

NAVIGATING POST-JUDGMENT MOTIONS: A GUIDE THROUGH THE THICKET



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Disappointing jury verdicts or statements of decision trigger a flurry of questions: Should we challenge this result through post-judgment motions before appealing? If so, which post-judgment motions? When are they due? And how do they interact with an appeal?

This article answers these frequent questions, along with highlighting some potential pitfalls to avoid. Its focus is on California state court practice.

Overview. There are several types of post-judgment motions in California law. The most common are new trial motions; motions for judgment notwithstanding the verdict (JNOV); and motions to vacate. These motions aren't mutually exclusive—a party can pursue them concurrently.

New trial motions – content and relief.

New trial motions are available after a jury trial or a bench trial. They must rely on the grounds specified in Code of Civil Procedure section 657, which include attorney or jury misconduct; insufficiency of the evidence; excessive or inadequate damages; and errors of law.¹

Although new trial motions aren't a prerequisite to pursuing most issues on appeal, there is a significant exception: excessive/inadequate damages. (§ 657, subd. (5).) Purely legal damages issues, such as the applicable measure of damages, do not have to be teed up in a new trial motion. But damages arguments that turn on witness credibility, conflicting evidence, or claims of jury passion or prejudice ordinarily are

forfeited if not raised first in a timely new trial motion. (E.g., *Greenwich, S.F., LLC v. Wong* (2010) 190 Cal.App.4th 739, 759.)

New trial motions are also crucial where the existing trial record does not demonstrate the error—for example, evidence demonstrating juror misconduct during deliberations (§ 657, subd. (2)). Affidavits attesting to the misconduct can be submitted with a new trial motion. But tread carefully: There are nuanced rules about what's admissible in a juror declaration. (See, e.g., Evid. Code, § 1150; *Bell v. Bayerische Motoren Werke Aktiengesellschaft* (2010) 181 Cal.App.4th 1108, 1124–1125.)

In other situations, new trial motions can be worthwhile even if not strictly necessary to preserve issues for an appeal.

For example, a trial court has much broader discretion in considering an insufficient-evidence claim than an appellate court does. On a new trial motion, the trial court sits as a “thirteenth juror” with a duty to independently assess the evidence, and with power to disbelieve witnesses, reweigh the evidence, and draw different inferences than the jury. (*Ryan v. Crown Castle NG Networks Inc.* (2016) 6 Cal.App.5th 775, 784–785.) If the court concludes that the clear weight of the evidence is against the verdict, it can grant a new trial even though the evidence would be enough to sustain the jury's verdict on appeal. (*Candido v. Huitt* (1984) 151 Cal.App.3d 918, 923.)

By contrast, an appellate court reviewing an evidence-insufficiency challenge must view the evidence in the light favorable to the judgment and affirm if any substantial evidence supports the judgment. Accordingly, if there's a chance the trial court had a different take than the jury on liability evidence,

or thought the damages were too high (or too low), testing the waters with a new trial motion may make sense.

The potential relief on a new trial motion is typically what the name suggests: a partial or full new trial. But there are also other possibilities. For example, after a bench trial, the court can change the statement of decision or modify the judgment, among other things. (§ 662.) And after a jury trial, if the court finds the damages excessive or inadequate, it can offer the non-moving party a remittitur or additur in lieu of a new trial. (§ 662.5.)

New trial motions – procedure.

New trial motions involve multiple deadlines and other procedural requirements – some of which are jurisdictional, meaning the court can’t grant a new trial absent compliance with them, no matter how meritorious the motion.

Notice of intent. The new trial motion journey starts with a notice of intent to move for a new trial that lists the statutory grounds for the intended motion. (§§ 657, 659.) It’s common practice to list all of the statutory grounds, because a new trial order can be affirmed on any grounds listed in the notice even if they weren’t developed into arguments.

The notice can be filed (1) after the verdict/statement of decision and before the entry of judgment; or (2) after entry of judgment or service of notice of entry of judgment, within a timeframe specified in section 659. (*Ibid.*) The notice-filing deadline is jurisdictional. It can’t be extended by order or stipulation; nor is there an extension for mail service of the triggering document. (*Ibid.*)

Other filings. After filing the notice of intent, the moving party has 10 days to file and serve a memorandum of points and authorities and any supporting declarations. (§ 659a.) The non-moving party then has 10 days to file its opposition and any counter-affidavits. (*Ibid.*) The moving party then has 5 days to file a reply. (*Ibid.*) Unlike the notice of intent deadline, these deadlines are not jurisdictional, and can each be extended by up to 10 days by stipulation or by the court for good cause. (*Ibid.*)

Hearing. New-trial motion hearing dates are supposed to be set by the court rather than the moving party. (§ 661.) Sometimes an electronic-filing system or the clerk’s office conditions filing the notice of intent on having a reserved hearing date. In that case, strategies to consider include calling the clerk before the filing to request a date, or picking the first available date and

then applying ex parte to advance it as needed.

Decision timing. The court has a short window to decide a new trial motion: Its power to grant a new trial expires on the earliest of (1) 75 days after the clerk mails notice of entry of judgment “pursuant to [Code of Civil Procedure] [s]ection 664.5” or (2) 75 days after a party serves notice of entry of judgment on the moving party. (§ 660.) If no notice is given, the court’s power instead expires 75 days after filing of the first notice of intent to move for a new trial. (*Ibid.*) If day 75 falls on a weekend or court holiday, the deadline is the next court day. (§§ 12a, 660.)

A motion not decided within the applicable time is automatically denied by operation of law. (§ 660.) To reduce the risk of that happening, (1) list the decision deadline on the cover page of all related filings, (2) ensure that the hearing date is sufficiently before the deadline, and (3) remind the court of the deadline at the hearing.

Decision requirements. An order granting a new trial must “state the ground or grounds relied upon . . .” (§ 657.) The court also must specify its reasons for granting the motion either in the order itself or in a separate written “specification of reasons” filed within 10 days of the order. (*Ibid.*) The court must prepare the order and specification itself—it can’t direct a party to draft it, as courts sometimes do for proposed judgments or statements of decision. (*Ibid.*)

JNOV motions - substance

The trial court can grant judgment notwithstanding the verdict “whenever a motion for a directed verdict for the aggrieved party should have been granted had a previous motion been made.” (§ 629, subd. (a).) That means JNOV is proper if, viewing the evidence in the light most favorable to the verdict, there is no substantial evidence to support the verdict.

JNOV can be granted as to an entire judgment or on specific issues, such as striking a punitive damages award. And the court can grant both JNOV and a new trial on the same issues. (§ 629.)

Indeed, it often makes sense to file both motions, because the court has more leeway to consider evidentiary sufficiency on a new trial motion (where it sits as the thirteenth juror) than on a JNOV motion (where it must view the evidence in the light favorable to the verdict). If the court grants both and the JNOV is affirmed, the JNOV prevails. (§ 629, subd. (d).)

If the JNOV is reversed but the new trial order is affirmed (or isn't appealed), it carries the day.

The JNOV deadlines track the new trial deadlines: The JNOV motion is due by the section 659 deadline for filing a notice of intent to move for a new trial and the section 659a deadline governs the subsequent filing deadlines. (§ 629, subd. (b).) The court loses jurisdiction to grant JNOV after “the last date upon which it has the power to rule on a motion for a new trial”—if the court hasn't ruled by then, the motion is denied by operation of law. (*Ibid.*)

Motion to vacate the judgment

The court can set aside a judgment after a bench or jury trial on two grounds: (1) “Incorrect or erroneous legal basis for the decision, not consistent with or not supported by the facts”; or (2) “A judgment or decree not consistent with or not supported by the special verdict.” (§ 663.) In either case, the error must have “materially affect[ed] the substantial rights of the [moving] party and entitl[e] the party to a different judgment.” (*Ibid.*)

A section 663 motion to vacate doesn't allow the court to reweigh the facts—it must be based on uncontroverted evidence. That means that if there's evidence on both sides and the argument is as to weight, the correct vehicle is a new trial motion, not a motion to vacate.

Motion to vacate procedures and deadlines track the new trial motion framework. The process begins with a notice of intent designating the grounds on which the motion will be made and specifying the particular claimed errors. (§ 663a.) The deadlines for the notice of intent, subsequent filings, and decision on the motion are the same as those in the new trial

statutes. (*Ibid.*; §§ 659a, 660.) And, as with a new trial motion, the court has no power to grant a motion to vacate once its deadline passes, nor can the court extend its time. (§ 663a; see, e.g., *Garibotti v. Hinkle* (2015) 243 Cal.App.4th 470, 476–477.) So, as with new trial and JNOV motions, parties should proactively ensure that their motion is decided before the deadline.

An order vacating a judgment under section 663 cannot simply vacate the judgment and set the matter at large—it must order entry of a specific new judgment. (*20th Century Ins. Co. v. Superior Court* (2001) 90 Cal.App.4th 1247, 1260.)

Coordinating post-judgment motions with an appeal

The interaction of post-judgment motions with appeals could fill an entire article itself. But here are a few salient points:

- A valid new trial, JNOV, or vacatur motion generally extends the time for all parties to appeal from the underlying judgment until after the motion is decided. The deadlines are detailed in California Rules of Court, rule 8.108.
- A new trial motion can proceed concurrently with an appeal from the judgment. But an appeal may divest the trial court of jurisdiction to decide a JNOV motion or a section 663 motion to vacate. (*Foggy v. Ralph F. Clark & Associates, Inc.* (1987) 192 Cal.App.3d 1204, 1211–1213 [creating split as to JNOV]; *Copley v. Copley* (1981) 126 Cal.App.3d 248, 298 [vacatur].) Accordingly, if pursuing JNOV or vacatur, it may be prudent to defer appealing from the judgment until after the motion is decided.

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