

Motions for New Trial: A Possible Alternative to an Appeal

If you have lost a case after a dispositive motion or trial, consider whether to ask the court to grant you a new trial. If you can show grounds for a new trial, you may be able to get a second bite at the apple without having to go through the appeal process. You must be careful, however; the procedures are tricky and strict compliance is required. Filing a motion for new trial can have significant benefits; even if you do not win, it can help to preserve and focus your arguments on appeal. There are potential downsides to consider as well. This column focuses on motions for new trial in the California state courts.

Should I file a new trial motion?

It is often overlooked that a motion for a new trial can be brought not only after a jury or bench trial, but also after certain dispositive motions resulting in a final judgment, including a judgment of dismissal after a demurrer is sustained, a judgment on the pleadings, and summary judgment. Therefore, anytime you have an adverse judgment, consider whether a motion for a new trial is available.

First, consider whether grounds for a new trial exist in your case. The grounds are listed in section 657 of the Code of Civil Procedure, and include irregularity in the proceedings; jury misconduct; accident or surprise; newly discovered evidence; excessive or inadequate damages; insufficiency of the evidence or the verdict or decision is against the law; or error in law. The court may also grant a new trial on only *part* of the issues, such as damages. The unique thing about these motions is that, under certain circumstances, judges have the power to *weigh* the evidence in determining whether to grant a new trial. Section 657 provides that where the moving party claims that the evidence is insufficient to support the verdict, or the damages are excessive or inadequate, the court must consider the entire record and decide whether the court or jury should have reached a different result. The judge can consider the quantity and quality of the evidence presented, including the credibility of the witnesses at trial. The court of appeal, in contrast, generally cannot weigh the evidence in this manner.

Additionally, if you are thinking about pursuing an appeal on the ground of excessive or inadequate damages, you *must* file a motion for new trial in order to preserve the issue on appeal. Ordinarily, you do not waive errors on appeal by failing to move for a new trial; this is an exception to the rule.

Next, think about what could happen if you win the motion. Is it possible that a second trial might result in an even worse result? Are there sufficient resources available to cover the costs and attorney fees that would be incurred in a second trial? If the motion is granted, would that help to push the parties toward a settlement?

Finally, consider whether you need additional evidence to support your motion. If you are arguing that there was irregularity in the proceedings; jury misconduct; accident or surprise; or newly discovered evidence, then you need to support these arguments with affidavits or declarations. If you are opposing such a motion, then you may wish to submit counter-affidavits. Note that if you contend that there was jury misconduct (or are opposing a motion on this basis), there are special rules regarding the admissibility of statements by jurors: in general, statements about conduct or events are admissible, while statements about the jurors' subjective reasoning processes are not.

Make Sure to Follow the Rules!

If you intend to seek a new trial, you must act fast and follow the rules precisely. The procedures are tricky, there are short deadlines, and exact compliance with the rules is required. The rules are jurisdictional, so a court does not have the power to grant a new trial unless the motion is timely filed.

Section 659 of the Code of Civil Procedure requires that the moving party must file and serve a notice of intention to move for a new trial, specifying the statutory grounds for the motion, within 15 days after notice of entry of the judgment has been served by a clerk or a party. This time period cannot be extended by stipulation or court order, and there is no extension under section 1013 of the Code of Civil Procedure, even if the notice of entry was served by mail. Next, the supporting papers, including any affidavits, must be filed within 10 days after the notice of intention is filed. This time period can be extended by the judge for up to 20 days.

While it is important to timely file your motion papers, it is equally important to make sure that your motion is heard and decided within the jurisdictional deadline and according to the rules. Section 661 of the Code of Civil Procedure provides that such motions must be "heard and determined" by the judge who presided over the trial, unless that judge is unable to hear the motion. The judge must hear the matter and rule upon it within 60 days after notice of entry of the judgment; the court has *no power* to rule on the motion after the 60-day time period has expired. It is up to the moving party to make sure that the motion is scheduled with sufficient time for the court to hear and decide the motion. Most courts give calendar precedence to motions for new trial; they understand the need to schedule a hearing quickly.

Finally, if the judge decides to grant a new trial, there are additional rules to follow. First, as noted above, the court must rule on the motion within 60 days after notice of entry of the judgment. The court must issue an order identifying the grounds for granting the new trial, *i.e.*, the statutory grounds listed in section 657 of the Code of Civil Procedure. In addition, the judge must give a statement of the "reasons" for granting a new trial, which may either be part of the order granting a new trial, or may be issued separately within 10 days after the new trial order. The statement of reasons must be prepared, signed, and filed by the judge; it *cannot* be prepared by a party or counsel and then submitted to the judge for his or her signature. So, if the judge asks you to draft

the statement of reasons, you need to gently remind the judge that this is not permissible under the statute.

If the court denies your motion, all is not necessarily lost. If you pursue an appeal, then the motion may help to preserve the arguments you intend to raise on appeal. A motion for new trial can also help to identify potential appellate issues and will help to shape and focus your arguments. Moreover, it may give the other side a preview of some of the arguments on appeal, which can help to promote settlement.

C. Athena Roussos is an attorney in Elk Grove, California, and is certified as an Appellate Law Specialist by the California State Bar Board of Legal Specialization. She also teaches at McGeorge School of Law in Sacramento. Roussos can be reached at (916) 670-7901 or athena@athenaroussoslaw.com.

Peg Carew Toledo also contributed to this article. Toledo is Of Counsel at Mennemeier, Glassman & Stroud LLP, a Sacramento civil litigation boutique. She is also certified as an Appellate Law Specialist by the California State Bar Board of Legal Specialization. Toledo can be reached at (916) 551-2592 or toledo@mgsllaw.com.