



[This Photo](#) by Unknown Author is licensed under [CC BY-SA](#)

Misadventures of Mistrial

Presented by Team One

David Miller, Moderator & Plaintiff's attorney Ramon David Munchausen

Katie Clunen, Defense attorney Karina Papagian

Theresa Loss, Defendant Dr. Bladder

Susan Elston, Plaintiff Violet Willowglass

Brandon Jansen, Judge Morton Pfeffer

F. Stephen Jones, Otis Jones

For counsel to bring a motion for mistrial, both of the following conditions must be met:

A valid ground for the motion

A timely motion made

CHECKLIST: Moving for Mistrial.

Determine if there are grounds for a mistrial.

Misconduct of counsel.

Misconduct of jury.

Misconduct of judge.

Testimony by judge or juror.

Illness of juror.

Judges inability to complete trial.

Jury discharged without rendering verdict.

Failure to timely complete short cause trial.

Jury returned incomplete special verdict.

Misconduct is prejudicial.

Authority: Code of Civil Procedure 657

Determine if mistrial is mandatory or discretionary.

Determine if bringing a motion for mistrial is the best strategy.

Make the motion for mistrial immediately, as soon as the misconduct occurs.

Make the motion orally during trial.

Request evidentiary hearing, if necessary.

Request that the judge admonish the jury regarding the misconduct.



[Up^](#) [Add To My Favorites](#)

CODE OF CIVIL PROCEDURE - CCP

PART 2. OF CIVIL ACTIONS [307 - 1062.20] (Part 2 enacted 1872.)

TITLE 8. OF THE TRIAL AND JUDGMENT IN CIVIL ACTIONS [577 - 674] (Title 8 enacted 1872.)

CHAPTER 7. Provisions Relating to Trials in General [646 - 663.2] (Chapter 7 enacted 1872.)

ARTICLE 2. New Trials [656 - 663.2] (Article 2 enacted 1872.)

656. A new trial is a re-examination of an issue of fact in the same court after a trial and decision by a jury, court, or referee.

(Amended by Stats. 1907, Ch. 380.)

657. The verdict may be vacated and any other decision may be modified or vacated, in whole or in part, and a new or further trial granted on all or part of the issues, on the application of the party aggrieved, for any of the following causes, materially affecting the substantial rights of such party:

1. Irregularity in the proceedings of the court, jury or adverse party, or any order of the court or abuse of discretion by which either party was prevented from having a fair trial.
2. Misconduct of the jury; and whenever any one or more of the jurors have been induced to assent to any general or special verdict, or to a finding on any question submitted to them by the court, by a resort to the determination of chance, such misconduct may be proved by the affidavit of any one of the jurors.
3. Accident or surprise, which ordinary prudence could not have guarded against.
4. Newly discovered evidence, material for the party making the application, which he could not, with reasonable diligence, have discovered and produced at the trial.
5. Excessive or inadequate damages.
6. Insufficiency of the evidence to justify the verdict or other decision, or the verdict or other decision is against law.
7. Error in law, occurring at the trial and excepted to by the party making the application.

When a new trial is granted, on all or part of the issues, the court shall specify the ground or grounds upon which it is granted and the court's reason or reasons for granting the new trial upon each ground stated.

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.

The order passing upon and determining the motion must be made and entered as provided in Section 660 and if the motion is granted must state the ground or grounds relied upon by the court, and may contain the specification of reasons. If an order granting such motion does not contain such specification of reasons, the court must, within 10 days after filing such order, prepare, sign and file such specification of reasons in writing with the clerk. The court shall not direct the attorney for a party to prepare either or both said order and said specification of reasons.

On appeal from an order granting a new trial the order shall be affirmed if it should have been granted upon any ground stated in the motion, whether or not specified in the order or specification of reasons, except that (a) the order shall not be affirmed upon the ground of the insufficiency of the evidence to justify the verdict or other decision, or upon the ground of excessive or inadequate damages, unless such ground is stated in the order granting the motion and (b) on appeal from an order granting a new trial upon the ground of the insufficiency of the evidence to justify the verdict or other decision, or upon the ground of excessive or inadequate damages, it shall be conclusively presumed that said order as to such ground was made only for the reasons specified in said order or said specification of reasons, and such order shall be reversed as to such ground only if there is no substantial basis in the record for any of such reasons.

(Amended by Stats. 1967, Ch. 72.)

657.1. A new trial may also be granted as provided in Section 914 of this code.

(Added by Stats. 1968, Ch. 387.)

658. When the application is made for a cause mentioned in the first, second, third and fourth subdivisions of Section 657, it must be made upon affidavits; otherwise it must be made on the minutes of the court.

(Amended by Stats. 1983, Ch. 1167, Sec. 9.)

659. (a) The party intending to move for a new trial shall file with the clerk and serve upon each adverse party a notice of his or her intention to move for a new trial, designating the grounds upon which the motion will be made and whether the same will be made upon affidavits or the minutes of the court, or both, either:

(1) After the decision is rendered and before the entry of judgment.

(2) Within 15 days of the date of mailing notice of entry of judgment by the clerk of the court pursuant to Section 664.5, or service upon him or her by any party of written notice of entry of judgment, or within 180 days after the entry of judgment, whichever is earliest; provided, that upon the filing of the first notice of intention to move for a new trial by a party, 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.

(b) That notice of intention to move for a new trial shall be deemed to be a motion for a new trial on all the grounds stated in the notice. The times specified in paragraphs (1) and (2) of subdivision (a) shall not be extended by order or stipulation or by those provisions of Section 1013 that extend the time for exercising a right or doing an act where service is by mail.

(Amended by Stats. 2012, Ch. 83, Sec. 1. (AB 2106) Effective January 1, 2013.)

659a. Within 10 days of filing the notice, the moving party shall serve upon all other parties and file any brief and accompanying documents, including affidavits in support of the motion. The other parties shall have 10 days after that service within which to serve upon the moving party and file any opposing briefs and accompanying documents, including counter-affidavits. The moving party shall have five days after that service to file any reply brief and accompanying documents. These deadlines may, for good cause shown by affidavit or by written stipulation of the parties, be extended by any judge for an additional period not to exceed 10 days.

(Amended by Stats. 2014, Ch. 93, Sec. 2. (AB 1659) Effective January 1, 2015.)

660. (a) On the hearing of the motion, reference may be had in all cases to the pleadings and orders of the court on file, and when the motion is made on the minutes, reference may also be had to any depositions and documentary evidence offered at the trial and to the report of the proceedings on the trial taken by the phonographic reporter, or to any certified transcript of the report or if there be no such report or certified transcript, to proceedings occurring at the trial that are within the recollection of the judge; when the proceedings at the trial have been phonographically reported, but the reporter's notes have not been transcribed, the reporter shall, upon request of the court or either party, attend the hearing of the motion and read his or her notes, or such parts thereof as the court, or either party, may require.

(b) The hearing and determination of the motion for a new trial shall have precedence over all other matters except criminal cases, probate matters, and cases actually on trial, and it shall be the duty of the court to determine the motion at the earliest possible moment.

(c) Except as otherwise provided in Section 12a of this code, the power of the court to rule on a motion for a new trial shall expire 75 days after the mailing of notice of entry of judgment by the clerk of the court pursuant to Section 664.5 or 75 days after service on the moving party by any party of written notice of entry of judgment, whichever is earlier, or if that notice has not been given, 75 days after the filing of the first notice of intention to move for a new trial. If the motion is not determined within the 75-day period, or within that period as extended, the effect shall be a denial of the motion without further order of the court. A motion for a new trial is not determined within the meaning of this section until an order ruling on the motion is entered in the permanent minutes of the court or signed by the judge and filed with the clerk. The entry of a new trial order in the permanent minutes of the court shall constitute a determination of the motion even though that minute order, as entered, expressly directs that a written order be prepared, signed, and filed. The minute entry shall in all cases show the date on which the order is entered in the permanent minutes, but failure to comply with this direction shall not impair the validity or effectiveness of the order.

(Amended by Stats. 2018, Ch. 317, Sec. 1. (AB 2230) Effective January 1, 2019.)

661. The motion for a new trial shall be heard and determined by the judge who presided at the trial; provided, however, that in case of the inability of such judge or if at the time noticed for hearing thereon he is absent from the county where the trial was had, the same shall be heard and determined by any other judge of the same court. Upon the expiration of the time to file counter affidavits the clerk forthwith shall call the motion to the attention of the judge who presided at the trial, or the judge acting in his place, as the case may be, and such judge thereupon shall designate the time for oral argument, if any, to be had on said motion. Five (5) days' notice by mail shall be given of such oral argument, if any, by the clerk to the respective parties. Such motion, if heard by a judge other than the trial judge shall be argued orally or shall be submitted without oral argument, as the judge may direct, not later than ten (10) days before the expiration of the time within which the court has power to pass on the same.

(Amended by Stats. 1933, Ch. 744.)

662. In ruling on such motion, in a cause tried without a jury, the court may, on such terms as may be just, change or add to the statement of decision, modify the judgment, in whole or in part, vacate the judgment, in whole or in part, and grant a new trial on all or part of the issues, or, in lieu of granting a new trial, may vacate and set aside the statement of decision and judgment and reopen the case for further proceedings and the introduction of additional evidence with the same effect as if the case had been reopened after the submission thereof and before a decision had been filed or judgment rendered. Any judgment thereafter entered shall be subject to the provisions of sections 657 and 659.

(Amended by Stats. 1981, Ch. 900, Sec. 4.)

662.5. (a) In any civil action where after trial by jury an order granting a new trial limited to the issue of damages would be proper, the trial court may in its discretion:

(1) If the ground for granting a new trial is inadequate damages, issue a conditional order granting the new trial unless the party against whom the verdict has been rendered consents to the addition of damages in an amount the court in its independent judgment determines from the evidence to be fair and reasonable.

(2) If the ground for granting a new trial is excessive damages, issue a conditional order granting the new trial unless the party in whose favor the verdict has been rendered consents to the reduction of so much thereof as the court in its independent judgment determines from the evidence to be fair and reasonable.

(b) If a deadline for acceptance or rejection of the addition or reduction of damages is not set forth in the conditional order, the deadline is 30 days from the date the conditional order is served by the clerk of the court. Failure to respond to the order in accordance with this section shall be deemed a rejection of the addition or reduction of damages and a new trial limited to the issue of damages shall be granted automatically.

(c) A party filing and serving an acceptance of a conditionally ordered addition or reduction of damages shall concurrently serve and submit to the court a proposed amended judgment reflecting the modified judgment amount, as well as any other uncontested judgment awards.

(Amended by Stats. 2011, Ch. 409, Sec. 2. (AB 1403) Effective January 1, 2012.)

663. A judgment or decree, when based upon a decision by the court, or the special verdict of a jury, may, upon motion of the party aggrieved, be set aside and vacated by the same court, and another and different judgment entered, for either of the following causes, materially affecting the substantial rights of the party and entitling the party to a different judgment:

1. Incorrect or erroneous legal basis for the decision, not consistent with or not supported by the facts; and in such case when the judgment is set aside, the statement of decision shall be amended and corrected.

2. A judgment or decree not consistent with or not supported by the special verdict.

(Amended by Stats. 1981, Ch. 900, Sec. 5.)

663a. (a) A party intending to make a motion to set aside and vacate a judgment, as described in Section 663, shall file with the clerk and serve upon the adverse party a notice of his or her intention, designating the grounds upon which the motion will be made, and specifying the particulars in which the legal basis for the decision is not consistent with or supported by the facts, or in which the judgment or decree is not consistent with the special verdict, either:

(1) After the decision is rendered and before the entry of judgment.

(2) Within 15 days of the date of mailing of notice of entry of judgment by the clerk of the court pursuant to Section 664.5, or service upon him or her by any party of written notice of entry of judgment, or within 180 days after the entry of judgment, whichever is earliest.

(b) Except as otherwise provided in Section 12a, the power of the court to rule on a motion to set aside and vacate a judgment shall expire 75 days from the mailing of notice of entry of judgment by the clerk of the court pursuant to Section 664.5, or 75 days after service upon the moving party by any party of written notice of entry of the judgment, whichever is earlier, or if that notice has not been given, 75 days after the filing of the first notice of intention to move to set aside and vacate the judgment. If that motion is not determined within the 75-day period, or within that period as extended, the effect shall be a denial of the motion without further order of the court. A motion to set aside and vacate a judgment is not determined within the meaning of this section until an order ruling on the motion is entered in the permanent minutes of the court, or signed by the judge and filed with the clerk. The entry of an order to set aside and vacate the judgment in the permanent minutes of the court shall constitute a determination of the motion even though that minute order, as entered, expressly directs that a written order be prepared, signed, and filed. The minute entry shall, in all cases, show the date on which the order is entered in the permanent minutes, but failure to comply with this direction shall not impair the validity or effectiveness of the order.

(c) The provisions of Section 1013 extending the time for exercising a right or doing an act where service is by mail shall not apply to extend the times specified in paragraphs (1) and (2) of subdivision (a).

(d) The moving, opposing, and reply briefs and any accompanying documents shall be filed and served within the periods specified by Section 659a and the hearing on the motion shall be set in the same manner as the hearing on a motion for new trial under Section 660.

(e) An order of the court granting a motion may be reviewed on appeal in the same manner as a special order made after final judgment.

(Amended by Stats. 2018, Ch. 317, Sec. 2. (AB 2230) Effective January 1, 2019.)

663.1. The court may grant a new trial of any action or proceeding when all of the following conditions exist:

(a) Any proposed bill of exceptions or statement of the case on motion for a new trial is lost or destroyed by reason of conflagration or other public calamity.

(b) No other record of the proceedings upon the trial thereof can be obtained.

(c) Such action or proceeding is subject to review by motion for new trial pending at the time of such loss or destruction.

(d) The court in which such action or proceeding is pending deems it impossible or impracticable to restore such proceedings and to settle a bill of exceptions or statement of the case containing such proceedings, so as to enable the court to review the judgment or order therein by motion for new trial.

(e) At the time of such loss or destruction a motion for new trial was pending.

In order to grant such new trial, it shall be unnecessary to have any bill of exceptions or statement of the case settled, but upon the facts recited in this section being shown to the satisfaction of the court by affidavit or otherwise, the court may grant such new trial.

(Added by Stats. 1953, Ch. 52.)

663.2. Pending the hearing of a motion pursuant to Section 663.1 to grant a new trial, the time within which a bill of exceptions may be prepared, served, or presented for settlement shall be extended and shall not commence to run until the decision upon the motion. The motion must be made within 30 days after the loss or destruction of the records.

(Added by Stats. 1953, Ch. 52.)