

# Appellate Tips for Trial Lawyers

LOS ANGELES COUNTY BAR ASSOCIATION

Volume I, Number 12 • An E-Publication of the Los Angeles County Bar Association • December 2008

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California civil and criminal litigation overlap in a crucial area: preserving your record for appeal. Although this series of short articles is mainly designed for civil trial lawyers, some "best practices" apply in every trial. Keep an eye on what our appellate-lawyer writers have to say about how to preserve your trial court victory or how to lay the groundwork for a successful challenge when you have lost.

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### New Trial Orders: The Procedural Minefield

by Kent J. Bullard

Seeking a new trial is a task that trial lawyers hope they will not need to tackle. But if you must do so, remember that winning the motion is not everything. Getting the resulting order right is just as important. Preparation of the order has been aptly described as "a procedural minefield" ([Sanchez Corea v. Bank of America](#) (1985) 38 Cal. 3d 892, 911 (Kaus, J., dissenting)), and the mines can turn a trial court victory into an appellate defeat.

Strict statutory limitations govern the time for making new trial orders, what they must include, and who must prepare them. The California Supreme Court has recently provided a helpful summary of the governing rules in [Oakland Raiders v. National Football League](#) (2007) 41 Cal. 4th 624.

#### Time Limits

If an order granting a motion for a new trial is not made within a specified 60-day period, the motion will be denied (Code Civ. Proc., §660). This 60-day deadline is jurisdictional ([Siegal v. Superior Court](#) (1968) 68 Cal. 2d 97, 101) and is triggered by the earliest of the following:

- When the clerk mails notice of entry of judgment upon order of the court.
- When any party serves notice of entry of judgment on the party moving for a new trial.
- Absent either of the above, the filing of the first notice of intent to move

for a new trial (Code Civ. Proc., §660).

There is authority that the 60-day period is not triggered by a notice of entry of judgment filed by the same party that later moves for a new trial (*People ex rel. Dept. of Transportation v. Cherry Highlands Properties* (1999) 76 Cal. App. 4th 257, 261, *disapproved on other grounds in* *Palmer v. GTE Calif., Inc.* (2003) 30 Cal. 4th 1265, 1278, n. 5).

However, the conservative, prudent approach is to treat *anyone's* notice of entry as the trigger. In an analogous situation, at least one unpublished opinion has held that service of notice of entry of judgment by the same party that later appeals the judgment does trigger the 60-day deadline for filing a notice of appeal under California Rules of Court, Rule 8.104(a)(2) (*Disner v. Manatt, Phelps & Phillips, LLP*, B194325, 2008 LEXIS 306 (Jan. 15, 2008) (unpublished)).

If a new trial order lacks a specification of reasons (sometimes called a statement of reasons), a separate specification of reasons must be filed within 10 days after the new trial order is filed (Code Civ. Proc. §657). This deadline too is jurisdictional (*Oakland Raiders*, 41 Cal. 4th at 634).

#### **Required Contents of Order**

Code of Civil Procedure Section 657 states seven possible grounds for granting a new trial:

1. Irregularity in the proceedings...
2. Misconduct of the jury...
3. Accident or surprise...
4. Newly discovered evidence...
5. Excessive or inadequate damages...
6. Insufficiency of the evidence...
7. Error in law....

According to Section 657, a new trial order must state the ground or grounds upon which it is granted. Nevertheless, on appeal, the order will be affirmed if it should have been granted upon any ground *stated in the motion*, even if not specified in the order or specification of reasons.

There are two exceptions, however: An order may not be affirmed on the ground of 1) insufficiency of the evidence or 2) inadequate damages, unless that ground is specified in the order (*Oakland Raiders*, 41 Cal. 4th at 641) or is the only ground asserted in the motion (*La Manna v. Stewart* (1975) 13 Cal. 3d 413, 418).

The specification of reasons is a different, additional requirement: Either in the new trial order itself or in a separate specification, the trial judge must also provide a specific reason or reasons for granting the new trial on each ground stated (Code Civ. Proc. §657). This requires referring to evidence and not just ultimate facts (*Oakland Raiders*, 41 Cal. 4th at 641). For certain grounds—insufficiency of the evidence and excessive or inadequate damages—failure to state specific reasons is fatal to the new trial order and requires reversal on appeal (*La Manna*, 13 Cal. 3d at 425 (insufficiency of the evidence)).

For other grounds, failure to state specific reasons is not fatal but may result in a less deferential standard of review on appeal. For example, if the specification of reasons for a new trial order on the ground of juror misconduct is deficient, the order will be reviewed independently rather than for an abuse of discretion—a much better situation for the appellant (*Oakland Raiders*, 41 Cal. 4th at 636-40). In addition, the failure to state reasons in support of a ground for ordering a new trial will shift the burden of persuasion on appeal to the party seeking to uphold the new trial order (*id.* at 641).

### **Preparation of the Order**

The trial judge must personally prepare the order and specification of reasons (Code Civ. Proc. §657). Orders prepared by counsel are jurisdictionally defective (*Estate of Sheldon* (1977) 75 Cal. App. 3d 364, 370). Both the order and specification of reasons must be written—the court can not merely announce them from the bench (*La Manna*, 13 Cal. 3d at 422-23).

### **Bottom Line: Remind the Trial Judge**

As the case law illustrates, busy trial judges sometimes make mistakes on new trial orders. Because lawyers cannot supply proposed orders, the best they can do is remind the judge of the crucial importance of the deadlines and the formal requirements. Unless you know for sure that your judge already fully understands this, do not be shy about reminding him or her.



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