 2 CA4th 345, 350.

§18.43 2. Motion inappropriate when evidence substantially conflicts

If there is a substantial conflict in the evidence, the court does not have the power to direct a verdict and the case must be permitted to go to the jury. *Estate of Fleming* (1926) 199 C 750, 754; *Short v Nevada Joint Union High Sch. Dist.* (1985) 163 CA3d 1087, 1096 (directed verdict for defendant reversed).

Because the "scintilla of evidence" doctrine has been rejected in California, however, there need not be a complete absence of conflict in the evidence but rather the absence of a substantial conflict. *Conservatorship of Everette M.* (1990) 219 CA3d 1567, 1573; *Jensen v Leonard* (1947) 82 CA2d 340, 353.

§18.44 3. Make motion when nonexistence of essential fact established as matter of law

If the evidence raises an inference that a fact exists and either party offers uncontradicted evidence that the fact does not exist, the nonexistence of the fact is established as a matter of law. The evidence must be so persuasive, however, that it cannot rationally be disbelieved.

If the fact was necessary to establish an essential element of the plaintiff's case or a defense, the motion for directed verdict may be granted. *Engstrom v Auburn Auto. Sales Corp.* (1938) 11 C2d 64, 70; *Teich v General Mills, Inc.* (1959) 170 CA2d 791, 794 (stating rule for nonsuit and directed verdict).

NOTE► In at least one case, the court suggested that the prudent course for a court is to deny the directed verdict motion in favor of granting a later motion for judgment notwithstanding the verdict. *Beavers v Allstate Ins. Co.* (1990) 225 CA3d 310, 328. On motion for judgment notwithstanding the verdict, see §§25.2–25.21.

§18.45 4. Evidence viewed in light favorable to nonmoving party

Although the court considers all evidence on a motion for directed verdict when it is brought at the end of a trial, the evidence is viewed, as in a motion for nonsuit, in the light most favorable to the nonmoving party. See §18.14.

Unlike a motion for new trial, the court may not weigh the credibility of witnesses when considering a motion for directed verdict. It may consider only the effect of their testimony after conceding the truth of it. *Stevens v Parke, Davis & Co.* (1973) 9 C3d 51, 69; *Alexander v State* (1984) 159 CA3d 890, 896; *Miller v Dussault* (1972) 26 CA3d 311, 316. On new trial motions, see §§25.22–25.71.

The court is not bound, however, to accept testimony that is inherently improbable. *Jensen v Leonard* (1947) 82 CA2d 340, 353 (inherently improbable testimony, from mentally ill witness, not substantial evidence).

§18.46 5. Evidence unfavorable to nonmoving party cannot be considered

If the nonmoving party examined a moving party's witness as an adverse witness under Evid C §776, the court may not consider evidence unfavorable to the nonmoving party produced by that moving party's witness. *Miller v Dussault* (1972) 26 CA3d 311, 316.

The fact that a trial court might grant a new trial on evidence that it judges to be unreliable does not justify granting a directed verdict on the same evidence. *Estate of Caspar* (1916) 172 C 147, 150; *Urland v French* (1956) 141 CA2d 278, 282; *Weck v Los Angeles County Flood Control Dist.* (1947) 80 CA2d 182, 190. On motion for new trial, see §§25.22–25.71.

F. Timing

§18.47 1. Making motion at close of presentation of evidence

Unless the court specifies an earlier time for making a motion for directed verdict, any party may move for a directed verdict after all parties have completed the presentation of their evidence in a jury trial. CCP §630(a). Ordinarily, a motion for directed verdict is made at this time. On making motion at other times, see §18.48.

Although the court has discretion to hear a motion for directed verdict any time before submission of the case to the jury (*Gibson v Southern Pac. Co.* (1955) 137 CA2d 337, 346), moving for directed verdict before full presentation of evidence may deny the adverse party a full opportunity to present the case (*Bias v Reed* (1914) 169 C 33, 37).

§18.48 2. Making motion at other times

The court may also grant a motion for directed verdict at the following times:

- After submission to the jury, if the jury is unable to reach a verdict. *Perrine v PG&E* (1960) 186 CA2d 442, 446.
- After the defendant's opening statement, if it is clear that the defendant has stated all facts expected to be proved and has had an opportunity to enlarge the opening statement. *Topanga Beach Renters Ass'n v Department of Gen. Servs.* (1976) 58 CA3d 188, 192 (improperly granted because some factual issues remained that could potentially defeat plaintiff's case); *Nuffer v Insurance Co. of N. Am.* (1965)

236 CA2d 349, 363 (directed verdict for plaintiff after presentation of plaintiff's case and defendant's opening statement; defendant's opening statement determined to be complete statement of facts defendant expected to prove).

- After the plaintiff's opening statement. Because the grounds for nonsuit and directed verdict are the same, some courts have permitted the defendant to move for a directed verdict after the plaintiff's opening statement (see *Hartford Acc. & Indem. Co. v Bank of America* (1963) 220 CA2d 545), but conventionally a motion for nonsuit is made under CCP §581c. On motion for nonsuit after opening statement, see §18.15.
- At any time on the court's own motion. See *Golden v Conway* (1976) 55 CA3d 948, 953 (reversed owing to existence of factual issues).

G. Procedures for moving party

§18.49 1. Make motion outside jury's presence

The motion for directed verdict is usually made orally after a request to approach the bench at the conclusion of the evidence. Local rules may require that the motion be made outside the hearing of the jury. See, *e.g.*, Los Angeles Ct R 3.99.

The judge may excuse the jury or retire with counsel to chambers to hear argument on the motion. The motion and the specific grounds for making it, as well as counsel's argument, should take place in the court reporter's presence. On making a record, see §18.4.

§18.50 2. Oral motion: Specify grounds

Unless counsel specifies the grounds on which the motion is made, and unless the court gives the grounds on which a judgment is based, a directed verdict can be reversed on appeal. See *Timmsen v Forrest E. Olson, Inc.* (1970) 6 CA3d 860, 868 (nonsuit case); 7 Witkin, California Procedure, *Trial* §§425–426 (5th ed 2008). By pointing out the specific grounds supporting the motion, counsel allows the opposing party the opportunity to introduce further evidence to correct any defects in the case.

Although no particular form of motion for directed verdict is required, an oral motion such as the following can be used:

> _ _ _[*Plaintiff/Defendant*]_ _ _, _ _ _[*name*]_ _ _, moves that the Court direct a verdict in favor of the _ _ _[*plaintiff/defendant*]_ _ _ on the following grounds, each of which independently entitles _ _ _[*plaintiff/defendant*]_ _ _ to the granting of the motion: _ _ _[*Specify*]_ _ _.

If the description of the deficiencies of the opponent's evidence is lengthy, counsel should delineate each additional defect in the opponent's case for the record with an introductory phrase such as, "The motion for directed verdict is further made on the separate and independent ground that …."

§18.51 3. Written supporting memorandum desirable when issues complicated

Although supporting papers are preferable and may assist in persuading the judge, a written memorandum in support of the motion is not required and may be difficult to produce if counsel is not sure that a motion for directed verdict can be made until all the opposing party's evidence is heard.

Counsel should try, however, to submit a supporting memorandum when the motion is made or argued if the issues are complicated and the grounds for making the motion can be anticipated from weaknesses in the opposing party's case. If the motion itself is also written, counsel should state this on the record when the motion is argued or submitted. For form of written motion, see §18.129.

H. Procedures for opposing party

§18.52 1. Argue that moving party failed to adequately specify grounds

Counsel for the opposing party should ensure that the moving party states the specific grounds for the motion. A specific statement of grounds permits the opposing party to offer additional evidence to correct any deficiencies in the case.

If the grounds for the motion are not specified, opposing counsel can request that the court require the moving party to state any objections specifically and completely or ask that the motion be denied on that ground. As with a motion for nonsuit, it is error to grant the motion when the grounds have not been specifically stated. *Timmsen v Forrest E. Olson, Inc.* (1970) 6 CA3d 860, 868 (nonsuit case). See §18.25.

§18.53 2. Ask to reopen case; waiver

The opposing party may stand on the evidence as presented and explain to the court why the evidence is sufficient. If any available evidence has been overlooked, however, the opposing party may ask the court for permission to reopen the case to introduce it. On motion to reopen, see §§18.65–18.81.

If a motion to reopen is not made, the court will assume that counsel has no further evidence to present, and the right to reopen will be waived. See *Carrier & Braddock, Inc. v S.W. Straus & Co.* (1931) 213 C 508, 513 (nonsuit case); *Tuller v Arnold* (1893) 98 C 522, 523 (same).

It is error not to allow counsel to reopen the case if requested, unless the deficiency clearly cannot be remedied, *e.g.*, the proposed evidence is redundant of admitted evidence or simply asks differently phrased questions of the same witnesses. See *Eatwell v Beck* (1953) 41 C2d 128, 133 (nonsuit case); *Sanchez v Bay Gen. Hosp.* (1981) 116 CA3d 776, 794 (court denied motion to reopen before directing verdict when proposed evidence covered same areas counsel thoroughly contested during trial).

I. Effect of granting motion; costs; judgment

§18.54 1. Operates as adjudication on merits

Unless the court rules otherwise, a directed verdict operates as an adjudication on the merits. CCP §630(c). It is effective without any assent of the jury. CCP §630(e). See §18.38.

Such a verdict is res judicata on the issues of the case (unless the court has ordered that the directed verdict is not on the merits). CCP §581c(c). See 7 Witkin, California Procedure, *Trial* §420 (5th ed 2008).

§18.55 2. Prevailing party entitled to costs

The order directing a verdict results in a judgment and consequently carries costs. *Matson v Fortuna High Sch. Dist.* (1921) 54 CA 586 (granting costs on judgment of nonsuit).

The prevailing party on a motion for directed verdict, like any party with an action dismissed in that party's favor, may file a cost bill under CCP §§1031–1034. On recovering costs generally, see chap 27.

§18.56 3. Order of judgment

The order of judgment must be in writing, signed by the judge, entered in the clerk's register, and filed in the action. See CCP §581d. See form in §18.130.

As with other successful motions, the prevailing party normally prepares the judgment for the judge's signature and ensures that the clerk enters and files the judgment. On judgments generally, see chap 23.

V. MOTION FOR CONTINUANCE

§18.57 A. Checklist: Procedures for making or opposing motion

Moving Party

___ 1. Determine legal basis for motion. See §18.62.

___ 2. Advise court and counsel of situation at earliest opportunity. See §18.60.

___ 3. Prepare declarations (or subpoena witnesses) as needed. See §18.61.

___ 4. Prepare a written memorandum in support of motion if time permits. See §18.61.

___ 5. Consider alternatives to continuance (*e.g.,* witnesses out of order). See §18.59.

___ 6. Consider cost liability for motion. See §18.64.

Opponent

___ 1. Investigate evidentiary basis for motion, particularly timeliness and diligence. See §18.63.

___ 2. Prepare counterdeclarations (or subpoena witnesses) as needed. See §18.61.

___ 3. Identify prejudice to be caused by continuance. See §18.58.

___ 4. Identify absence of good cause or delaying tactics. See §18.60.

___ 5. Identify costs to be incurred if motion granted. See §18.64.

___ 6. Consider alternatives to continuance. See §18.63.

Either Party

___ 1. If motion granted, seek order that subpoenas remain in effect. See chap 4.

___ 2. If witness not available in future, request that deposition be ordered. See §18.63.

B. Nature of motion

§18.58 1. Disfavored

Judicial policy does not favor continuances before or during trial. Cal Rules of Ct 3.1332(c). See *County of San Bernardino v Doria Mining & Eng'g Corp.* (1977) 72 CA3d 776, 783. In spite of the seemingly obligatory language of CCP §595.2, which provides for a 30-day continuance on stipulation of the parties, the statute is directory only. It does, however, reflect the legislature's policy of allowing brief continuances when the parties extend professional courtesy to one another, which the courts should, if possible, accommodate. *Pham v Nguyen* (1997) 54 CA4th 11, 15 (criticizing *County of San Bernardino v Doria Mining & Eng'g Corp., supra*).

A motion for continuance made after the trial has begun asks that the progress of the trial be interrupted and a future time or date set for resumption. Such a motion is rarely granted. Nonetheless, emergencies during trial may compel counsel to move for a continuance. On grounds for making motion, see §18.60.

PRACTICE TIP► It is particularly difficult to obtain a continuance after trial has started—when a courtroom, judge, reporter, and other resources have been dedicated to resolving the case. It is important to be aware, however, that it is technically possible to obtain a continuance during trial. In extreme circumstances, consider this motion or another viable alternative for meeting an emergency during trial. For possible alternatives, see §18.59.

The increasing concern for prompt disposition of civil actions is reflected in a widespread disinclination toward granting continuance motions. See, *e.g.*, Cal Rules of Ct 3.1332(c) (court may grant a continuance only on affirmative showing of good cause); 7 Witkin, California Procedure, *Trial* §9 (5th ed

2008). On the other hand, changes made to the California Rules of Court in 2004 reflect concern that some courts have taken an inflexible and overly rigid approach to continuances (discussed in Note, §6.6). See *Oliveros v County of Los Angeles* (2004) 120 CA4th 1389, 1394 (abuse of discretion to deny continuance solely because of its impact on trial court's calendar; strong public policy favoring disposition on merits outweighs judicial efficiency when two principles collide). On pretrial motions for continuance, see §§6.6–6.25.

§18.59 2. Consider alternatives

If the emergency or surprise can be resolved in a relatively short period of time, it is better to ask the court for a recess rather than to move for a continuance. Many trial judges are amenable to reasonable requests for a recess, even when it will merely facilitate presentation of a case. A recess is often only a matter of hours, involving minimal interference with the court calendar and the progress of a trial.

Other alternatives may be preferable to a motion for continuance. For example, if the reason for the continuance is that a witness is unavailable, consider using the existing deposition of that witness in lieu of testimony, particularly if the deposition was videotaped. This alternative is less desirable than presenting the witness in person, but a videotaped deposition may help ameliorate the deficiency.

§18.60 C. Satisfying grounds for continuance

A continuance before or during trial must not be granted except on a showing of good cause under Cal Rules of Ct 3.1332(c). See *Jurado v Toys 'R' Us, Inc.* (1993) 12 CA4th 1615, 1617 (error for trial court to deny motion for continuance to plaintiff's attorney, who showed good cause by subpoenaing essential medical expert witnesses, both of whom disobeyed subpoenas); *Young v Redman* (1976) 55 CA3d 827, 832 (defendant's business trips during trial did not constitute good cause for continuance). For further discussion of continuance motions made before trial, see §§6.6–6.25. See also California Civil Procedure Before Trial, chap 42 (4th ed Cal CEB).

PRACTICE TIP► Not only must you show good cause, you must also make the motion as soon as reasonably practical on discovering that a continuance is needed. Cal Rules of Ct 3.1332(b). Additionally, you must show that the situation could not have been reasonably foreseen. See *Hays v Viscome* (1953) 122 CA2d 135, 141 (reversing trial court's denial of continuance when party legitimately surprised by opponent's failure to call expected witness; time needed to locate counsel's own witness).

An order denying a continuance will be overturned on appeal only if clear abuse can be shown. *Vann v Shilleh* (1975) 54 CA3d 192, 196 (abuse of discretion when trial court's ruling denying continuance was arbitrary, capricious, and contrary to interests of justice; attorney withdrew at last minute). See *Crosby v Martinez* (1958) 159 CA2d 534, 541 (reversal of judgment denying short continuance to allow plaintiff to produce witness to refute damaging, incompetent, and unanticipated hearsay admitted over plaintiff's objection); *Arntz Contracting Co. v St. Paul Fire & Marine Ins. Co.* (1996) 47 CA4th 464 (expert witness had stroke; continuance properly denied when expert's deposition testimony was available for use at trial; court allowed former party witness to testify on same matters and forbade opposition to make any comment on absence of independent expert). See also §6.7; California Trial Objections, chap 54 (Cal CEB). See also 7 Witkin, California Procedure, *Trial* §§10–12 (5th ed 2008).

D. Procedures for moving party

§18.61 1. Written noticed motion or ex parte application; supporting declarations

Motions for continuance must be made on written notice or by ex parte application under Cal Rules of Ct 3.1200–3.1207. Cal Rules of Ct 3.1332(b). Because most reasons for requesting a continuance during trial are not foreseeable, however, the motion is usually made orally. Whether oral or written, the motion must conform to Cal Rules of Ct 3.1332.

PRACTICE TIP► When it is practicable to obtain them within a short time, give the court written declarations showing that an unforeseen emergency has developed and that no available means exist to meet it short of a trial continuance. For medical emergencies, present declarations of treating doctors to the court and opposing counsel when the motion is made or argued, or offer to submit them shortly after argument. See *Jurado v Toys 'R' Us, Inc.* (1993) 12 CA4th 1615, 1618 (when court accepts lawyer's representations without affidavit, requirement is excused by implication).

§18.62 2. Making oral motion

It is good practice for both the motion and argument to be made outside the jury's presence. An oral motion can take the following form:

> _ _ _[*Plaintiff/Defendant*]_ _ _, _ _ _[*name*]_ _ _, moves for continuance of this trial on the ground that _ _ _[*e.g., a key witness,* _ _ _[*name*]_ _ _, has suddenly become ill]_ _ _. We request _ _ _[*e.g., that the trial be recessed until* _ _ _[*time*]_ _ _ on _ _ _[*date*]_ _ _, when the witness should be able to testify]_ _ _.

After making the motion, specifically state the following:

- The grounds for the motion;
- When the emergency or the reason for the motion arose;
- When the need for a continuance first became known; and
- The unsuccessful measures short of continuance already taken to meet the situation.

For medical emergencies, submit (or, if there is no time, offer to obtain) declarations of treating physicians. If the motion is based on the unavailability of a witness, explain the nature of the testimony to be given to show its materiality and the fact that no substitute witness is readily available.

E. Procedures for opposing party

§18.63 1. Suggest alternatives or conditions to continuance

In arguing against the motion, suggest alternative solutions to the problem short of a continuance whenever appropriate. For example, if trial counsel or a witness is ill, ask the court to substitute another attorney or witness instead of continuing the trial (see Cal Rules of Ct 3.1332(d)(4)) or ask the court to condition the continuance on the moving party's consent to the taking of depositions of witnesses who are present at the trial.

Depositions may be taken before the judge or clerk of the court in which the case is pending or before a notary public. Testimony may be read from the deposition when the trial resumes, subject to the same objections as if the witnesses had been produced. CCP §596. See *Taylor v Bell* (1971) 21 CA3d 1002, 1008 (continuance conditioned on testimony of then-present witness to be given by deposition). On requesting that a witness's travel expenses to return to the trial and other costs be paid by the moving party, see §18.64.

§18.64 2. Ask for payment of costs

When appropriate, emphasize the costs that will be incurred if a continuance is granted and request that the moving party pay the costs that will be incurred by the other parties due to the continuance. If possible, these costs should be identified and quantified for the court. For form that can be adapted for this purpose, see §27.129.

The court may condition a continuance on the moving party's payment of the adverse party's costs due to the postponement of trial. CCP §1024. See Cal Rules of Ct 3.1332(d)(10). These items are not regulated by general statutes defining costs, and the court has discretion to order compensation to the opposing party for expenses incurred in preparing for the now-continued trial. CCP §1024. See, *e.g.*, *Inman v Fremont Med. Ctr.* (1975) 49 CA3d 169, 173 (trial court's order conditioning continuance on payment of court costs for impaneling jury affirmed); *Wilkin v Tadlock* (1952) 110 CA2d 156, 158 (party seeking continuance ordered to pay parties' transportation costs to and from employment outside state). The trial court, however, lacks authority to condition a grant of continuance on plaintiff's payment of attorney fees to defendant. *Levine v Pollack* (1995) 37 CA4th 129.

VI. MOTION TO REOPEN CASE

§18.65 A. Checklist: Procedures for making or opposing motion

Moving Party

___ 1. Determine legal basis for motion. See §18.66.

___ 2. Prepare written memorandum in support of motion if time permits. See §18.78.

___ 3. Describe new evidence to be presented and show good cause for granting motion. See §18.70.

___ 4. State grounds showing diligence in seeking evidence; inadvertence, surprise, or excusable neglect in presenting evidence; and relevance and materiality of proposed evidence. See §18.71.

___ 5. Be prepared to rebut claim of prejudice or allegation of delaying tactics. See §18.79.

Opponent

___ 1. Investigate evidentiary basis, particularly timeliness and diligence. See §18.66.

___ 2. Evaluate whether new evidence is cumulative of evidence already presented. See §18.80.

___ 3. Identify absence of good cause or delaying tactics. See §18.70.

___ 4. Identify prejudice to be caused by reopening. See §18.67.

___ 5. Request continuance to meet new evidence that will be presented. See §18.60.

B. Nature of motion

§18.66 1. Motion asks for opportunity to offer new evidence

A motion to reopen is a request to reopen a party's case in chief. In contrast to evidence presented merely in rebuttal, in which a party is limited to the issues raised by the opponent, a motion to reopen asks that the moving party be permitted to offer new evidence to establish the elements of a cause of action or a defense.

A motion to reopen may be made when counsel believes that essential evidence has been omitted. This realization may come because the opponent makes a motion for nonsuit or directed verdict, counsel is surprised at trial, or evidence was inadvertently omitted or previously unavailable.

PRACTICE TIP► Before making a motion to reopen, be sure that the new evidence is clear and substantial. Otherwise, matters presented after reopening may adversely affect the trier of fact by appearing to weaken or confuse your case.

§18.67 2. Within court's discretion

Normally, a plaintiff or defendant can only offer rebutting evidence after its case in chief has been presented, "unless the court, for good reason, in furtherance of justice, permits them to offer evidence upon their original case." CCP §607(6). See Evid C §320 (court has discretion to regulate order of proof).

A decision to reopen is within the trial court's discretion. *Marriage of Olson* (1980) 27 C3d 414, 422 (denying motion); *Western Specialty Co. v Clairemont Constr. Co.* (1962) 204 CA2d 532, 537 (denying motion).

It is an abuse of discretion to deny a motion to reopen when a different result on further hearing was likely if the party had been permitted to reopen and present the evidence. *Estate of Horman* (1968) 265 CA2d 796, 807 (inadvertence coupled with surprise by delayed rulings of court).

No abuse of discretion exists, however, if the moving party does not show that a different result would follow from the introduction of further evidence. *Ensher, Alexander & Barsoom, Inc. v Ensher* (1964) 225 CA2d 318, 325; *Fry v Sheedy* (1956) 143 CA2d 615, 623. The court may correctly deny a motion to reopen when it finds that the proffered evidence is merely cumulative. *Malibou Lake Mountain Club, Ltd. v Robertson* (1963) 219 CA2d 181, 186.

§18.68 3. Bench trial: Reopening alternative to new trial

After a bench trial, the court can reopen the case instead of granting a new trial for the introduction of additional evidence. CCP §662. Even if the court does not specifically vacate prior findings and judgment, its order to reopen has the effect of vacating the earlier judgment. *Taormino v Denny* (1970) 1 C3d 679, 684.

The signing of a judgment constitutes a denial of a reopening motion. *Silver v Schwartz* (1956) 142 CA2d 92, 96. For further discussion, see §24.13.

§18.69 4. Reopening on court's own motion

The court may also reopen a case on its own motion. *Taylor v Bell* (1971) 21 CA3d 1002, 1007. For example, it may do so following a suggestion to the parties that they explore a new theory. *Baker v City of Palo Alto* (1961) 190 CA2d 744, 755.

In *Coit Drapery Cleaners, Inc. v Sequoia Ins. Co.* (1993) 14 CA4th 1595, 1611, the trial judge, hearing one part of a case as a bench trial, considered evidence adduced in the jury trial phase but only after oral statement of the court's ruling. The judge gave notice to the parties of his consideration of that evidence and then ruled contrary to his previous ruling. Although such a procedure is unorthodox, it is nothing other than a sua sponte reopening of evidence—well within the trial court's discretion. See §18.67.

C. Requirements

§18.70 1. Grounds: Good cause required

The moving party must show good cause for granting a motion to reopen. *Sanchez v Bay Gen. Hosp.* (1981) 116 CA3d 776, 793; *Pocock v Deniz* (1955) 134 CA2d 758, 761.

Failure to be sufficiently specific and clear is itself a ground for denial. *Sample v S.H. Kress & Co.* (1961) 190 CA2d 503, 508 (unnamed witness to describe door's operation in general terms; court properly held alleged testimony claim to be too vague).

§18.71 2. Showing of due diligence

Failure to show due diligence in procuring evidence during the case in chief, or in offering a satisfactory explanation for not previously introducing it, justifies a denial of a motion to reopen. *Stewart v Cox* (1961) 55 C2d 857, 866; *De Angeles v Roos Bros.* (1966) 244 CA2d 434, 441. See *Giomi v Viotti* (1956) 144 CA2d 714, 718 (court found a failure of diligence because counsel did not determine which of two similarly named persons was the proper witness).

In some cases, the courts have held that a party must show that evidence was either unknown or unavailable. See *Malibou Lake Mountain Club, Ltd. v Robertson* (1963) 219 CA2d 181, 185. See also *Foster v Keating* (1953) 120 CA2d 435, 437 (court stated that counsel should defer expiration of damages issue until relationship of party decided; when court found that damages had not been proved, reversible error to deny reopening).

D. Timing

§18.72 1. Asking to reopen case after motion for nonsuit or directed verdict

When a party asks to reopen the case in response to a motion for nonsuit or directed verdict, the purpose of the motion to reopen is to supply additional evidence correcting the deficiencies enumerated by the opposing party. Unless a case clearly cannot be stated, it is error to grant the motion for nonsuit after refusing the plaintiff the chance to remedy the defects of the case. See *Eatwell v Beck* (1953) 41 C2d 128, 133.

The court may deny a motion to reopen and direct a verdict, however, when the evidence to be presented after reopening is merely cumulative, covering the same areas counsel thoroughly litigated during trial. *Sanchez v Bay Gen. Hosp.* (1981) 116 CA3d 776, 794. See *Sample v S.H. Kress & Co.* (1961) 190 CA2d 503, 508 (denial of motion to reopen proper when nonsuit would still result even if additional facts were proved).

§18.73 2. Making motion immediately after oversight or surprise; waiver

Waiver. If the motion to reopen is made because of an oversight by the moving party or surprise during trial, the motion should be made as soon as practicable or counsel may waive any objection on appeal. *Morris v Williams* (1967) 67 C2d 733, 760; *Christina v Daneri* (1937) 22 CA2d 190, 193 (inadvertently omitted evidence).

If surprised, new evidence cannot be merely cumulative. The court retains jurisdiction to reject a claim of inadvertence if the proposed effort is merely of differently phrased questions of prior witnesses who had been thoroughly examined on the same subjects as proposed. *Sanchez v Bay Gen. Hosp.* (1981) 116 CA3d 776, 794. See also *Ulwelling v Crown Coach Corp.* (1962) 206 CA2d 96, 127 (proposed evidence would merely be cumulative).

False allegation of surprise. Counsel cannot claim inadvertence or excusable neglect when that is not the case. See *Rosenfeld, Meyer & Susman v Cohen* (1987) 191 CA3d 1035, 1053, in which an examination of the trial briefs disclosed that the parties knew of the issues involved and that counsel's assertion of mistake based on an alleged misunderstanding of who bore the burden of proof was untrue. The motion was properly denied because the failure was not due to inadvertence or excusable neglect but, instead, the informed and knowing choice of trial counsel.

§18.74 3. Making motion after argument

A case may be reopened after argument in a jury trial at the court's discretion. *Nelson v Douglas Pedlow, Inc.* (1955) 130 CA2d 780, 783; *Eatwell v Beck* (1953) 41 C2d 128, 134.

§18.75 4. Making motion after submission in bench trial

The motion may be made in a bench trial after the case has been submitted for decision. *Taylor v Bell* (1971) 21 CA3d 1002, 1007; *Alvak Enters. v Phillips* (1959) 167 CA2d 69, 74. This is true even if considerable time has elapsed since submission of the case for decision. *Marriage of Hahn* (1990) 224 CA3d 1236, 1240 n3 (motion properly granted even though made 3 months after announcement of a tentative decision, but before entry of judgment).

A considerable delay can militate against the granting of the motion. *Minnick v California Dep't of Corrections* (1979) 95 CA3d 506, 526 (trial court did not err in denying defendant's motion to reopen made 5 months after case submitted for decision, as "made by afterthought and much too late"); *Stowmen v Monroe* (1963) 219 CA2d 302 (motion could have been, but was not, made for a considerable time between submission of case and entry of judgment). See *In re T.M.R.* (1974) 41 CA3d 694, 702.

§18.76 5. Reopening case after judgment in bench trial

When a new trial motion is made, a case may be reopened in a bench trial even after judgment, with the same effect as if the case had been reopened after submission but before findings were filed or judgment was rendered. CCP §662. For further discussion, see §24.13.

E. Procedures for moving party

§18.77 1. Oral motion during trial

When a motion to reopen is made during trial, it is typically made orally and without notice. In a jury trial, counsel should make a motion outside the jury's presence, accompanied by an offer of proof of the evidence to be produced. On handling offers of proof, see §§15.50–15.60.

No particular form of motion to reopen is required. A clear statement of the motion, why good cause exists for granting it, and the nature of the proposed evidence is satisfactory. Counsel should explain why the evidence was not previously introduced despite due diligence.

For an oral motion to reopen, counsel can use wording such as the following:

> _ _ _[*Plaintiff/Defendant*]_ _ _, _ _ _[*name*]_ _ _, moves to reopen the case to present further evidence on the issue of _ _ _[*describe*]_ _ _. Good cause exists for granting this motion because _ _ _[*describe reason, explain why evidence was not previously presented, and demonstrate due diligence in bringing motion*]_ _ _. The nature of the evidence that _ _ _[*plaintiff/defendant*]_ _ _ wishes to introduce consists of _ _ _[*describe*]_ _ _.

§18.78 2. Written motion after submission in bench trial

When the motion is made in a bench trial after the matter has been submitted for decision, it can be made by written motion with a supporting memorandum and declarations. If the case has been submitted and counsel for the parties are no longer present in the courtroom, it may also be necessary to notice the motion. See *Alvak Enters. v Phillips* (1959) 167 CA2d 69, 75 (noticed motion to reopen; additional evidence presented solely by affidavits).

The declaration should state what the moving party expects to prove, the character of the proposed evidence, the diligence exercised to introduce the evidence during trial, and the reasons justifying failure to offer it at that time. *Westerholm v 20th Century Ins. Co.* (1976) 58 CA3d 628, 634; *Malibou Lake Mountain Club, Ltd. v Robertson* (1963) 219 CA2d 181, 185.

Before asking the court to set aside the submission of a case in a bench trial, the moving party should be sure that any motion to reopen will present only new evidence—not evidence that is merely cumulative. *Malibou Lake Mountain Club, Ltd. v Robertson, supra*; *Virtue v Flynt* (1958) 164 CA2d 480, 489. See *Diamond Springs Lime Co. v American River Constructors* (1971) 16 CA3d 581, 604 (proposed evi-

dence not related to cause of dam failure; denial of reopening proper). For written form of motion to reopen, see §18.131.

F. Procedures for opponent

§18.79 1. Motion for nonsuit or directed verdict pending

Choosing not to oppose motion. When a motion for nonsuit or directed verdict is pending, counsel may not wish to oppose a motion to reopen. It may be error for the court not to permit the case to be reopened unless the defect clearly cannot be remedied. Compare *Eatwell v Beck* (1953) 41 C2d 128, 133 (error for refusal to reopen), with *Sample v S.H. Kress & Co.* (1961) 190 CA2d 503, 508 (no error for refusing to reopen).

Opposing motion when defect cannot be corrected. In some cases, however, counsel may wish to oppose the motion to reopen made in response to a motion for nonsuit or directed verdict if the opposing party clearly cannot correct the defect and if the court specifically states this point on the record. See, *e.g.*, *Sanchez v Bay Gen. Hosp.* (1981) 116 CA3d 776, 793 (directed verdict); *Sample v S.H. Kress & Co., supra* (nonsuit).

§18.80 2. Motion to reopen after submission

Counsel opposing a motion to reopen after submission of the case in a bench trial may wish to support any opposition with a written memorandum. Although opposing counsel's argument depends on the particular factual situation, an essential point may be that good cause does not exist for reopening the case.

PRACTICE TIP► Pay particular attention to the thoroughness and admissibility of the moving party's declaration of facts on which the motion to reopen is based. A declaration is often vulnerable to the argument that the "newly discovered" evidence would not have been overlooked had the moving party's counsel exercised due diligence. In some instances, the declaration may also make it appropriate to argue that the evidence that the moving party seeks to present is cumulative in nature.

§18.81 G. Appeal after judgment only

An order denying a motion to reopen is not appealable and is reviewable only on appeal from the judgment. *Litvinuk v Litvinuk* (1945) 27 C2d 38, 43; *Pete v Henderson* (1957) 155 CA2d 772, 774; *Kallgren v Steele* (1955) 131 CA2d 43, 47.

The ruling on the motion will not be disturbed on appeal unless the trial court clearly abused its discretion. *Marriage of Hahn* (1990) 224 CA3d 1236, 1240.

VII. MOTION FOR MISTRIAL

§18.82 A. Checklist: Procedures for making or opposing motion

Moving Party

___ 1. Object immediately to offending conduct or prejudicial event. See §18.88.

___ 2. Reserve motion to be heard at earliest opportunity outside presence of jury. See §18.91.

___ 3. Make oral statement of specific grounds. See §18.92.

___ 4. Identify specific offending conduct or prejudicial event. See §18.92.

___ 5. Specify how conduct or event prevents party from receiving a fair trial. See §18.85.

Opponent

___ 1. Determine opponent's diligence and whether waiver has occurred. See §18.97.

___ 2. Point out how conduct or event has not caused incurable damage. See §18.83.

___ 3. Advance less-drastic solutions (*e.g.,* recess, admonition to jury). See §18.96.

B. Nature of motion

§18.83 1. Asks to terminate trial

A motion for mistrial requests the court to end the trial before its conclusion for error or irregularity too substantial to correct. Grounds for mistrial may be any misconduct or irregularity that prevents a party from receiving a fair trial. Typically, the error is one whose prejudicial effect on the jury is not curable through admonition. See *Clemente v State* (1985) 40 C3d 202, 217 (counsel improperly referred to matter not in evidence, but error cured by admonition); *Velasquez v Centrome, Inc.* (2015) 233 CA4th 1191, 1215 (court initially informed jury of personal injury plaintiff's undocumented immigration status, but then determined it was not relevant; at this point court should have declared a mistrial).

Substantial irregularities include the illness of a juror when no alternate is available (CCP §233) or the jury's failure to return a verdict (CCP §616). See, *e.g., Estate of Bartholomae* (1968) 261 CA2d 839, 842 (court granted mistrial when jury returned special verdicts on only two of three issues to be decided). On other irregularities as grounds for mistrial, see California Trial Objections, chap 56 (Cal CEB).

Counsel, jurors, witnesses, spectators, or the court may be responsible for misconduct or irregularities that result in a mistrial. On misconduct of counsel and court during trial, see chap 16. On juror misconduct, see chap 17.

§18.84 2. Consider alternatives

Because the result is so significant, counsel should consider alternatives to a motion for mistrial. If, for instance, the court erroneously admits certain evidence, a motion to strike may be adequate to preserve the issue for later motions or for appeal. *Mosesian v Pennwalt Corp.* (1987) 191 CA3d 851, 865, disapproved on other grounds in *People v Ault* (2004) 33 C4th 1250, 1272 n15.

Other alternatives to a motion for mistrial include counsel's request that the court admonish the jurors and instruct them to disregard what has occurred. When appropriate, counsel can also ask that the court impose sanctions or a contempt citation on offending counsel. See §§16.94, 16.99.

§18.85 C. Grounds: Preventing fair trial

In most situations, the trial court has discretion to grant or deny motions for mistrial. See, *e.g., Santiago v Firestone Tire & Rubber Co.* (1990) 224 CA3d 1318, 1335 (jury could not agree on question 1 of a special verdict; no injustice in instructing jury to answer question 2; answer would be dispositive).

Any misconduct or irregularity that irreparably prejudices a party's chances of receiving a fair trial is grounds for a mistrial. The court may properly deny the motion if it is satisfied that no injustice will result from the complained-of activity. The most common grounds for a motion for mistrial are misconduct by a juror, counsel, a spectator, or a trial witness that the court in its discretion determines to be irreparably prejudicial. On misconduct of counsel, court, and jury as grounds for mistrial, see chaps 16–17, 21.

NOTE► Many motions for mistrial are often based on the same grounds as those supporting a motion for new trial. See CCP §657(1)–(2); §§25.22–25.71.

§18.86 1. Statutory grounds

Mistrials *must* be granted when

- The judge presiding at the trial testifies as a witness over a party's objection. Evid C §703(b). Calling the judge to testify is considered to be a consent to the granting of a motion for mistrial, and objecting to the judge as a witness is considered to be a motion for mistrial. Evid C §703(c).
- A juror testifies over the objection of a party. Evid C §704(b). Calling a juror to testify is considered to be a consent to the granting of a motion for mistrial, and objecting to a juror as a witness is considered to be a motion for mistrial. Evid C §704(c).
- A juror becomes ill, no alternate is available, and the parties will not stipulate to less than a full jury panel rendering the verdict. CCP §233.
- A jury is discharged without rendering a verdict, or is prevented from giving a verdict by accident or other cause, and the court declines to enter judgment under CCP §630. CCP §616.
- A person previously presiding over the case testifies as a witness at the trial, with certain exceptions. See Evid C §703.5.

§18.87 2. Judge unable to complete trial

If a judge is unable to complete either a bench trial or a jury trial when any issues require court findings, a mistrial must be granted. A party is entitled to a decision on the facts of a case by the same judge who heard the evidence. *Guardianship of Sullivan* (1904) 143 C 462, 468 (one judge heard evidence; second judge heard argument; third judge entered judgment).

The death of a judge generally requires a mistrial. *McAllen v Souza* (1937) 24 CA2d 247, 250 (judge died before entering final judgment). But see *Leiserson v City of San Diego* (1986) 184 CA3d 41, 48 (deceased judge's executed intended decision properly confirmed by presiding judge under CCP §635).

NOTE► A judge's power to complete a trial in superior court is terminated when the judge is appointed to the appellate court. *Reimer v Firpo* (1949) 94 CA2d 798, 801. On events establishing a judge's vacancy from office, see Govt C §1770.

D. Timing

§18.88 1. Prejudicial effect from cumulative errors or irregularities

Frequently, the cumulative effect of an adversary's prejudicial remarks throughout trial, rather than one act of misconduct, may compel counsel to move for mistrial. In this instance, counsel should object on the record immediately after each impropriety, request an admonition and instruction to the jury, and move for mistrial if the misconduct continues. See *Barajas v USA Petroleum Corp.* (1986) 184 CA3d 974, 985 (objection to one but not other repeated acts of misconduct constituted waiver of right to mistrial).

PRACTICE TIP► Be sure to object not just once, but each time a repeated act of misconduct occurs. Otherwise, your rights to mistrial and to preserve your objection on appeal may be waived. See §18.102. On procedures for objecting and requesting admonitions, and moving for mistrial, see §18.90.

§18.89 2. Single act of misconduct or serious irregularity

If a grievous error occurs that in the trial attorney's judgment incurably prejudices the case, preventing the client from having a fair trial, a motion for mistrial should be made immediately after the misconduct or irregularity takes place. In most courts, the motion must be made outside the jury's presence. On procedures for making a motion for mistrial, see §§18.90–18.95.

Only misconduct so prejudicial that an admonishment would be ineffective excuses the failure to request such admonition. *Lewis v Bill Robertson & Sons, Inc.* (1984) 162 CA3d 650, 654 (court's prejudicial comment on evidence constituted incurable error). See *Velasquez v Centrome, Inc.* (2015) 233 CA4th 1191, 1210 n8 (plaintiff's counsel was not required to accept court's offer of curative jury instruction when court ruled during jury selection that plaintiff's undocumented immigration status was relevant to his personal injury claim but withdrew the ruling during trial). See §18.86 on mandatory grounds for mistrial.

E. Procedures for moving party

§18.90 1. Objection on record and request for admonition; waiver of right to mistrial

Counsel should object immediately on the record to the protested action, assign it as misconduct or error, and promptly request the judge to give the jury a curative admonition. On making motion for mistrial, see §18.92.

If counsel delays making an objection or fails to object, the right to move for mistrial later in the trial may be waived. *Horn v Atchison, T. & S.F. Ry.* (1964) 61 C2d 602, 610 (failure to make timely objections and request jury admonitions waived right to mistrial after plaintiff's closing argument). See *Whitfield v Roth* (1974) 10 C3d 874, 892 (counsel sent cigars and candy to jury room to celebrate birth of his child; misconduct curable and failure to object was waiver).

Objection to one but not other repeated acts of misconduct may also constitute a waiver of the right to mistrial. *Barajas v USA Petroleum Corp.* (1986) 184 CA3d 974, 985 (reference to excluded evidence in contravention of court order).

§18.91 2. Motion for mistrial and argument outside jury's presence

A motion for mistrial is almost always made orally. Some courts require that the motion for mistrial itself as well as the argument take place outside the jurors' hearing. See, *e.g.*, Los Angeles Ct R 3.99.

Even if not required by local rules, it is good practice for counsel both to make the motion and to request that argument take place outside the jurors' hearing so that any prejudicial effect will not be further compounded. The judge may hear the motion and argument at the bench, retire with counsel to chambers, or recess the jury and proceed with argument in the courtroom. Counsel should request the court reporter's presence if the judge has not already done so.

PRACTICE TIP► Before making a motion for mistrial, be sure that it is something you want the court to grant. Evaluate the possibility that your opponent is deliberately trying to scuttle the trial if his or her case is not going well. Asking for sanctions or a contempt citation may be a wiser course. See §§16.94, 16.99.

§18.92 3. Oral motion: Specify grounds

Although no particular form is required, the grounds for a motion for mistrial must be clearly and specifically stated. For example, counsel may move for mistrial on the ground that an admonition to the jury cannot cure the prejudicial effect of the misconduct or error, stating specifically why the prejudicial effect cannot be cured.

Counsel may use a form of oral motion such as the following:

> _ _[*Plaintiff/Defendant*]_ _, _ _[*name*]_ _, objects to _ _[*describe act, occurrence, or irregularity*]_ _ and assigns it as _ _[*misconduct/error*]_ _. _ _[*Plaintiff/Defendant*]_ _ moves for mistrial on the ground that the _ _[*act/occurrence/irregularity*]_ _ is so prejudicial that a fair trial is

not possible. The prejudice cannot be cured by an admonition to the jury or by cautionary instructions because _ _[*specify*]_ _.

§18.93 4. Admonishment of jury after motion denied; protecting the record

If the motion for mistrial is denied, counsel should renew the request that the court admonish the jury.

PRACTICE TIP► Be sure that your request for admonition is on the record. The court's ruling on the mistrial motion should also be entered in the record. You may also wish to request a minute order from the court clerk.

§18.94 5. Proceeding with trial after motion taken under submission

Some judges proceed with the trial after argument on a motion for mistrial, taking the motion under submission until a decision can be made on the effect of the prejudicial conduct or irregularity on the jury.

In this event, counsel should request the court to admonish the jurors to disregard the improper conduct or irregularity. Counsel should renew the motion taken under submission before the close of evidence to avoid waiver of the motion. Any delay in giving an admonition would only compound the prejudicial effect of the complained-of irregularity.

§18.95 6. Moving for mistrial in bench trial

A motion for mistrial is rare in a bench trial, but it should be considered when there is irregularity or misconduct on the part of the trial judge. Unlike a jury, a judge is usually presumed to be capable of overlooking prejudicial remarks from counsel or witnesses when reaching a decision on the merits.

If a mandatory ground for mistrial occurs (*e.g.*, the death of the trial judge after submission, but before decision, in the case; see §18.86), counsel should make the motion for mistrial in writing. *Rose v Boyson* (1981) 122 CA3d 92, 97 (judge sitting without jury elevated to appellate court after judgment but before findings signed; court noted power of parties to stipulate otherwise). See *Reimer v Firpo* (1949) 94 CA2d 798, 801.

F. Procedures for opposing party

§18.96 1. Suggest alternative means to cure prejudice

Generally, opposing counsel can suggest less drastic means than mistrial to cure any prejudice. Mistrials can result in substantial additional expense for both the courts and the parties if the case is retried. Normally, a prompt admonition is considered sufficient to cure any prejudicial effect. See *Clemente v State* (1985) 40 C3d 202, 217; *Horn v Atchison, T. & S.F. Ry.* (1964) 61 C2d 602, 610.

In some instances, a continuance (or recess) may make a mistrial unnecessary. See, *e.g.*, *Schnear v Boldrey* (1971) 22 CA3d 478, 482 (when several jurors became ill, judge continued trial instead of discharging jury and declaring mistrial).

§18.97 2. Argue when appropriate that motion was not made immediately following misconduct

If, *e.g.*, a motion for mistrial is based on juror misconduct (counsel for moving party overhears jurors discussing the case before deliberation), the motion for mistrial must be made immediately. Otherwise, opposing counsel can argue that the right to a mistrial is waived, because a party should not be permitted to gamble on the outcome of the case before moving for relief.

Opposing counsel can also ask the court for a brief recess in which to research authorities if counsel believes that this would help persuade the court to deny the motion. If the court seems inclined to grant

the motion, another alternative is to request that the matter be taken under submission until it becomes clear whether prejudice has resulted.

G. Effect of court's ruling: Motion granted

§18.98 1. Deciding when case will be retried

When a jury is discharged without rendering a verdict, or is prevented from rendering a verdict by accident or other cause, the case may be retried immediately or at a future time. CCP §616.

Some judges call a conference among counsel immediately after a mistrial has been declared, covering questions of possible settlement or retrial of the case and the name of the judge who may preside at the trial. For example, if a mistrial was declared because of the deliberate misconduct of an attorney seeking a way out of a losing case, the judge may wish to disqualify himself or herself from retrial of the case.

§18.99 2. Reinstate case to trial calendar

After an order for mistrial has been granted, the case may be dropped from the trial calendar. If this happens, it is generally the plaintiff's counsel's responsibility to ensure a trial date, whether by making a motion to specially set for trial, invoking a fast-track procedure in accordance with local rules, or choosing some other method.

Although no statute authorizes preference for cases in which a mistrial has been declared, as a practical matter such cases often receive an early retrial date. If the court chooses to do so, however, it may commence the new trial immediately after declaring a mistrial. See §18.98.

§18.100 3. Order not appealable

An order granting a motion for mistrial is the same as having no trial at all. When a mistrial is declared, the finder of fact has made no determinations or final judgment from which to take an appeal. See *Reimer v Firpo* (1949) 94 CA2d 798, 801 (motion granted).

Although the order granting a mistrial is not directly appealable, there are some circumstances under which it may be reviewed by extraordinary writ, *e.g.*, when the jury has already reached its verdict. See *Heavy Duty Truck Leasing, Inc. v Superior Court* (1970) 11 CA3d 116, 119 (court of appeal issued peremptory writ of mandate requiring trial court to enter judgment on jury verdict and vacate its order for mistrial).

H. When motion denied

§18.101 1. Appellate review from judgment

An order denying a motion for mistrial is not directly appealable, but it may be reviewed on appeal from the judgment. *Hartman v Gordon H. Ball, Inc.* (1969) 269 CA2d 779; *Warner v O'Connor* (1962) 199 CA2d 770, 774.

When a motion for mistrial is denied, a later appeal may be based on the erroneous ruling itself or for failure to grant a new trial for trial irregularities, jury misconduct, or the like. See CCP §657(1)–(2); discussion in §§25.22–25.71.

§18.102 2. Waiver on appeal

Failure to object, delay in making an objection, or failure to seek jury admonitions when prejudicial conduct occurs may constitute waiver on appeal. See, *e.g.*, *Neumann v Bishop* (1976) 59 CA3d 451, 468 (improper argument). On moving for mistrial during argument, see §19.54.

A timely objection and request for admonition are necessary to preserve the issue on appeal. As long as an objection is made, however, making a motion for mistrial is not required to reverse a verdict on appeal.

Generally, an admonition in jury trials will cure all but extreme cases of error. *Horn v Atchison, T. & S.F. Ry.* (1964) 61 C2d 602, 610. The record on appeal must show that counsel made a timely objection and request for admonition of the jury, but that the admonition was insufficient to cure the prejudice. See *Whitfield v Roth* (1974) 10 C3d 874, 892; *Lewis v Bill Robertson & Sons, Inc.* (1984) 162 CA3d 650, 654; *Love v Wolf* (1964) 226 CA2d 378, 392 (extreme misconduct; repeated attorney misconduct not cured by admonition).

VIII. MOTION TO AMEND PLEADINGS TO CONFORM TO PROOF

§18.103 A. Checklist: Procedures for making or opposing motion

Moving Party

___ 1. Evaluate whether issues already tried or to be tried are different than those in pleadings. See §18.104.

___ 2. If there is a variance, prepare amended pleading or amendment to pleading or ask court for permission to interlineate small amendments on face of pleading. See §18.115.

___ 3. If challenged, explain how opposing party had notice of issues in dispute and that proposed amendment does not change issues or evidence to be presented. See §18.106.

___ 4. Show that amended pleading or amendment is in furtherance of justice. See §18.117.

Opponent

___ 1. Determine whether amended pleading or amendment raises new issues after close of evidence. See §18.105.

___ 2. Show departure from facts originally pleaded and lack of notice. See §18.109.

___ 3. Identify prejudice that amended matter will cause in maintaining the action or defense on merits. See §18.106.

___ 4. Show that moving party's motion was not timely made. See §18.113.

___ 5. Argue that allowing the amended pleading or amendment to be filed is not in furtherance of justice. See §18.120.

___ 6. If granted, ask for continuance to meet the new issues and evidence and ask for reimbursement for costs incurred from continuance. See §18.110.

B. Nature of motion

§18.104 1. Amendments liberally granted during trial

Amendments to pleadings made during trial are governed by the same general rule of liberality that allows amendments before trial, so that disputed issues may be decided on the merits. *Hooper v Romero* (1968) 262 CA2d 574, 580. See Cal Rules of Ct 3.1324. The courts have discretion to permit amendments to pleadings to conform to proof "on such terms as may be just." CCP §469.

Amendments to answers are usually granted with liberality because a defendant denied leave is permanently deprived of the defense. *Gould v Stafford* (1894) 101 C 32, 34; *Dunzweiler v Superior Court* (1968) 267 CA2d 569, 576.

On amending pleadings before trial, see §§6.87–6.93. For full discussion of pretrial changes to pleadings, see California Civil Procedure Before Trial, chap 16, §§25.70–25.79 (4th ed Cal CEB).

§18.105 2. Denial of amendments that raise new issues after close of evidence

Motions to amend pleadings to conform to proof are often made because issues that have already been tried are different from those in the pleadings. On contents of motion to amend pleadings, see Cal Rules of Ct 3.1324.

The court tends to deny amendments to conform to proof when those amendments raise new issues after the close of evidence. *Trafton v Youngblood* (1968) 69 C2d 17, 31; *Lavely v Nonemaker* (1931) 212 C 380, 385.

C. Curing immaterial variances

§18.106 1. Showing no prejudice to other party

Amendments during trial most often arise when there is a variance between a pleading and the proof presented at trial, *i.e.*, the pleading alleges one thing and the proof shows another. See *Stearns v Fair Employment Practice Comm'n* (1971) 6 C3d 205, 212.

Case law has minimized the effect of variance, and motions to amend pleadings to conform to proof are generally granted as long as they do not prejudice the rights of the other party. *Trafton v Youngblood* (1968) 69 C2d 17, 31; *Quezada v Hart* (1977) 67 CA3d 754, 761, disapproved on other grounds in *Holliday v Jones* (1989) 215 CA3d 102, 112.

If the variance is slight, or one that has not misled the adverse party to his or her prejudice, the court may direct the fact to be found according to the evidence, or order an immediate amendment, without costs. CCP §470. See, *e.g.*, *Zander v Texaco, Inc.* (1968) 259 CA2d 793, 802 (court's findings conformed to factual issues tried but at variance with pleadings).

The motion may be denied, however, when the amendment raises a disfavored plea, was insufficient to state a cause of action or defense, changed a cause of action, or contradicted an admission.

Under CCP §475, the court must disregard any error or defect that does not affect the substantial rights of the parties. *Lever v Garoogian* (1974) 41 CA3d 37, 41 (defect in answer to complaint not reversible error when plaintiff had notice of defense from defendant's answers to plaintiff's requests for admission).

§18.107 2. General rule: Amendments limited to causes of action in complaint

As a general rule, a party's recovery is limited to the causes of action set out in the complaint. See *Howard v Schaniel* (1980) 113 CA3d 256, 265. Likewise, a party's defense generally is limited to proof of issues raised by the answer. These restrictions give the other party notice of the scope of proof that will be presented at trial. See 5 Witkin, California Procedure, *Pleading* §1209 (5th ed 2008).

If an objection is sustained as being outside the pleadings, the court has no duty to aid counsel or to amend the pleadings sua sponte. Counsel must affirmatively move for relief. *R.E. Tharp, Inc. v Miller Hay Co.* (1968) 261 CA2d 81, 85.

§18.108 3. Exception: New causes of action permitted when based on same set of facts

The courts generally permit amendments that state a different cause of action or a new defense if the proposed recovery or defense is based on the same general set of facts. *Godfrey v Steinpress* (1982) 128 CA3d 154, 174 (cause of action added by amendment did not alter factual issues or presentation of evidence).

PRACTICE TIP► Whenever possible, point out to the court that your proposed amendment does not alter the issues in the case or have an effect on the evidence presented by either side. See, *e.g.*, *Brady v Elixir Indus.* (1987) 196 CA3d 1299, 1303, disapproved on other grounds in *Turner v Anheuser-Busch, Inc.* (1994) 7 C4th 1238, 1251 (reversible error to deny amendment to conform to proof

when facts admitted in trial were admissible under unamended complaint and adversary not prejudiced).

It is error for a trial court to permit an amendment alleging facts entirely outside the existing causes of action. *Earp v Nobmann* (1981) 122 CA3d 270, 286, disapproved on other grounds in *Silberg v Anderson* (1990) 50 C3d 205, 219.

D. Curing material variances

§18.109 1. Variance has misled other party

A material variance is defined as one that has actually misled the adverse party to his or her prejudice in maintaining the action or defense on the merits. CCP §469.

Even material variances may be cured by an amendment to conform to proof if they do not represent a complete departure from the general set of facts originally pleaded. *Union Bank v Wendland* (1976) 54 CA3d 393, 400; *General Credit Corp. v Pichel* (1975) 44 CA3d 844, 849.

§18.110 2. Ordering continuance (recess) or vacating submission of court case; waiver

The court can correct a material variance by ordering an amendment to the pleadings on terms it considers just. CCP §469. Such terms may include ordering a continuance for the opposing party to meet the evidence.

In a bench trial, the order granting leave to amend the pleadings may vacate submission of the case to permit the opposing party to introduce additional evidence. See *Mountain States Creamery Co. v Tagerman* (1952) 39 C2d 355, 357.

Substantial variance may also be cured under the theory that the issues were already tried, and that counsel had notice during trial and waived any prejudicial effect by failing to object to evidence or moving for nonsuit when the variance between the pleadings and proof became apparent. See 5 Witkin, California Procedure, *Pleading* §1214 (5th ed 2008).

§18.111 E. Failure of proof

If the claim or defense is unproved—not merely in some particulars, but in its general scope and meaning—it is considered to be a failure of proof rather than a case of variance under CCP §469 or §470. CCP §471. *Hunt v Smyth* (1972) 25 CA3d 807, 829 (trial court properly disallowed proposed amendment unsupported by evidence and not timely made).

The absence of a fact vital to the proposed defense constitutes a complete failure of proof that a pleading amendment cannot cure. See *Johnston v County of Yolo* (1969) 274 CA2d 46, 51.

F. Timing

§18.112 1. Motion may be granted at any time

The court may allow any pleading to be amended at any stage of the proceedings as long as it is in "furtherance of justice." CCP §§576, 473.

EXAMPLE► *Enterprise Leasing Corp. v Shugart Corp.* (1991) 231 CA3d 737, 750 (motion after opening statement erroneously denied).

EXAMPLE► *Kamm v Bank of Cal.* (1887) 74 C 191, 198 (at close of plaintiff's evidence pending motion for nonsuit).

EXAMPLE► *Walsh v Hooker & Fay* (1963) 212 CA2d 450, 454 (after conclusion of argument).

EXAMPLE► *Valencia v Shell Oil Co.* (1944) 23 C2d 840, 848 (after submission of case).

EXAMPLE► *Foster v Keating* (1953) 120 CA2d 435, 444 (after announcement of intended decision).

Pleadings may be conformed to proof even after judgment. See §18.133.

§18.113 2. Making timely motion; tactics

Counsel should normally make the motion at the earliest possible time because prejudicial delay is a ground for denial. See §§18.106, 18.109.

PRACTICE TIP► The best practice is to move to amend the pleadings as soon as it becomes clear that they should be amended. If possible, the motion should be made before trial begins.

In certain situations all the necessary information may not be available or the amendment may be so minor or technical (*e.g.*, the spelling of a name when the person's identity is not in dispute) that a motion to amend may be legitimately delayed. *McKee v Mires* (1952) 110 CA2d 517, 523 (affirming trial court's discretion to permit amendment to complaint, even when made at "conclusion of case" or "after submission of the cause"). See *Hulsey v Koehler* (1990) 218 CA3d 1150, 1159 (affirmed trial court's denial of plaintiff's motion to amend to add defense when counsel realized existence of defense on reading deposition transcript 2 days before trial).

NOTE► An amendment that raises new issues or requires a reopening of evidence will normally be denied without a strong showing of diligence and justification. If it is granted, the adverse party should be allowed to meet the amendment and with any new evidence.

§18.114 3. Conforming pleadings to proof after judgment

Pleadings may also be amended to conform to proof after judgment (*Babcock v Antis* (1979) 94 CA3d 823, 830, disapproved on other grounds in *Snukal v Flightways Mfg., Inc.* (2000) 23 C4th 754, 775 n6) but only if the judgment is first vacated under CCP §473 or a new trial motion or other basis exists. *Young v Berry Equip. Rentals, Inc.* (1976) 55 CA3d 35, 38; *King v Unger* (1938) 25 CA2d 632, 635. See *Jahn v Brickey* (1985) 168 CA3d 399, 402 (in posttrial motion, judgment vacated to amend complaint by interlineation to substitute figures in prayer for damages).

On vacating judgment to amend pleadings after trial, see §§25.72–25.77.

G. Procedures for moving party

§18.115 1. Methods of amending pleadings

A pleading may be amended by:

- An amendment to the pleading;
- An amended pleading; or
- Alterations on the face of the pleading.

An amendment to the pleading specifically itemizes, line by line, the changes made in the original pleading. See, *e.g.*, *McKee v Mires* (1952) 110 CA2d 517, 522 (amendment to conform to proof designated line, page, and paragraph of complaint to be amended).

Unlike an amendment to the pleading, an amended pleading wholly supersedes the original pleading. See, *e.g.*, *Cohen v Superior Court* (1966) 244 CA2d 650, 657.

The correct procedure for amendments by alteration on the face of the pleading includes receiving prior permission from the court and requesting the court or clerk to initial all alterations. See Cal Rules of Ct 3.1324. Amendments made by interlineating or otherwise making alterations on the face of the pleading

are not allowed unless the court gives permission and the court or clerk initials the alterations. Cal Rules of Ct 3.1324.

Although minor changes of several words can be interlineated into an original pleading, an "amendment to the pleading" can be inconvenient and confusing because it requires reference to multiple documents. The courts frequently prefer that an "amended pleading" be drafted to wholly supersede the original pleading.

§18.116 2. Oral motion: Submit written amendment

A motion to amend pleadings to conform to proof is usually made orally during trial. If the motion is granted, the order allowing the amendment is not equivalent to the amendment itself. *Campagna v Market St. Ry.* (1944) 24 C2d 304, 308; *People ex rel Dep't of Pub. Works v Vallejos* (1967) 251 CA2d 414, 416.

It is good practice to submit the proposed amendment to the court with copies for the opposing party at the time of making the motion or, if this is not possible, after the motion is granted. The opposing party may request the right of approval as to form before it is filed. See form of amendment in §18.134.

If the motion can be anticipated, written supporting papers may be prepared. On occasion, counsel may wish to make the motion itself in writing. See forms of motion to amend and court order in §§18.132–18.133.

§18.117 3. Arguing motion

In arguing the motion, the moving party should state why the evidence presented during trial is sufficient to justify the proposed amendment. To avoid the need for an answer, counsel amending a complaint can request that new allegations be deemed denied and the existing answer be deemed the answer to the amended pleading. See *Valencia v Shell Oil Co.* (1944) 23 C2d 840, 848 (issues presented by amended complaint already tried with defendants presenting their evidence on disputed issues). It would be error for an amendment to be made and judgment entered without further hearing. *Reidy v Collins* (1933) 134 CA 713, 722.

H. Procedures for opposing party

§18.118 1. Before motion made: Object on grounds of relevancy or move for nonsuit

If evidence is offered during trial that differs from the pleadings, and no motion to amend the pleadings has yet been made, counsel may immediately object on grounds of relevancy. Evid C §350. When there is a variance between the pleadings and the proof, defense counsel may also choose to move for nonsuit at the close of the plaintiff's case. CCP §581c. On nonsuit, see §§18.7–18.34.

§18.119 2. Failure to challenge variance; waiver

A failure to challenge evidence at variance with the pleadings may result later in the trial in a waiver of counsel's objections to the moving party's amending the pleadings to conform to proof. *Quezada v Hart* (1977) 67 CA3d 754, 761, disapproved on other grounds in *Holliday v Jones* (1989) 215 CA3d 102, 112. On doctrine of substantial variance cured by trial, see 5 Witkin, California Procedure, *Pleading* §1214 (5th ed 2008).

A variance may be disregarded when the action has been fully and fairly tried on the merits as though the variance had not existed. See, *e.g.*, *Hayes v Richfield Oil Corp.* (1952) 38 C2d 375, 382 (variance not prejudicial when unpleaded theory of recovery fully litigated by parties).

§18.120 3. Arguing against motion when made; grounds

Once a motion to amend the pleadings has been made, the opposing party may object on grounds such as the following:

- Good cause does not exist for granting leave to amend.

EXAMPLE► *Hartman v Shell Oil Co.* (1977) 68 CA3d 240, 251 (denial of motion to amend to conform to proof affirmed when evidence before jury did not support proposed affirmative defense).

EXAMPLE► *Brautigam v Brooks* (1964) 227 CA2d 547, 560 (leave to amend erroneous when amendment proposed a defense already withdrawn before jury selection).

- The moving party has not shown due diligence in making the motion.

EXAMPLE► *Bedolla v Logan & Frazer* (1975) 52 CA3d 118, 135 (amendment not sought until fourth day of trial).

EXAMPLE► *Stockton v Ortiz* (1975) 47 CA3d 183, 194 (plaintiff delayed without good cause in making motion to add new theory of liability).

- Granting the motion would unduly prejudice the opposing party in maintaining the action or defense on the merits.

EXAMPLE► *Earp v Nobmann* (1981) 122 CA3d 270, 286 (error to permit amendment alleging facts entirely outside cause of action), disapproved on other grounds in *Silberg v Anderson* (1990) 50 C3d 205, 219.

EXAMPLE► *Richter v Adams* (1937) 19 CA2d 572, 577 (plaintiff prejudiced at close of trial by amended complaint setting forth defense not originally pleaded and introduced over plaintiff's objection).

- The statute of limitations has run and the relation-back doctrine does not apply.

EXAMPLE► *Barrington v A. H. Robins Co.* (1985) 39 C3d 146, 155 (amended complaint erroneously dismissed based on trial court's failure to apply relation-back rule to that complaint).

EXAMPLE► *Dominguez v City of Alhambra* (1981) 118 CA3d 237, 244 (untimely government tort claim).

- The amendment is based on evidence to which an objection was properly made at trial.

EXAMPLE► *Cota v County of Los Angeles* (1980) 105 CA3d 282, 293 (denial of motion at end of trial when court previously excluded evidence related to amendment).

- The amendment contradicts an admission or stipulation.

EXAMPLE► *Roemer v Retail Credit Co.* (1975) 44 CA3d 926, 939 (unjustifiably long delay and amendment in conflict with stipulated facts).

I. Effect of granting motion

§18.121 1. Opposing party's request to produce evidence

When the motion is granted, it is often not necessary for the opposing party to request time to plead and produce further evidence. If the complaint has been amended, the original answer on file is generally adequate to state a defense against any new allegations. In this instance, either counsel can ask the court to rule that the new allegations be deemed denied.

If the amendment raises new issues that the opposing party has not heard, however, counsel for the opposing party should request an opportunity to respond and produce further evidence. See *Reidy v Collins*

(1933) 134 CA 713, 723 (judgment reversed; appellant had no opportunity to be heard on new issues raised by amended complaint to conform to proof filed after submission).

In a bench trial, the court may vacate submission to give the adverse party time to gather additional evidence to rebut allegations in a plaintiff's amendment to conform to proof. *Mountain States Creamery Co. v Tagerman* (1952) 39 C2d 355, 356.

§18.122 2. Granting opposing party continuance and costs

If appropriate, counsel for the opposing party may request that the court grant a continuance to meet the contentions of the amended pleading, and require the moving party to pay any costs resulting from a postponement. See CCP §473; *Oakes v McCarthy Co.* (1968) 267 CA2d 231, 262 (1-week continuance and deposition properly ordered even though amendments merely elaborated on issues previously pleaded).

The court may order costs otherwise not recoverable. *Williams v Myer* (1907) 150 C 714, 718 (fees for jurors, witnesses, defendants' expenses of attending trial, attorneys); *Fuller v Vista del Arroyo Hotel* (1941) 42 CA2d 400, 402 (defendant who raised new defense ordered to pay all expenses plaintiff had incurred to date). But see *DeCesare v Lembert* (1983) 144 CA3d 20, 23 (recovery of attorney fees inappropriate on motion for continuance).

§18.123 3. Abuse of discretion test on appeal

If timely and appropriate objections to a variance between the pleadings and proof have been made during the trial, the issues are preserved on appeal in the event of an adverse judgment. See *Richter v Adams* (1937) 19 CA2d 572, 577 (judgment against plaintiff who repeatedly, yet unsuccessfully, objected to introduction of evidence at variance with defendants' pleadings; reversed). See also *Union Bank v Wendland* (1976) 54 CA3d 393, 400 (error to deny leave to amend pleadings; appellate court adopted amended theory and reversed on merits).

A ruling will not be reversed on appeal, however, unless abuse of discretion can be shown. *Godfrey v Steinpress* (1982) 128 CA3d 154, 174. See *Trafton v Youngblood* (1968) 69 C2d 17, 31 (clear abuse required for reversal); *Bedolla v Logan & Frazer* (1975) 52 CA3d 118, 135 (only manifest or gross abuse of discretion required for reversal). See also CCP §§473 (providing for amendments of pleadings generally), 576 (providing for amendments to pleadings or pretrial orders).

IX. FORMS

A. Motion for nonsuit

§18.124 1. Form: Motion for judgment of nonsuit (CCP §581c)

_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
Attorney For _ _[*e.g., plaintiff*]_ _, _ _[*name*]_ _

_ _ _ _ _ _ Court, County of _ _ _ _ _ _

_ _[*Name(s)*]_ _ **Plaintiff(s)** **vs** _ _[*Name(s)*]_ _ **Defendant(s)**	**No.** _ _ _ _ _ _ **MOTION FOR JUDGMENT OF NONSUIT (CCP §581c); SUPPORTING MEMORANDUM**

Defendant, _ _[*name*]_ _, moves under Code of Civil Procedure section 581 for judgment of nonsuit against plaintiff, _ _[*name*]_ _. This motion is made on the ground that _ _[*specify deficiencies of plaintiff's opening statement or evidence*]_ _.

This motion is based on all pleadings, papers, and records in this action; the evidence presented at trial; and the attached supporting memorandum.

Date: _ _ _ _ _ _

_ _[*Signature*]_ _
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

Copies: Original (filed with court clerk with proof of service); copies for service (one for each attorney of record and unrepresented party); office copies.

Comment: Motions for nonsuit are usually made orally. If defense counsel anticipates making the motion and prepares it in written form, the motion should be presented immediately after the plaintiff's opening statement or after presentation of the plaintiff's evidence. In this instance, counsel should state on the record that the motion is made by submission of written papers. If the motion is made orally, any written supporting memorandum should be presented when the motion is made or argued. See §18.26.

§18.125 2. Form: Judgment of nonsuit (after opening statement) (CCP §581c)

_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
Attorney For _ _[*e.g., plaintiff*]_ _, _ _[*name*]_ _

_ _ _ _ _ _ Court, County of _ _ _ _ _ _

_ _[*Name(s)*]_ _ **Plaintiff(s)** **vs** _ _[*Name(s)*]_ _ **Defendant(s)**	**No.** _ _ _ _ _ _ **JUDGMENT OF NONSUIT (CCP §581c)**

The motion of defendant, _ _[*name*]_ _, for judgment of nonsuit under Code of Civil Procedure section 581c was heard on _ _[*date*]_ _ during the _ _[*jury/bench*]_ _ trial of this action. Appearing as attorneys were: _ _[*List names of attorneys and parties represented by each*]_ _.

After opening statement, in which counsel for plaintiff, _ _[*name*]_ _, stated all the facts that _ _[*he/she*]_ _ intended to prove, counsel for defendant moved for (1) judgment of nonsuit on the ground that _ _[*state specific deficiency*]_ _ and (2) costs.

IT IS ORDERED that:

1. Defendant recover judgment on the merits against plaintiff;

2. The complaint on file in this action be dismissed; and

3. Defendant recover against plaintiff costs in the amount of _ _[*dollar amount*]_ _, with interest at an annual rate of _ _[*e.g., 10*]_ _ percent from the date of entry of this judgment until paid.

Date: _ _ _ _ _ _ _____
Judge

Copies: Original and copy (present to judge for signature, then file with court clerk); copies for service (one for each attorney of record and unrepresented party); office copies.

Comment: A motion for nonsuit may be made in a jury or a bench trial after the plaintiff's opening statement. See §18.22.

§18.126 3. Form: Judgment of nonsuit (after close of evidence) (CCP §581c)

_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
Attorney For _ _[*e.g., plaintiff*]_ _, _ _[*name*]_ _

_ _ _ _ _ _ Court, County of _ _ _ _ _ _

_ _[*Name(s)*]_ _ **Plaintiff(s)**	**No.** _ _ _ _ _ _
vs	**JUDGMENT OF NONSUIT (CCP §581c)**
_ _[*Name(s)*]_ _ **Defendant(s)**	

The motion of defendant, _ _[*name*]_ _, for judgment of nonsuit under Code of Civil Procedure section 581c was heard on _ _[*date*]_ _ during the jury trial of this action. Appearing as attorneys were: _ _[*List names of attorneys and parties represented by each*]_ _.

After counsel for plaintiff, _ _[*name*]_ _, presented plaintiff's evidence and testimony, and plaintiff rested, counsel for defendant moved (1) for judgment of nonsuit for insufficiency of plaintiff's proof in that _ _[*state essential defects of plaintiff's evidence*]_ _ and (2) for costs.

IT IS ORDERED that:

1. Defendant recover judgment on the merits against plaintiff;

2. The complaint on file in this action be dismissed; and

3. Defendant recover against plaintiff costs in the amount of _ _[*dollar amount*]_ _, with interest at an annual rate of _ _[*e.g., 10*]_ _ percent from the date of entry of this judgment until paid.

Date: _ _ _ _ _ _ _____
Judge

Copies: Original and copy (present to judge for signature, then file with court clerk); copies for service (one for each attorney of record and unrepresented party); office copies.

Comment: A motion for nonsuit may be made in a jury trial after the close of the plaintiff's evidence. See §18.22. On making a motion for judgment under CCP §631.8 at this point in a bench trial, see §§24.14–24.29.

B. Motion for judgment after discharge of jury

§18.127 1. Form: Notice of motion for judgment (CCP §630(f))

_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
Attorney For _ _[*e.g., plaintiff*]_ _, _ _[*name*]_ _

_ _ _ _ _ _ Court, County of _ _ _ _ _ _

_ _[*Name(s)*]_ _ **Plaintiff(s)**	**No.** _ _ _ _ _ _
vs	**NOTICE OF MOTION FOR JUDGMENT (CCP §630(f)); SUPPORTING MEMORANDUM; DECLARATION OF** _ _[*NAME*]_ _
_ _[*Name(s)*]_ _ **Defendant(s)**	**Hearing:** _ _[*date; time*]_ _ **Dep't:** _ _[*number*]_ _ **Hearing judge:** _ _[*if known*]_ _ **Action filed:** _ _[*date*]_ _ **Trial date:** _ _ _

PLEASE TAKE NOTICE that _ _[*plaintiff/defendant*]_ _, _ _[*name*]_ _**, moves under Code of Civil Procedure section 630(f) that the court issue an order for judgment in** _ _[*his/hers/its*]_ _ **favor on** _ _[*date must be within 30 days after jury's discharge*]_ _**. This motion is based on section 630(f): If** _ _[*plaintiff/defendant*]_ _ **had moved for directed verdict during trial, it should have been granted on the grounds that** _ _[*specify*]_ _**, as set forth in detail in the attached supporting memorandum and declaration of** _ _[*name*]_ _**.**

This motion is based on all pleadings, papers, and records in this action; the evidence presented at trial; _ _[*and*]_ _ **the attached supporting memorandum and declaration of** _ _[*name*]_ _**; and any evidence received at the hearing.**

Date: _ _ _ _ _ _

_ _[*Signature*]_ _
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

Copies: Original (filed with court clerk with proof of service); copies for service (one for each attorney of record and unrepresented party); office copies.

Comment: Counsel's declaration should set forth the date on which the jury was discharged and state that the notice was given within 10 days as required by CCP §630(f) and shown in the attached proof of service. The hearing should be noticed within 30 days after the jury's discharge, at which time the court's power to act under §630(f) expires. See §§18.40–18.41.

§18.128 2. Form: Order for entry of judgment (CCP §630(f))

_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
Attorney For _ _[*e.g., plaintiff*]_ _**,** _ _[*name*]_ _

_ _ _ _ _ _ Court, County of _ _ _ _ _ _

_ _[*Name(s)*]_ _ **Plaintiff(s)**	**No.** _ _ _ _ _ _
vs	**ORDER FOR ENTRY OF JUDGMENT (CCP §630(f));**
_ _[*Name(s)*]_ _ **Defendant(s)**	**Hearing:** _ _[*date; time*]_ _ **Dep't:** _ _[*number*]_ _ **Hearing judge:** _ _[*if known*]_ _ **Action filed:** _ _[*date*]_ _ **Trial date:** _ _ _

The motion of _ _[*plaintiff/defendant*]_ _**,** _ _[*name*]_ _**, for judgment under Code of Civil Procedure section 630(f) was heard at the above date and time during the** _ _[*jury/court*]_ _ **trial of this action. Appearing as attorneys were:** _ _[*List names of attorneys and parties represented by each*]_ _**.**

IT IS ORDERED that:

[*Option 1: Plaintiff*]

1. Plaintiff recover judgment on the merits against defendant, _ _[*name*]_ _**, in the amount of** _ _[*dollar amount*]_ _**, with interest at an annual rate of** _ _[*e.g., 10*]_ _ **percent from the date of entry of this judgment until paid; and**

2. Plaintiff recover against defendant costs in the amount of _ _[*dollar amount*]_ _**.**

[*Option 2: Defendant*]

1. Plaintiff recover nothing from defendant; and

2. Defendant recover against plaintiff costs in the amount of _ _[*dollar amount*]_ _**.**

[*Continue*]

Date: _ _ _ _ _ _ _____
Judge

Copies: Original and copy (present to judge for signature, then file with court clerk); copies for service (one for each attorney of record and unrepresented party); office copies.

Comment: The order of judgment may be attached to the moving papers, presented to the judge during argument if counsel prevails on the motion, or drafted and submitted to the court after the order has been granted. For further discussion, see §§18.40–18.41.

C. Motion for directed verdict

§18.129 1. Form: Motion for directed verdict (CCP §630)

_ _[*Name of attorney; State Bar number*]_ _

_ _[*Address*]_ _
_ _[*Telephone number*]_ _
Attorney For _ _[*e.g., plaintiff*]_ _**,** _ _[*name*]_ _

_ _ _ _ _ _ Court, County of _ _ _ _ _ _

_ _[*Name(s)*]_ _ **Plaintiff(s)**	**No.** _ _ _ _ _ _
vs	**MOTION FOR DIRECTED VERDICT (CCP §630); SUPPORTING MEMORANDUM; DECLARATION OF** _ _[*NAME*]_ _
_ _[*Name(s)*]_ _ **Defendant(s)**	

_ _[*Plaintiff/Defendant*]_ _**,** _ _[*name*]_ _**, moves under Code of Civil Procedure section 630 that the court direct the jury to return a verdict in** _ _[*his/her/its*]_ _ **favor. This motion is made on the grounds that** _ _[*specify*]_ _**.**

This motion is based on all pleadings, papers, and records in this action; the evidence presented at trial; _ _[*and*]_ _ **the attached supporting memorandum and declaration of** _ _[*name; and any evidence received at the hearing*]_ _**.**

Date: _ _ _ _ _ _

_ _[*Signature*]_ _
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

Copies: Original (filed with court clerk with proof of service); copies for service (one for each attorney of record and unrepresented party); office copies.

Comment: A motion for directed verdict is usually made orally. If counsel anticipates making the motion and prepares it in written form, counsel should present the motion at the customary time for making the motion and state on the record that the motion is made by submission of written papers. Whether the motion is oral or written, any written supporting memorandum should also be presented at the time the motion is made. See §18.51.

§18.130 2. Form: Judgment on directed verdict (CCP §630)

_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
Attorney For _ _[*e.g., plaintiff*]_ _**,** _ _[*name*]_ _

_ _ _ _ _ _ Court, County of _ _ _ _ _ _

_ _[*Name(s)*]_ _ **Plaintiff(s)**	**No.** _ _ _ _ _ _
vs	**JUDGMENT ON DIRECTED VERDICT**
_ _[*Name(s)*]_ _ **Defendant(s)**	

The motion of _ _[*plaintiff/defendant*]_ _**,** _ _[*name*]_ _**, for directed verdict under Code of Civil Procedure section 630 was heard on** _ _[*date*]_ _ **during the jury trial of this action. Appearing as attorneys were:** _ _[*List names of attorneys and parties represented by each*]_ _**.**

After _ _[*e.g., presentation of both plaintiff's and defendant's evidence*]_ _**, counsel for** _ _[*plaintiff/defendant*]_ _ **moved for directed verdict on the grounds that** _ _[*specify*]_ _**. The court directed a verdict on the merits in favor of** _ _[*plaintiff/defendant*]_ _**, and the jury returned the verdict accordingly.**

IT IS ORDERED that:

[*Option 1: Plaintiff*]

1. Plaintiff recover judgment on the merits against defendant, _ _[*name*]_ _**, in the amount of** _ _[*dollar amount*]_ _**; and**

2. Plaintiff recover against defendant costs in the amount of _ _[*dollar amount*]_ _**, with interest at an annual rate of** _ _[*e.g., 10*]_ _ **percent from the date of entry of this judgment until paid.**

[*Option 2: Defendant*]

1. Plaintiff recover nothing from defendant; and

2. Defendant recover against plaintiff costs in the amount of _ _[*dollar amount*]_ _**.**

[*Continue*]

Date: _ _ _ _ _ _ _____
Judge

Copies: Original (filed with court clerk with proof of service); copies for service (one for each attorney of record and unrepresented party); office copies.

Comment: For discussion of directed verdict motions, see §§18.35–18.56.

§18.131 D. Form: Notice of motion to reopen case (CCP §607(6))

_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
Attorney For _ _[*e.g., plaintiff*]_ _**,** _ _[*name*]_ _

_ _ _ _ _ _ **Court, County of** _ _ _ _ _ _

_ _[*Name(s)*]_ _ **Plaintiff(s)** **vs** _ _[*Name(s)*]_ _ **Defendant(s)**	**No.** _ _ _ _ _ _ **NOTICE OF MOTION AND MOTION TO REOPEN CASE (CCP §630(6)); SUPPORTING MEMORANDUM; DECLARATION OF** _ _[*NAME*]_ _ **Hearing:** _ _[*date; time*]_ _ **Dep't:** _ _[*number*]_ _ **Hearing judge:** _ _[*if known*]_ _ **Action filed:** _ _[*date*]_ _ **Trial date:** _ _ _

PLEASE TAKE NOTICE that on the above date and time, or as soon thereafter as the matter can be heard, _ _[*plaintiff/defendant*]_ _, _ _[*name*]_ _, will move under Code of Civil Procedure section 607(6) to reopen the case and request an order setting aside submission of the case to allow the introduction of additional evidence. This motion is made on the grounds that _ _[*specify, e.g., material oral and documentary evidence*]_ _ were not presented at the trial because _ _[*state reason, e.g., evidence was newly discovered*]_ _. The oral evidence consists of _ _[*describe*]_ _ on the issue of _ _[*identify*]_ _. The documentary evidence consists of _ _[*describe*]_ _ on the issue of _ _[*identify*]_ _.

This motion is based on all pleadings, records, and papers on file in this action; and the attached supporting memorandum and declaration of _ _[*name*]_ _.

Date: _ _ _ _ _ _ _ _[*Signature*]_ _
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

Copies: Original (filed with court clerk with proof of service); copies for service (one for each attorney of record and unrepresented party); office copies.

Comment: If a motion to reopen has been made after submission of the case in a bench trial, it should be a noticed motion, and a supporting memorandum and a declaration must be attached. See Cal Rules of Ct 3.1113. If the parties are still before the court, the motion need not be written. On making oral motion to reopen, see §18.77.

E. Amending pleadings to conform to proof

§18.132 1. Form: Motion for leave to amend pleadings to conform to proof

_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
Attorney For _ _[*e.g., plaintiff*]_ _, _ _[*name*]_ _

_ _ _ _ _ _ Court, County of _ _ _ _ _ _

_ _[*Name(s)*]_ _ **Plaintiff(s)**	**No.** _ _ _ _ _ _
vs	**MOTION FOR LEAVE TO AMEND PLEADINGS TO CONFORM TO PROOF; SUPPORTING MEMORANDUM; DECLARATION OF** _ _[*NAME*]_ _
_ _[*Name(s)*]_ _ **Defendant(s)**	

_ _[*Plaintiff/Defendant*]_ _, _ _[*name*]_ _, moves the court for an order granting leave to amend the pleadings to conform to proof. This motion is made under Code of Civil Procedure section _ _[*e.g., 469/470/473/576*]_ _ on the ground that there is a variance between the pleadings and the proof in that _ _[*identify allegations in pleading at variance with proof*]_ _.

This motion is based on all pleadings, papers, and records in this action; the evidence presented at trial; _ _[*and*]_ _ the attached supporting memorandum and declaration of _ _[*name*]_ _; _ _[*any evidence received at the hearing*]_ _; and the attached _ _[*identify proposed amendment to pleading or amended pleading*]_ _.

Date: _ _ _ _ _ _

_ _[*Signature*]_ _
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

Copies: Original (filed with court clerk with proof of service); copies for service (one for each attorney of record and unrepresented party); office copies.

Comment: This motion is usually made orally. Counsel may prepare a written supporting memorandum. See §18.116. A declaration should state facts showing that amending the pleadings would further justice. The proposed amendment to the pleading or the proposed amended pleading should be attached as an exhibit to the moving papers. See §18.115.

§18.133 2. Form: Order granting leave to amend

_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
Attorney For _ _[*e.g., plaintiff*]_ _, _ _[*name*]_ _

_ _ _ _ _ _ Court, County of _ _ _ _ _ _

_ _[*Name(s)*]_ _ **Plaintiff(s)**	**No.** _ _ _ _ _ _
vs	**MOTION FOR LEAVE TO AMEND PLEADINGS TO CONFORM TO PROOF; SUPPORTING MEMORANDUM; DECLARATION OF** _ _[*NAME*]_ _
_ _[*Name(s)*]_ _ **Defendant(s)**	

The motion of _ _[*plaintiff/defendant*]_ _, _ _[*name*]_ _, for leave to amend the pleadings to conform to the proof under Code of Civil Procedure section *e.g., 469/470/473/576* was heard on _ _[*date*]_ _ during the _ _[*jury/court*]_ _ trial of this action. Appearing as attorneys were: _ _[*List names of attorneys and parties represented by each*]_ _.

IT IS ORDERED that the _ _[*identify amendment to pleading or amended pleading*]_ _ **be filed, a copy of which was** _ _[*e.g., presented to the court during argument on this motion*]_ _**, and that the** _ _[*identify original pleading*]_ _ **be thus amended.**

Date: _ _ _ _ _ _ _____
Judge

Copies: Original (filed with court clerk with proof of service); copies for service (one for each attorney of record and unrepresented party); office copies.

Comment: The order may be attached to counsel's supporting papers, submitted to the court after the motion is granted during argument, or later drafted and submitted for the judge's signature when the amendment is filed. See §18.115.

§18.134 3. Form: Amendment to pleading

_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
Attorney For _ _[*e.g., plaintiff*]_ _**,** _ _[*name*]_ _

_ _ _ _ _ _ Court, County of _ _ _ _ _ _

_ _[*Name(s)*]_ _ **Plaintiff(s)**	**No. _ _ _ _ _ _**
vs	**AMENDMENT TO** _ _[*TITLE OF PLEADING*]_ _
_ _[*Name(s)*]_ _ **Defendant(s)**	

Having obtained leave of the court to amend the _ _[*identify pleading*]_ _ **on file in this action to conform to proof,** _ _[*plaintiff/defendant*]_ _**,** _ _[*name*]_ _**, amends the pleading as follows:**

[*Specify amendments such as the following*]

1. Deletes paragraph _ _ _, lines _ _ _, on page _ _ _.

2. Substitutes the following new paragraph: _ _[*State language of amendment*]_ _**.**

[*Continue*]

Date: _ _ _ _ _ _ _ _[*Signature*]_ _
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

Copies: Original (filed with court clerk with proof of service); copies for service (one for each attorney of record and unrepresented party); office copies.

Comment: If alterations of the original pleading are extensive, counsel should file an entirely different or amended pleading superseding the original pleading. On methods of amending pleadings, see §18.115.

25

Motions After Trial

John S. Gilmore

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§25.1 I. SCOPE OF CHAPTER

Motions after trial attacking the judgment or verdict require careful consideration and, in many instances, strict adherence to procedural rules and time requirements. This chapter covers

- Motions for judgment notwithstanding the verdict (JNOV) (see §§25.2–25.21);

- Motions for new trial (see §§25.22–25.71);
- Motions to vacate and enter a different judgment (see §§25.72–25.77);
- Motions to correct a clerical error (see §§25.78–25.83); and

? Other postjudgment proceedings and motions, *e.g.*, involving public entities, medical malpractice actions (see §§25.84–25.89).

Motions for judgment when the jury is discharged without rendering a verdict (CCP §630(f)) are discussed in §25.9 and §§18.40–18.41.

NOTE► In voluntary expedited jury trials, the parties agree not to make any posttrial motions, except for motions relating to attorney fees or costs, motions to correct a judgment for clerical error, and motions to enforce a judgment. CCP §630.09(c).

On correcting or modifying judgments, see §§23.29–23.31. On motions to vacate default and judgment by default, motions to vacate based on extrinsic fraud or mistake, or attack by independent action, see California Civil Procedure Before Trial §§38.62–38.86 (4th ed Cal CEB). See also 8 Witkin, California Procedure, *Attack on Judgment in Trial Court* (5th ed 2008).

II. MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT (JNOV)

A. Description and use

§25.2 1. Motion for JNOV tests sufficiency of evidence presented during trial

The statutory motion for judgment notwithstanding the verdict (JNOV) authorizes a trial court to grant judgment in favor of a party against whom the jury has rendered a verdict whenever a motion for directed verdict should have been granted if that motion had been made. CCP §629(a); *Beavers v Allstate Ins. Co.* (1990) 225 CA3d 310, 327. The denial of a party's motion for directed verdict does not prevent the court from later granting a motion for JNOV. See *Rollenhagen v City of Orange* (1981) 116 CA3d 414, 417, disapproved on other grounds in *Brown v Kelly Broadcasting Co.* (1989) 48 C3d 711, 738; *Teich v General Mills, Inc.* (1959) 170 CA2d 791, 794.

A JNOV motion may be granted only when no substantial evidence supports the jury's verdict. It is the equivalent of reversal of a judgment for insufficiency of the evidence as a matter of law. See *McCoy v Hearst Corp.* (1991) 227 CA3d 1657, 1663. In effect, a JNOV motion tests whether the facts in evidence constitute a prima facie case or a defense as a matter of law. For purposes of the motion, all facts supporting the verdict are presumed true. See §25.5.

Tactically, a motion for JNOV is usually made at the same time as a motion for new trial. See §25.10.

§25.3 2. Motion for directed verdict not required beforehand

A motion for directed verdict is not a prerequisite to a JNOV motion. See CCP §629. Even if a motion for directed verdict was denied earlier, the court can still grant a motion for JNOV. See §25.2.

§25.4 3. Who can move for JNOV

The motion may be made by a party or by the court on its own motion after the verdict has been rendered. CCP §629(a).

Either defendant or plaintiff may move for JNOV. See CCP §629; *Moore v City & County of San Francisco* (1970) 5 CA3d 728, 734.

B. Grounds for motion

§25.5 1. Jury verdict not supported by substantial evidence

The grounds for granting a JNOV motion are the same as those for granting a motion for directed verdict. See §§18.35–18.56. The motion may be granted only when no substantial evidence supports a jury's verdict. See *Sweatman v Department of Veterans Affairs* (2001) 25 C4th 62, 68; *Wolf v Walt Disney Pictures & Television* (2008) 162 CA4th 1107, 1138; *Teich v General Mills, Inc.* (1959) 170 CA2d 791, 794.

To grant the motion, the court must use the following test: The court finds that there is no substantial evidence to support the verdict, even when it gives the prevailing party's evidence and the legitimate inferences drawn from that evidence all the value to which they are legally entitled, and disregards conflicting evidence on behalf of the moving party. See *Quintal v Laurel Grove Hosp.* (1964) 62 C2d 154, 159; *McFarland v Voorheis-Trindle Co.* (1959) 52 C2d 698, 703; *Reynolds v Willson* (1958) 51 C2d 94, 99.

Viewed from another perspective, the court must deny the motion when it finds that "substantial evidence" supports the verdict (with evidence and reasonable inferences that can be drawn from the evidence) viewed in the light most favorable to the prevailing party, while disregarding conflicting evidence on behalf of the party making the motion. See *Hauter v Zogarts* (1975) 14 C3d 104, 110; *Begnal v Canfield Assocs.* (2000) 78 CA4th 66, 72; *Campbell v Cal-Gard Sur. Servs., Inc.* (1998) 62 CA4th 563, 569; *Arthur v Avon Inflatables, Ltd.* (1984) 156 CA3d 401, 406.

The party opposing a JNOV motion may rely on favorable portions of testimony elicited from the cross-examination of adverse witnesses under Evid C §776. *Casetta v United States Rubber Co.* (1968) 260 CA2d 792, 799; *Reynolds v Natural Gas Equip.* (1960) 184 CA2d 724, 731. The evidence or reasonable inferences drawn from it must be presumed true because any conflicting evidence must be resolved in favor of the party opposing a JNOV motion. See *Hauter v Zogarts, supra*; §25.6.

The motion should be granted when the evidence does not support a special finding of either legal cause or damages. If that is the case, there would also be no substantial evidence to support even a general verdict. *Sukoff v Lemkin* (1988) 202 CA3d 740, 744 n3 (mere probability that event would have happened does not support claim for damages). On special verdicts and special findings supporting a general verdict, see chap 22.

PRACTICE TIP► If any substantive evidence supports an award for punitive damages, a JNOV motion must be denied. But counsel should consider a motion for new trial on the ground of excessive damages. See *Teitel v First Los Angeles Bank* (1991) 231 CA3d 1593, 1603 (court suggested JNOV appropriate when amount of damages not in dispute). This is one example of why experienced trial lawyers usually move for JNOV and for new trial at the same time. See §25.10.

§25.6 2. No other reasonable conclusion may be drawn from evidence; judge cannot weigh evidence

The motion may be granted only when as a matter of law no other reasonable conclusion is legally deducible from the evidence, and any other holding would be so lacking in evidentiary support that a reviewing court would be compelled to reverse. *Sukoff v Lemkin* (1988) 202 CA3d 740, 743; *Valdez v J.D. Diffenbaugh Co.* (1975) 51 CA3d 494, 513; *Moore v City & County of San Francisco* (1970) 5 CA3d 728, 733.

In considering the evidence, the court may not *weigh* it. *Quintal v Laurel Grove Hosp., supra*. It must *accept* the evidence tending to support the verdict as true—unless it is "inherently incredible" on its face. *Borba v Thomas* (1977) 70 CA3d 144, 152. Similarly, the court may not judge the credibility of witnesses. *Clemmer v Hartford Ins. Co.* (1978) 22 C3d 865, 877; *Hauter v Zogarts* (1975) 14 C3d 104, 110; *Carter v CB Richard Ellis, Inc.* (2004) 122 CA4th 1313, 1320.

§25.7 3. Genuine verdict required

A motion for JNOV assumes that "a verdict has been rendered." CCP §629(a). The motion is not proper when the verdict is so incomprehensible, contradictory, or unintelligible that the jury's intent cannot be ascertained. See *Hallinan v Prindle* (1934) 220 C 46, 55.

The court needs a verdict on which a motion for JNOV can be entertained. *Mish v Brockus* (1950) 97 CA2d 770, 776.

§25.8 a. When verdict defective

If the jury returns an ambiguous or defective verdict, the proper remedy is to request—before the jury is discharged—the trial court to send the jury out for further deliberations to correct the verdict. See CCP §619. On curing verdicts, see §§22.24–22.31. If counsel makes no objection to a verdict that could have been cured before the jury's discharge, waiver may have occurred. *Woodcock v Fontana Scaffolding & Equip. Co.* (1968) 69 C2d 452, 456 n2. On waiver, see §22.31.

When the jury has been discharged and waiver has *not* occurred, the trial judge may interpret an ambiguous verdict "from its language considered in connection with the pleadings, evidence and instructions." An appellate court may also attempt to determine a correct interpretation of the verdict, if possible, but reversal is required when a "hopeless ambiguity" exists. *Woodcock v Fontana Scaffolding & Equip. Co., supra* (verdict held not ambiguous); *Telles v Title Ins. & Trust Co.* (1969) 3 CA3d 179, 187 (trial court erroneously interpreted verdict).

§25.9 b. Motion for judgment under CCP §630(f)

When the verdict is inconsistent or ambiguous after the jury is discharged, and grounds existed to grant a motion for directed verdict if one had been made, a motion for judgment can be made under CCP §630(f). See §§18.40–18.41 and form in §18.127.

NOTE► After the jury has been discharged, defects in the verdict may also become apparent that provide grounds for a motion for new trial. On impeaching the verdict on the ground of jury misconduct, see §§25.30–25.32.

C. Procedures

§25.10 1. Move for JNOV and new trial at same time

It is almost always to a party's advantage to move for JNOV and new trial simultaneously. A motion for JNOV does not extend the time for filing and serving a notice of intention to move for new trial (CCP §629(b)), and simultaneously moving for new trial allows the court flexibility to grant or deny either motion.

The code conforms the filing deadlines and procedures for both motions (as well as the motion to set aside and vacate the judgment; see §§25.75–25.77). See CCP §629(b) (JNOV motion must be made within period specified in CCP §659 (governing notice of intention to move for new trial); briefs and supporting documents must be served and filed within time limits set by CCP §659a (briefs and accompanying documents in motion for new trial); and hearing set in same manner as CCP §660 (hearing in motion for new trial)). See also *Catania v Halcyon S.S. Co.* (1975) 44 CA3d 348, 350; *Espinoza v Rossini* (1966) 247 CA2d 40, 45. On the time requirements for a JNOV, see §25.13.

If the trial court grants both motions, the order granting the motion for new trial is effective if judgment entered on the order granting JNOV is reversed on appeal. See CCP §629(d). Because of the narrow scope of the trial court's power on motions for JNOV, orders granting the motion are frequently reversed. If the trial judge has also granted a new trial, a motion on which the court has broader discretion, then that order stands and the case will be retried.

The court may also grant the JNOV motion on one or more issues, and new trial on other issues. When there are several issues, such as liability and damages (or negligence, intentional conduct, and damages), the trial court is free to grant JNOV on one or more issues and new trial on the others. For example, the trial court has the power to grant JNOV on a single issue such as punitive damages. *Beavers v Allstate Ins. Co.* (1990) 225 CA3d 310, 332. See §25.18.

§25.11 2. All issues must be determined before motion may be made in bifurcated trial

In bifurcated trials (see CCP §598), motions for JNOV, like motions for new trial, cannot be made until all issues in the bifurcated trial have been determined. The court does not have jurisdiction to enter JNOV if the plaintiff wins the liability phase, and an unsuccessful defendant cannot make the motion until after the trial on damages is concluded. See *Auto Equity Sales, Inc. v Superior Court* (1962) 57 C2d 450, 458; *Ochoa v Dorado* (2014) 228 CA4th 120, 131; *Meyser v American Bldg. Maintenance, Inc.* (1978) 85 CA3d 933, 937.

§25.12 3. Written motion required

A written motion for JNOV is required. See CCP §§629, 659; *Younesi v Lane* (1991) 228 CA3d 967, 971, disapproved on other grounds in *Van Beurden Ins. Servs., Inc. v Customized Worldwide Weather Ins. Agency, Inc.* (1997) 15 C4th 51, 63 (oral motion invalid). As with other motions, a supporting memorandum must be attached. Cal Rules of Ct 3.1113(a); *Quantum Cooking Concepts, Inc. v LV Assocs., Inc.* (2011) 197 CA4th 927, 932 (Rule 3.1113's requirement of supporting memorandum applies to posttrial motions). It is also good practice to submit a proposed order with the moving papers. For forms of motion and order, see §§25.90–25.91.

PRACTICE TIP► It is also a good idea to speak with the judge's clerk about filing the papers and the date of the hearing. Unlike law and motion matters, a motion for JNOV is generally heard by the trial judge. On notice and other time requirements, see §25.13.

§25.13 4. Time requirements

A motion for JNOV is subject to strict time limitations: It must be made within the period allowed under CCP §659 for filing and serving notice of intention to move for new trial. CCP §629(b). Thus, it must be filed either:

- Before the entry of judgment; or
- Within 15 days of the date the court clerk mailed notice of entry of judgment under CCP §664.5, within 15 days of service of written notice of entry of judgment by any party, or within 180 days after the entry of judgment—whichever is earliest.

See *Palmer v GTE Cal., Inc.* (2003) 30 C4th 1265, discussed in §25.52, 25.53.

A motion for JNOV or a notice of intention to move for a new trial filed before the time permitted by statute is premature and of no effect; a trial court ruling based on such a motion is void. *Ochoa v Dorado* (2014) 228 CA4th 120, 131.

Filing a motion for JNOV does not stay entry of judgment (CCP §664), nor does it extend the time for filing and serving a notice of intention to move for new trial (CCP §629(b)). See *Pratt v Vencor, Inc.* (2003) 105 CA4th 905, 909.

Counsel for a party moving for JNOV must give at least 16 court days' notice of the hearing, and an additional 5 calendar days' notice if service is by mail when the place of mailing and the place of address are in California. See CCP §1005(b). All papers opposing the motion must be filed and served at least 9 court days before the hearing unless the court orders a shorter time. CCP §1005(b). Opposition and reply

motion or reply papers must be served by personal delivery, facsimile transmission, express mail, or other statutory means reasonably calculated to ensure delivery to the other party not later than the close of the next business day after the time the opposing papers or reply papers are filed. CCP §1005(c). Code of Civil Procedure §1013, which extends the time within which a right may be exercised, does *not* apply to a notice of motion, papers opposing a motion, or reply papers.

The moving, opposing, and reply briefs and any accompanying documents must be filed and served within the time limits set in CCP §659a (time limits for briefs and accompanying documents in motion for new trial). CCP §629(b). Under these limits, the moving party must serve and file any brief and accompanying documents, including affidavits, within 10 days after filing the notice; the opposing party must serve and file any opposing briefs and accompanying documents, including counteraffidavits, within 10 days after receiving service of the moving party's brief; and the moving party has 5 days to file a reply after receiving service of the opposing party's brief. These deadlines may be extended for up to 10 days for good cause shown or by written stipulation of the parties. CCP §659a; see §25.59.

The hearing on a motion for JNOV must be set in the same manner as the hearing on a motion for a new trial under CCP §660. CCP §629(b). See §§25.52–25.56. If one or more parties have made motions for JNOV and for new trial, the hearing is set by the court clerk at the same time. CCP §§629(b), 661. Hearing both motions together conserves preparation and travel time of counsel and allows the trial judge to concentrate on all the issues at a single hearing. See §25.10.

If the party moving for JNOV also serves notice of intention to move for new trial, an additional 15 days must be allowed for other parties to file their notices of intention to move for new trial. For further discussion of time requirements on motions for new trial, see §§25.52–25.56.

§25.14 5. Motion made by court subject to different filing and notice requirements

When the trial court moves for JNOV, it need give only 5 days' notice. CCP §629. The court is not bound by the time requirements of CCP §§629 and 659, and may make the motion at any time before its power to rule on a new trial motion expires. CCP §629.

The court has the power to rule on a motion for new trial for 60 days after the clerk or a party mails a notice of the entry of judgment, whichever notice is mailed earlier, or, if no notice has been given, 60 days after the first notice of intention to move for new trial was filed. CCP §660.

NOTE► The California Supreme Court has granted review in *Webb v Special Elec. Co.* (review granted June 12, 2013, S209927; superseded opinion at 214 CA4th 595) to determine whether the trial court's decision to treat the defendant's pretrial motions for nonsuit and for a directed verdict as a JNOV was procedurally improper.

D. Trial judge's ruling on motion

§25.15 1. After deadline for filing and serving new trial motion

Whether the court or a party moves for JNOV, the court is prohibited from ruling on the JNOV motion until the time for the parties' filing and serving a motion for new trial has run. CCP §§629, 659. See §25.13.

If a motion for new trial is also filed, both motions must be ruled on at the same time. CCP §629. This provision, however, is directory rather than mandatory, so that separate rulings on each motion made within the requisite time period constitute substantial compliance. *Espinoza v Rossini* (1966) 247 CA2d 40, 45.

§25.16 2. Before time to rule on new trial motion expires

The court must rule on the motion for JNOV before the time for ruling on the motion for new trial has expired. CCP §§629(b), 660; *Davcon, Inc. v Roberts & Morgan* (2003) 110 CA4th 1355, 1362; *Sturgeon v Leavitt* (1979) 94 CA3d 957, 961.

The court has the power to rule on a motion for new trial for 60 days after the clerk or a party mails a notice of the entry of judgment, whichever notice is mailed earlier, or, if no notice has been given, 60 days after the first notice of intention to move for new trial was filed. CCP §660. See *Davcon, Inc. v Roberts & Morgan, supra*.

A "ruling" on the motion is defined as an order that is:

- Entered in the permanent minutes of the court; or
- Signed by the trial judge and filed with the clerk.

CCP §660; *Catania v Halcyon S.S. Co.* (1975) 44 CA3d 348, 350.

PRACTICE TIP► Be sure the court rules on the motion as defined above before the 60-day period expires. If the court has not ruled on the motion for JNOV within that period, the effect is a denial of the motion. CCP §§629, 660.

§25.17 3. Process judgment form without delay

If the motion is granted, it is good practice to present a form of judgment to the court for signature as soon as possible after the "ruling" is made. See §25.16. When that judgment is signed and entered after the applicable time period has run (see §25.14), CCP §660 is not violated as long as the order appears in the permanent minutes of the court. See *Catania v Halcyon S.S. Co.* (1975) 44 CA3d 348, 350.

It is important for the prevailing party to process the form of judgment without delay because the court is entitled to reconsider its order before the entry of judgment on the order, if the time within which the court must rule on the motion has not expired. See CCP §629. See *Jones v Sieve* (1988) 203 CA3d 359, 369–370. For form of judgment, see §23.37.

§25.18 4. Order granting JNOV may be limited to certain issues

An order granting JNOV may be limited to certain issues. See *Mason v Mercury Cas. Co.* (1976) 64 CA3d 471 (motions for JNOV and new trial granted on punitive damages issue only); *Gordon v Strawther Enters.* (1969) 273 CA2d 504, 516 (liability only; damages to be determined by court or jury).

If judgment on the jury verdict was for the defendant, the trial court cannot grant a plaintiff's motion for JNOV and assess damages when they are unliquidated. But the court can grant the motion for JNOV on liability and order a new trial on damages if plaintiff's counsel has also moved for a new trial. See *Spillman v City & County of San Francisco* (1967) 252 CA2d 782, 786.

E. Review on appeal

§25.19 1. Merits of ruling on motion can be reached on appeal from judgment

An order granting a motion for JNOV is not appealable. See *Horton v Jones* (1972) 26 CA3d 952, 956 (motion for JNOV denied after liability phase of bifurcated trial; no appellate jurisdiction, even with parties' consent, because no final judgment).

The merits of that ruling may only be reached on appeal from the resulting judgment. See *Jordan v Talbot* (1961) 55 C2d 597, 602 (no showing that JNOV was entered); *Herman v Shandor* (1970) 8 CA3d 476, 479 (JNOV not entered).

§25.20 2. Judgments notwithstanding the verdict are frequently reversed

When motions for JNOV are granted, the judgments entered are as vulnerable on appeal as the judgments entered on motions for nonsuit and directed verdict. On nonsuit and directed verdict motions generally, see chap 18. The appellate court uses the same test as the trial court, reading the record in the light most advantageous to appellant, resolving all conflicts in that party's favor, and giving appellant the benefit of all reasonable inferences in support of the jury's original verdict. *Henrioulle v Marin Ventures, Inc.* (1978) 20 C3d 512, 515; *Brennan v Townsend & O'Leary Enters., Inc.* (2011) 199 CA4th 1336, 1345; *McCown v Spencer* (1970) 8 CA3d 216, 226. See §25.5.

Judgments notwithstanding the verdict are often reversed on the ground, contrary to the trial court's determination, that there was sufficient evidence to support the jury's verdict. See, *e.g.*, *Henrioulle v Marin Ventures, Inc., supra* (JNOV reversed because exculpatory clause in residential lease found unenforceable); *Teitel v First Los Angeles Bank* (1991) 231 CA3d 1593, 1603 (JNOV reversed and judgment reinstated; remanded to reconsider portion of motion for new trial).

§25.21 3. Denial of motion will be upheld on appeal if substantial evidence supports verdict

The scope of appellate review of a trial court's denial of motion for JNOV is to determine whether there is any substantial evidence, whether contradicted or uncontradicted, that supports the jury's conclusion, and, if so, to uphold the trial court's denial. *Pusateri v E. F. Hutton & Co.* (1986) 180 CA3d 247, 250. See *Smith v ACandS, Inc.* (1994) 31 CA4th 77, 87, disapproved on other grounds in *Camargo v Tjaarda Dairy* (2001) 25 C4th 1235, 1245 n10 (denial reversed; insufficient evidence of causation). See §25.5.

III. MOTION FOR NEW TRIAL

A. Description and use

§25.22 1. Motion appropriate only if injustice occurred

A motion for new trial requests the trial court to reexamine an issue of fact or law. See CCP §§656–662.5, 914; *Malkasian v Irwin* (1964) 61 C2d 738, 745.

When a new trial is ordered, the court must have examined the entire cause, including the evidence, and concluded that a miscarriage of justice occurred. Cal Const art VI, §13. The error must be prejudicial, *i.e.*, a different result would have been probable if the error had not occurred. See CCP §475 (no presumption that an error is prejudicial; both prejudice and substantial resulting injury must be shown); *Olinger v Pacific Greyhound Lines* (1935) 7 CA2d 484, 488. See also *Mercer v Perez* (1968) 68 C2d 104, 111 (ruling for new trial assumes finding that miscarriage of justice occurred); *English v Lin* (1994) 26 CA4th 1358, 1364 (alleged juror misconduct that does not result in actual prejudice does not warrant new trial). For further discussion, see 8 Witkin, California Procedure, *Attack on Judgment in Trial Court* §§131–132 (5th ed 2008).

A party may raise legal theories in a new trial motion that were not relied on during trial to urge that the judgment was against the law or inconsistent with the facts, as long as the new theory presents a question of law to be applied to undisputed facts in the record. *Hoffman-Haag v Transamerica Ins. Co.* (1991) 1 CA4th 10, 15.

Grounds for the motion are statutory only. *Fomco, Inc. v Joe Maggio, Inc.* (1961) 55 C2d 162, 166. See CCP §§657–657.1, 914; §§25.26–25.50. Because the court does not have inherent power to grant a new trial, statutory requirements must be followed precisely. *Mercer v Perez* (1968) 68 C2d 104, 118 (procedural steps for making and ruling on motion are mandatory and must be strictly followed). See *Cembrook v Sterling Drug Inc.* (1964) 231 CA2d 52, 66. But see *Shapiro v Prudential Prop. & Cas. Co.* (1997) 52 CA4th 722, 726 (granting new trial on damages where plaintiff did not move for new trial, but

did move to correct the verdict and for partial JNOV; court of appeal found that these motions "placed the issue of a new trial before the court").

Waiver of the grounds for a new trial may have occurred if counsel did not properly object to the error during trial, move to strike, or request the court to admonish the jury if prompt action could have cured the misconduct or error. On making trial objections and protecting the record, see chap 15.

A new trial motion may be used to challenge decisions made in many types of actions or special proceedings, not just to attack the verdict or decision rendered in a jury or bench trial. A motion for new trial is appropriate after a judgment of dismissal, nonsuit, or directed verdict, or after a ruling sustaining a demurrer to the complaint (*Carney v Simmonds* (1957) 49 C2d 84, 88); after a ruling granting a summary judgment motion (*Aguilar v Atlantic Richfield Co.* (2001) 25 C4th 826, 858); or after a judgment on the pleadings (*Olson v County of Sacramento* (1969) 274 CA2d 316).

NOTE► Carefully analyze the effect of a motion for new trial with regard to default judgments. Under some circumstances, a motion for new trial may be used to attack default judgments for excessive damages, or when the judgment (or decision) was against the law, if all jurisdictional time requirements can be met. See *Misic v Segars* (1995) 37 CA4th 1149, 1154. See also California Civil Procedure Before Trial §38.62 (4th ed Cal CEB).

§25.23 2. Compared with motion for JNOV

Unlike a motion for JNOV, a motion for new trial does not seek reversal of the judgment and entry of a new and different judgment at the trial court level. Instead, the purpose of a motion for new trial is to order retrial of some or all of the issues because of a miscarriage of justice. See Cal Const art VI, §13; §25.22.

If a party moves for both JNOV and a new trial, the court must rule on both motions at the same time. CCP §629(b). See *La Manna v Stewart* (1975) 13 C3d 413, 417. The filing deadlines for a new trial motion and a motion for JNOV are the same. See §25.10. On motions for JNOV, see §§25.2–25.21.

The trial court's discretion in ruling on a motion for new trial, and the grounds it may consider, are much broader than its discretion and the grounds it may consider when ruling on a motion for JNOV: The latter is effectively limited to instances in which no substantial evidence supports the verdict. *Yarrow v State* (1960) 53 C2d 427, 436. See §25.5.

The trial court has statutory power under CCP §629(a) to move on its own motion for JNOV (see §25.14), but only an aggrieved party may move for a new trial. *Schroeder v Auto Driveaway Co.* (1974) 11 C3d 908, 919; *Healy Tibbitts Constr. Co. v Employers' Surplus Lines Ins. Co.* (1977) 72 CA3d 741, 754; *Smith v Superior Court* (1976) 64 CA3d 434. See CCP §657.

§25.24 3. Partial new trial

A new trial may be granted on some issues and not others, in whole or in part. CCP §657. Available options include granting new trial on some issues and not on others, such as damages only. CCP §662.5. See *Liodas v Sahadi* (1977) 19 C3d 278, 285 (complete new trial if any doubt that new trial should be limited to damages).

PRACTICE TIP► Make clear to the court exactly what you are asking for. If a new trial on all the issues would not be in your client's best interest, be sure the court understands that you are not requesting an entire new trial. Your written motion should make it clear that you are moving for a partial new trial (*e.g.*, on the issue of damages only).

When a motion for new trial is made after a bench trial decision, the judge may change or add to the statement of decision, modify or vacate the judgment, grant a new trial on all or part of the issues or, instead of granting new trial, simply vacate and set aside the decision or judgment and reopen the case for

further proceedings. See CCP §662; *Oliver v Boxley* (1960) 181 CA2d 471, 476. On bench trials, see chap 24.

§25.25 4. Motion in bifurcated trial

A motion for new trial may not be made until all issues in a bifurcated case have been determined. For example, the plaintiff may move for a new trial if the defendant wins the liability phase, but the defendant must await damage results if the plaintiff prevails on liability. See Cal Rules of Ct 3.1591(c) ("Any motion for a new trial following a bifurcated trial must be made after all the issues are tried"); *Auto Equity Sales, Inc. v Superior Court* (1962) 57 C2d 450, 460; *Ochoa v Dorado* (2014) 228 CA4th 120, 131; *Fountain Valley Chateau Blanc Homeowner's Ass'n v Department of Veterans Affairs* (1998) 67 CA4th 743, 752 n3.

In bench trials, the motion is premature unless all issues have been tried. Cal Rules of Ct 3.1591. When separate issues are tried before different judges, each judge must hear and decide the new trial motion on the issues tried before that judge. Cal Rules of Ct 3.1591. On nullity of prematurely filed motion, see §25.54.

§25.26 B. Grounds for motion

Grounds for a motion for new trial are contained in CCP §§657–657.1 and 914 as follows:

- Irregularity in the proceedings of the court, jury, or adverse party, or any order of court or abuse of discretion by which any party was prevented from having a fair trial. CCP §657(1). See §§25.27–25.29.
- Jury misconduct. CCP §657(2). See §§25.30–25.32.
- Accident or surprise that ordinary prudence could not have prevented. CCP §657(3). See §§25.33–25.35.
- Newly discovered evidence, material for the moving party, that could not have been discovered with reasonable diligence and produced at trial. CCP §657(4). See §§25.36–25.37.
- Excessive or inadequate damages. CCP §657(5). See §§25.38–25.43.
- Insufficient evidence to justify the verdict or other decision. CCP §657(6). See §§25.44–25.45.
- Verdict or decision against the law. CCP §657(6). See §§25.46–25.47.
- Error in law occurring at the trial and excepted to by the moving party. CCP §657(7). See §§25.48–25.49.
- Inability to obtain a transcript because of the court reporter's death or disability or loss or destruction of the reporter's notes. CCP §§657.1, 914. See §25.50.

§25.27 1. Irregularity in proceedings or abuse of discretion (CCP §657(1))

A new trial may be granted for irregularity in the proceedings of the court, jury, or adverse party, or be based on any court order or abuse of discretion that prevented a party from having a fair trial. CCP §657(1).

"Irregularity" has been interpreted broadly to mean any overt act of the trial court, the jury, counsel, or an adverse party, amounting to misconduct, that violates a party's right to a fair and impartial trial. See, *e.g.*, *Montoya v Barragan* (2013) 220 CA4th 1215, 1229 (judge's verbal poll of how jurors voted, in absence of written verdict conforming with CCP §618, constituted irregularity in proceedings justifying grant of new trial); *Price v Giles* (1987) 196 CA3d 1469 (defense counsel's claim during jury argument that his own client had not been candid and had colluded with an opposing party constituted misconduct

toward his client, even though client prevailed, and it deprived plaintiff of fair trial); *Gotcher v Metcalf* (1970) 6 CA3d 96, 100 (reaffirming necessity of miscarriage of justice). *People ex rel Dep't of Pub. Works v Hunt* (1969) 2 CA3d 158, 172. For further discussion and examples of misconduct by court or counsel, see chap 16.

Although jury "irregularity" could include problems unrelated to jury misconduct (see §§25.30–25.31), the CCP §657(1)–(2) grounds of jury "irregularity" and "misconduct" overlap. For discussion and examples of jury misconduct during trial, see chap 17; during jury deliberations, see chap 21.

TACTICS► Whenever a motion for new trial is based on any action or impropriety of the jury, assert both grounds: jury irregularity (CCP §657(1)) and jury misconduct (CCP §657(2)). See, *e.g.*, *Williams v Bridges* (1934) 140 CA 537, 540 (false denial by juror of knowledge of case on voir dire).

§25.28 a. Prompt objection to impropriety may cure prejudicial effect and avoid waiver

Counsel should object promptly to misconduct by opposing counsel, another party, or the court; otherwise, the error may be waived. *Sabella v Southern Pac. Co.* (1969) 70 C2d 311, 319. It is rare that the court, when acting promptly and instructing the jury to disregard counsel's misconduct, cannot correct the prejudicial effect of an impropriety. *Horn v Atchison, T. & S.F. Ry.* (1964) 61 C2d 602, 610.

Evidentiary rulings that are patently unfair or that constitute an abuse of discretion are grounds for granting a new trial. See *Townsend v Gonzalez* (1957) 150 CA2d 241, 249 (admission of irrelevant evidence is grounds for new trial only if moving party was prejudiced). See also *Marriage of Carlsson* (2008) 163 CA4th 281, 294 (premature termination of trial that denied party right to present relevant evidence amounted to denial of due process, requiring retrial).

A new trial may be granted based on the rulings of another judge of the same court that did not occur during trial. *Sandco Am., Inc. v Notrica* (1990) 216 CA3d 1495, 1507 (discovery orders prevented party from having fair trial).

§25.29 b. New trial proper after flagrant misconduct even when party failed to object

When there are extreme and repeated instances of misconduct that the court either cannot correct or refuses to recognize, prejudicial misconduct may be present regardless of objections, admonitions, or their absence. *Hoffman v Brandt* (1966) 65 C2d 549; *Garden Grove Sch. Dist. v Hendler* (1965) 63 C2d 141; *Simmons v Southern Pac. Transp. Co.* (1976) 62 CA3d 341; *Love v Wolf* (1964) 226 CA2d 378.

When the trial court grants a motion for new trial after flagrant and repeated instances of misconduct, and the offended party failed to object at the trial, the appellate court will not use that failure to overturn the order for new trial unless the order was a clear abuse of discretion. See *Malkasian v Irwin* (1964) 61 C2d 738, 747; *Miller v National Am. Life Ins. Co.* (1976) 54 CA3d 331, 346.

2. Jury misconduct (CCP §657(2))

§25.30 a. Jury misconduct raises rebuttable presumption of prejudice

Litigants are entitled to an unbiased and unprejudiced jury. US Const amend VII; Cal Const art I, §16; *Hasson v Ford Motor Co.* (1982) 32 C3d 388, 416; *Weathers v Kaiser Found. Hosps.* (1971) 5 C3d 98, 110. On selecting an impartial jury, see chap 8.

When jury misconduct has been shown, a rebuttable presumption of prejudice arises. *People v Merriman* (2014) 60 C4th 1, 95 (juror concealing relevant facts during jury selection process or discussing case with nonjuror during trial). See also *People v Lavender* (2014) 60 C4th 679, 691 (in criminal case, jurors' discussion of defendant's failure to testify created presumption of prejudice, which could be

rebutted by evidence that jury was reminded not to consider that issue and lack of objective evidence that reminder would have been ineffective); *People v Vigil* (2011) 191 CA4th 1474, 1487 (juror conducted experiment outside courtroom); *Jones v Sieve* (1988) 203 CA3d 359, 365 (juror consulted reference volume for definition of central issue in trial and another related her personal experiences with medical condition at issue in trial); *Young v Brunicardi* (1986) 187 CA3d 1344 (judgment reversed based on retired police officer's representations to fellow jurors that defendant could not be negligent if he was not cited for Vehicle Code violation). See also *Hasson v Ford Motor Co., supra* (presumption not conclusive and may be rebutted by showing of lack of prejudice).

A motion for new trial based on juror misconduct must be based on a juror's overt acts that are objectively ascertainable, not on a juror's declaration setting forth his or her subjective reasoning process to impeach the verdict. *Locksley v Ungureanu* (1986) 178 CA3d 457 (assertions in same declaration that juror conducted experiments outside deliberations, however, could be considered in evaluating claim of juror misconduct). See *Enyart v City of Los Angeles* (1999) 76 CA4th 499 (defendant city entitled to new trial when jurors expressed negative bias against city and police officers during deliberations, but concealed such bias during voir dire).

A new trial will not be granted on the ground of jury misconduct when the misconduct was of such a trifling nature that it could not have been prejudicial to the moving party, and when it appears that the fairness of the trial was not affected by the alleged impropriety. *City of Pleasant Hill v First Baptist Church* (1969) 1 CA3d 384, 430. See also *Donovan v Poway Unified Sch. Dist.* (2008) 167 CA4th 567, 625. For examples of jury misconduct, see chap 17.

§25.31 b. Appellate review of entire record may rebut presumption of prejudice

When a review of the entire record rebuts the presumption of prejudice arising from a showing of jury misconduct, a motion for new trial on this ground may be denied. *Moore v Preventive Medicine Med. Group, Inc.* (1986) 178 CA3d 728 (issue raised by juror during deliberations regarding personal experience not covered in voir dire); *Wagner v Doulton* (1980) 112 CA3d 945 (juror made diagram; found to be based on evidence); *Kritzer v Citron* (1950) 101 CA2d 33, 36 (no prejudice shown when juror discussed case with physician but did not discuss information learned with other jurors or vote on verdict). See *Andrews v County of Orange* (1982) 130 CA3d 944, 960, disapproved on other grounds in *People v Nesler* (1997) 16 C4th 561 (review of entire record revealed that juror prejudgment and other misconduct resulted in miscarriage of justice requiring new trial).

Criteria for trial court examination of the entire record include the strength of the evidence that misconduct occurred, the nature and seriousness of the misconduct, and the probability that actual prejudice may have ensued. *Hasson v Ford Motor Co.* (1982) 32 C3d 388; *Whitlock v Foster Wheeler, LLC* (2008) 160 CA4th 149, 160; *Glage v Hawes Firearms Co.* (1990) 226 CA3d 314.

§25.32 c. Waiver for failure to advise court of jury impropriety

Failure to advise the court of jury impropriety, when counsel or a party knew in time to remedy the impropriety, waives the right to complain; a party may not remain silent, gambling on the outcome. *Sepulveda v Ishimaru* (1957) 149 CA2d 543, 547. See also *Donovan v Poway Unified Sch. Dist.* (2008) 167 CA4th 567, 625. On advising the court promptly of any jury impropriety, see §17.23; on jury misconduct during trial generally, see chap 17.

Jurors who read newspaper accounts of the trial violate their obligation not to receive information from sources outside the evidence. *People v Lessard* (1962) 58 C2d 447. For further discussion of the significance of juror exposure to media reports related to the trial, see §17.14.

PRACTICE TIP► If juror misconduct becomes known during trial, it does not necessarily require a new trial as long as the court-on its own, or at the request of counsel-gives appropriate instructions and

admonitions, and requires jurors to state at the time the verdict is rendered that they were not influenced by the misconduct. *People v Barton* (1995) 37 CA4th 709, 715.

3. Accident or surprise (CCP §657(3))

§25.33 a. Unexpected condition, diligence, and prejudice required

Counsel who asserts this ground in a motion for new trial must show that:

- An unexpected accident occurred;
- Diligence was exercised; and
- The accident was prejudicial, *i.e.*, but for the accident or surprise, a different and more favorable result could reasonably have been expected.

See *Wade v De Bernardi* (1970) 4 CA3d 967; *People ex rel Dep't of Pub. Works v Hunt* (1969) 2 CA3d 158, 168.

Accident or surprise necessary to warrant a new trial must be more than inadvertence or mistake. The accident or surprise must be a condition or situation in which a party is unexpectedly placed without being negligent and which ordinary prudence could not have guarded against. See CCP §657(3).

§25.34 b. Disfavored ground

The ground of accident or surprise is not favored. *Kauffman v De Mutiis* (1948) 31 C2d 429 (counsel failed to move for continuance after nonappearance of witness; order for new trial reversed); *Whitehill v United States Lines, Inc.* (1986) 177 CA3d 1201 (plaintiff's counsel refused trial court's offer to recess trial to depose defendant's surprise expert witness in order to obtain rebuttal evidence; denial of plaintiff's motion for new trial on ground of surprise affirmed). See *Garcia v County of Los Angeles* (1986) 177 CA3d 633.

Counsel must call the court's attention to the surprise as soon as it becomes apparent, rather than gambling on a favorable verdict before informing the court and only then attempting to remedy the situation. *People ex rel Dep't of Pub. Works v Hunt* (1969) 2 CA3d 158, 168.

§25.35 c. Case examples

Examples of surprise that have been held to provide sufficient grounds for granting a motion for new trial include the following:

- Complaint amended at conclusion of trial; party claiming surprise required to defend an entirely different issue. *Lavely v Nonemaker* (1931) 212 C 380.
- Unexpected introduction of unrecorded deed that moving party had no knowledge of. *Delmas v Martin* (1870) 39 C 555.
- Undisclosed expert witness unexpectedly called; moving party not prepared to cross-examine expert on use of improper calculations. *City of Fresno v Harrison* (1984) 154 CA3d 296, 300. But see *Stanchfield v Hamer Toyota, Inc.* (1995) 37 CA4th 1495 (no abuse of discretion in permitting expert to testify because there was enough time for expert to be redeposed before trial).
- Complete change of witness's testimony relied on to prove material fact that could not be proved by other testimony. *Whitfield v Debrincat* (1937) 18 CA2d 730.

Examples in which the surprise was held *not* to be sufficient ground for a new trial include the following:

- Failure to assert ground of surprise promptly. *State ex rel Dep't of Pub. Works v Donovan* (1962) 57 C2d 346, 351.
- Plaintiff's expert changed testimony on witness stand; no showing that adverse testimony substantially affected outcome. *Wade v De Bernardi* (1970) 4 CA3d 967, 971.
- Lack of diligence. *Marriage of Liu* (1987) 197 CA3d 143, 154; *People ex rel Dep't of Pub. Works v Hunt* (1969) 2 CA3d 158, 168; *Estate of Nessel* (1958) 164 CA2d 798, 803.

4. Newly discovered evidence (CCP §657(4))

§25.36 a. Evidence must be likely to produce different result

For counsel to assert this ground successfully, three separate elements must exist:

- The evidence must be **new** evidence, *i.e.*, different from and not cumulative of the evidence produced at trial. *Cameron v Crocker-Citizens Nat'l Bank* (1971) 19 CA3d 940, 947.
- The evidence must be **material**, *i.e.*, likely to produce a different result. *Plancarte v Guardsmark, LLC* (2004) 118 CA4th 640, 647 (employee's attorney fees paid by employer did not constitute ratification of employee's alleged wrongful acts). See also *Sherman v Kinetic Concepts, Inc.* (1998) 67 CA4th 1152, 1161; *Baron v Sanger Motor Sales* (1967) 249 CA2d 846, 859.
- Counsel must have exercised **reasonable diligence**. *Fomco, Inc. v Joe Maggio, Inc.* (1961) 55 C2d 162, 165 (matter of public record); *Andersen v Howland* (1970) 3 CA3d 380 (newly formed expert opinion). But see *Doe v United Air Lines* (2008) 160 CA4th 1500, 1509 (expert's declaration on mental disorder not tendered diligently).

The single most important reason for denying a motion for new trial on this ground is counsel's failure to seek the new evidence with reasonable diligence. See, *e.g.*, *Lewis v Agricultural Ins. Co.* (1969) 2 CA3d 285, 292 (witness could have easily been found before trial).

One court of appeal has upheld a trial court order granting a new trial motion based on new evidence that was discovered during jury deliberations, even though the party waited until after the jury returned an unfavorable verdict to move for a new trial. *Santillan v Roman Catholic Bishop of Fresno* (2012) 202 CA4th 708, 728. In upholding the trial court order, the appellate court relied on the late timing of the discovery and the trial court's statement that it would likely have denied a motion for continuance at that point, as well as the lack of case authority to guide the moving party when it discovered the evidence.

NOTE► Newly discovered impeachment evidence, if it is not cumulative, may be sufficient grounds for a new trial. *Lostritto v Southern Pac. Transp. Co.* (1977) 73 CA3d 737, 743 (witnesses with testimony contrary to plaintiff's position). But see *Bostard v Bostard* (1968) 258 CA2d 793, 798 (impeachment or contradictory evidence insufficient).

§25.37 b. Ground disfavored

Because judicial policy encourages litigants to exhaust every reasonable effort to produce all existing evidence on their behalf at trial, the courts disfavor the ground of newly discovered evidence. See *South Santa Clara Valley Water Conserv. Dist. v Johnson* (1964) 231 CA2d 388, 407.

5. Excessive or inadequate damages (CCP §657(5))

§25.38 a. Conditional order for new trial may be granted

The trial court has discretion to grant a conditional order for new trial on the ground of inadequate or excessive damages. CCP §662.5. If the ground is inadequate damages, the court may issue an order granting a new trial unless the party in whose favor the verdict was rendered consents to additional damages; if

the ground is excessive damages, the court may order a new trial unless the party consents to a reduction of damages. CCP §662.5(a)(1)–(2). The United States Supreme Court has held that punitive damage awards are permissible only when a meaningful posttrial review protects defendants from excessive awards. *Honda Motor Co. v Oberg* (1994) 512 US 415, 114 S Ct 2331.

If the court's conditional order does not specify a deadline for acceptance or rejection of the addition or reduction of damages, the deadline is 30 days from the date the clerk serves the order. CCP §662.5(b). Failure to respond within the deadline is considered a rejection, and a new trial on the issue of damages is automatically granted. CCP §662.5(b). A party that accepts a conditionally ordered addition or reduction of damages must also submit to the court a proposed amended judgment reflecting the modified judgment amount, as well as any other uncontested judgment awards. CCP §662.5(c).

The court has no power to order a reduction or an addition without a party's consent; if the court changes a jury verdict, it exceeds its jurisdiction. *Campain v Safeway Stores, Inc.* (1972) 29 CA3d 362, 366 n1 (new trial granted on damages only).

§25.39 b. Court has duty to weigh evidence

In considering a motion for new trial on this ground, the court has the responsibility to weigh the evidence on damages. The court has a positive duty to keep the verdict in line with the facts if, under the evidence, it believes that the verdict is excessive. *Handelman v Victor Equipment Co.* (1971) 21 CA3d 902, 909; *Thompson v John Strona & Sons* (1970) 5 CA3d 705. This duty applies equally to a damages award that the trial court believes is inadequate. See *Sanchez v Hasencamp* (1980) 107 CA3d 935; *Black v County of Los Angeles* (1976) 55 CA3d 920, 934; *San Francisco BART Dist. v Fremont Meadows, Inc.* (1971) 20 CA3d 797, 803.

The trial court, after independently assessing the evidence, must conclude that the trier of fact clearly should have reached a different result. *Fortman v Hemco, Inc.* (1989) 211 CA3d 241 ($23 million award not excessive in light of $16 million future medical expenses); *Bigboy v County of San Diego* (1984) 154 CA3d 397 (trial judge's "personal opinion" based on ranges of awards in other cases does not show that jury should have reached different verdict here). But see *Washington v Farlice* (1991) 1 CA4th 766, 777. See also *Las Palmas Assocs. v Las Palmas Ctr. Assocs.* (1991) 235 CA3d 1220, 1255 (appellate court reduced compensatory damages and then reduced punitive damages to same compensatory-to-punitive ratio of damages jury had awarded).

§25.40 c. Motion may be granted on issue of damages when liability correctly determined

It is proper for the court to grant a new trial on some issues and not others. *Little v Superior Court* (1961) 55 C2d 642. A limited order granting new trial only on the damages issue is improper when the question of liability is close and may not have been determined completely. *Thompson v Keckler* (1964) 228 CA2d 199, 209. Even if judgment is rendered in plaintiff's favor except for an inadequate amount of damages, it may be prejudicial to limit new trial to the issue of damages alone. 228 CA2d at 209.

When it appears that liability was correctly determined, a new trial limited to damages may be granted if it is clear that no injustice will result. *Torres v Automobile Club of S. Cal.* (1997) 15 C4th 771, 776; *Grail Semiconductor, Inc. v Mitsubishi Elec. & Electronics USA, Inc.* (2014) 225 CA4th 786, 794. When a limited retrial might prejudice either party, the court may resolve any doubts by granting a complete new trial. *Liodas v Sahadi* (1977) 19 C3d 278, 285 (error in damages instructions necessarily required trier of fact to consider liability as well as damages on retrial).

A new trial may also be granted on a portion of the damages issues, such as punitive damages. *Miller v National Am. Life Ins. Co.* (1976) 54 CA3d 331, 345. See *Brewer v Second Baptist Church* (1948) 32 C2d 791, 801 (limited retrial ordered on appeal); *Bullock v Philip Morris USA, Inc.* (2008) 159 CA4th 655, 696 (new trial on punitive damages only).

§25.41 d. Use of remittitur to reduce excessive damages limited

Code of Civil Procedure §662.5 limits the use of a remittitur to reduce excessive damages; it may not be used to reapportion liability among parties. *Schelbauer v Butler Mfg. Co.* (1984) 35 C3d 442 (improper for trial court to grant motion for new trial, subject to condition that, if plaintiff consented to reduction of verdict reflecting contributory negligence of both plaintiff and his employer, motion would be denied).

A new trial on apportionment of responsibility only may be appropriate in comparative negligence cases. See *O'Kelly v Willig Freight Lines* (1977) 66 CA3d 578.

§25.42 e. Appellate court may review conditional order under CCP §662.5

When a conditional order under CCP §662.5 is granted, and the party against whom it is made consents to additur or remittitur, appeal may be taken from the judgment entered. The appellate court will examine the trial court's stated grounds and its specification of reasons. See CCP §657. See §25.67.

NOTE► The issue of excessive damages is preserved on appeal by bringing a new trial motion on that ground. *Saari v Jongordon Corp.* (1992) 5 CA4th 797, 807.

Attacking damages as excessive or inadequate must be done in the trial court and cannot be raised for the first time on appeal. *Schroeder v Auto Driveaway Co.* (1974) 11 C3d 908, 918.

§25.43 f. Denial of motion difficult to overturn

Denial of a motion for new trial on grounds of excessive or inadequate damages is usually quite difficult to overturn on appeal. See, *e.g.*, *Seffert v Los Angeles Transit Lines* (1961) 56 C2d 498, 507 (excessive damages claimed; denial upheld); *DiRosario v Havens* (1987) 196 CA3d 1224 (same); *Sherwood v Rossini* (1968) 264 CA2d 926, 931 (inadequate damages claimed; denial upheld).

However, cases in which a denial of a motion for new trial was reversed include *Cunningham v Simpson* (1969) 1 C3d 301, 308 (excessive damages; denial of new trial reversed); *Little v Stuyvesant Life Ins. Co.* (1977) 67 CA3d 451, 469 (excessive punitive damages; denial of new trial reversed); and *Wetherbee v United Ins. Co. of Am.* (1968) 265 CA2d 921, 933 (excessive punitive damages of $500,000; denial of new trial reversed). Note that in *Wetherbee v United Ins. Co. of Am.* (1971) 18 CA3d 266, an award of $200,000 on retrial was affirmed.

6. Insufficiency of evidence (CCP §657(6))

§25.44 a. Court must reweigh evidence

The trial court has the power to set aside a verdict or decision not warranted by the evidence. CCP §657; *Perry v Fowler* (1951) 102 CA2d 808 (order for new trial upheld despite jury in retrial having returned same verdict as original jury).

In ruling on the evidence, the trial court reweighs the evidence. The judge may review conflicting evidence, determine its sufficiency, draw reasonable inferences from the evidence, and consider the credibility of witnesses. *Casella v SouthWest Dealer Servs., Inc.* (2007) 157 CA4th 1127, 1159; *Fountain Valley Chateau Blanc Homeowner's Ass'n v Department of Veterans Affairs* (1998) 67 CA4th 743, 751. A motion for new trial should be granted if the jury's verdict appears to be against the weight of the evidence. *Valdez v J.D. Diffenbaugh Co.* (1975) 51 CA3d 494, 512 (order for new trial on insufficiency of evidence affirmed).

§25.45 b. Order granting motion on this ground usually affirmed on appeal

This ground is frequently asserted and a new trial granted on insufficiency of the evidence is usually affirmed on appeal, as long as the statutory requirements for stating grounds and supplying an adequate

specification of reasons are followed. *Romero v Riggs* (1994) 24 CA4th 117, 121. On statement of grounds, see §25.66. On specification of reasons, see §25.67.

An order granting a new trial on this ground may be reversed only if there is no substantial evidence in the record to support the order. *Locksley v Ungureanu* (1986) 178 CA3d 457; *Valdez v J.D. Diffenbaugh Co.* (1975) 51 CA3d 494, 512.

NOTE► On appeal, the trial court's evaluation of witnesses' credibility is particularly significant when the higher court considers the sufficiency of the evidence. *Meiner v Ford Motor Co.* (1971) 17 CA3d 127.

7. Verdict or decision against law (CCP §657(6))

§25.46 a. Same test as for directed verdict and motion for JNOV

A general verdict is against law only when it is unsupported by any substantial evidence, *i.e.*, when the entire evidence justifies a directed verdict against the party in whose favor the verdict was returned. *Sanchez-Corea v Bank of America* (1985) 38 C3d 892; *Marriage of Beilock* (1978) 81 CA3d 713, 728; *Hilts v County of Solano* (1968) 265 CA2d 161, 177; *Kralyevich v Magrini* (1959) 172 CA2d 784, 789.

A verdict or decision against law is not widely used as a ground for a motion for a new trial, but it can apply to situations in which:

- There was a failure to make a finding on a material issue;
- The findings are irreconcilable or hopelessly inconsistent; or
- The evidence is not in conflict on any material point but is insufficient as a matter of law to support the verdict or decision.

See *Tagney v Hoy* (1968) 260 CA2d 372, 376.

§25.47 b. Court may not reweigh evidence

This ground is not appropriate when the trial court has weighed conflicting evidence. *Bray v Rosen* (1959) 167 CA2d 680, 683. Compare the ground of insufficiency of the evidence, in which the court has a duty to weigh the evidence. See §25.44.

A verdict is against law and contrary to jury instructions when the evidence on the point at issue is not in conflict and there are no facts under which the instruction warrants the verdict. *Morris v McCauley's Quality Transmission Serv.* (1976) 60 CA3d 964 (inconsistent verdicts); *Kaiser Cement & Gypsum v Allis-Chalmers Mfg. Co.* (1973) 35 CA3d 948, 958 (new trial reversed).

NOTE► A motion for new trial based on an error in the jury instructions is contemplated in the "error of law" ground. See §§25.48–25.49. A "verdict or decision against the law" assumes that the law in the jury instructions was correct.

8. Error in law (CCP §657(7))

§25.48 a. Motion granted only when court's rulings in error

A trial court has no power to grant a new trial unless there was, as a matter of law, error in its rulings. *Ramirez v USAA Cas. Ins. Co.* (1991) 234 CA3d 391, 397 (trial court properly ordered new trial when it realized that its ruling on interpretation of duty of insurance company was incorrect). Errors in law include improper admission or exclusion of evidence, misdirection of the jury, and errors of procedure. See *Hand Elec., Inc. v Snowline Joint Unified Sch. Dist.* (1994) 21 CA4th 862, 871 (erroneous jury instruction); *Bice v Stevens* (1954) 129 CA2d 342 (improper exclusion of evidence).

Counsel commonly assert this ground when errors in jury instructions have occurred. *Dabis v San Francisco Redev. Agency* (1975) 50 CA3d 704, 710 (order for new trial reversed because instruction correct as matter of law). A motion for new trial may be granted on this ground when the trial court failed to instruct the jury on each party's theories of the case that were supported by substantial evidence. See *Fish v Los Angeles Dodgers Baseball Club* (1976) 56 CA3d 620, 633, disapproved on other grounds in *Soule v General Motors Corp.* (1994) 8 C4th 548, 574; *Kimball v Whetzel* (1970) 10 CA3d 836. On jury instructions generally, see chap 20.

§25.49 b. Waiver for failure to assert error of law

If appropriate action to cure certain errors of law is not taken during trial, the right to appeal the error may be waived. See Evid C §§353–354 (necessity to object or move to strike erroneous evidence); *Taylor v Union Pac. R.R.* (1976) 16 C3d 893 (counsel failed to request trial court to withdraw previously granted waiver of jury trial).

Although instructions submitted by a party are deemed excepted to without an objection from opposing counsel (see CCP §§646–647), an instruction that is correct in law may not be attacked as too general or incomplete on appeal unless the aggrieved party requested an additional or qualifying instruction in the trial court. See *Agarwal v Johnson* (1979) 25 C3d 932, disapproved on other grounds in *White v Ultramar, Inc.* (1999) 21 C4th 563.

§25.50 9. Inability to obtain transcript (CCP §§657.1, 914)

On appeal, a new trial may be ordered when it is impossible to have a phonographic report of the trial transcribed because of the stenographic reporter's death or disability, or because the reporter's notes were lost or destroyed. CCP §§657.1, 914. A new trial ordered on this ground must be granted on all the issues. Section 914 does not authorize a new trial on some of the issues only. *Hennigan v United Pac. Ins. Co.* (1975) 53 CA3d 1, 7.

§25.51 C. Tactical considerations

After an adverse result, counsel and client should evaluate whether to move for a new trial, considering such questions as

- Is the motion necessary to protect issues on appeal, such as excessive or inadequate damages?
- If jury irregularity or misconduct is suspected, what investigative methods should be used to confirm it?
- What additional costs and fees will be incurred by making and prevailing on the motion?
- If the motion is granted in whole or in part, what is the probability of a favorable result on retrial?
- If the motion is lost, what preliminary recommendations can counsel make regarding appeal?

Some trial attorneys note potential errors during trial in a trial notebook or other record. If the trial was a jury trial, the foreperson or other jurors often consent to an interview about their deliberations and the particular points the jury relied on and rejected in reaching its verdict. Contact with jurors even after trial, however, should be made with care. See Cal Rules of Prof Cond 5–320(D) (attorney must not ask questions or make comments intended to harass or embarrass juror after discharge); *Lind v Medevac, Inc.* (1990) 219 CA3d 516, 520 (improper letter to jurors). On obtaining jurors' declarations, see §25.60.

Documents supporting a motion for new trial must be carefully prepared. If the motion is made, counsel should gather affidavits or declarations, and draft a supporting memorandum for the trial judge.

Do not assume that the trial court clerk has properly calendared hearing and ruling dates. It is a good idea to telephone periodically to follow up on the progress of the motion and to confirm the hearing date. On time requirements, see §§25.52–25.56.

D. Time requirements

§25.52 1. When notice of intention to move for new trial must be filed

The court clerk's notice of entry of judgment under CCP §664.5 commonly starts the running of two dependent time periods:

- The 15-day period for filing the notice of intention to move for a new trial (CCP §659(a)(2)); and
- The 60-day period within which the court must rule on the motion (CCP §660).

Notice of intention to move for a new trial must be filed and served on all adverse parties (CCP §659(a)(1)–(2))

- After the decision is rendered and before entry of judgment; or
- On whichever of the following dates is earliest:
  - Within 15 days after the date of the clerk's mailing of a CCP §664.5 notice of entry of judgment, or other appropriate notice of order;
  - Within 15 days after service by any party of notice of entry of judgment; or
  - Within 180 days after entry of judgment.

Written notice of entry of judgment is satisfied by serving a copy of the file-stamped judgment on the moving party. *Palmer v GTE Cal., Inc.* (2003) 30 C4th 1265, 1277 (document served on party who moves for new trial need not be separate document entitled "notice of entry of judgment"). The moving party's awareness of entry of judgment does not trigger the jurisdictional deadlines of CCP §659 or CCP §660. *Maroney v Iacobsohn* (2015) 237 CA4th 473, 481. If the clerk fails to mail the parties notice of entry of judgment and it appears that one party may move for a new trial, the nonmoving party should serve the notice to start the statutory deadlines running; the jurisdictional clock does not start running until the moving party is served with the notice.

Notice of intention to move for new trial is deemed to be a motion for new trial on all grounds stated in the notice. CCP §659(b).

After a party files a notice of intention to move for new trial, every other aggrieved party has 15 days after the notice is served to file and serve notice of intention to move for new trial. See CCP §§657, 659(a)(2). See checklist in §25.57.

PRACTICE TIP► In contemplating filing a notice of intention to move for new trial, calendar 15 days after (a) the clerk's mailing of a notice of entry of judgment under CCP §664.5, (b) service by another party of notice of entry of judgment, or (c) service by another party of notice of intention to move for new trial, whichever is earliest. In computing the time period, exclude the first day and include the last day. CCP §12; *Douglas v Janis* (1974) 43 CA3d 931, 935.

§25.53 2. When court must rule on motion

The court must rule on a motion for new trial, whatever date is earlier (a) within 60 days after the court clerk mails the notice of entry of judgment under CCP §664.5, (b) within 60 days after a party serves written notice of entry of judgment on the moving party, or (c) if no notice was given, then 60 days after the first notice of intention to move for new trial was filed. CCP §660.

When a notice of intention to move for new trial is filed before the notice of entry of judgment (see §§25.52, 25.54), the 60-day period in which the court must rule on the motion runs from the filing date of

the first notice of intention to move for a new trial. CCP §660; *Collins v Sutter Mem. Hosp.* (2011) 196 CA4th 1, 14; *Green v Laibco* (2011) 192 CA4th 441, 448; *Bunton v Arizona Pac. Tanklines* (1983) 141 CA3d 210. See checklist in §25.57.

Avoid forcing the court into a hasty decision, which would leave it little time to rule on the motion for new trial after hearing and argument. The following scenario may be illustrative.

EXAMPLE► The clerk mails the notice of entry of judgment under CCP §664.5, and 15 days later, the moving party files its notice of intention to move for new trial. The moving party then obtains a 20-day extension, extending the usual 10-day period under CCP §659a, to file supporting declarations that are filed on the 30th day after the notice of intention was filed. The adverse party files opposing declarations and a supporting memorandum within 10 days. The clerk gives a 5-day notice of hearing under CCP §660, which in effect compels the court both to hear and to rule on the motion on the 60th day. See *Desherow v Rhodes* (1969) 1 CA3d 733 (court hearing and minute order signed on 60th day; harmless clerical error that order not entered until 2 days later). Note that this case occurred when CCP §659a permitted a 20-day extension; the statute now permits only a 10-day extension.

§25.54 3. Prematurely filed notice has no effect

Notice of intention to move for new trial filed prematurely (*e.g.*, before all issues have been decided in a bifurcated trial or before a verdict or decision has been rendered) is a nullity. See Cal Rules of Ct 3.1591 (bifurcated trial); *Mays v Disneyland, Inc.* (1963) 213 CA2d 297 (liability issue decided in plaintiff's favor in bifurcated trial; defendant's motion premature). See §25.25.

The notice, if filed before judgment is entered and before the court makes its statement of decision or the jury renders its verdict, is of no effect. *Bunton v Arizona Pac. Tanklines* (1983) 141 CA3d 210 (jury trial); *Ehrler v Ehrler* (1981) 126 CA3d 147, 152 (bench trial).

Although the notice of intention to move for new trial may be filed before entry of judgment, it may not be filed before the jury reaches a verdict. *Auto Equity Sales, Inc. v Superior Court* (1962) 57 C2d 450; *Collins v Sutter Mem. Hosp.* (2011) 196 CA4th 1, 12; *Cobb v University of S. Cal.* (1996) 45 CA4th 1140, 1143.

In a bench trial, the notice is not premature if a statement of decision was requested and is signed and filed. *Ehrler v Ehrler, supra*; *Ruiz v Ruiz* (1980) 104 CA3d 374, 378 (both cases based on former "findings of fact and conclusions of law" instead of current "statement of decision"). However, a notice of intention to move for new trial is premature if the court has only announced its "tentative" decision, which may be changed. See *Ehrler v Ehrler, supra* (under former law, "intended" decision). On court's not being bound by tentative decision, see §24.30. On statement of decision, see §§24.34–24.50.

When the parties have not requested or waived a statement of decision in a bench trial, the court simply files the judgment. Until the judgment is filed, notice of intention to move for new trial is premature. See *Marriage of Hafferkamp* (1998) 61 CA4th 789, 793. In a county that keeps a "judgment book" (rather than recording them in the court's electronic data-processing system), entry of judgment does not occur until the clerk records the judgment in the judgment book. CCP §668. But in most counties today, filing the judgment with the court clerk constitutes entry. CCP §668.5. See §23.19.

§25.55 4. Court's specification of reasons to be filed after ruling

After ruling on a motion for new trial, the court must file its specification of reasons within 10 days after the order is filed. CCP §657. See also *Fergus v Songer* (2007) 150 CA4th 552, 566 (minute order granting motion for new trial constitutes determination of motion within meaning of CCP §660 and begins 10-day period). The statutory time period for the court's specification of reasons is jurisdictional. See §25.56.

The 10-day period after the ruling within which the court's specification of reasons must be filed is *in addition* to the 60-day period within which the court must rule on the motion. See §25.53 (discussing 60-day period). See checklist in §25.57.

EXAMPLE► If the order is filed on the 60th day, there is no requirement that the court's specification of reasons be filed during the 60-day period as long as the 10-day period is met; additional time, up to 10 days beyond the 60-day period, is allowed for that purpose. *Fortenberry v Weber* (1971) 18 CA3d 213, 220.

§25.56 5. Time limits are jurisdictional

The 60-day period within which the court must rule on the motion is jurisdictional. *Siegal v Superior Court* (1968) 68 C2d 97, 101. See also *Marriage of Herr* (2009) 174 CA4th 1463, 1470. An automatic stay in bankruptcy as to a party not involved in the motion for new trial does not extend the court's 60 day jurisdictional time limit to make its order. *Frieberg v City of Mission Viejo* (1995) 33 CA4th 1484. Any order made beyond that time is reversible per se. *Mercer v Perez* (1968) 68 C2d 104, 118. It cannot be made later nunc pro tunc. *Siegal v Superior Court, supra*.

Similarly, the time limit for the trial court to act on a motion for JNOV or a motion for a new trial is not tolled during the period between the date a party filed a peremptory challenge under CCP §170.6 and the date of a later order striking the challenge, when the first judge accepted disqualification immediately, on the same day the challenge was filed. *Davcon, Inc. v Roberts & Morgan* (2003) 110 CA4th 1355. Because the trial court's decision act on the motion for JNOV or new trial was made after it lost jurisdiction, the decision was a nullity. 110 CA4th at 1362.

The filing requirements for notice of intention to move for new trial are also mandatory and jurisdictional. CCP §659. The time for filing cannot be extended by the court or waived by the parties. CCP §659. The provisions of CCP §1013 extending the time for exercising a right or doing an act when service is by mail do not apply to a party intending to move for new trial. CCP §659(b).

A defective notice cannot be amended after the time for filing a notice has expired. *Faeh v Union Oil Co.* (1951) 107 CA2d 163. Any order granting a new trial after an untimely notice of intention to make the motion is void. *Douglas v Janis* (1974) 43 CA3d 931, 935.

The 10-day time period for the court to file its specification of reasons after ruling on the motion is also jurisdictional. *La Manna v Stewart* (1975) 13 C3d 413. On specification of reasons, see §25.67. See checklist in §25.57.

E. Procedures

§25.57 1. Checklist: Motion for new trial

A motion for new trial requires strict adherence to statutory requirements. Key procedural points as well as detailed time lines are associated with the making and ruling on a motion for new trial, including the following (cross-references to chapter discussions are shown after each item listed below):

___ 1. File notice of intention to move for new trial (CCP §659; see §25.52):

- ___ a. After the decision is rendered and before entry of judgment; or
- ___ b. Whatever date of the following is earliest:
  - ___ i. Within 15 days after the date of the clerk's mailing of a CCP §664.5 notice of entry of judgment, or other appropriate notice of order;
  - ___ ii. Within 15 days after service by any party of notice of entry of judgment; or
  - ___ iii. Within 180 days after entry of judgment.

___ 2. Notice of intention to move for new trial is deemed to be a motion for new trial on all grounds stated in the notice (CCP §659(b); see §25.52).

___ 3. Within 10 days of filing the notice of motion, the moving party must file and serve any brief and accompanying documents, including affidavits in support of the motion. CCP §659a. The opposing party must serve and file any opposing briefs and accompanying documents, including counteraffidavits, within 10 days after receiving service of the moving party's brief; and the moving party has 5 days to file a reply after receiving service of the opposing party's brief. CCP §659a; see §§25.59–25.61.

___ 4. Four grounds for new trial must be supported by declarations or affidavits (or by the court minutes): irregularity in the proceedings or abuse of discretion, jury misconduct, accident or surprise, and newly discovered evidence (CCP §658; see §25.60).

___ 5. Set date for hearing (after conferring with judge's clerk and checking local rules); the hearing must be held within the court's power to rule on the motion, which is 60 days, computed as the earliest date after (CCP §660; see §25.64):

___ a. The clerk's mailing of a CCP §664.5 notice of entry of judgment;

___ b. Service on the moving party of written notice of entry of judgment; or

___ c. In the absence of notice of entry of judgment, 60 days after the filing of the first notice of intention to move for new trial.

___ 6. Order granting new trial must be entered within 60 days of the earliest time set forth in the first item above (CCP §660; see §25.56).

___ 7. Court's specification of reasons for granting new trial must be made and entered within 10 days after court's order granting a motion for new trial (CCP §657; see §25.55).

___ 8. When a new trial is granted on some or all of the issues, the court must specify the ground or grounds on which it is granted and the court's reason or reasons for granting the motion on each ground stated (CCP §657; see §25.67).

___ 9. If the motion for new trial is granted on grounds of excessive/inadequate damages or insufficiency of the evidence, the court must first weigh the evidence, including reasonable inferences drawn from the evidence, and be convinced from the entire record that the court or jury should have clearly reached a different decision or verdict (CCP §657; see §25.67).

___ 10. When motion granted in an unlimited civil case (see CCP §88), notice of appeal from order granting new trial must be filed within the usual provisions of Cal Rules of Ct 8.104(a)–(b) (see §25.68).

___ 11. When motion denied in an unlimited civil case (see CCP §88), there is no appeal from order denying new trial, and appeal must be taken from the judgment (see §25.69). Notice of appeal from the original judgment must be filed within 30 days after either:

___ a. Entry of the order denying the motion; or

___ b. Denial by operation of law, but in no event later than 180 days after entry of judgment whether or not a motion for new trial has been determined. Cal Rules of Ct 8.108(b).

___ 12. When motion granted in a limited civil case (see CCP §85), the time to appeal to the appellate division of the superior court from an order granting new trial is the earliest of (see §25.68):

___ a. 30 days after service of notice of entry of the order by the clerk;

___ b. 30 days after service of notice of entry of the order by a party; or

___ c. 90 days after entry of the order (Cal Rules of Ct 8.800(a), 8.804(23), 8.822(a)).

___ 13. When motion denied in a limited civil case (see CCP §85), the order denying motion for new trial is not appealable, and appeal must be taken from the judgment. Assuming that notice of intention to move for new trial was valid, the notice of appeal must be filed within the earliest of (see §25.69):

___ a. 15 days after service of the order denying the motion or notice of entry of that order;

___ b. 15 days after denial of the motion by operation of law; or

___ c. 90 days after entry of judgment (Cal Rules of Ct 8.800(a), 8.804(23), 8.823(b)(1)).

___ 14. Cross-appeals from the judgment should be filed by a party not moving for a complete new trial, or by a party in whose favor the motion for new trial is granted, in order to protect rights if the court's order granting new trial is reversed on appeal (see Cal Rules of Ct 8.108(d), 8.823(g); §25.70).

2. Preparing the motion

§25.58 a. Notice of intention to move for new trial must state grounds

Notice of intention to move for new trial must state all applicable grounds on which the moving party relies. Failure to do so can be fatal to both the motion and any appeal. See CCP §§657, 659(a); *Malkasian v Irwin* (1964) 61 C2d 738, 745 (new trial may be granted only on grounds stated in motion).

When the notice of intention omits a ground but, within the time for filing the notice, further documents are filed asserting the missing ground, that ground will not be lost. See *Collins v Sutter Mem. Hosp.* (2011) 196 CA4th 1, 16; *Galindo v Partenreederei M.S. Parma* (1974) 43 CA3d 294, 301. However, a missing ground cannot be validly supplied by a document, such as a supporting memorandum, filed *after* the statutory period for filing the notice has run. *Wagner v Singleton* (1982) 133 CA3d 69, 72.

It is good practice for counsel to set out all grounds listed in CCP §657 in the notice of intention to move for new trial. Information on some grounds may not be known at the time of filing (*e.g.*, irregularities or misconduct not occurring in counsel's presence, or newly discovered evidence). Some grounds also overlap and the distinction between them is not always clear.

EXAMPLE► Both jury irregularity (CCP §657(1)) and jury misconduct (CCP §657(2)) should be asserted when a jury impropriety is under attack. When the question is one of law (*e.g.*, improper admission or rejection of evidence, misdirection of the jury, errors in trial procedure), the grounds should include the following statements: (a) orders of court and abuse of discretion prevented the moving party from having a fair trial (CCP §657(1)), (b) the verdict or decision was against law (CCP §657(6)), and (c) an error of law occurred (CCP §657(7)). If insufficiency of the evidence or excessive or inadequate damages are asserted, counsel should raise and argue another ground not subject to the adequate specification of reasons required on appeal. See CCP §657. See §25.67.

§25.59 b. Brief and accompanying documents must be filed within 10 days after notice is filed

Within 10 days of filing the notice of intention to move for a new trial, the moving party must serve on all other parties and file with the court any brief and accompanying documents, including affidavits in support of the motion. CCP §659a; Cal Rules of Ct 3.1600(a). See also Cal Rules of Ct 3.1113; *Quantum Cooking Concepts, Inc. v LV Assocs., Inc.* (2011) 197 CA4th 927, 932 (Rule 3.1113's requirement of supporting memorandum applies to posttrial motions). The court may deny the motion without a hearing on the merits if the moving party fails to serve and file the supporting memorandum within this time period. Cal Rules of Ct 3.1600(b). On supporting affidavits, see §§25.60–25.63.

An adverse party must serve and file any opposing briefs and accompanying documents, including counteraffidavits, within 10 days after receiving service of the moving party's brief. CCP §659a; Cal Rules of Ct 3.1600(a).

The moving party has 5 days to file a reply after receiving service of the opposing party's brief. CCP §659a.

These deadlines may be extended for up to 10 days for good cause shown or by written stipulation of the parties. CCP §659a.

3. Supporting affidavits or declarations

§25.60 a. When required

Four grounds for a motion for new trial must be supported by affidavits: (1) irregularity in the proceedings or abuse of discretion, (2) misconduct of the jury, (3) accident or surprise, or (4) newly discovered evidence. CCP §658. Declarations may be used in the place of affidavits. CCP §2015.5.

When the moving party relies wholly on facts appearing on the face of the record, however, such affidavits or declarations are unnecessary. See *Webber v Webber* (1948) 33 C2d 153, 163 (trial court irregularities). Instead, the motion can be supported by the minutes of the court or a portion of the trial transcript, if available. On time requirements for filing supporting affidavits or declarations, see §25.61.

§25.61 b. Must be filed within 10 days after notice is filed

The moving party must file any brief and accompanying documents, including any affidavits or declarations within 10 days after filing the notice of intention to move for new trial. CCP §659a. Although the notice of intention to move for new trial must be filed within the statutory period (see CCP §659; §25.52), the notice should not be filed until it is reasonably certain that declarations can be obtained within the 10-day period after the notice is filed.

The California Supreme Court has granted review in *Kabran v Sharp Mem. Hosp.* (review granted July 29, 2015, S227393; superseded opinion at 236 CA4th 1294) to decide whether the time limit for filing affidavits or declarations under CCP §659 is mandatory and jurisdictional such that the court cannot consider late-filed documents. To be safe, the 10-day period should be calendared and followed unless an extension is obtained. A maximum 10-day extension for filing affidavits or declarations can be obtained by written stipulation or court order on a showing of good cause. CCP §659a.

The other parties have 10 days after the moving party has served its briefs and affidavits to serve their own brief and counteraffidavits. CCP §659a.The moving party then has 5 days to file any reply. CCP §659a.

§25.62 c. Jury irregularity or misconduct declarations may not reflect subjective reasoning

Affidavits or declarations supporting evidence of jury irregularity or misconduct pose particular difficulties. Overt acts and statements may be used; subjective reasoning processes may not. See Evid C §1150(a). Opposing counsel should object to juror declarations that discuss the jury's subjective reasoning process. See *Cove, Inc. v Mora* (1985) 172 CA3d 97.

The moving party and counsel must affirmatively show that both were ignorant of the impropriety. *Weathers v Kaiser Found. Hosps.* (1971) 5 C3d 98, 103; *Wiley v Southern Pac. Transp. Co.* (1990) 220 CA3d 177. These "no knowledge" affidavits must be filed within the 10-day period prescribed by CCP §659a. *People v Southern Cal. Edison Co.* (1976) 56 CA3d 593, 601. See §25.61.

In some circumstances, counsel's affidavit alone is sufficient. *Weathers v Kaiser Found. Hosps., supra*. But see *People v Southern Cal. Edison Co., supra*. In any event, when the facts of the alleged misconduct occur after jury deliberations have commenced, and counsel and the moving party could not possibly have

known of the alleged misconduct before the verdict, "no knowledge" affidavits are unnecessary. *Krouse v Graham* (1977) 19 C3d 59, 82.

§25.63 d. When jury declarations necessary

Juror declarations are usually necessary if the verdict was reached by lot or chance; if one or more jurors concealed bias or prejudice on voir dire; or if statements were made, or conduct, conditions, or events occurred, within or without the jury deliberation room, that were of a character likely to have improperly influenced the deliberations and the resulting verdict. See Evid C §1150. On juror misconduct during trial, see chap 17; during deliberations, see chap 21.

PRACTICE TIP► Prepare declarations carefully. Even if oral testimony would be helpful at the hearing on the motion, there is no right to take oral testimony from jurors unless the opposing party does not object, or so stipulates. *Bardessono v Michels* (1970) 3 C3d 780 (no objection); *Maple v Cincinnati, Inc.* (1985) 163 CA3d 387.

§25.64 F. Hearing (CCP §661)

The court sets the hearing date, and the court clerk, not a party, is required to give notice of that date. CCP §661; *Jones v Evans* (1970) 4 CA3d 115, 118. Unless the parties waive the right to a hearing, the court must notice and hear a motion for new trial. *Avery v Associated Seed Growers, Inc.* (1963) 211 CA2d 613, 626.

After the time for the moving party to file a reply has run (see CCP §659a; §25.61), the clerk must give the parties 5 days' notice by mail of the time for oral argument, if any. The trial judge usually hears the motion and has discretion to permit oral argument. Although most judges permit the parties to argue, the court is not obligated to allow oral argument at the hearing. CCP §661. See *Kimmel v Keefe* (1970) 9 CA3d 402, 408.

Oral testimony from witnesses is not usually permitted, and testimony is presented by affidavit or declaration. See *Linhart v Nelson* (1976) 18 C3d 641. If oral testimony is heard without objection, however, there is no jurisdictional error. *Bardessono v Michels* (1970) 3 C3d 780, 793. See also *People v Hedgecock* (1990) 51 C3d 395, 414.

At the hearing, the parties may refer to the pleadings and orders in the court's file. When the motion is made on the minutes (on the record), references may also be made to any depositions and documentary evidence that were offered at the trial and to the trial transcript. CCP §660.

When a judge other than the trial judge hears the motion, the hearing must be held no later than 10 days before the time to rule on it expires. CCP §661. After having heard and determined the motion, a judge may authorize another judge in the same court to sign the new trial order. *Dell'Oca v Bank of New York Trust Co.* (2008) 159 CA4th 531, 545.

§25.65 G. Trial judge's ruling on motion

Granting a new trial on all or some of the issues is within the trial court's discretion and will not be reversed on appeal without a clear showing of abuse. *Jiminez v Sears, Roebuck & Co.* (1971) 4 C3d 379, 387; *Marshall v Brown* (1983) 141 CA3d 408, 414. The abuse of discretion standard does not apply, however, if the affidavit or other evidence on which the new trial order is made furnishes no basis for the exercise of that discretion. *DeFelice v Tabor* (1957) 149 CA2d 273, 275. See *Horowitz v Noble* (1978) 79 CA3d 120, 137.

In making its ruling, the judge may reexamine any fact issues in the case or any decision by a jury, court, or referee. The trial court may disbelieve witnesses, including experts, reweigh evidence, and draw reasonable inferences contrary to those drawn by the jury. See *Meiner v Ford Motor Co.* (1971) 17 CA3d 127; *Perry v Fowler* (1951) 102 CA2d 808.

If the court denies a motion for new trial, no particular language for the order is required. See CCP §657. If the court fails to rule on the motion for a new trial within the applicable 60-day period, the motion is deemed denied. CCP §660; *Dodge v Superior Court* (2000) 77 CA4th 513, 517.

In ruling on the motion after a court trial, the court may—in terms that are just—modify either the statement of decision or the judgment, and grant a new trial on all or some of the issues. CCP §662.

Instead of granting a new trial, the court has the power to vacate and set aside the statement of decision or judgment, and reopen the case for further proceedings and the introduction of additional evidence with the same effect as if the case had been reopened after its submission and before the decision was filed or judgment rendered. CCP §662. Any judgment entered under §662 is then subject to motion for new trial under CCP §§657, 659. See *Gossman v Gossman* (1942) 52 CA2d 184, 198. No statement of grounds or specification of reasons is required to support a judge's order under §662. See *LaBorne v Mulvany* (1974) 43 CA3d 905, 917.

When the court reporter's notes are missing, the trial court may recall a witness to aid the judge in reconstructing a settled statement. If the court is unable to obtain a stipulation or an agreed or settled statement, it must then order a new trial. *Weinstein v E.F. Hutton & Co.* (1990) 220 CA3d 364, 368.

A final order granting or denying a new trial exhausts the trial court's jurisdiction for all purposes except to correct clerical errors or provide relief under CCP §473. A trial court lacks jurisdiction to hear another new trial motion. See *Wenzoski v Central Banking Sys.* (1987) 43 C3d 539. A notice of appeal filed while the trial court retains jurisdiction under rules relating to motions for JNOV or new trial does not deprive the trial court of jurisdiction. *Foggy v Ralph F. Clark & Assocs.* (1987) 192 CA3d 1204.

§25.66 1. Statement of grounds

When the court grants a motion for new trial on all or some of the issues, the order must state the grounds on which the court relies. CCP §657. See *Treber v Superior Court* (1968) 68 C2d 128, 136; *Resort Video, Ltd. v Laser Video, Inc.* (1995) 35 CA4th 1679, 1694. The court is prohibited from directing a party's attorney to prepare the order. CCP §657.

Grounds in the court's order should be stated as closely as possible to the statutory language of CCP §657(1)–(7). See *Oakland Raiders v National Football League* (2007) 41 C4th 624, 634; *Mercer v Perez* (1968) 68 C2d 104, 111.

PRACTICE TIP► If the trial judge inadequately states a ground for granting a new trial, try to cure any deficiencies before expiration of the 60-day period within which the court must rule on the motion. If the order does not state an important ground for the decision, immediately call that omission to the court's attention and try to obtain a clarification. However, the order may not be fatally defective if your notice of intention to move for new trial states grounds that may be supported on appeal. The trial court's failure to state *any* ground for granting a new trial does not render the order void, but it does render it defective, and the reviewing court can still affirm the order if it should have been granted on any ground listed in the notice of intention to move for new trial.

An exception exists for motions granted on grounds of insufficiency of the evidence, or excessive or inadequate damages. The reviewing court cannot affirm the order on either of these grounds unless the ground is stated in the order. *Sanchez-Corea v Bank of America* (1985) 38 C3d 892, 906.

The trial court has jurisdiction to order a new trial on issues not included in the motion for new trial if they are so interwoven with the issues on which a new trial would be granted that excluding them would be unfair to another party. *Pelletier v Eisenberg* (1986) 177 CA3d 558. Subject to CCP §657, the court may grant a motion for new trial on any ground set forth in the notice of intention to move for new trial even if the moving party does not urge that ground in supporting papers or oral argument. *Neal v Montgomery Elevator Co.* (1992) 7 CA4th 1194.

§25.67 2. Specification of reasons

When the court grants a motion for new trial on some or all of the issues, the court must specify the ground or grounds on which it is granted and the court's reason or reasons for granting the motion on each ground stated. CCP §657. The court's specification of reasons may be included in the order granting the motion or in a separate document filed within 10 days after the order is filed. CCP §657. See also *Fergus v Songer* (2007) 150 CA4th 552, 566 (minute order granting motion for new trial constitutes determination of motion within meaning of CCP §660 and begins 10-day period).

The 10-day requirement is a statute of limitations, and a specification filed after that time is null. *Ballou v Master Props. No. 6* (1987) 189 CA3d 65; *Swanson v Western Greyhound Lines, Inc.* (1969) 268 CA2d 758. The court has no power to amend its specification of reasons after the 10-day period has expired by nunc pro tunc order or otherwise. *Mercer v Perez* (1968) 68 C2d 104, 121.

Substantial compliance arguments have been accepted by the appellate courts, however, when the trial court made detailed written specifications in its ruling on an invalid oral motion for new trial and the parties agreed to accept them in the court's ruling on a subsequent written motion. *Herman v Shandor* (1970) 8 CA3d 476, 480. But see *Miller v Los Angeles County Flood Control Dist.* (1973) 8 C3d 689, 698 n8 (reasons stated in denial of motion for JNOV referred to in part of order granting new trial held not adequate).

The court's specification of reasons must be written; reasons given orally are inadequate. *La Manna v Stewart* (1975) 13 C3d 413, 421; *Worden v Gentry* (1975) 50 CA3d 600. See *Steinhart v South Coast Area Transit* (1986) 183 CA3d 770 (reference to transcript inadequate). If the court grants a motion for new trial without a written specification of reasons, it is necessarily erroneous because "*full* and timely compliance" with CCP §657 is required. *Stewart v Truck Ins. Exch.* (1993) 17 CA4th 468, 484 (emphasis in original).

The court is prohibited from delegating its responsibility to prepare the specification of reasons to an attorney for a party. CCP §657. However, counsel should immediately call any defects to the court's attention in writing before the 10-day period has expired.

If a new trial motion is granted on the ground of insufficiency of the evidence or extensive or inadequate damages, the trial court's specification of reasons must briefly identify that portion of the record that convinced it that the jury (or the court itself in a bench trial) clearly should have reached a different result. CCP §657. See *Scala v Jerry Witt & Sons* (1970) 3 C3d 359, 367. The specification must refer to all issues in dispute. *Devine v Murrieta* (1975) 49 CA3d 855 (order failed to discuss proximate cause); *Previte v Lincolnwood* (1975) 48 CA3d 976, 987 (order failed to discuss fraud issues).

Although no hard and fast rule can be made on the proper content of the specification of reasons, ultimate facts standing alone are inadequate. Such statements as "the defendant was not negligent" (*Scala v Jerry Witt & Sons* (1970) 3 C3d 359, 368) and "inadequate damages were awarded to plaintiff" (*Krueger v Meyer* (1975) 48 CA3d 760) are unacceptable.

The specification of reasons must include more than a mere restatement of the grounds. *Scala v Jerry Witt & Sons* (1970) 3 C3d 359, 370. See *Baker v American Horticulture Supply, Inc.* (2010) 186 CA4th 1059, 1066 (noting that trial court granted new trial "with precision, virtually ensuring that its ruling and rationale are not assailable on appeal").

EXAMPLE► If the court disbelieves a witness, based on the witness's demeanor or manner, it should so state, but it need not go into further detail. *Meiner v Ford Motor Co.* (1971) 17 CA3d 127, 140. Comments by the supreme court in *Mercer v Perez* (1968) 68 C2d 104, 115, illustrate adequate specifications: If the ground is "irregularity in the proceedings" caused by counsel's referring to insurance, the judge should state that the reason for the ruling was counsel's misconduct in making that reference; if the ground is "misconduct of the jury" through its resorting to chance, the judge should specify this improper method of deliberation as the reason; if the ground is that the decision is "against the law" because of failure to find on a material issue, the judge should so state and iden-

tify that issue. For more examples, see *Romero v Riggs* (1994) 24 CA4th 117. See also *Resort Video, Ltd. v Laser Video, Inc.* (1995) 35 CA4th 1679, 1695.

When grounds for granting a motion for new trial are insufficiency of the evidence or excessive or inadequate damages, the order is reversible if the specification of reasons is inadequate. CCP §657; *Silberg v California Life Ins. Co.* (1974) 11 C3d 452, 462; *Stevens v Parke, Davis & Co.* (1973) 9 C3d 51, 60; *Stewart v Truck Ins. Exch.* (1993) 17 CA4th 468. However, appellate courts will not reverse an order granting a new trial in these circumstances if the ruling can be affirmed on another ground. See *Sanchez-Corea v Bank of America* (1985) 38 C3d 892; *Marriage of Beilock* (1978) 81 CA3d 713, 728; *Estate of Sheldon* (1977) 75 CA3d 364, 370.

H. Review on appeal

§25.68 1. Order granting motion

An order granting new trial is appealable. Appeal is premature when all causes of action are not determined. *Cobb v University of S. Cal.* (1996) 45 CA4th 1140. Appeal from an "unlimited civil case" (see CCP §88) is to the court of appeal. CCP §904.1(a)(4). Appeal from a "limited civil case" (see CCP §85) is to the appellate division of the superior court. CCP §904.2(e).

Appeal from an order granting a new trial in an unlimited case is governed by the usual time for filing notice of appeal (60 days after clerk's or party's service of notice of entry of judgment, or 180 days after date of entry itself). Cal Rules of Ct 8.104(a).

Under Cal Rules of Ct 8.800(a), 8.804(23), and 8.822(a), the time to appeal to the appellate division of the superior court from an order granting new trial in a limited civil case is the earliest of

- 30 days after the clerk serves notice of entry of the order (CCP §664.5);
- 30 days after a party serves notice of entry of the order; or
- 90 days after entry of the order.

On when the order is deemed entered, see Cal Rules of Ct 8.822(b).

The standard of review on appeal is abuse of discretion. *People v Ault* (2004) 33 C4th 1250, 1271.

With certain exceptions (see below), a new trial order will be affirmed on appeal if it should have been granted on any ground stated in the notice of intention to move for new trial, whether or not the ground is included in the order or the court's specification of reasons. CCP §657; *Shaw v Pacific Greyhound Lines* (1958) 50 C2d 153; *Marriage of Beilock* (1978) 81 CA3d 713.

WARNING► The exceptions to this rule occur when grounds for a new trial motion are (1) insufficiency of the evidence or (2) excessive or inadequate damages. These two grounds *must* be stated in the court's order and supported by an adequate specification of reasons. CCP §657. See §25.67. However, if one of these grounds is the only ground stated in the notice of intention, an order granting the motion is proper without stating the ground. *La Manna v Stewart* (1975) 13 C3d 413.

When the order for a new trial cannot be affirmed due to an inadequate specification of reasons for the ground of insufficiency of the evidence or excessive or inadequate damages, the court of appeal will look to other grounds stated in the notice of intention in an effort to affirm the trial court's order. *Treber v Superior Court* (1968) 68 C2d 128, 132.

If no other grounds were stated (or, if stated, are not supported by the record), the new trial order must be reversed. *Mercer v Perez* (1968) 68 C2d 104, 119. See *Sanchez-Corea v Bank of America* (1985) 38 C3d 892, 906 (defendant did not meet its burden; order granting defendant's motion for new trial reversed).

If a new trial motion is granted on the ground of juror misconduct and there is conflicting evidence on this issue, the absence of a statement of reasons requires the appellate court to independently review the trial court's order. *Oakland Raiders v National Football League* (2007) 41 C4th 624, 640.

When the trial court fails to file an adequate specification of reasons, counsel should notify the court in writing with suggested amplification before the 10-day mandatory time period has run. See *La Manna v Stewart, supra*. If the court fails to cure the inadequacy after notice from counsel, the appropriate remedy is either:

- Writ of mandate when within the 10-day period; see *LaBorne v Mulvany* (1974) 43 CA3d 905, 916; or
- Appeal when the 10-day period from the filing of the order has run; see *Treber v Superior Court* (1968) 68 C2d 128, 135.

The party obtaining an order granting a new trial that is appealed should cross-appeal from the original judgment in the event the order granting a new trial is reversed due to the trial court's failure to meet the adequate specification requirement. See Cal Rules of Ct 8.108(g); *La Manna v Stewart* (1975) 13 C3d 413, 425; *Smith v Circle Inn* (1977) 73 CA3d 86. On time for filing a cross-appeal in a limited civil case, see Cal Rules of Ct 8.823(g).

§25.69 2. Order denying motion

Unlimited civil cases. An order denying a motion for new trial is not appealable, although the order may be reviewed on appeal from the judgment. CCP §§906, 904.1; *State ex rel Dep't of Pub. Works v Donovan* (1962) 57 C2d 346, 351. The standard of review on appeal of a denial of a motion for new trial is independent review. *Whitlock v Foster Wheeler, LLC* (2008) 160 CA4th 149, 158.

When the trial court denies a motion for new trial in an unlimited civil case (see CCP §88), and notice of intention to move for a new trial was timely, notice of appeal from the original judgment must be filed within 30 days after either:

- Entry of the order denying the motion; or
- Denial by operation of law, or in no event later than 180 days after entry of judgment whether or not the court has ruled on the motion.

Cal Rules of Ct 8.108(b); see *Howard v Lufkin* (1988) 206 CA3d 297.

Limited civil cases. An order denying a motion for new trial is not appealable, but it may be reviewed on appeal from the judgment. See CCP §§906, 904.2.

When a motion for new trial is denied in a limited civil case (see CCP §85), and the notice of intention was valid, *i.e.*, met statutory requirements, notice of appeal from the original judgment must be filed within:

- 15 days after the clerk or a party serves an order denying the motion or notice of entry of that order;
- 15 days after denial of the motion by operation of law; or
- 90 days after entry of judgment.

Cal Rules of Ct 8.823(b)(1). On time for filing a cross-appeal when a new trial order is granted in a limited civil case and it is appealed, see Cal Rules of Ct 8.823(g).

§25.70 3. Party prevailing on motion should file cross-appeal

When an order granting new trial is appealed, the unsuccessful party on the original judgment who prevailed on the motion for new trial should file a cross-appeal within 20 days after notice of the appeal as protection from a reversal of the order. Cal Rules of Ct 8.108(g). See *Mercer v Perez* (1968) 68 C2d

104, 124. In a limited civil case, the time for filing a cross-appeal is 10 days after the trial court clerk's notice of the first appeal. Cal Rules of Ct 8.823(g).

Otherwise, if an order granting a new trial is reversed, the original judgment is automatically reinstated. *Stevens v Parke, Davis & Co.* (1973) 9 C3d 51, 63. But see *Teitel v First Los Angeles Bank* (1991) 231 CA3d 1593 (JNOV reversed, judgment reinstated, remand to reconsider portion of motion for new trial). All parties to the appeal should designate the appropriate record.

NOTE► It is extremely important to file timely notices of appeal from all adverse judgments when appropriate, and not to rely on an appeal from a motion granting a limited new trial. On notices of appeal and cross-appeals generally, see California Civil Appellate Practice, chaps 7 and 8 (3d ed Cal CEB).

§25.71 4. When moving party should appeal original judgment

If motion for new trial is denied, and the moving party's notice of intention is held to be invalid (*e.g.*, because of failure to meet statutory time requirements), the 30-day extension to appeal the original judgment may be inoperative, and the usual period to file a timely appeal will have already expired. See Cal Rules of Ct 8.104, 8.108(b), 8.822–8.823; *Ramirez v Moran* (1988) 201 CA3d 431. But see *Wenzoski v Central Banking Sys.* (1987) 43 C3d 539.

To protect against this contingency, a moving party who is in doubt about the validity of the notice of intention to move for new trial should consider appealing the original judgment within the required time period after the entry of judgment. See Cal Rules of Ct 8.104, 8.822; *Neff v Ernst* (1957) 48 C2d 628, 634. See §25.38.

The trial court retains jurisdiction to hear and determine the motion for new trial if an appeal was taken from the judgment. *Neff v Ernst, supra*; *Foggy v Ralph F. Clark & Assocs.* (1987) 192 CA3d 1204. If motion for new trial is granted, the judgment is vacated and the appeal from the judgment becomes ineffective. *Neff v Ernst, supra*.

IV. MOTION TO SET ASIDE AND VACATE JUDGMENT

A. Description and use; grounds

§25.72 1. Appropriate when original judgment is contrary to facts found by court or jury

The statutory motion to set aside and vacate the judgment and enter another and different judgment enables the trial court to correct an original judgment that is improper because it is contrary to the facts found by the court or jury. CCP §663. The motion is available only when:

- The judgment is based on an erroneous decision in a bench trial inconsistent with or unsupported by the facts; or
- The judgment or decree is inconsistent or unsupported by a jury's special verdict.

CCP §663; *Simac Design, Inc. v Alciati* (1979) 92 CA3d 146, 153 (uncontroverted facts). See *County of Alameda v Carleson* (1971) 5 C3d 730, 738; *Glen Hill Farm, LLC v California Horse Racing Bd.* (2010) 189 CA4th 1296, 1302; *Shapiro v Prudential Prop. & Cas. Co.* (1997) 52 CA4th 722, 728.

The motion cannot be used to attack the legal basis for the court's decision. When the court's statement of decision or the jury's verdict is not supported by sufficient evidence, motions for JNOV and new trial are appropriate. See *Ramirez v Moran* (1988) 201 CA3d 431, 434 (motion that was based on excusable neglect of a party and newly discovered evidence was improperly designated as motion to vacate judgment; construed as motion for new trial). However, when a question of law can be applied to undisputed facts in the record, a party may raise new legal theories not relied on during trial to urge that the judgment

be vacated because it was against the law or inconsistent with those facts. *Hoffman-Haag v Transamerica Ins. Co.* (1991) 1 CA4th 10, 15.

A motion to vacate and enter a different judgment is proper when the statement of decision or verdict is supported by the evidence but the court's judgment or decree is incorrect and needs to be changed. If a judgment has been modified under a motion for new trial (CCP §662) following a court trial, a motion to vacate the judgment and enter a different one under §663 may be appropriate. *Howard A. Deason & Co. v Costa Tierra, Ltd.* (1969) 2 CA3d 742, 758.

Setting aside a default or a void judgment under CCP §473, or under the court's inherent powers, is discussed in California Civil Procedure Before Trial, chap 38 (4th ed Cal CEB). On motions for equitable relief from judgments entered through extrinsic fraud or mistake, see 8 Witkin, California Procedure, *Attack on Judgment in Trial Court* §§215–242 (5th ed 2008). When a judgment is void, it is subject to collateral attack by means of a postjudgment motion to vacate or to set aside as void. *Residents for Adequate Water v Redwood Valley County Water Dist.* (1995) 34 CA4th 1801, 1805; *In re Marriage of Brockman* (1987) 194 CA3d 1035, 1040.

§25.73 2. Party's substantial rights must be materially affected

The motion is granted only when a party's substantial rights have been materially affected; it is not granted to correct minor errors. A motion to vacate is applicable only to a final judgment and not to an interlocutory order or judgment. See 9 Witkin, California Procedure, *Appeal* §§135–136, 138–139 (5th ed 2008).

§25.74 3. Moving party need not be original party to action

An aggrieved party moving to vacate judgment under CCP §663 need not be an original party to the action. But the party must be one whose interests or rights are injuriously affected by the judgment. *County of Alameda v Carleson* (1971) 5 C3d 730, 738; *People v Hy-Lond Enters.* (1979) 93 CA3d 734, 750; *Simac Design, Inc. v Alciati* (1979) 92 CA3d 146, 153.

To intervene in a lawsuit, an aggrieved party may use a motion to vacate a judgment or a motion for new trial, but only if that party has an "immediate, pecuniary, and substantial interest" in the judgment. *Lippman v City of Los Angeles* (1991) 234 CA3d 1630, 1634. The possibility that a party will be bound by the judgment does not satisfy this standard. A party must be immediately bound by the judgment at the time the party moves to intervene. See *Tomassi v Scarff* (2000) 85 CA4th 1053.

B. Procedures

§25.75 1. Noticed motion required

The procedures for moving to set aside and vacate a judgment are set forth in CCP §663a. A party intending to make the motion must file a notice of motion with the clerk and serve the notice on the opposing party.

Counsel must designate grounds for the motion and specify the particulars in which the court's decision or judgment are inconsistent with the facts of the case or verdict. CCP §663a(a).

§25.76 2. Timing

Under CCP §663a(a), a notice of motion to set aside and vacate a judgment must be filed and served either:

- After the decision is rendered and before entry of judgment; or

- Within 15 days of the date the court clerk mailed notice of entry of judgment under CCP §664.5, within 15 days of a party's service of written notice of entry of judgment, or within 180 days after the entry of judgment, whichever is earliest.

Code of Civil Procedure §1013, extending the time to exercise a right when service is by mail, does not apply to a motion to vacate and enter a different judgment. CCP §663a(c).

A motion to vacate brought more than 6 months after the judgment is a collateral and not a direct attack on the judgment. If the court that entered the original judgment still has jurisdiction, its ruling is final and conclusive, even if wrong and contrary to statute. *Adoption of Matthew B.* (1991) 232 CA3d 1239, 1268.

A party who filed an untimely motion to vacate a judgment under CCP §663 cannot obtain relief under CCP §473 because CCP §473 does not apply to a party's failure to take a jurisdictional step, such as filing a timely motion for new trial. *Advanced Bldg. Maintenance v State Com. Ins. Fund* (1996) 49 CA4th 1388, 1393.

The moving, opposing, and reply briefs and any accompanying documents must be filed and served within the time limits set in CCP §659a (governing new trial motions). CCP §663a(d). Under these limits, the moving party must serve and file any brief and accompanying documents in support of the motion within 10 days of filing the notice; the opposing party must serve and file any opposing briefs and accompanying documents, including counteraffidavits, within 10 days after receiving service of the moving party's brief; and the moving party has 5 days to file a reply after receiving service of the opposing party's brief. CCP §659a; see §25.59.

The hearing must be set in the same manner as the hearing in a motion for a new trial under CCP §660. CCP §663a(d). See §§25.52–25.56.

§25.77 C. Trial judge's ruling; appeal

A motion to vacate must be heard and determined by the judge who presided at the trial unless that judge has died, is unable to hear it, or is absent from the county at the time noticed for hearing. Cal Rules of Ct 3.1602.

Following a change of venue, the court of coordinate jurisdiction has the same power as the original court to vacate the orders of the court of original venue. *Greene v Superior Court* (1961) 55 C2d 403, 405.

The court has a limited time in which to rule on a motion to set aside and vacate a judgment. Under CCP §663a(b), time to rule on the motion expires:

- 60 days after the clerk mails notice of entry of judgment;
- 60 days after the moving party is served with written notice of entry of judgment, whichever is earlier; or
- If notice of entry of judgment is not given, 60 days after filing of the first notice of intention to move to set aside and vacate the judgment.

If the motion is not determined within the 60-day period, it is deemed denied. CCP §663a(b). One court of appeal has held that this is a jurisdictional time limit, like the time limit in CCP §660 for ruling on a motion for new trial. *Garibotti v Hinkle* (2015) 243 CA4th 470, 480 (order granting motion to vacate default judgment was void when court on stipulation of the parties continued the hearing to date past 60 days). See §25.56.

The motion is not "determined" for purposes of the statute until an order ruling on the motion is (CCP §663a(b))

- Entered in the permanent minutes of the court; or
- Signed by the judge and filed with the clerk.

The entry of the order in the permanent minutes constitutes a determination of the motion, even if the minute order, as entered, expressly directs that a written order be prepared, signed, and filed. The minute entry must show the date on which the order actually is entered in the permanent minutes, but failure to comply with this direction does not affect the validity of the order. CCP §663a(b).

The trial court's power to enforce, modify, or vacate a judgment is suspended when a notice of appeal is filed. *Elsea v Saberi* (1992) 4 CA4th 625, 629.

The order granting a motion to set aside and vacate a judgment may be reviewed on appeal in the same manner as a special order made after final judgment; an order denying the motion is also directly appealable. CCP §§663a, 904.1(a)(2); *Howard v Lufkin* (1988) 206 CA3d 297, 303. But see contrary dicta in *Clemmer v Hartford Ins. Co.* (1978) 22 C3d 865 (reference to such order as "being nonappealable"). See also discussion of *Clemmer* in *Howard v Lufkin, supra*, and in *Forman v Knapp Press* (1985) 173 CA3d 200.

V. MOTION TO CORRECT CLERICAL ERROR

A. Description and use; grounds

§25.78 1. Motion appropriate to conform record to actual judgment or order

Every court has both statutory and inherent power to correct clerical errors in its records to conform to a judgment or an order that was actually made. CCP §473; *In re McGee* (1951) 37 C2d 6, 8 (appellate court); *Bastajian v Brown* (1941) 19 C2d 209, 214 (trial court). See also *APRI Ins. Co. v Superior Court* (1999) 76 CA4th 176, 185.

A motion to correct clerical error is appropriate if a form of judgment fails to coincide with the substance intended at the time of rendering the judgment. *Estate of Eckstrom* (1960) 54 C2d 540, 545; *Ames v Paley* (2001) 89 CA4th 668, 672.

NOTE► The clerical error need not appear on the face of the record. *Culligan v Leider* (1944) 65 CA2d 51, 57. If it does not, however, counsel should consider whether additional evidence is needed, *e.g.*, a declaration of the clerk or the court itself to show that the error was clerical. See *In re Roberts* (1962) 200 CA2d 95, 97.

§25.79 2. Motion may not be granted to remedy judicial error

The court may annul judgments or vacate orders that were inadvertently made as long as they were not a result of the judicial error. See *Estate of Doane* (1964) 62 C2d 68, 71; *Conservatorship of Tobias* (1989) 208 CA3d 1031, 1034. The court cannot correct a judicial error or enter a judgment or an order that was never made. *Siegal v Superior Court* (1968) 68 C2d 97, 101.

Judicial error is present when the court misconstrues the evidence, misapplies the law applicable to the facts disclosed by the evidence, or was misled by counsel. *Lankton v Superior Court* (1936) 5 C2d 694, 695. Judicial errors must be rectified by attack on the judgment. *Phillips v Trusheim* (1945) 25 C2d 913 (order granting motion to vacate judgment was reversed).

The distinction between clerical and judicial error turns on whether the error was inadvertently made in recording the judgment or was made in rendering the judgment itself. *In re Candelario* (1970) 3 C3d 702, 705. See *Bell v Farmers Ins. Exch.* (2006) 135 CA4th 1138, 1144; *Marriage of Kaufman* (1980) 101 CA3d 147, 151.

EXAMPLE► A motion to correct clerical error can be made when (1) an order is entered by a clerk that was not intended by the court, (2) the court failed to express its actual intention in the order actually made, (3) an irregularity occurred that made the order or judgment premature, or (4) the court was ignorant of some fact that was material to its action. See cases cited in *Stevens v Superior Court* (1936) 7 C2d 110, 113.

The court cannot correct judicial error by entering a judgment or an order that was never rendered by the judge. *Siegal v Superior Court, supra*.

For further discussion on correcting and modifying judgments, see §§23.29–23.31. For forms of motion and order, see §§25.99–25.100.

B. Procedures

§25.80 1. Timing: Clerical error may be corrected at any time

A motion to correct a clerical error may be made at any time. *Carpenter v Pacific Mut. Life Ins. Co.* (1939) 14 C2d 704, 707; *Marriage of Kaufman* (1980) 101 CA3d 147, 151. The motion may be made even after the judgment or order has been appealed. *Culligan v Leider* (1944) 65 CA2d 51, 56 (trial court ordered that record be corrected while appeal was pending in appellate court).

Clerical error in an order concerning a motion for new trial may not be corrected, however, after the 60-day jurisdictional time period within which to rule on a motion for new trial has elapsed. *Siegal v Superior Court* (1968) 68 C2d 97, 101. On motion for new trial, see §§25.22–25.71.

§25.81 2. Notice

Clerical error may be corrected by the court without notice on its own motion, by a party on properly noticed and supported motion, or by a party by extraordinary writ. CCP §473(d); *Carpenter v Pacific Mut. Life Ins. Co.* (1939) 14 C2d 704, 707.

§25.82 3. Nunc pro tunc orders

A judgment or an order containing a clerical error may be corrected nunc pro tunc. See *Carpenter v Pacific Mut. Life Ins. Co.* (1939) 14 C2d 704, 707; *Bell v Farmers Ins. Exch.* (2006) 135 CA4th 1138, 1144; *Marriage of Kaufman* (1980) 101 CA3d 147, 151. The purpose of a nunc pro tunc order is to correct the judgment or order to reflect the judgment or order actually made. *Estate of Eckstrom* (1960) 54 C2d 540, 544.

EXAMPLE► In *Ukegawa Bros. v ALRB* (1989) 212 CA3d 1314, an administrative board's order misidentifying the subject of the order as a corporation rather than as a general partnership was corrected nunc pro tunc. The court held that the error was clerical, not judicial, and because the trial evidence demonstrated that the corporation was the alter ego of the general partnership, the board retained the power to correctly name the party at any time. For further discussion on correcting judgments nunc pro tunc, see §23.30.

§25.83 C. Trial judge's ruling; appeal

The court has full power to determine the character of the error. Without a clear showing to the contrary, its conclusion is final. In considering whether the error is clerical or judicial, the court must determine whether the judgment or order expresses its original decision. *Estate of Doane* (1964) 62 C2d 68, 71; *Carpenter v Pacific Mut. Life Ins. Co.* (1939) 14 C2d 704, 708. In this function, the court has the right to rely on its own memory, bench notes, memorandum decisions, and minute orders. *Bastajian v Brown* (1941) 19 C2d 209, 215 (findings of fact contrary to minute order). See *Carpenter v Pacific Mut. Life Ins. Co.* (1939) 14 C2d 704, 709.

If there is contrary evidence, however, the court's correction of an alleged error setting forth the history of its thoughts and entries in bench notes may not be conclusive on appeal. *Stevens v Superior Court* (1936) 7 C2d 110, 113 (court's recitals disregarded); *Estate of Sloan* (1963) 222 CA2d 283, 293 (judicial, not clerical, error); *Estate of Harris* (1962) 200 CA2d 578, 590 (insufficient statement by court).

The question on appeal is, essentially, what order in fact did the court originally intend to make? *Estate of Careaga* (1964) 61 C2d 471, 474.

VI. SPECIAL POSTJUDGMENT MOTIONS

A. Postjudgment procedures involving public entities

§25.84 1. Settlement conference may be held after judgment

In certain actions against public entities, Govt C §962 provides for a postjudgment settlement conference, which must be held on request of a defendant public entity. That request must be made within the time to request a new trial. See §25.52.

The conference must not occur until *after* determinations of motions for new trial, JNOV, remittitur, and additur, but it must occur *before* a hearing on any motions under Govt C §§984 and 985 (see §25.85). Govt C §962.

§25.85 2. Posttrial order may regulate payment of awards

Government Code §§984 and 985 provide for a posttrial order allowing periodic payments of large money awards and offset of collateral-source payments. Under Cal Rules of Ct 3.1804, a defendant public entity that has elected to make periodic payments under Govt C §984 must serve and file a notice of election within 60 days after entry of judgment or 30 days after notice of entry of judgment, whichever is earlier. If a hearing is required, it must be calendared within 30 days after the election was made.

Timely filing of a valid request for a settlement conference under Govt C §962, election for periodic payments under Govt C §984, or motion for posttrial hearing under Govt C §985 extends time for filing notice of appeal in unlimited civil cases to 180 days after entry of judgment or 90 days after notice of entry of judgment, whichever is earlier. Cal Rules of Ct 8.108(f). In limited civil cases, time is extended to the earlier of 90 days after entry of judgment or 60 days after notice of entry of judgment. Cal Rules of Ct 8.823(f).

B. Posttrial motions in medical malpractice actions

§25.86 1. Medical malpractice damages subject to periodic payments

Under the Medical Injury Compensation Reform Act (MICRA), judgments for medical malpractice damages are subject to periodic payments of that portion of the judgment attributable to future damages. See CCP §667.7; *Salgado v County of Los Angeles* (1998) 19 C4th 629; *Gorman v Leftwich* (1990) 218 CA3d 141, 152 (periodic payment provision properly raised by postverdict motion; no surprise because matter was raised in defendant's answer to complaint and in request for jury instructions); *Hrimnak v Watkins* (1995) 38 CA4th 964, 982 (directions to trial court on procedure).

The defendant should request a stay of entry of judgment immediately after an adverse verdict is rendered. See *Craven v Crout* (1985) 163 CA3d 779, 784. If a stay is denied, a motion to vacate judgment is appropriate under CCP §663. A plaintiff's attorney may also wish to request a stay of entry of judgment until the amount and method of payment of attorney fees have been determined. See *Nguyen v Los Angeles County Harbor/UCLA Med. Ctr.* (1995) 40 CA4th 1433.

§25.87 2. Postverdict motion may reduce damages

A postverdict motion may be used to reduce damages to the ceiling figure for noneconomic damages under MICRA. See CC §3333.2; *Salgado v County of Los Angeles* (1998) 19 C4th 629. When a plaintiff has been found comparatively at fault in a malpractice action, an award of noneconomic damages is reduced first by the percentage of plaintiff's fault, and then capped by MICRA. *McAdory v Rogers* (1989)

215 CA3d 1273; see also *Atkins v Strayhorn* (1990) 223 CA3d 1380, 1391 (CC §3333.2 applied after plaintiff's award reduced by comparative negligence).

In *Gilman v Beverly Cal. Corp.* (1991) 231 CA3d 121, 126, the court analyzed the interplay between MICRA and Proposition 51 (CC §§1431.1–1431.5), which imposed several (rather than joint) liability on multiple tortfeasors, making a defendant liable for noneconomic damages according to its share of fault. The *Gilman* court held that when apportionment of defendant liability is at issue (unlike in *McAdory* and *Atkins*, which concerned plaintiffs' comparative negligence), the trial court must apply the MICRA cap of CC §3333.2 first to the noneconomic damage award and then determine the prorata liability of each defendant. 231 CA3d at 128. *Gilman*'s method for applying the MICRA cap was followed in *Mayes v Bryan* (2006) 139 CA4th 1075, 1100 (in wrongful death action in which all but two healthcare defendants settled before jury deliberations, court reduced noneconomic damages verdict of $3 million to $250,000 MICRA cap, and then apportioned amount owing by nonsettling defendants according to their share of liability under Proposition 51).

Whether the plaintiff is entitled to postjudgment interest on periodic payments for future economic or noneconomic loss depends on the facts of the case. See *Schiernbeck v Haight* (1992) 7 CA4th 869, 874 (no entitlement to interest).

Aside from MICRA considerations, a defendant may forfeit claims that damages awarded at trial must be reduced post-verdict. See *Greer v Buzgheia* (2006) 141 CA4th 1150 (defendant failed to request verdict form containing separate entry for plaintiff's past medical expenses).

§25.88 C. Writ of error coram vobis

Writ of error coram vobis may be available to order another court to correct factual errors, but only if no other remedy is available. *Betz v Pankow* (1993) 16 CA4th 931, 941 (writ denied, remittitur afforded appropriate remedy); *Monsan Homes, Inc. v Pogrebneak* (1989) 210 CA3d 826, 831 (writ denied because party had power to correct record under CCP §1008 motion for reconsideration). See 8 Witkin, California Procedure, *Attack on Judgment in Trial Court* §4 (5th ed 2008).

§25.89 D. Writ of error coram nobis

The seldom used writ of error coram nobis is directed to the trial court to remedy an error of fact, as opposed to an error of law. Compare *Rollins v City & County of San Francisco* (1974) 37 CA3d 145 (writ upheld), with *Monsan Homes, Inc. v Pogrebneak* (1989) 210 CA3d 826, 831 (writ denied), and *Philippine Export & Foreign Loan Guar. Corp. v Chuidian* (1990) 218 CA3d 1058, 1090 (writ denied). See also *Los Angeles Airways, Inc. v Hughes Tool Co.* (1979) 95 CA3d 1 (writ denied), which questioned the holding and reasoning of *Rollins v City & County of San Francisco, supra*.

Writ of error coram nobis lies to correct error committed by the same court that is hearing the writ. For discussion, see California Civil Writ Practice §15.44 (4th ed Cal CEB); 3 Witkin, California Procedure, *Actions* §75 (5th ed 2008).

VII. FORMS

A. Motion for JNOV

§25.90 1. Form: Notice of Motion for JNOV (CCP §629)

_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
Attorney For _ _[*e.g., plaintiff*]_ _, _ _[*name*]_ _

_ _ _ _ _ _ Court, County of _ _ _ _ _ _

_ _[*Name(s)*]_ _ **Plaintiff(s)** **vs** _ _[*Name(s)*]_ _ **Defendant(s)**	**No.** _ _ _ _ _ _ **NOTICE OF MOTION AND MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT (CCP §629); SUPPORTING MEMORANDUM** **Hearing:** _ _[*date; time*]_ _ **Dep't:** _ _[*number*]_ _ **Hearing judge:** _ _[*if known*]_ _ **Action filed:** _ _[*date*]_ _ **Trial date:** _ _ _

To each party and attorney of record:

PLEASE TAKE NOTICE that on _ _[*date*]_ _**, at** _ _[*time*]_ _**, or as soon thereafter as the matter can be heard, in Department** _ _[*number*]_ _ **of this court, located at** _ _[*address*]_ _**,** _ _[*plaintiff/defendant*]_ _**,** _ _[*name*]_ _**, will move the court for judgment in** _ _[*plaintiff/defendant*]_ _**'s favor, notwithstanding the verdict rendered by the jury on** _ _[*date*]_ _**.**

This motion is made on the grounds that the evidence is not sufficient to support the jury's verdict, the verdict is erroneous as a matter of law, and, if a motion for directed verdict had been made during trial, it should have been granted.

This motion is based on this notice; all pleadings, papers, and records in this action; evidence presented at trial; and the attached supporting memorandum.

Date: _ _ _ _ _ _

_ _[*Signature*]_ _
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

Copies: Original (filed with court clerk with proof of service); copies for service (one for each attorney of record and unrepresented party); office copies.

Comment: This motion is often made in conjunction with the motion for new trial. See §25.10. If the motion is made by the court, it is good practice for counsel to file memorandum supporting their respective positions. A declaration is often unnecessary when the motion is based on matters in the trial record and the judge's own knowledge, rather than on extraneous facts brought in by declaration.

§25.91 2. Form: Order Granting or Denying JNOV (CCP §629)

_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
Attorney For _ _[*e.g., plaintiff*]_ _**,** _ _[*name*]_ _

_ _ _ _ _ _ Court, County of _ _ _ _ _ _

_ _[*Name(s)*]_ _ **Plaintiff(s)** **vs** _ _[*Name(s)*]_ _ **Defendant(s)**	**No.** _ _ _ _ _ _ **ORDER** _ _[*GRANTING/DENYING*]_ _ **JUDGMENT NOTWITHSTANDING THE VERDICT (CCP §629)** **Hearing:** _ _[*date; time*]_ _

	Dep't: _ _[*number*]_ _ **Hearing judge:** _ _[*if known*]_ _ **Action filed:** _ _[*date*]_ _ **Trial date:** _ _ _

The motion of _ _[*plaintiff/defendant name*]_ _**, for judgment notwithstanding the verdict came on regularly for hearing on** _ _[*date*]_ _**. Appearing as attorneys for the parties were** _ _[*list attorneys and indicate parties represented*]_ _**. Good cause appearing,**

IT IS ORDERED that

[*Either*]

judgment be entered in favor of _ _[*plaintiff/defendant*]_ _**,** _ _[*name*]_ _**, notwithstanding the jury's verdict entered on** _ _[*date*]_ _**, as follows:** _ _[*State language of judgment*]_ _**.**

[*or*]

the motion is denied.

[*Continue*]

Date: _ _ _ _ _ _ _____
Judge

Copies: Original and copy (presented to judge for signature and filed with court clerk); copies for service (one for each attorney of record and unrepresented party); office copies.

Comment: As with other motions, it is good practice to submit a proposed order to the court with the motion for JNOV. See §25.12.

B. Motion for new trial

§25.92 1. Form: Notice of intention to move for new trial (jury trial) (CCP §§657–661)

_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
Attorney For _ _[*e.g., plaintiff*]_ _**,** _ _[*name*]_ _

_ _ _ _ _ _ Court, County of _ _ _ _ _ _

_ _[*Name(s)*]_ _ **Plaintiff(s)** **vs** _ _[*Name(s)*]_ _ **Defendant(s)**	**No.** _ _ _ _ _ _ **NOTICE OF INTENTION TO MOVE FOR NEW TRIAL (CCP §§657–661)** **Hearing:** _ _[*date; time*]_ _ **Dep't:** _ _[*number*]_ _ **Hearing judge:** _ _[*if known*]_ _ **Action filed:** _ _[*date*]_ _ **Trial date:** _ _ _

To each party and attorney of record:

PLEASE TAKE NOTICE that in Department _ _[*number*]_ _**, at a time that shall be set by the court under Code of Civil Procedure section 661 so that the motion will be heard and determined on or before** _ _[*last date ruling can be made before court loses jurisdiction; see §25.53*]_ _**,** _ _[*plaintiff/defendant name*]_ _**, will move the court to set aside the jury's verdict rendered on** _ _[*date*]_ _**,**

[*Add if appropriate*]

to vacate the judgment entered on _ _[*date*]_ _**, in** _ _[*plaintiff/defendant*]_ _**'s favor,**

[*Continue*]

and to grant _ _[*plaintiff/defendant name*]_ _ **a new trial on the following issues:** _ _[*List issues to be relitigated*]_ _**.**

This motion is made on the following grounds, each of which materially affected the substantial rights of _ _[*plaintiff/defendant name*]_ _**, who was thereby prevented from receiving a fair trial:**

1. Irregularity in the proceedings of the court;

2. Irregularity in the proceedings of the jury;

3. Irregularity on the part of the _ _[*plaintiff/defendant name*]_ _**;**

4. Improper orders of the court;

5. Abuse of discretion by the court;

6. Misconduct of the jury;

7. Accident or surprise, or other acts that ordinary prudence could not have guarded against;

8. Newly discovered evidence, material to the moving party, that could not have been discovered with reasonable diligence and produced at trial;

9. _ _[*Excessive/Inadequate*]_ _ **damages;**

10. Insufficiency of the evidence to justify the verdict;

11. The verdict is against law;

12. Error in law occurring at the trial and excepted to by the moving party;

13. Inability to obtain the trial transcript because of _ _[*state reason, e.g., destruction by fire of the court reporter's notes*]_ _**.**

The _ _[*e.g., 1st, 2d, 3d, 4th, 5th, 6th, and 7th grounds specified above*]_ _ **will be supported by the minutes of the court and by declarations to be served and filed hereafter. All other grounds are based on the minutes of the court.**

The motion is also based on this notice; all pleadings, papers, and records in this action; the evidence presented at trial; and the attached supporting memorandum.

Date: _ _ _ _ _ _

_ _[*Signature*]_ _
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

Copies: Original (filed with court clerk with proof of service); copies for service (one for each attorney of record and unrepresented party); office copies.

Comment: State all grounds that might apply because, if not stated in the notice, they may not be asserted at the hearing. See §25.58. Code of Civil Procedure §1013, extending time when service is by mail, is inapplicable. CCP §659(b). Any brief and accompanying documents, including declarations or affidavits, should be served on all other parties and filed with the court within 10 days after serving the notice of motion. CCP §659a. See §§25.59–25.61. Counsel who does not attach a supporting memorandum to the notice must do so within 10 days after filing the notice; otherwise, the motion may be denied without a hearing on the merits. Cal Rules of Ct 3.1600(b).

§25.93 2. Form: Notice of intention to move for new trial (bench trial) (CCP §§657–662)

_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
Attorney For _ _[*e.g., plaintiff*]_ _**,** _ _[*name*]_ _

_ _ _ _ _ _ Court, County of _ _ _ _ _ _

_ _[*Name(s)*]_ _ **Plaintiff(s)**	**No.** _ _ _ _ _ _
vs	**NOTICE OF INTENTION TO MOVE FOR NEW TRIAL (CCP §§657–662)**
_ _[*Name(s)*]_ _ **Defendant(s)**	**Hearing:** _ _[*date; time*]_ _ **Dep't:** _ _[*number*]_ _ **Hearing judge:** _ _[*if known*]_ _ **Action filed:** _ _[*date*]_ _ **Trial date:** _ _ _

To each party and attorney of record:

PLEASE TAKE NOTICE that in Department _ _[*number*]_ _**, at a time that shall be set by the court under Code of Civil Procedure sections 661 and 662 so that the motion will be heard and determined on or before** _ _[*last date ruling can be made before court loses jurisdiction; see §25.53*]_ _**,** _ _[*plaintiff/defendant name*]_ _ **will move the court to set aside the judgment entered in** _ _[*plaintiff's/defendant's*]_ _ **favor and to grant** _ _[*plaintiff/defendant*]_ _ **a new trial on all issues.**

As an alternative, _ _[*plaintiff/defendant*]_ _ **will move the court to modify and change its statement of decision, to vacate the judgment, and to enter a new judgment in favor of** _ _[*plaintiff/defendant*]_ _ **and against** _ _[*plaintiff/defendant*]_ _**.**

As another alternative, _ _[*plaintiff/defendant*]_ _ **will move to set aside the statement of decision and judgment and reopen the case for further proceedings, including introduction of additional evidence with the same effect as if the case had been reopened after submission and before a decision had been filed or judgment rendered.**

This motion is made on the following grounds, each of which materially affected the substantial rights of _ _[*plaintiff/defendant name*]_ _, who was thereby prevented from receiving a fair trial:

1. Irregularity in the proceedings of the court;

2. Irregularity by the _ _[*plaintiff/defendant*]_ _, _ _[*name*]_ _.

3. Improper orders of the court;

4. Abuse of discretion by the court;

5. Accident or surprise, or other acts that ordinary prudence could not have guarded against;

6. Newly discovered evidence, material to the moving party, that could not have been discovered with reasonable diligence and produced at trial;

7. _ _[*Excessive/Inadequate*]_ _ damages;

8. Insufficiency of the evidence to justify the decision;

9. The decision is against law;

10. Error in law occurring at the trial and excepted to by the moving party;

11. Inability to obtain the trial transcript because of _ _[*state reason, e.g., destruction by fire of the court reporter's notes*]_ _.

The _ _[*e.g., 1st, 2d, 3d, 4th, 5th, and 6th grounds specified above*]_ _ will be supported by the minutes of the court and by declarations to be served and filed hereafter. All other grounds are based on the minutes of the court.

The motion is also based on this notice; all pleadings, papers, and records in this action; _ _[*plaintiff/defendant name*]_ _'s specification of controverted issues, proposal of content of statement of decision, request for statement of decision, proposed statement of decision; the evidence presented at trial; and the attached supporting memorandum.

Date: _ _ _ _ _ _ _ _[*Signature*]_ _
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

Copies: Original (filed with court clerk with proof of service); copies for service (one for each attorney of record and unrepresented party); office copies.

Comment: Counsel should attached the documents indicated in the final paragraph of this motion. For discussion, see §§24.34–24.50.

§25.94 3. Form: Order granting motion for new trial

_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
Attorney For _ _[*e.g., plaintiff*]_ _, _ _[*name*]_ _

_ _ _ _ _ _ Court, County of _ _ _ _ _ _

_ _[*Name(s)*]_ _ **Plaintiff(s)** **vs** _ _[*Name(s)*]_ _ **Defendant(s)**	**No.** _ _ _ _ _ _ **ORDER GRANTING MOTION FOR NEW TRIAL** **Hearing:** _ _[*date; time*]_ _ **Dep't:** _ _[*number*]_ _ **Hearing judge:** _ _[*if known*]_ _ **Action filed:** _ _[*date*]_ _ **Trial date:** _ _ _

The motion of _ _[*plaintiff/defendant name*]_ _ **came on regularly for hearing on** _ _[*date*]_ _**. Appearing for the parties were** _ _[*list attorneys and indicate parties represented*]_ _**. Good cause appearing,**

IT IS ORDERED that the _ _[*verdict/decision*]_ _ **rendered in this action on** _ _[*date*]_ _**,**

[*Add if appropriate*]

and the judgment entered on _ _[*date*]_ _**,**

[*Continue*]

be vacated and set aside, and that _ _[*plaintiff/defendant name*]_ _ **be granted a new trial on**

[*Either*]

all issues.

[*or*]

the following issue(s): _ _[*State issue(s) to be relitigated*]_ _**.**

[*Continue*]

This motion is granted on the following ground(s): _ _[*List each ground supporting the granting of the motion with a specification of reasons the motion was granted on each ground*]_ _**.**

Date: _ _ _ _ _ _ _____
Judge

Copies: Original (prepared and signed by judge to be filed in court file); copies for service (one for each attorney of record and unrepresented party).

Comment: The court may not direct an attorney for a party to prepare either the order containing a statement of grounds or the specification of reasons. See §§25.66–25.67. However, counsel should promptly call any defects in the order to the court's attention in writing. If the specification of reasons is not included in the order, the court must file it within 10 days after the order is filed. CCP §657. For the record on appeal, the language stating each ground supporting the granting of the motion should be as close as possible to the statutory language of CCP §§657(1)–(7), 914.

§25.95 4. Form: Order denying motion for new trial

_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
Attorney For _ _[*e.g., plaintiff*]_ _**,** _ _[*name*]_ _

_ _ _ _ _ _ Court, County of _ _ _ _ _ _

_ _[*Name(s)*]_ _ **Plaintiff(s)**	**No.** _ _ _ _ _ _
vs	**ORDER DENYING MOTION FOR NEW TRIAL** **Hearing:** _ _[*date; time*]_ _
_ _[*Name(s)*]_ _ **Defendant(s)**	**Dep't:** _ _[*number*]_ _ **Hearing judge:** _ _[*if known*]_ _ **Action filed:** _ _[*date*]_ _ **Trial date:** _ _ _

The motion of _ _[*plaintiff/defendant name*]_ _ came on regularly for hearing on _ _[*date*]_ _. Appearing as attorneys for the parties were _ _[*list attorneys and indicate parties represented*]_ _. After presentation of declarations, evidence, and other arguments of counsel, it appears to the court that the motion for new trial should be denied.

IT IS ORDERED that _ _[*plaintiff/defendant name*]_ _'s motion for new trial is denied.

Date: _ _ _ _ _ _

_____
Judge

Copies: Original and copy (presented to judge for signature and filed with court clerk); copies for service (one for each attorney of record and unrepresented party); office copies.

Comment: If the motion is denied, no particular requirements on either the grounds or a specification of reasons for the order are in force. See CCP §657. Any party may appeal from the original judgment after the entry of the order denying the motion or denial by operation of law when a valid notice of intention has met statutory requirements. See Cal Rules of Ct 8.108(b), 8.823(b); §25.69.

C. Motion to vacate judgment and enter different judgment

§25.96 1. Form: Notice of motion to vacate judgment and enter different judgment (CCP §663)

_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
Attorney For _ _[*e.g., plaintiff*]_ _**,** _ _[*name*]_ _

_ _ _ _ _ _ Court, County of _ _ _ _ _ _

_ _[*Name(s)*]_ _ **Plaintiff(s)** **vs** _ _[*Name(s)*]_ _ **Defendant(s)**	**No.** _ _ _ _ _ _ **NOTICE OF MOTION AND MOTION TO VACATE JUDGMENT AND ENTER DIFFERENT JUDGMENT (CCP §663); SUPPORTING MEMORANDUM; DECLARATION OF** _ _[*name*]_ _ **Hearing:** _ _[*date; time*]_ _ **Dep't:** _ _[*number*]_ _ **Hearing judge:** _ _[*if known*]_ _ **Action filed:** _ _[*date*]_ _ **Trial date:** _ _ _

To each party and attorney of record:

PLEASE TAKE NOTICE that on _ _[*date*]_ _**, at** _ _[*time*]_ _**, or as soon thereafter as the matter can be heard, in Department** _ _ _ _ _ _ **of the above-titled court, located at** _ _[*address*]_ _**,** _ _[*plaintiff/defendant name*]_ _ **will move the court for an order setting aside and vacating its judgment entered in this case on** _ _[*date of entry of judgment*]_ _ **and entering another, different judgment.**

[*Either*]

This motion is made on the ground that _ _[*e.g., the legal basis for the decision is not consistent with or supported by the facts/the judgment is not consistent with the special verdict*]_ _**, because** _ _[*specify particulars*]_ _**.**

[*or*]

This motion is based on this notice; all pleadings, papers, and records in this action; the evidence presented at trial; the attached supporting memorandum and the declaration of _ _[*name*]_ _**;** _ _[*and on such evidence as may be presented at the hearing*]_ _**.**

[*Continue*]

Date: _ _ _ _ _ _

_ _[*Signature*]_ _
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

Copies: Original (filed with court clerk with proof of service); copies for service (one for each attorney of record and unrepresented party); office copies.

Comment: The notice of motion should specify the particulars in which the decision or judgment is inconsistent with the facts or special verdict. CCP §663a(a).See §§25.72–25.77.

§25.97 2. Form: Order granting motion to vacate judgment and enter different judgment (jury's special verdict) (CCP §663)

_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
Attorney For _ _[*e.g., plaintiff*]_ _**,** _ _[*name*]_ _

_ _ _ _ _ _ Court, County of _ _ _ _ _ _

_ _[*Name(s)*]_ _ **Plaintiff(s)** **vs** _ _[*Name(s)*]_ _ **Defendant(s)**	**No.** _ _ _ _ _ _ **ORDER GRANTING MOTION TO VACATE JUDGMENT AND ENTER DIFFERENT JUDGMENT (CCP §663)** **Hearing:** _ _[*date; time*]_ _ **Dep't:** _ _[*number*]_ _ **Hearing judge:** _ _[*if known*]_ _ **Action filed:** _ _[*date*]_ _ **Trial date:** _ _ _

The motion of _ _[*plaintiff/defendant*]_ _**,** _ _[*name*]_ _**, to vacate judgment and enter different judgment came on regularly for hearing on** _ _[*date*]_ _**. Appearing as attorneys for the parties were** _ _[*list attorneys and indicate parties represented*]_ _**. Good cause appearing,**

IT IS ORDERED that judgment rendered on _ _[*date*]_ _**, be vacated and that judgment consistent with and supported by the jury's special verdict be entered as follows:** _ _[*State language of new judgment*]_ _**.**

Date: _ _ _ _ _ _ _____
Judge

Copies: Original and copy (presented to judge for signature and filed with court clerk); copies for service (one for each attorney of record and unrepresented party); office copies.

Comment: This form is appropriate when the original judgment was inconsistent with or unsupported by the jury's special verdict. See §25.72.

§25.98 3. Form: Order granting motion to vacate judgment and enter different judgment (court's statement of decision) (CCP §663)

_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
Attorney For _ _[*e.g., plaintiff*]_ _**,** _ _[*name*]_ _

_ _ _ _ _ _ Court, County of _ _ _ _ _ _

_ _[*Name(s)*]_ _ **Plaintiff(s)** **vs** _ _[*Name(s)*]_ _ **Defendant(s)**	**No.** _ _ _ _ _ _ **ORDER GRANTING MOTION TO VACATE JUDGMENT AND ENTER DIFFERENT JUDGMENT (CCP §663)** **Hearing:** _ _[*date; time*]_ _ **Dep't:** _ _[*number*]_ _ **Hearing judge:** _ _[*if known*]_ _ **Action filed:** _ _[*date*]_ _ **Trial date:** _ _ _

The motion of _ _[*plaintiff/defendant*]_ _**,** _ _[*name*]_ _**, to vacate judgment and enter different judgment came on regularly for hearing on** _ _[*date*]_ _**. Appearing as attorneys for the parties were** _ _[*list attorneys and indicate parties represented*]_ _**. Good cause appearing,**

IT IS ORDERED that judgment rendered on _ _[*date*]_ _**, be vacated, and that different judgment be entered as follows:** _ _[*State language of new judgment*]_ _**.**

IT IS FURTHER ORDERED that the statement of decision be amended to conform to the facts as follows: _ _[*State corrections in the statement of decision*]_ _**.**

Date: _ _ _ _ _ _ _____
Judge

Copies: Original and copy (presented to judge for signature and filed with court clerk); copies for service (one for each attorney of record and unrepresented party); office copies.

Comment: This form is appropriate when the original judgment is incorrect because the legal basis for the decision is not consistent with or supported by the facts in a court trial. See §25.72.

D. Motion to correct clerical error

§25.99 1. Form: Notice of motion to correct clerical error (CCP §473)

_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
Attorney For _ _[*e.g., plaintiff*]_ _**,** _ _[*name*]_ _

_ _ _ _ _ _ Court, County of _ _ _ _ _ _

_ _[*Name(s)*]_ _ **Plaintiff(s)**	**No.** _ _ _ _ _ _
vs	**NOTICE OF MOTION AND MOTION TO CORRECT CLERICAL ERROR (CCP §473); SUPPORTING MEMORANDUM; DECLARATION OF** _ _[*name*]_ _
_ _[*Name(s)*]_ _ **Defendant(s)**	**Hearing:** _ _[*date; time*]_ _ **Dep't:** _ _[*number*]_ _ **Hearing judge:** _ _[*if known*]_ _ **Action filed:** _ _[*date*]_ _ **Trial date:** _ _ _

To each party and attorney of record:

PLEASE TAKE NOTICE that on _ _[*date*]_ _**, at** _ _[*time*]_ _**, or as soon thereafter as the matter can be heard, in Department** _ _ _ _ _ _ **of the above-titled court, located at** _ _[*address*]_ _**,** _ _[*plaintiff/defendant name*]_ _ **will move the court for an order correcting** _ _[*nunc pro tunc*]_ _ **the** _ _[*judgment entered/order made*]_ _ **on** _ _[*date*]_ _**, in favor of** _ _[*name of plaintiff or defendant*]_ _**, and against** _ _[*name of moving party*]_ _**, by (1) deleting the following:** _ _[*State language to be eliminated*]_ _**; and (2) inserting in its place the following:** _ _[*State proposed correction(s)*]_ _**. This motion is made on the grounds that the** _ _[*judgment entered/order made*]_ _ **contains clerical error in that** _ _[*specify error(s)*]_ _**, and that the proposed correction(s)** _ _[*is/are*]_ _ **necessary to conform the** _ _[*judgment/order*]_ _ **to the actual** _ _[*judgment/order*]_ _ **intended and made by the court.**

This motion is based on this notice; all pleadings, papers, and records in this action; the evidence presented at trial; the attached supporting memorandum and declaration of _ _[*name*]_ _**;** _ _[*and on such evidence as may be presented at the hearing*]_ _**.**

Date: _ _ _ _ _ _ _ _[*Signature*]_ _
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

Copies: Original (filed with court clerk with proof of service); copies for service (one for each attorney of record and unrepresented party); office copies.

Comment: Correction of clerical error in a judgment can also be made on an order to show cause. See, *e.g.*, *Thomson v L.C. Roney & Co.* (1952) 112 CA2d 420. A supporting memorandum should be attached. Cal Rules of Ct 3.1113(a). A declaration from the court clerk or the court itself may be necessary if the clerical error does not appear on the face of the record. See §§23.31, 25.78.

§25.100 2. Form: Order granting motion to correct clerical error (CCP §473)

_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
Attorney For _ _[*e.g., plaintiff*]_ _**,** _ _[*name*]_ _

Court, County of _ _ _ _ _ _

_ _[*Name(s)*]_ _ **Plaintiff(s)** **vs** _ _[*Name(s)*]_ _ **Defendant(s)**	**No.** _ _ _ _ _ _ **ORDER GRANTING MOTION TO CORRECT** _ _[*NUNC PRO TUNC JUDGMENT/ORDER*]_ _ **(CCP §473)** **Hearing:** _ _[*date; time*]_ _ **Dep't:** _ _[*number*]_ _ **Hearing judge:** _ _[*if known*]_ _ **Action filed:** _ _[*date*]_ _ **Trial date:** _ _ _

The motion of _ _[*plaintiff/defendant name*]_ _ **to correct clerical error came on regularly for hearing on** _ _[*date*]_ _**. Appearing as attorneys for the parties were** _ _[*list attorneys and indicate parties represented*]_ _**.**

Owing to clerical error, it appears that the _ _[*insert title of document entered/made*]_ _ **on** _ _[*date*]_ _**, does not correctly set forth the** _ _[*judgment rendered/order made*]_ _ **by this court. Good cause appearing,**

IT IS ORDERED that the _ _[*insert title of document to be corrected entered/made*]_ _ **on** _ _[*date*]_ _**, be amended by (1) deleting the following:** _ _[*State language to be eliminated*]_ _ **and (2) inserting the following:** _ _[*State language to be inserted*]_ _**.**

[*Add if appropriate*]

IT IS FURTHER ORDERED that this order be entered nunc pro tunc as of _ _[*insert full date of original judgment/order*]_ _**.**

[*Continue*]

Date: _ _ _ _ _ _ _____
Judge

Copies: Original and copy (presented to judge for signature and filed with court clerk); copies for service (one for each attorney of record and unrepresented party); office copies.

Comment: To prevent further errors, reference may be made to the page and line numbers of the matter to be deleted. Counsel can also avoid confusion by setting out a complete clause or sentence even if only one word is to be changed or struck. On procedures for correcting clerical errors, see §§25.80–25.81.