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I just won! Can I relax now?

FROM A COSTS MEMO TO AN ATTORNEY'S FEES MOTION TO JUROR DECLARATIONS, A REVIEW OF WHAT TO DO AFTER THE VERDICT

Congratulations! You just got (at least) nine jurors to agree with your client. What a feeling – well done! But, unfortunately, it is not time to rest yet. Much is still required to hang on to your verdict in the trial court and on appeal. This article will highlight the things you can do in state court to maximize your client's recovery and help ensure your winning jury verdict survives appeal intact.

First, here are things you *must* do after trial to maximize your client's recovery. If you do not do these things right after judgment is entered, there is no opportunity to do them later or on appeal.

File a costs memorandum

Prevailing parties with "a net monetary relief" are "entitled as a matter of right to recover costs in any action or proceeding." (Code Civ. Proc., § 1032.) (Unless otherwise indicated, all citations are to the Code of Civil Procedure.) The costs are recoverable so long as they are incurred (whether or not they are paid). (§ 1033.5, subd. (c)(1).)

But this right is not absolute. The costs still must be "allowable," "reasonably necessary" to the conduct of the litigation, and "reasonable" in amount. (§ 1033.5, subd. (c)(2) and (3).)

Moreover, penalties may apply if the recovery at trial did not exceed a settlement offer made under section 998. Specifically, if you reject a defense offer and fail to obtain a more favorable

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judgment at trial, the defense (instead of your prevailing plaintiff) is entitled to all costs incurred after the offer was made. In addition, the court may order plaintiff to pay defendant's reasonable post-offer expert witness fees. (§ 998; *Murillo v. Fleetwood Enterprises, Inc.* (1998) 17 Cal.4th 985, 1000.)

However, if the defense rejects your 998 offer and they fail to obtain a "more favorable judgment," then your plaintiff is entitled to all costs, whether they were incurred before or after the 998 offer because, as courts have held, it is "absurd" to argue that plaintiffs should be limited to post-offer costs when it is the defendant who forced the case to trial. (*Goodstein v. Bank of San Pedro* (1994) 27 Cal.App.4th 899, 910.) In addition, personal injury plaintiffs who beat a 998 offer that the defense rejected may also recover prejudgment interest. (Civ. Code, § 3291.)

To obtain a costs award, you must file your costs memorandum within 15 days of service of the judgment. (CRC 3.1700.)

Motion for attorney's fees

Your client is entitled to recover attorney's fees when authorized by contract, statute, or other common law doctrine.

Fees may be authorized by contract even for tort claims. (*Santisas v. Goodin* (1998) 17 Cal.4th 599, 606; *Xuereb v. Marcus & Millichap, Inc.* (1992) 3 Cal.App.4th 1338, 1343.) If you are representing a tenant in a negligence action against a landlord, you should examine the lease to analyze whether you would be entitled to fees under the contract if you win. For example, contracts that provide for fees to the prevailing party "in any action arising out of the contract" or any action "relating to" the contract are deemed broad enough to encompass both contract and tort claims. (*Santisas v. Goodin, supra*, 17 Cal.4th at 608; *Moallem v. Coldwell Banker Comm'l Group, Inc.* (1994) 25 Cal.App.4th 1827.) In *Hemphill v. Wright Family, LLC* (2015) 234 Cal.App.4th 91, 913-915, the court held that a residential lease providing for a fee award in "any action aris[ing] out of" the "tenancy" encompassed the tenant's negligence and strict-liability claims against the landlord. If the contract does authorize fees, consider stating explicitly that you are seeking fees in the complaint or in an amended complaint (but beware that doing so could also expose your client to fees if the suit is unsuccessful).

If your case is governed by statute, you may also be entitled to prevailing party attorney fees. For example, employment cases alleging claims under FEHA and cases governed by the private attorney general statute (§ 1021.5) are two of the most common types of cases that are eligible for statutory attorney fees.

Finally, attorney fees may also be recoverable under two common law doctrines: (1) the common fund doctrine and (2) the substantial benefit doctrine. Under the common fund doctrine, courts may award attorney fees where the judgment results in recovery of a fund or property benefitting others in addition to the plaintiff (often in a class action setting). Under such circumstances, the court has equitable power to order plaintiff's attorney fees be paid out of the common fund or property. (*Serrano v. Priest* (1977) 20 Cal.3d 25, 35.) Even where no common fund or property has been recovered, under the substantial benefit doctrine, a court has equitable power to order fees where plaintiff has sued in a representative capacity, has created a substantial pecuniary or nonpecuniary benefit to members of an ascertainable class, and the court's subject matter jurisdiction allows for an award that spreads the cost proportionately among members of the class that benefited. (*Smith v. Szeyller* (2019) 31 Cal.App.5th 450, 460.)

To claim attorney's fees recoverable by contract, a noticed motion is required – they cannot be awarded as part of the judgment or by an itemized costs bill. (*Cadle Co. v. World Wide Hospitality* (2006) 144 Cal.App.4th 504, 515; *Russell v. Trans Pac. Group* (1993) 19 Cal.App.4th 1717, 1725.) And for fees recoverable by statute, a noticed motion is required if the court needs to determine the "reasonable" fee. And likewise, attorney fees recoverable "by law" also require a noticed motion. Under Rule of Court 3.1702, this motion "must be served and filed within the time for filing a notice of appeal," which is governed by CRC Rule 8.104 and 8.108 in an unlimited civil case (usually 60 days from service of notice of entry of judgment).

Responding to posttrial attacks on the verdict

Here are best practices for responding to defense attacks on the verdict in posttrial motions. These tips will not only help you defeat their posttrial motions, but will also lay the groundwork for success on appeal.

Attack timeliness and look for forfeiture

When a posttrial motion is filed, carefully examine the timeliness of the notice and seek denial of their motion if it is untimely. Specifically, defendants have only 15 days from service of the judgment to file their notice of intent to move for a new trial or JNOV (judgment notwithstanding the verdict). (§§ 629, 659.) Accordingly, be sure to check whether the judgment was served by both the clerk and a party – if so the first service starts the clock ticking and the second service has no effect.

You should also look to see whether any arguments asserted in their new-trial motion have been forfeited. For example, a claim that evidence was improperly admitted is forfeited if the defendant failed to object to its introduction at trial. (*Mosesian v. Pennwalt Corp.* (1987) 191 Cal.App.3d 851 (overruled on other grounds in *People v. Ault* (2004) 33 Cal.4th 1250.) And a claim that jury voting was defective is waived by a failure to request further deliberations. (*Sanchez-Corea v. Bank of Am.* (1985) 38 Cal.3d 892.)

Consider filing a cross-motion

When facing a posttrial motion attacking your hard-won verdict, consider filing your own new-trial motion on any claims your client lost, either at trial or at summary judgment. (Even if your client did not lose any claims, you should

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preserve the record of any errors committed against you, which you can properly raise – even in the absence of any cross-appeal – under section 906.) In so doing, you might condition your request on the court's decision to grant a new trial ("though plaintiff is satisfied with the verdict as is, should the court grant a new trial, plaintiff requests that any new trial order also embrace plaintiff's claims on…").

For new trial, you have 15 days after defendant's notice to file your own notice of intention to move for new trial: "each other party shall have 15 days after the service of that notice upon him or her to file and serve a notice of intention to move for a new trial." (§659, subd.(a)(2).)

Even experienced lawyers often do not adequately consider this option, especially when they have just won on most – but not all – claims in a difficult case ("we were just happy that we won"). Unfortunately, when the judge grants the defendant's new-trial motion and takes away the verdict, it is too late.

Let's hear from the jurors

The importance of juror declarations is hard to overstate. It is always more powerful to hear directly from the jurors about the confusion over an erroneous instruction or improperly admitted evidence than to hear a lawyer make the same claim ("it was prejudicial because it confused the jury"). Yet many (if not most) experienced lawyers do not obtain juror declarations for fear they are "inadmissible." This is misguided for two reasons.

First, even if your juror declarations are "inadmissible," they can usually provide worthwhile support for your argument, and the ability for the Court of Appeal to hear directly from jurors about the effects of any controversial rulings may be critical regardless of whether the court's opinion relies on them or not. For example, in *Guernsey v. City of Salinas*, (2018) 30 Cal.App.5th 269, five juror declarations explained the prejudicial effect of an erroneous instruction and, although they were not relied on, the defense judgment was reversed because of the erroneous special instruction.

Second, properly drafted juror declarations are held to be admissible – so, why not try? Especially if the other side submits juror declarations in support of their posttrial motion, you want to do everything you can to rebut their declarations. For example, statements in juror declarations that the "jurors discussed the police immunity instruction" and that the jurors "verbally agreed" that an instruction "did not permit us to find negligence on the part of defendants" are admissible. (*Harb v. City of Bakersfield* (2015) 233 Cal.App.4th 606, 623-624.) And one declaration in support of new trial was effectively countered by eight juror declarations in *Barboni v. Tuomi*, (2012) 210 Cal.App.4th 340.

Juror declarations should be used both to oppose their motion and support your cross-motion. In your conversations with jurors, in addition to ferreting out any possible juror bias ("I would never vote for plaintiff because she is a lesbian") or misconduct ("let's each write down a number for damages and then just take the average and use that for our verdict"), it is often fruitful to ask about the prejudicial effect of an asserted error. For example, on the prejudicial effect of an erroneous instruction or erroneously admitted evidence, jurors can speak to the length of time spent discussing a jury instruction or a piece of evidence.

When drafting juror declarations there are two rules to follow:

(1) Comply with Evidence Code section 1150. This requires that juror declarations be limited to "statements made, or conduct, conditions, or events occurring, either within or without the jury room," but refrain from stating "the effect of such statement, conduct, condition, or event upon a juror either in influencing him to assent to or dissent from the verdict or concerning the mental processes by which it was determined."

(2) Be sure to structure the declaration in short paragraphs to make it easy for a court to exclude certain parts while admitting others and make sure the court knows it should not strike the whole declaration but should instead consider the parts that are admissible. (*Lankster v. Alpha Beta Co.* (1993) 15 Cal.App.4th 678, 681 fn. 1.)

Object, object, object

Finally, you should object to the admissibility of any defense juror declarations on any valid ground you can. If the moving declarations contain hearsay or are otherwise inadmissible, your objections should request that those portions of the declarations or other material be stricken. Conversely, if the defense does not object, you should note their failure to object at the hearing.

Valerie McGinty is a certified appellate specialist who represents plaintiffs exclusively. Valerie was Consumer Attorneys of California's 2016 Marvin E. Lewis recipient. In 2014, she received CAOC's Street Fighter of the Year award for her work as lead appellate counsel in Young v. Horizon West, *(2013) 220 Cal.App.4th 1122. Valerie is a Super Lawyer and is rated AV Preeminent by Martindale Hubbell. Email her at valerie@plaintiffsappeals.com.*