
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, School 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.



PROGRAM SERIES SUBHEAD

The Strategic Use of Motions During and After Trial

November 2016

1-Hour MCLE Credit

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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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