RIGHT TO JURY TRIAL

TACTICAL CONSIDERATIONS: ADVANTAGES VS. DISADVANTAGES OF JURY TRIALS

[2:1] Whether to try a case before a judge or jury is one of the basic tactical decisions that each side must make in any lawsuit in which the right to jury trial exists.

Many factors affecting this decision are subjective and vary with each case: e.g., jury appeal of case and client; type of damage claim; counsel's experience with juries; reputation of trial judge, etc.

However, there are also some objective factors to consider, including:

- [2:2] *Cost:* Jury trials are more expensive. Jury fees must be posted and maintained throughout the trial (*see* ¶*2:191*). Legal fees are also higher because jury cases usually take longer to try and require additional legal work (e.g., preparation for voir dire, jury instructions, etc.).
- [2:3] *Time:* Jury trials are inherently more time-consuming than bench trials. Time is required for jury selection and jury deliberations. Moreover, trial usually moves more slowly due to the need for sidebar and in-chambers conferences and expanded opening and closing statements. Also, judges often adopt shorter court hours for a jury trial than they do for nonjury trials.

  In addition, the fact you have 12 or more jurors and alternates to account for every day increases the risk of delay due to tardiness or illness. A juror's absence, unless excused, brings the proceedings to a halt and raises the prospects of a mistrial.
- [2:4] *Risk of mistrial:* There is also a risk of juror misconduct resulting in a mistrial; e.g., jurors may disregard the court's admonitions and discuss the case with others, or undertake independent investigations, etc. (See discussion of juror misconduct in *Ch. 7, Jury Management During Trial; and Ch. 12, Motions During Trial*.)
- [2:5] *Potential bias:* Many trial lawyers prefer to gamble on the collective biases of a jury—which usually reflect the biases of the community—than on the bias of a single judge. Moreover, juror bias against the client's position may be exposed on voir dire, but there is no way to voir dire the judge.
- [2:6] *Challenges:* A jury trial provides each party a limited number of peremptory challenges, plus an unlimited number of challenges for cause to assure an impartial panel (*see* ¶*5:408 ff.*). In a bench trial, counsel has only one peremptory challenge (CCP §170.6(a)(4), ¶*3:168*) and the chances of eliminating a judge for bias or prejudice are exceedingly slim (*see* ¶*3:46 ff.*).

TACTICAL CONSIDERATIONS: ADVANTAGES VS. DISADVANTAGES OF JURY TRIALS (Cont'd)

- [2:7] *Jury capabilities:* Some trial lawyers prefer to entrust cases involving technical matters or complex facts to judges rather than juries on the assumption judges are "smarter" than juries. Other litigators disagree and feel juries are capable of understanding even highly technical matters *if the case is presented properly*. (The trial lawyer's job in such cases is to simplify, simplify, simplify.) There is a similar difference of opinion on whether juries should be entrusted with highly inflammatory or emotional cases.
- [2:8] *Stricter application of rules of evidence:* Judges usually enforce the rules of evidence more strictly in jury trials than in bench trials. Judges in nonjury trials will often admit arguably inadmissible evidence on the theory that, as the triers of fact, they will simply "ignore" it. (However, judges are human and if such evidence is highly prejudicial to your client's position, this may be a good reason to insist on a jury trial.)
- [2:9] *Possibility of directed verdict:* Counsel can move for a directed verdict in a jury trial at the close of plaintiff's case-in-chief, defense case-in-chief and at the close of the evidence. If the trial judge is convinced *reasonable minds could not differ* on the outcome, the judge can take the case from the jury and order a directed verdict. The advantage here is that the parties have the benefits of a jury trial *if the evidence warrants* and the safeguards of a court trial if it does not.
- [2:10] *Voluntary Expedited Jury Trials Act and Mandatory Expedited Jury Trials in Limited Civil Cases Act:* California provides for both voluntary expedited jury trials (CCP §630.01 et seq.) and mandatory expedited jury trials (CCP §630.20 et seq.; see also CRC 3.1545-3.1553. All parties may consent to modify the procedures relating to a civil jury trial by agreeing pursuant to CCP §630.03(a) "to participate in an expedited jury trial and, if represented, their counsel, shall sign a proposed consent order granting an expedited jury trial." In limited civil cases, in which the amount in controversy must not exceed $35,000 (CCP §85 et seq. (CCP §§85 and 86 amended Stats. 2023, Ch. 861; eff. 1/1/24)), mandatory expedited jury trial procedures apply subject to specified exceptions. As a result, all of the factors discussed above (¶*2:1 ff.*) may weigh differently. For example, by consenting to an expedited jury trial, "parties agree to waive any motions for directed verdict, motions to set aside the verdict or any judgment rendered by the jury, or motions for a new trial on the basis of inadequate or excessive damages" (CCP §630.08(a)). *See detailed discussion at ¶2:400 ff.*

[2:11] **Scope:** This Chapter covers the law and procedures applicable to the right to trial by jury. Included are the following topics:

- Sources of the right to jury trial (¶*2:12*);

- What constitutes jury trial (¶*2:16*);
- Cases in which jury trial may be demanded (¶*2:62*);
- Procedure for demanding trial by jury (¶*2:172*);
- Waiver of right (¶*2:258*);
- Relief from waiver (¶*2:308*).

A. SOURCES OF RIGHT TO JURY TRIAL

[2:12] The right to a jury trial in California courts is provided both by the California Constitution and by statutes:

1. [2:13] **California Constitution:** "Trial by jury is an inviolate right and shall be secured to all, but in a civil cause *three-fourths of the jury may render a verdict* . . . In a civil cause a jury may be waived by the consent of the parties expressed as prescribed by statute."

   "In civil causes the jury shall consist of *12 persons* or a lesser number agreed on by the parties in open court. In civil causes other than causes within the appellate jurisdiction of the court of appeal the Legislature may provide that the jury shall consist of eight persons or a lesser number agreed on by the parties in open court . . ." [Cal.Const. Art. I, §16 (emphasis added)]

   a. [2:13.1] **Compare—eminent domain cases:** Article I, §19 of the California Constitution provides a *limited right* to jury trial in eminent domain cases. *See* ¶*2:148*.

   b. [2:13.2] **Compare—U.S. Constitution not applicable:** The Seventh Amendment to the U.S. Constitution, which guarantees a federal right to jury trial in civil cases, is *not* binding on the states. [*Hung v. Wang* (1992) 8 CA4th 908, 927, 11 CR2d 113, 124; *Jehl v. Southern Pac. Co.* (1967) 66 C2d 821, 827, 59 CR 276, 280]

      The Seventh Amendment requires jury verdicts in federal civil cases to be unanimous. [*Murray v. Laborers Union Local No. 324* (9th Cir. 1995) 55 F3d 1445, 1451 (collecting cases)]

      Jury unanimity is also required in federal civil cases as to affirmative defenses; i.e., a defendant who raises several defenses cannot be held liable unless the jury *unanimously rejects each defense*. [*Jazzabi v. Allstate Ins. Co.* (9th Cir. 2002) 278 F3d 979, 982-984]

       [2:13.3] ***PRACTICE POINTER:*** This unanimous verdict requirement is often a major reason why state court defendants invoke federal removal jurisdiction. (Removal jurisdiction is discussed in detail in Stevenson & Fitzgerald, *Rutter Group Prac. Guide: Federal Civ. Pro. Before Trial* (TRG), Ch. 2D.)

2. [2:14] **Statutes:** "In actions for the recovery of specific, real, or personal property, with or without damages, or for money claimed

as due upon contract, or as damages for breach of contract, or for injuries, an issue of fact must be tried by a jury, *unless a jury trial is waived, or a reference is ordered* as provided in this Code. Where in these cases there are issues both of law and fact, the issue of law must be first disposed of. In other cases, issues of fact must be tried by the Court, subject to its power to order any such issue to be tried by a jury, or to be referred to a referee, as provided in this Code." [CCP §592 (emphasis added)]

The right to a jury trial under Cal.Const. Art. I, §16 "shall be preserved to the parties inviolate." [CCP §631(a)]

a. [2:15] **Exception—small claims actions:** Small claims hearings are required to be "informal" (CCP §116.510). Therefore, there is no right to a jury trial either in small claims actions or on appeal of a small claims judgment to the superior court. [See CCP §116.770(b); *Crouchman v. Sup.Ct. (El Dorado Investors)* (1988) 45 C3d 1167, 1173, 248 CR 626, 628]

B. WHAT CONSTITUTES JURY TRIAL

1. [2:16] **"Jury" Defined:** A trial jury is "a body of persons selected from the citizens of the area served by the court and sworn to try and determine by verdict a *question of fact*." [CCP §194(p) (emphasis added)]

2. [2:17] **Procedural Safeguards Required:** Impartiality is "an integral part of the constitutional concept of the right of a jury trial." [*Dorshkind v. Harry N. Koff Agency, Inc.* (1976) 64 CA3d 302, 308, 134 CR 344, 347]

   a. [2:18] **Selection of jurors:** To assure unbiased and impartial jurors, various procedural safeguards (e.g., random selection, voir dire, etc.) are provided for selection of jurors. [See *Dorshkind v. Harry N. Koff Agency, Inc.* (1976) 64 CA3d 302, 308, 134 CR 344, 347]

   Cross-refer: Jury selection procedures are discussed in *Ch. 5, Jury Selection*.

   b. [2:19] **Selection of presiding juror:** To assure an impartial jury, jurors must be free to select their own presiding juror (foreperson); *see ¶15:15 ff.* It is reversible error for the trial judge to make the selection. [*Dorshkind v. Harry N. Koff Agency, Inc.* (1976) 64 CA3d 302, 308, 134 CR 344, 347; *People v. Perez* (1989) 212 CA3d 395, 402, 260 CR 474, 478—jurors free to change their mind and select new foreperson during course of deliberations]

      (1) [2:20] **Rationale:** "If the trial judge is free to select the foreman of the jury, there will undoubtedly be some jurors who feel a certain amount of deference is due to the opinion of the person selected by the trial judge, regardless of the other instructions routinely given, which remind the jury that each juror has the right and the

responsibility to arrive at his or her free choice in the matter at hand, without being influenced by any conduct—verbal or nonverbal—from the trial judge." [*Dorshkind v. Harvey N. Koff Agency, Inc.* (1976) 64 CA3d 302, 308, 134 CR 344, 347]

Cross-refer: See further discussion in *Ch. 15, Jury Deliberations*.

3. [2:21] **Number of Jurors:** In civil cases, "the jury shall consist of 12 persons or a lesser number agreed on by the parties in open court." [Cal.Const. Art. I, §16; see CCP §220]

a. [2:22] **Stipulations to lesser number:** The parties may stipulate "in open court" to a jury of less than 12 members in superior court civil cases. [Cal.Const. Art. I, §16; L.A. Sup.Ct. Rules 3.48(c), 3.98]

(1) [2:23] **"In open court":** Normally, any stipulation for less than 12 jurors should be formally entered upon the minutes in open court. [See *Meder v. Safeway Stores, Inc.* (1979) 98 CA3d 497, 504, 159 CR 609, 613]

(a) [2:24] **Compare—stipulation in chambers:** But a party who stipulates in chambers to a lesser number of jurors and ratifies the stipulation by participating in the trial without objection, may be *estopped* to raise the lack of 12 jurors as error on appeal. [*Meder v. Safeway Stores, Inc.* (1979) 98 CA3d 497, 504, 159 CR 609, 614]

"[A] party may be precluded from complaining on appeal of a lesser number if the party . . . stipulated to a lesser number, *whether or not in open court* . . ." [*Salton Bay Marina v. Imperial Irrig. Dist.* (1985) 172 CA3d 914, 944, 218 CR 839, 856 (emphasis added)]

(2) [2:25] **Timing of stipulation:** A stipulation to less than 12 jurors may be made either before trial commences or at any time during the trial.

[2:26] ***PRACTICE POINTER:*** Because of the 3/4 verdict requirement (¶*2:13*), there is little sense in stipulating to a jury of less than 12 persons to start off with.

But it makes sense to stipulate *before trial commences* that if because of illness or other good cause the number of jurors able to continue drops to less than 12, a lesser number may return a verdict (*see* ¶*2:27 ff.*).

Of course, such stipulation could be made when the need arises. But at that point, if one side or the other feels it is not doing well, it may refuse to stipulate in order to provoke a mistrial.

(a) [2:27] **Comment:** Many trial judges, sensitive to this possibility, try to obtain such stipulation at the outset when it is most likely to be granted.

For example, where the judge has decided to call 2 alternate jurors, the judge may seek a stipulation that:

— if 3 jurors drop out, trial can proceed with the remaining 11 jurors, 9 votes being required for a verdict; and

— if 4 jurors drop out, trial can proceed with the remaining 10, 8 votes being required for a verdict. (Keep in mind this approach is limited to *civil cases*; in criminal cases, such stipulation would impair the defendant's right to unanimous verdict.)

Mathematically, it is slightly more difficult to obtain a verdict with fewer jurors (perceived as an advantage for defendants).

As a result, some judges have given up asking counsel to stipulate to fewer than 12 jurors. Their thinking is that unless you go from a 9-3 split all the way down to a 6-2 split, the percentages change adversely to one side or the other. Losing 4 jurors and getting to a 6-2 split is such a remote possibility that it is not worth considering.

(3) [2:28] **Client consent required?** It is unclear whether attorneys have *implied* authority to stipulate to less than 12 jurors *without* their clients' express authority or consent. [See *Giouzelis v. McDonald* (1981) 119 CA3d 436, 446, 174 CR 58, 63 (dictum stating they can)]

- [2:29] **Comment:** Attorneys need *express* authority to waive or limit their clients' "substantive rights." Without such authority, their stipulations are not binding on their clients. [*Blanton v. Womancare, Inc.* (1985) 38 C3d 396, 404, 212 CR 151, 156—*no* implied authority to stipulate to binding arbitration and thus waive client's right to jury trial]

  But the *number* of jurors would appear to be a "procedural matter" within the attorney's implied authority. As to such matters, the client's consent is not required. [*Blanton v. Womancare, Inc.*, supra, 38 C3d at 404, 212 CR at 156—"Considerations of procedural efficiency require . . . that in the course of a trial there be but one captain per ship. An attorney must be able to make such tactical decisions . . . even when the client voices opposition in open court"; *see further discussion at* ¶*2:291 ff.*]

[2:30] ***PRACTICE POINTER:*** To avoid any question about your authority to stipulate to less than 12 jurors, have the client join in the stipulation, or have the client's consent put on the record in open court.

(4) [2:31] **Effect of stipulation to excuse juror from deliberations:** A stipulation to excuse one or more jurors from the jury's deliberations may be treated as a stipulation to accept less than 12 jurors. [*Giouzelis v. McDonald* (1981) 119 CA3d 436, 446, 174 CR 58, 63]

(a) [2:32] **Example:** Juror X needed medical care on the morning set for instructing the jury. Counsel stipulated on the record in open court that Juror X be excused for medical treatment and return thereafter, and that *the jury could commence deliberations in his absence*. The stipulation waived any objection to that juror's absence during a portion of the deliberations. [*Giouzelis v. McDonald* (1981) 119 CA3d 436, 444-446, 174 CR 58, 62-63]

b. [2:33] **Effect of insufficient jurors during course of trial:** Occasionally, jurors' illness or excused absences result in there being fewer than 12 jurors present during trial. (Normally, alternate jurors fill the gap. But, occasionally, there are not enough alternates.)

(1) [2:34] **Waiver by failure to object:** In such cases, a party must make a *timely objection* to the insufficient number of jurors. Otherwise, that party is precluded from objecting on appeal. [*Salton Bay Marina v. Imperial Irrig. Dist*. (1985) 172 CA3d 914, 944, 218 CR 839, 856]

(2) [2:35] **Example:** The parties estimated trial would take 4-5 weeks. It took almost 8 weeks. Originally, there were 12 jurors and 2 alternates. By the end of the trial, both alternates had been seated. The court then excused one juror pursuant to a commitment known to all counsel. *No objection was made until after the juror had been excused*. By waiting until the juror had been discharged, the party *waived* its right to object to fewer than 12 jurors. [*Salton Bay Marina v. Imperial Irrig. Dist.* (1985) 172 CA3d 914, 944, 218 CR 839, 856]

[2:35.1-35.4] *Reserved.*

c. [2:35.5] **Compare—number of jurors in expedited jury trial:** The Voluntary Expedited Jury Trials Act (CCP §630.01 et seq., ¶*2:400 ff.*) allows parties to agree to eight jurors, or fewer, without alternates. [CCP §§630.03(e)(2)(C), 630.04(a)]

In *mandatory* expedited jury trials (limited civil cases), the jury is composed of eight jurors and one alternate, unless the parties have agreed to fewer jurors. [CCP §§630.23(b)]

d. [2:36] **Compare—number of jurors in limited civil cases:** The Legislature is *empowered* to provide for eight-person juries in limited civil cases. [Cal.Const. Art. I, §16]

However, no implementing legislation is presently in effect. Thus, 12 jurors are still required unless the parties agree otherwise.

4. [2:36.1] **Right to Jury in Bifurcated Trials—Same or Different Jury:** Where bifurcation has been ordered, there are two separate trials (e.g., first trial on liability issues, second on damages). [See CCP §1048(b), *discussed at* ¶*4:326 ff.*]

In most cases, it is up to the court to decide whether the *same jury* will hear both trials or a different jury impaneled for the second trial. (In some cases, the first trial may be a *nonjury* trial on equitable issues, followed by a jury trial on "legal" issues; *see* ¶*2:160 ff.*)

a. [2:36.2] **Exception—punitive damage cases:** Where punitive damages are claimed, the issue of whether defendant is liable to plaintiff for "malice, oppression or fraud" must be tried first (if defendant so requests). If defendant is found liable for such conduct, the issue of punitive damages is then tried. In such cases, the *same jury* must hear both phases of the trial. [Civ.C. §3295(d); *Medo v. Sup.Ct. (Raymark Indus., Inc.)* (1988) 205 CA3d 64, 68, 251 CR 924, 926; *Rivera v. Sassoon* (1995) 39 CA4th 1045, 1048, 46 CR2d 144, 146; *see discussion at* ¶*4:379*]

However, the "same jury rule" does not apply on retrial following reversal of the punitive damages award. [*Torres v. Automobile Club of Southern Calif.* (1997) 15 C4th 771, 778, 63 CR2d 859, 863; *see* ¶*4:391*]

[2:36.3-36.4] *Reserved.*

5. [2:36.5] **Right to Jury in Coordinated Cases:** A coordination judge is authorized to take whatever steps are necessary to "expedite the just determination of the coordinated actions without delay" (CRC 3.541(b)). Specifically, the judge may "[o]rder any issue or defense to be tried separately and before trial of the remaining issues when it appears that the disposition of any of the coordinated actions might thereby be expedited." [CRC 3.541(b)(3)]

Comment: Whether this includes the power to impanel a *single jury* to hear related segments of a coordinated proceeding is unclear.

6. [2:37] **Jury as Trier of *Fact:*** The right to a jury trial is the right to have a jury consider and decide issues of fact. [CCP §592 (*see* ¶*2:14*); Ev.C. §312(a)]

Issues of law are tried to the court. [CCP §591]

a. [2:38] **Issues of fact:** Issues of fact arise from the matters at issue under the pleadings: "An issue of fact arises . . . [u]pon a *material* allegation in the complaint controverted by the answer; and . . . [u]pon new matters in the answer . . ." [CCP §590 (emphasis added)]

Such issues are for jury determination: "Subject to the control of the court, the jury is to determine the *effect and value* of the evidence addressed to it, including the *credibility* of witnesses and hearsay declarants." [Ev.C. §312(b) (emphasis added); *Islas v. D & G Mfg. Co., Inc.* (2004) 120 CA4th 571, 578, 15 CR3d 559, 563; *Vorse v. Sarasy* (1997) 53 CA4th 998, 1013, 62 CR2d 164, 173—error to strike witness' testimony because *court* concluded witness not credible]

- [2:38.1] Parties to a contract disputed the meaning of contract terms. A party's conduct between the time the contract was executed and when the dispute arose might reveal what the parties understood and intended the terms to mean. Therefore, evidence was properly admitted that one party concealed evidence from the other during that period. In deciding witness credibility, the jury may consider conflicting testimony about a key contract provision. [*City of Hope Nat'l Med. Ctr. v. Genentech, Inc.* (2008) 43 C4th 375, 395-397, 75 CR3d 333, 350-352]

  "Interpretation of a written instrument becomes solely a judicial function only when it is based on the words of the instrument alone, when there is no conflict in the extrinsic evidence . . . But when, as here, ascertaining the intent of the parties at the time the contract was executed depends on the credibility of extrinsic evidence, that credibility determination and the interpretation of the contract are questions of fact that may properly be resolved by the jury." [*City of Hope Nat'l Med. Ctr. v. Genentech, Inc.*, supra, 43 C4th at 395, 75 CR3d at 350]

- [2:38.2] *Compare:* In a breach of contract action, the trial court erred in allowing the jury to interpret the meaning of a key term in the agreement. The meaning of the term did not depend on the credibility of conflicting extrinsic evidence. "When there is no material conflict in the extrinsic evidence, the trial court interprets the contract as a matter of law . . . This is true even when conflicting inferences may be drawn from the undisputed extrinsic evidence . . . or that extrinsic evidence renders the contract terms susceptible to more than one reasonable interpretation." [*Wolf v. Walt Disney Pictures & Television* (2008) 162 CA4th 1107, 1126-1128, 76 CR3d 585, 602-604 (internal citations omitted); *see* ¶*2:39 ff.*]

b. [2:39] **Compare—role of trial judge in jury trials:** Although the jury is the trier of fact, questions of *law* are determined by the trial judge. [Ev.C. §310; CCP §591]

(1) [2:40] **Issues of law:** Following are examples of issues of law determined by the trial judge:

- [2:41] *Legal sufficiency of pleadings:* Issues as to the legal sufficiency of the complaint, answer or other pleadings are "issues of law" decided by the trial court. [See CCP §589]
- [2:42] *Construction of statutes:* The interpretation of statutes and court rules is an "issue of law" for the trial judge. [Ev.C. §310(a); see *Bakersfield Comm. Hosp. v. Department of Health* (1977) 77 CA3d 193, 196, 200, 142 CR 773, 774, 777]
- [2:43] *Interpretation of documents:* The interpretation of writings is an issue of law for the judge, not the jury, to decide. [Ev.C. §310(a)]
- [2:44] *Admissibility of evidence:* The admissibility of evidence and questions as to the rules of evidence are issues of law for the trial judge. [Ev.C. §310(a)]
- [2:44.1] *Whether legal duty owed:* Whether a legal duty is owed in a particular case is a question of law for the court. [*Lindstrom v. Hertz Corp.* (2000) 81 CA4th 644, 651-652, 96 CR2d 874, 879-880—no right to jury trial in negligent entrustment action where defendant's duty could be determined as a matter of law]
- [2:44.2] *Whether defendant's conduct increased inherent risks of sport?* Courts are divided on whether the judge or jury must decide whether defendant's conduct increased the inherent risks of a sport beyond the range of ordinary activity. [See *Towns v. Davidson* (2007) 147 CA4th 461, 472-473, 54 CR3d 568, 576-577—"recklessness" beyond ordinary range of activity inherent in sport is for *court* to determine; *Huff v. Wilkins* (2006) 138 CA4th 732, 745, 41 CR3d 754, 764—"increased risk" is part of *legal duty* analysis for *court* to determine; compare *Sanchez v. Hillerich & Bradsby Co.* (2002) 104 CA4th 703, 715, 128 CR2d 529, 538—"increased risk" is *factual* issue for *jury* to decide; *Vine v. Bear Valley Ski Co.* (2004) 118 CA4th 577, 592-593, 13 CR3d 370, 381 & fn. 4 (same)]

  Comment: The issue is far from clear. Some of the cases cited above, while bearing on the point, do not explicitly discuss the jury's role. In *Huff*, for example, the issue arose in the context of a summary judgment motion. The court's decision appears to turn on whether the evidence showed that a minor's violation