
# Protecting your verdict

## A roadmap to navigate the post-trial landscape, from preparing a proposed judgment to opposing the motion for new trial

By Travis Davis

In my years as a litigator, I have encountered and brought hundreds of post-trial motions. My philosophy and approach is this: Protect your verdict and maximize your judgment.

Opposing post-trial motions requires great discipline. While skilled presentation and control of the evidence gets your verdict, skilled writing and attention to detail shields it. And shield it you must, as post-trial motions attacking a well-earned verdict are as commonplace as sending written discovery at the outset of litigation. To succeed, your writing must be direct, helpful to the reader, and compelling.

At the same time, you must go on the offensive if you want to fully maximize your verdict and end with a valuable judgment in your client's hands. Take the lead by preparing the proposed judgment; then, once signed by the court, promptly give notice of entry of that judgment. This triggers deadlines for post-trial motions and noticing an appeal – putting you in control and the opposing side on the clock.

With an understanding of the basic mechanics of post-trial law-and-motion, you can help secure your client's moment of justice. My aim in this article is to give you – the fellow trial advocate – a roadmap to navigate this post-trial landscape. Then, I will leave you with some general research, writing, and organization tips for opposing post-trial motions.

### Roadmap to post-trial recovery

Immediately after obtaining your verdict, you need to prepare a proposed judgment. Take the lead on this but share it with defense counsel and try to get their consent before filing. This will help avoid any objections to the proposed judgment (which can result in immediate briefs on the validity of the verdict before a judgment is even signed). The last thing you want to do is fight to maintain your verdict mere days after the jury returned it.

Once the signed judgment is received, give notice of entry of judgment. Then, calendar the following deadlines:

1. 15 calendar days to file your memorandum of costs (Cal. Rules of Court, rule 3.1700(a)(1)), and
2. 15 calendar days for any party to give notice of intent to move for new trial or judgment notwithstanding the verdict ("JNOV"). (Code Civ. Proc., § 659.)

Once notice of intent is given, the moving party then has 10 calendar days to file and serve their supporting memorandum and affidavits. The opposing party then has 10 calendar days to oppose, and the moving party has five calendar days thereafter to reply. (Code. Civ. Proc., § 659a; Cal. Rules of Court, rule 3.1600(a).)

***Practice pointer***: These dates can be extended by a maximum of 10 days either by stipulation or by court approval (if going the latter route, an ex parte application will be necessary given the short turnaround).

Note that while there is a Judicial Council form for giving notice of entry of judgment, other filings may be deemed sufficient notice. (See, *Dodge v. Superior Court* (2000) 77 Cal.App.4th 513, 522.) Therefore, if you intend to bring a post-trial motion and/or file a memorandum of costs, calendar such deadlines from the earliest document which could reasonably be deemed to have given notice of entry of judgment.

The most common occurrence of this is the clerk's certificate of mailing of the signed judgment. In this scenario, you should calendar 15 days from the date of the clerk's certificate for your memorandum of costs and/or notice of intent to move for new trial or JNOV. But still give formal notice of entry of judgment immediately after receiving the clerk's certificate. This is the safe approach, yet also ensures that the clock has started running on post-trial and notice-of-appeal deadlines.

### Filing the memorandum of costs and opposing a motion to tax or strike costs

As the prevailing party, you are entitled to ordinary costs leading up to and incurred at trial. (Code Civil. Proc., § 1032.) Your judgment also accrues interest at a rate of 10% annually (7% if the defendant is a public entity). (*Id*., § 685.010.) When preparing your proposed judgment, account for these items by including language such as "Plaintiff shall have and recover from Defendant the sum of X, plus costs and interest in an amount to be determined." Once notice of entry of judgment is given, timely file your memorandum of costs. Utilize both the summary and worksheet provided by the Judicial Council.

A memorandum of costs is verified by signature only, not by attaching actual receipts, invoices, etc. (*Ladas v. California State Auto. Ass'n* (1993) 19 Cal.4th 761, 774-776.) Accordingly, it is wise of your opponent to request proof of costs before filing their motion to tax. This allows them to verify these costs, and only move to tax or strike those for which they have a solid argument for exclusion. But when they do not request such documentation, you are often faced with a motion that blindly attacks the majority of claimed costs.

In this situation, use their overzealousness against them. Quickly dismiss their challenges of costs which are clearly allowed under the code. This builds your credibility and puts theirs into doubt. Then, focus your opposition on the more valuable costs which require more explanation to recover.

Of course, in your opposition, you must now include the aforementioned


receipts of those items put at issue. (*Jones v. Dumrichob* (1998) 63 Cal.App.4th 1258, 1265.) Knowing this, it is vital to keep organized records of the costs incurred during litigation and trial and have those records ready as soon as you give notice of entry of judgment. Be ready to attach voluminous receipts to your opposition.

***Practice pointer – expert witness costs***: Compile pdfs of receipts for each "item" on the memorandum of costs that is the subject of their motion to strike and attach those as exhibits to your declaration in opposition. For example, Exhibit A will be all receipts of filing fees, Exhibit B will be all receipts of deposition costs, etc. Then, at the end of each subsection in which you lay the grounds for the propriety of those costs, reference the exhibit so that the Court can verify all contested costs.

A common ground for the defendant to seek to strike a cost item is to claim that it was not necessary for trial. One I often see is the retention of an expert witness that ultimately does not testify at trial. This is not the standard for recovery. Rather, California law specifically provides for the recovery of expert witness costs incurred "in either, or both, preparation for trial... or during trial." (Code Civ. Proc., § 998, subd. (d); *Santantonio v. Westinghouse Broad. Co.* (1994) 25 Cal.App.4th 102, 124 ["[S]ection 998 also covers the cost of experts who aid in the preparation of the case for trial, even if they do not actually testify"].) Therefore, explain why this cost was necessary at some point of the litigation. For example, if the opposing side hires a biomechanical expert at initial expert designations, and you do not, it then becomes necessary to counter-designate a biomechanical expert in a supplemental designation. But if the opposing side withdraws or otherwise decides not to call that expert at trial, you may also have no reason to call your biomechanical expert at trial. In this instance, although your expert did not testify (and thus did not assist the trier of fact), their retention was reasonable and necessary to the preparation of the case. This is a properly claimed cost.

## Enforcing your rights under CCP § 998

If you served a valid statutory offer to compromise under Code of Civil Procedure section 998 and obtained a verdict in excess of that offer, you must claim the associated costs (expert-witness fees and prejudgment interest) in your memorandum of costs. Failure to do so could result in a waiver of these valuable costs. (Code Civ. Proc. § 1033.5, subd. (a)(8); *Jones v. John Crane, Inc.* (2005) 132 Cal.App.4th 990, 1012 ["[P]rejudgment interest under section 3291 is not an element of damages and must be claimed by memorandum of costs"].)

On the Judicial Council form, use items 8 (Witness Fees) and 16 (Other) of the Memorandum of Costs to claim them.

***Practice tip***: Because Item 16 is a single-line item, draft an "Attachment 16" which provides the full computation of your prejudgment interest.

Because they are typically the most significant of costs claimed, "998 costs" are often the subject of motions to strike. This is especially true of expert-witness fees. By and large, expert-witness testimony is expensive. But this is not a one-sided problem. When faced with a motion to tax arguing that your expert-witness fees are exorbitant, point out that both sides incurred great costs in bringing the claims and defenses to the jury.

Focus also on the complexity of the matter, outlining all elements of your prima facie case with emphasis on the areas that were disputed. If a defendant disputes not only liability, but also the nature and extent of the plaintiff's damages, then explain that experts specializing in these areas were necessary to counter such contentions.

***Practice pointer***: It is helpful to create bullet-pointed paragraphs explaining the testimony that each expert gave, and to which element of the case their expert opinion was directed.

In a motion to tax, the validity of the 998 offer itself is often called into question. A section 998 offer is in good faith if it is within the reasonable range of value of the case. The verdict is prima facie evidence of this. (*Calvo Fisher & Jacob LLP v. Lujan* (2015) 234 Cal.App.4th 608, 629.)

Moreover, a 998 offer is not unreasonable merely because the full extent of the damages was not known by the defendant when the offer was made. Reasonableness generally "is measured, first, by determining whether the offer represents a reasonable prediction of the amount of money, if any, defendant would have to pay plaintiff following a trial, discounted by an appropriate factor for receipt of money by plaintiff before trial, all premised upon information that was known or reasonably should have been known to the defendant." (*Elrod v. Oregon Cummins Diesel, Inc.* (1987) 195 Cal.App.3d 693, 699.) Point out that the reasonableness of the offer is at issue, not the unreasonableness of the offeree's response. Moreover, courts must also consider what an offeree should have known in making such an assessment. (*Licudine v. Cedars-Sinai Med. Ctr.* (2019) 30 Cal.App.5th 918, 925.)

Focus also on what the Discovery Act allows a party to conduct. Depositions can occur within a mere 10 days of being noticed. (Code Civ. Proc., § 2025.270.) A medical examination can occur within 30 days of being noticed, and that time may be shortened upon stipulation of the parties or upon court order. (*Id.*, § 2032.220.) If an offeree truly does not have enough information to evaluate the reasonableness of a 998 offer, then they must be diligent in obtaining such information.

## Opposing a motion for new trial: Common grounds

I cannot recall a single motion for new trial in which I simply utilized an old template to prepare my opposition. Every motion is unique to the facts of that case, and therefore requires a unique opposition to credibly attack it. With that said,


new-trial motions are limited to seven grounds (Code Civ. Proc., § 657), and there are certainly a few of these grounds that are commonly asserted. Helpful opposition points are summarized below.

As an initial matter, keep in mind – and point out in your opposition – that any misconduct, errors, or other issues at trial cannot justify a new trial unless prejudice arose as a result. "The trial court had no discretion to grant a new trial in the absence of prejudicial error." (*Nishihama v. City and County of San Francisco* (2001) 93 Cal.App.4th 298, 306.) Often, a new-trial motion will outline claimed improprieties but fail to connect these to any tangible prejudice. Therefore, after addressing the issues raised, establish why the verdict aligned with the evidence, and could not have been a result of prejudicial error.

***Attorney misconduct***

Questions posed by plaintiff's counsel are often cited as grounds for a new trial based on attorney misconduct. But asking a question that is objectionable does not equate to misconduct. There is a reason that objections are allowed during trial, and that courts are empowered to rule on an objection. To remedy objectionable questions, objections to them may be sustained, admonitions may be given, and, most importantly, witnesses are instructed to not answer the question. (*People v. Perez* (1962) 58 Cal.2d 229, 247.) Moreover, as the jury is frequently reminded in trial, the questions posed by counsel are not evidence. (CACI 106 – Evidence.)

The manner in which cross-examination is conducted is another frequently seen basis for seeking a new trial. But attorneys are granted wide latitude in cross-examination, and even more so when cross-examining expert witnesses. (Evid. Code, § 721 ["[A] witness testifying as an expert . . . may be fully cross-examined as to . . . the matter upon which his or her opinion is based and the reasons for his or her opinion"].)

Finally, strong and colorful statements in closing arguments are often attacked. However, the law gives counsel wide latitude in closing arguments. "In his addresses to the jury it is his privilege to descant upon the facts proved or admitted in the pleadings; to arraign the conduct of the parties; impugn, excuse, justify, or condemn motives, as far as they are developed in the evidence; assail the credibility of witnesses, when it is impeached by direct evidence, or by the inconsistency or incoherence of their testimony, their manner of testifying, their appearance on the stand, or by circumstances. His illustrations may be as various as the resources of his genius; his argumentation as full and profound as his learning can make it; and he may, if he will, give play to his wit, or wings to his imagination." (*People v. Manson* (1976) 61 Cal.App.3d 102, 199, fn. 98.)

***Juror misconduct***

A motion for new trial due to juror misconduct will allege that members of the jury – at some point in the proceedings – did or heard something that affected the verdict. Such motions are typically supported by juror affidavits. Review these carefully for conformity to the law. Juror declarations are admissible only to the extent that they describe overt acts constituting jury misconduct, and they are inadmissible if they describe the effect of any such event on a juror's subjective reasoning process. (*In re Stankewitz* (1985) 40 Cal.3d 391, 398.)

Overt acts are those facts which "can be easily proved or disproved" and for which there is "invariably little disagreement as to their occurrence." (*People v. Hutchinson* (1969) 71 Cal.2d 342, 350.) In contrast, juror declarations are inadmissible when they, at most, suggest deliberative error in the jury's collective mental process. (*Bell v. Bayerische Motoren Werke Aktiengesellschaft* (2010) 181 Cal.App.4th 1108, 1124-1126.)

***Practice pointer***: In addition to your memorandum of points and authorities in opposition to the motion, also file an objection to evidence specifying which paragraphs of the juror declarations are inadmissible. (Cal. Rules of Court, rule 3.1354.)

Upon receipt of juror affidavits supporting a motion for new trial, share these with other jurors and ask them: 1) whether the claimed improprieties are true, and 2) whether the claimed improprieties, if they occurred, affected the verdict. The mere discussion of improper considerations does not amount to misconduct that warrants a new trial. Rather, if they discussed but then quickly disregarded such grounds, then no prejudice arose. (*Torres v. Los Angeles* (1962) 58 Cal.2d 35, 53-54 ["A trial court may deny a motion for a new trial and may refuse to reassess damages in an action when it is apparent that the jury resolved conflicting evidence in making its award of damages"]; *Barboni v. Tuomi* (2012) 210 Cal.App.4th 340, 350 ["[A]s the trial court pointed out, 'Mere mention of insurance does not constitute consideration.' More importantly, all eight jurors stated that insurance was not a factor in their decisions"].)

Finally, it is fatal error for a motion for new trial on juror misconduct to not include a "no knowledge" declaration from the moving party and their counsel. "A litigant seeking a new trial on the ground of juror improprieties must present affidavits showing that neither the party nor his or her attorney were aware of the misbehavior until after the verdict was returned, and if the party does not comply with this requirement, the motion for a new trial is properly denied." (*People v. Southern Cal. Edison Co.* (1976) 56 Cal.App.3d 593, 598-600.) This doctrine is based on "uninterrupted case authority" and is "firmly established and long approved in this state." (*Id.*, at pp. 598-599.) This is not an ancient doctrine. It is still applied to this day. (See, e.g., *Nissan Motor Acceptance Cases* (2021) 63 Cal.App.5th 793, 812 ["trial courts require a 'no knowledge' declaration from the moving party in a new trial motion based on juror misconduct"].)

When a motion for new trial on juror misconduct does not include "no knowledge" declarations, lead your opposition with this fatal procedural error. "The absence of such a showing in


support of the motion for a new trial is fatal." (*Forman v. Alexander's Markets* (1956) 138 Cal.App.2d 671, 674-675.) It would be "reversible error" for the motion to be granted. (*Id*. at 676.)

***Excessive damages***

The standard for granting a new trial on the grounds of insufficient evidence or excessive damages is specified in the new-trial statute, section 657 of the Code of Civil Procedure. It says, "A new trial shall not be granted upon the ground of insufficiency of the evidence to justify the verdict or other decision, nor upon the ground of excessive or inadequate damages, *unless after weighing the evidence the court is convinced from the entire record, including reasonable inferences therefrom, that the court or jury clearly should have reached a different verdict or decision*." (Emphasis added.)

Defendants will often ignore this standard and will instead argue that a trial court has broad discretion to grant a new-trial motion and to re-weigh the evidence. You should counter by citing the actual standard, and by pointing out that this standard is not satisfied simply because, if the trial court had been the fact finder, it would have reached a different decision than the jury. (*People v. Robarge* (1953) 41 Cal.2d 628, 633.)

Regarding noneconomic damages, it is important not only to highlight the ways in which the plaintiff's damages have affected his or her life (e.g., restrictions on hobbies, household tasks, etc.), but to also stress the noneconomic damages that corresponded with their economic damages. If they underwent substantial medical treatment, and have recommendations for future treatment, that carries with it a significant amount of noneconomic loss. (See CACI 3905A [allowing for noneconomic damages for physical pain, physical impairment, inconvenience, etc.].)

***Error in evidence***

These are very case-specific, and do not lend themselves to general advice. However, the claimed errors are often also the subject of pre-trial motions in limine. For example, the plaintiff files a motion in limine to preclude health-insurance reimbursement rates at trial. If the defense opposes this, but the evidence is nonetheless excluded, then it is likely they will raise this as error at the time of new-trial motions. Therefore, use the work you already put into the motion in limine and plug the relevant parts into your new trial opposition.

## Opposing a motion for judgment notwithstanding the verdict (JNOV)

A judgment notwithstanding the verdict, or JNOV, asks the Court to overturn a verdict because no substantial evidence supports it. (*Hansen v. Sunnyside Products, Inc.* (1997) 55 Cal.App.4th 1497, 1510.) It is essentially a demurrer to the evidence presented at trial. (*Brassinga v. City of Mountain View* (1998) 66 Cal.App.4th 195, 210.) Because of that, these motions are difficult to bring with success.

When faced with a JNOV, focus your opposition on the voluminous evidence that established your prima facie case. If you carefully strategized before trial and laid out all elements needed to prove your case, then you will already have the points in opposition to defeat a JNOV.

## Writing tips

While the above is intended to outline specific post-trial work we routinely see, I want to leave you with some writing tips that are true for all post-trial work.

Prepare, prepare, prepare. The *last* step in drafting an opposition to any post-trial motion is the actual writing. Often, we are tempted to dive in and begin writing immediately, especially in the face of fast-approaching deadlines. This is not recommended. Rather, most of your time should be devoted to researching the legal issues and gathering the facts.

That said, you do not have unlimited time. Remember that you are not proving your case over again – you are countering only those arguments presented in the opposing party's motion. They carry the burden, and thus you only need to address the points they raise (while, of course, providing counter-evidence and law where necessary).

When it comes to finding the relevant law for a post-trial motion, start with the moving party's authorities. Read the cases they cite in full. Find those critical facts that distinguish the cases from yours. Research related cases to look for law that may be more applicable to your particular trial.

Take the same approach in gathering the facts of your case. Review the facts they rely on and then locate other testimony or evidence that counters or lessens the import of those facts. For example, if the moving party claims that the plaintiff did not testify to a certain element of damages, gather the testimony of the other witnesses (i.e., treating physicians, damage witnesses) who completed the full picture of the plaintiff's injuries.

***Practice pointer***: Make sure you order daily transcripts during trial. You do not want to be tracking down certified transcripts when you have mere days to file your opposition.

## Organization is key

Organizing in the face of a time crunch can be overwhelming. Keep it simple. Follow the pattern that the moving party establishes. Not only does this help you quickly create an outline of points to hit, but it also ensures that the reader (the court) sees that you have adequately addressed all issues raised. You may find that a sample received by a colleague is directly on point, and often prior briefs are a great resource. However, as advised above, do not adopt their formatting. Rather, extract the law and arguments from those templates and plug them into your pre-written outline. Again, you are countering a specific motion with limited arguments – mirror the moving party's format and address their arguments head on.

Keep each section short. Keep paragraphs short, too. Each section should contain a singular overarching theme. If you need to expand on a topic, use subsections. Be certain that the


opposition is organized in a manner that is simple to follow. Just as each section should be concise, each paragraph should be even more so.

California Rules of Court, rule 3.1113 requires that memorandums longer than 10 pages must contain a table of contents and a table of authorities. Nine times out of 10, you should not trigger this rule. You may feel that you are doing your client a disservice if you do not cram every winning point in your opposition, but rest assured you are not.

## Conclusion

The best approach to post-trial motions is truly one of precision and strength. Of course, do not leave major arguments unanswered. But do not get lost in the weeds finding every technical flaw in the moving party's motion. Tell the court why your verdict or costs should stand, and do so with your best evidence.

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