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by Michael Shipley

Maroney's Minefield

California's complicated rules for obtaining a new trial can lead all but the most careful to an unfair result

POSTJUDGMENT PROCEDURE in California state court is governed by complicated and confusing statutory and case authority. The procedures for new trial motions can be especially perilous. Courts have construed many of their requirements to be "mandatory and jurisdictional."[1] That is, if a party (even the trial judge) makes a mistake, it often cannot be excused or repaired, even on remand. This results in a significant number of appellate reversals on procedural grounds. A recent decision, *Maroney v. Iacobsohn*, is illustrative.[2] Until the California Legislature addresses this issue,[3] attorneys moving for new trial would be well-advised to understand the many nuances of the procedure.

While the Federal Rules of Civil Procedure address the issue of new trials in less than 300 words in four subsections of Rule 59, California's Code of Civil Procedure, in contrast, uses 12 separate sections[4] of thousands of words, many of which were enacted in California's 1872 codification of the Field Code.[5] Numerous procedures are unique to new trial motions. The process starts with the movant's filing a "notice of his or her intention to move for new trial."[6] There are several alternative timeframes during which the notice must be filed, depending on how the moving party received notice of the entry of judgment.[7] The code lists the grounds—seven vaguely worded and conceptually overlapping categories—that are the only bases on which a new trial motion can be brought or granted.[8] The notice must state the grounds and indicate whether the motion will be supported by affidavits, the record of the court, or both.[9] The actual brief, along with any supporting affidavits, is not filed until 10 days later.[10] An opposition, with any affidavits in support, is filed 10 days after that. And—under an amendment effective January 1, 2015—the moving party can file reply papers five days later.[11]

The code includes a deadline for the trial court to decide the motion, again providing three alternatives.[12] Failure to rule by the deadline is deemed a denial by operation of law. The code further dictates the form that an order granting a motion must take,[13] to be followed by a written specification of reasons that the trial judge must draft him- or herself.[14] A signed proposed order is not sufficient.[15] Oral findings on the record, no matter how lengthy or detailed, are insufficient.[16] On top of that, Section 657 of the Code of Civil Procedure contains some perplexing restrictions on appellate review,[17] which can result in outcomes that are difficult to justify from the perspective of fairness and due process.[18]

All this makes little sense, particularly to

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lawyers more familiar with federal practice. Worse yet, the mandatory and jurisdictional[19] nature of certain rules results in a not insignificant number of appellate reversals over procedural mistakes—including those made by trial courts rather than the moving party.[20] Many of these reversals cannot be fixed on remand.[21] As Justice Otto Kaus noted in a dissent 30 years ago, the various judicial interpretations of the new trial statutes have created a procedural minefield that can defeat even the most vigilant attorney or experienced trial court judge.[22]

Maroney,[23] a recent decision by the Second District's Division Three, is a good example.[24] The plaintiff, Maroney, won a jury verdict, but the damages awarded were far less than her medical bills.[25] The damages were reduced further because the jury found her 40 percent at fault.[26] Although the court entered judgment, it is unclear how the parties learned of its entry. Notice was not served by the clerk, and neither party served the other with a notice of entry of judgment.[27]

At any rate, Maroney definitely had actual notice—she attached the judgment as an exhibit to a motion to tax costs.[28] Twenty-two days later, she filed a notice of intention to move for new trial.[29] Maroney then filed her new trial motion, arguing that the damages were insufficient, that there was insufficient evidence of her contributory negligence, and that the jury should not have been instructed on the contributory negligence issue.[30]

At the hearing, the court asked whether a notice of entry had been served, prompting Iacobsohn to suggest that the court's jurisdiction had expired. After a continuance for supplemental briefing on the timing issue, the trial court heard the motion. Iacobsohn argued that Maroney's motion was untimely under Section 659 because her notice of intention was filed more than 15 days after she received actual notice that judgment had been entered.[31] The hearing occurred on the 82nd day after Maroney filed her costs motion—exactly 60 days after she filed and served her notice of intention. Although the trial court said it was inclined to grant the motion on the merits, it perceived the timing of the hearing to have divested it of jurisdiction.[32]

Under the third paragraph of Section 660, the court's authority to grant a new trial expires 60 days after the earliest of three events: the clerk's mailing of a notice of entry of the judgment, a party's service of notice of entry on the moving party, or the moving party's filing of its notice of intention.[33] The trial court reasoned that because the costs filing established that Maroney received actual notice that a judgment was entered, that was equivalent to service of a notice of entry. It followed that under Section 660, it was too late for the court to act.[34]

Perhaps thinking it was doing Maroney a favor, the trial court proceeded to rule that—even though it thought it lacked jurisdiction to grant her a new trial—it would grant her motion subject to her appeal of the jurisdictional issue. The trial court explained, however, that unless an appellate court reversed on the jurisdiction issue, "there is no new trial."[35] The court thus purported to conditionally grant the motion based on the grounds stated in the court reporter's transcript.[36]

Maroney appealed. She argued that the trial court erred on the jurisdiction issue and that its ruling should be affirmed to the extent that it granted the motion because there was evidence that supported the trial court's broad discretion to order a new trial.[37] Perhaps because the trial court said that it would rule in her favor on the merits, she did not argue or submit a record establishing that the trial court erroneously denied the motion on any basis other than jurisdiction.[38] Iacobsohn, in turn, argued that the trial court got it right on jurisdiction, but that in conditionally granting a new trial, it failed to comply with various jurisdictional formalities such as drafting a specification of reasons, and that Maroney had not provided an adequate record to appeal the judgment on the merits.[39]

The court of appeal first grappled with the timing issue. Did Maroney's service of the judgment in connection with the costs filing amount to a notice of entry under Section 664.5(a)?[40] Relying on *Van Beurden Insurance Services, Inc. v. Customized Worldwide Weather Insurance Agency, Inc.*[41]—a case that stands for the proposition that statutes addressing jurisdiction-implicating time limits should be literally construed to avoid guesswork over their meaning—the appellate court said no. Under the unambiguous text of Sections 659 and 660, the clock runs only from the service of a written notice of entry of judgment "on the moving party."[42] If the moving party has not been served with a notice, the time does not run, regardless of whether the moving party had actual notice of the entry of judgment. Because Maroney had not been served with a notice of entry, Section 660's 60-day window did not open until she filed her notice of intention, which put the hearing on the 60th day. When the trial court heard the motion and issued its order, it did, in fact, have jurisdiction to rule on and to grant Maroney's motion.[43]

One would ordinarily expect this to result in a harmless error analysis, followed by a reversal and remand for the new trial that the trial court said it would have ordered if it had jurisdiction. Instead, the court of appeal held that the trial court had no authority to enter an order "purporting to grant Plaintiff's motion for new trial on the condition that Plaintiff would file an appeal from the order and secure a favorable appellate ruling on the trial court's jurisdiction."[44] On this point, the appellate court cited *LaManna v. Stewart*[45] and *Mercer v. Perez*.[46] These two cases support the requirement that a trial court comply strictly with the requirement of a written specification of reasons. Based on that authority, the court of appeal held that the "conditional order in this case is a nullity that we can neither reverse nor affirm."[47]

Because the trial court's order was invalid, the court of appeal treated it as if the trial court entered no order at all.[48] So, on the next day—61 days from Maroney's notice of intention—the court had effectively failed to rule. The motion was deemed denied by operation of Section 660 because no valid ruling was entered within 60 days of her notice of intention. And since Maroney's appeal did not address or provide record support to challenge the merits of the (deemed) denial under the relevant standard of review, she waived her appeal on the merits of the trial court's denial, which would have been affirmed.[49] There was no new trial for Maroney.

This kind of thing happens rather often in California new trial appeals. An appellant can correctly argue that the trial court had jurisdiction to grant a new trial, only to have the opportunity to actually conduct that trial taken away, based on the trial court's failure to use the words the code requires it to say (or, in Maroney's case, not say). An appellant can have an appeal deemed waived because the trial court's purported "grant" of the motion tricked the appellant into arguing for an affirmance of a grant on the merits—in which the ruling is presumed correct[50]—instead of a reversal—in which the appellant bears the burden of showing error on the record.[51]

Granted, Maroney missed some opportunities. Most significantly, she probably doomed her appeal from the start by taking the trial court at its word that it was granting her motion. A trial court only actually grants a motion for new trial when it orders a "'re-examination of an issue of fact,' as though no trial had been previously had."[52] "[W]hen a motion for new trial is granted 'in general terms,' the cause stands 'in the exact situation in which it was before any trial thereof had been had,' and…no *subsequent* order may be made modifying the judgment previously entered."[53] But a venerable line of cases establishes that an order purporting to "grant" a new trial motion that affords no relief or that provides relief other than a full-blown new trial on at least some issues[54] is, for all

MCLE Test No. 250

The Los Angeles County Bar Association certifies that this activity has been approved for Minimum Continuing Legal Education credit by the State Bar of California in the amount of 1 hour.

1. A motion for new trial is timely only if a notice of intention to move for new trial is filed prior to the entry of judgment.
True.
False.

2. Which of the following is not a statutory ground for new trial?
A. Irregularity in the proceedings of the court.
B. Misconduct of the jury.
C. Misstatement of the evidence during closing argument.
D. Excessive or inadequate damages.

3. A notice of intention to move for new trial must be accompanied by a memorandum of points and authorities.
True.
False.

4. A motion for new trial can raise factual issues outside the record of the court at trial.
True.
False.

5. An amendment to the Code of Civil Procedure permitting a moving party to file a reply brief became effective in:
A. 1872.
B. 1973.
C. 1997.
D. 2015.

6. When a court has not acted upon a motion within the relevant time period under Code of Civil Procedure Section 660:
A. The motion is granted.
B. The motion is denied by operation of law.
C. The time to appeal is extended.

7. *Maroney v. Iacobsohn* holds that a party's time to serve a notice of intention to move for new trial runs from the time at which the moving party has actual notice of the entry of judgment.
True.
False.

8. The court's authority to grant a new trial motion expires 30 days after the clerk's mailing of the notice of entry of judgment.
True.
False.

9. To grant a motion for new trial, the court is required to enter an order specifying its reasons.
True.
False.

10. The court can direct a party to prepare a proposed order specifying the reasons why the court is granting a motion for new trial.
True.
False.

11. In *Maroney v. Iacobsohn*, the court of appeal held that the ultimate result of the trial court's error in deciding it lacked jurisdiction was to render the motion denied by operation of law.
True.
False.

12. After a bench trial, a court that orders an amendment of its statement of reasons in response to a new trial motion has granted the motion.
True.
False.

13. California trial judges have broad discretion whether to order new trials.
True.
False.

14. In deciding a new trial motion, a California judge can disagree with the jury regarding the credibility of witnesses.
True.
False.

15. *Maroney v. Iacobsohn* affirmed the denial of a new trial motion because the plaintiff failed to make a record for reversal on appeal.
True.
False.

16. A dissenting Supreme Court justice once referred to new trial procedure in California as a procedural minefield.
True.
False.

17. The requirement that the court specify its reasons for a new trial is mandatory and jurisdictional.
True.
False.

18. Serving a copy of a judgment attached to a pleading is sufficient to constitute notice of entry of judgment under Code of Civil Procedure Section 664.5(a).
True.
False.

19. California state courts are more willing than federal courts to entertain new trial motions that examine what occurred during the jury's deliberations.
True.
False.

20. California courts have vacated new trial orders based on procedural mistakes by the trial judge that were outside the control of the moving party.
True.
False.

MCLE Answer Sheet #250

MARONEY'S MINEFIELD

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3.	☐ True	☐ False		
4.	☐ True	☐ False		
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20.	☐ True	☐ False		

relevant purposes, a denial.[55]

Were the order treated as a denial, two key and related consequences would follow. First, the unusual formalities that apply to an order *granting* a new trial motion—such as in those at issue in *La Manna*, which was relied upon by the court of appeal—do not apply to an order *denying* a new trial motion.[56] Second, the rules against remanding to correct a trial court's procedural errors are based on Section 657,[57] which facially applies only on "appeal from an order granting a new trial." There thus should be no bar to a reversal and remand[58] to correct a timely,[59] but procedurally erroneous, denial on an appeal from the underlying judgment, into which the new trial motion is subsumed.[60] Provided, of course, that it was an abuse of the trial court's discretion to deny the motion[61] and that the appellant can establish the prejudice necessary to merit a reversal on procedural grounds.[62]

From there, Maroney might have had a fairly clear path. The conditional nature of the order, which the court of appeal found to be so fatally and jurisdictionally flawed as to render it void when treated as a grant, would just be dicta in an order denying the motion on jurisdictional grounds. That avoids any issues of nullity or arguments that the motion should have been deemed denied by operation of law under Section 660. Even under the standard of deferential abuse of discretion, the denial of a new trial motion based on error of law—such as the trial court's erroneous construction of Sections 659 and 660—is just such an abuse.[63] Finally, given the trial court's comments that it was inclined to grant the motion, it would be difficult to say that the court's error about its lack of jurisdiction was not prejudicial.[64]

Another curious feature of California's rules is that they offer a narrow procedural gateway but very broad substantive grounds for a new trial. For example, a trial judge can simply decide that the jury got it wrong[65] and is afforded significant appellate deference if he or she does so.[66] California courts may delve much more deeply into the jury's deliberations than would be acceptable in federal court.[67] On the other hand, a California trial judge is micromanaged on new trial procedure, and if a case falls into one of the code's many traps, an innocent party may pay the price.

Over the past 50 years, the California Supreme Court has repeatedly noted the unfairness inherent in new trial procedures and—in tacit recognition of the California Legislature's unusual primacy over civil procedure[68]—has essentially invited that body to address the problem.[69] Until these issues are addressed, however, practitioners must remain extremely diligent regarding the many complications arising from new trial procedure in state court. ■

[1] *See* La Manna v. Stewart, 13 Cal. 3d 413, 422 (1975).
[2] *See* Maroney v. Iacobsohn, 237 Cal. App. 4th 473 (2015).
[3] *See* Smith v. Ibos, 22 Cal. App. 2d 551, 554 (1937) ("The power of the Legislature [in] specifying procedural steps for new trials is exclusive and unlimited."); *see also* Oakland Raiders v. National Football League, 41 Cal. 4th 624, 635 (2007).
[4] Code Civ. Proc. §§656-662.5, 663.1-2.
[5] *See generally* Gould v. Wood, 205 Cal. 141, 143 (1928) (noting that the Field Code was "the basis of our own Code of Civil Procedure adopted in 1872").
[6] Code Civ. Proc. §659(a).
[7] Code Civ. Proc. §659(a)(2).
[8] *See* Code. Civ. Proc. §657.
[9] Code Civ. Proc. §659(a).
[10] *Id.*
[11] *Id.*
[12] Code Civ. Proc. §660.
[13] *Id.*
[14] Code Civ. Proc. §657.
[15] *See* La Manna v. Stewart, 13 Cal. 3d 413, 424 (1975).
[16] *See id.*
[17] The final paragraph of §657 provides that an order granting a new trial on insufficiency of the evidence or excessive or inadequate damages cannot be affirmed unless those grounds are stated in the order granting the motion.
[18] *See, e.g.*, La Manna, 13 Cal. 3d at 424 (reversing new trial order on insufficiency of the evidence because the trial court failed to specify its reasons); *see also generally* Sanchez-Corea v. Bank of Am., 38 Cal. 3d 892, 903-06 (1985); *accord* Marriage of Beilock, 81 Cal. App. 3d 713, 725 (1978) (explaining policy rationale behind appellate review provisions).
[19] La Manna, 13 Cal. 3d at 422.
[20] *See, e.g.*, *id.* at 424; *accord* Sanchez-Corea, 38 Cal. 3d at 905 n.5.
[21] *See* Clemens v. Regents of Univ. of Cal., 8 Cal. App. 3d 1, 20 (1970); Mercer v. Perez, 68 Cal. 2d 104, 120 (1968).
[22] Sanchez-Corea, 38 Cal. 3d at 911 (Kaus, J., dissenting); *see also* Thompson v. Friendly Hills Reg'l Med. Ctr., 71 Cal. App. 4th 544, 550 (1999).
[23] Maroney v. Iacobsohn, 237 Cal. App. 4th 473 (2015).
[24] The opinion was modified on rehearing, but its reasoning remained essentially the same. The original opinion, now vacated, was published as Maroney v. Iacobsohn, 233 Cal. App. 4th 900 (2015).
[25] Maroney, 237 Cal. App. 4th at 478.
[26] *Id.*
[27] *See* Code Civ. Proc. §664.5(a).
[28] Maroney, 237 Cal. App. 4th at 477. Iacobsohn had the right to recover his costs because he had made an offer of judgment under Code of Civil Procedure §998, which Maroney had rejected, and Maroney recovered less than the offer.
[29] Maroney, 237 Cal. App. 4th at 477-78.
[30] *Id.* at 478.
[31] *Id.*
[32] *Id.*
[33] *See* Code Civ. Proc. §660.
[34] Maroney, 237 Cal. App. 4th at 479.
[35] *Id.*
[36] *Id.*
[37] *See* Maroney v. Iacobsohn, No. B249890, Appellant Keely Maroney's Br. Supporting Appeal, 2013 WL 7019816 (Cal. App. Dec. 17, 2013).
[38] *Id.*; *see also* Maroney, 237 Cal. App. 4th at 486.
[39] Maroney v. Iacobsohn, No. B249890, Combined Appellants' and Respo'ts' Br., 2014 WL 986487 (Cal.

App. Feb. 4, 2014).
[40] Maroney, 237 Cal. App. 4th at 480.
[41] Van Beurden Ins. Servs., Inc. v. Customized Worldwide Weather Ins. Agency, Inc., 15 Cal. 4th 51, 62 (1997).
[42] Maroney, 237 Cal. App. 4th at 481.
[43] *Id.* at 484.
[44] *Id.* at 485.
[45] La Manna v. Stewart, 13 Cal. 3d 413, 418 (1975).
[46] Mercer v. Perez, 68 Cal. 2d 104, 118 (1968).
[47] Maroney, 237 Cal. App. 4th at 485.
[48] *Id.*
[49] *Id.* at 486.
[50] *See* Wayte v. Rollins Int'l, Inc., 169 Cal. App. 3d 1, 22 (1985); Cook v. Bordi, 177 Cal. App. 2d 112, 116 (1960).
[51] *See* Hearn v. Howard, 177 Cal. App. 4th 1193, 1207 (2009); Girch v. Cal-Union Stores, Inc., 268 Cal. App. 2d 541, 549 (1968).
[52] Bureau of Welfare v. Drapeau, 21 Cal. App. 2d 138, 150 (1937) (citing CODE CIV. PROC. §656).
[53] *Id.* at 149-50 (emphasis in original) (citation omitted).
[54] *See* CODE CIV. PROC. §662 (permitting an award of other relief in lieu of a new trial when the right to jury trial is not implicated).
[55] Concerned Citizens Coal. of Stockton v. City of Stockton, 128 Cal. App. 4th 70, 78 (2005); La Borne v. Mulvany, 43 Cal. App. 3d 905, 920 (1974); Avery v. Assoc. Seed Growers, Inc., 211 Cal. App. 2d 613, 621 (1963); Moklofsky v. Moklofsky, 79 Cal. App. 2d 259, 264 (1947); In re Perkins' Estate, 21 Cal. 2d 561, 568 (1943); Roraback v. Roraback, 38 Cal. App. 2d 592, 596 (1940); Drapeau, 21 Cal. App. 2d at 150; *see also* W. Electro-Plating Co. v. Henness, 196 Cal. App. 2d 564, 569 n.2 (1961); Spier v. Lang, 4 Cal. 2d 711, 715 (1935).
[56] *See* Laabs v. City of Victorville, 163 Cal. App. 4th 1242, 1272 n.17 (2008).
[57] *See* Mercer v. Perez, 68 Cal. 2d 104, 120 (1968); Oakland Raiders v. National Football League, 41 Cal. 4th 624, 635 (2007).
[58] *See, e.g.*, Krouse v. Graham, 19 Cal. 3d 59, 82 (1977); *see also* Barrese v. Murray, 198 Cal. App. 4th 494, 508 (2011) (60-day time limit to decide new trial motions under §660).
[59] After rehearing, the Maroney court added a footnote asserting that it could not remand the matter for reconsideration. Maroney v. Iacobsohn, 237 Cal. App. 4th 473, 485 n.11 (2015) (citing Siegal v. Superior Court, 68 Cal. 2d 97, 101 (1968); Westrec Marina Mgmt., Inc. v. Jardine Ins. Brokers Orange Cnty., Inc., 85 Cal. App. 4th 1042, 1048 (2000); and Meskell v. Culver City Unified Sch. Dist., 12 Cal. App. 3d 815, 822 (1970)). None of the cited cases stands for the proposition that the court of appeal cannot remand for reconsideration of a timely but erroneous denial of a new trial motion. Indeed, the *Maroney* footnote also cites to Barrese, 198 Cal. App. 4th at 496, 502-03, 508, in which the court of appeal reversed and remanded for reconsideration a trial court's timely denial based on its erroneous belief that it lacked the authority to disregard the jury's fact-finding on a new trial motion.
[60] Although a granted new trial motion is directly appealable under Code of Civil Procedure §904.1(a)(4), a denial of a new trial motion is not. *See* Walker v. L.A. Metro. Transp. Auth., 35 Cal. 4th 15, 22 (2005). In that case, an appeal lies from the judgment into which the denial order is subsumed. *Id.*
[61] David v. Hernandez, 226 Cal. App. 4th 578, 592 (2014) (standard of review for denied new trial motion).
[62] *See* CODE CIV. PROC. §475; CAL. CONST. art. VI, §13; *cf.* Weisenburg v. Molina, 58 Cal. App. 3d 478, 486 (1976) (holding that the trial court erred when it erroneously denied a new trial motion for lack of jurisdiction, but declining to reverse on that ground because "no prejudice resulted to appellants from the trial court's erroneous ruling that it had no jurisdiction to hear the motions for new trial.").
[63] David, 226 Cal. App. 4th at 592.
[64] *See* Mercer v. Perez, 68 Cal. 2d 104, 127 (1968); CAL. CONST. art. VI, §13.
[65] *Id.* at 112 (noting that the trial judge is "vested with the authority, for example, to disbelieve witnesses, reweigh the evidence, and draw reasonable inferences therefrom contrary to those of the trier of fact").
[66] *Id.* (ruling will be upheld "unless a manifest and unmistakable abuse of discretion is made to appear").
[67] *Compare* Tramell v. McDonnell Douglas Corp., 163 Cal. App. 3d 157, 173-76 (1984) (considering affidavits to determine whether the jury committed misconduct by adjusting verdict to account for anticipated attorney's fees and income taxes); Krouse v. Graham, 19 Cal. 3d 59, 81 (1977) (remanding for trial court to consider juror affidavits attesting that a verdict was inflated to compensate the plaintiff for her attorney's fees); *with* Warger v. Shauers, 135 S. Ct. 521, 529 (2014) (juror affidavits admissible only as to evidence extrinsic to the jury's deliberations).
[68] *See* In re Alonzo J., 58 Cal. 4th 924, 937 (2014); CAL. CONST. art. VI, §6 (procedural rules adopted by the Judicial Council cannot conflict with statutes); *see also* Glenn S. Koppel, *Populism, Politics, and Procedure: The Saga of Summary Judgment and the Rulemaking Process in California*, 24 PEPP. L. REV. 455, 462-64 (1997) (discussing California's unusual "legislative primacy" over civil procedure).
[69] *See* Oakland Raiders v. National Football League, 41 Cal. 4th 624, 635 (2007) (citing Mercer, 68 Cal. 2d at 117; La Manna v. Stewart, 13 Cal. 3d 413, 422 n.8 (1975)).