

**Resolution 13-08-2009**

New Trial: Time to Make Motion

RESOLVED, that the Conference of Delegates of California Bar Associations recommends that legislation be sponsored to amend Code of Civil Procedure section 659 to read as follows:

- 1 § 659  
2 The party intending to move for a new trial must file with the clerk and serve upon  
3 each adverse party a notice of his intention to move for a new trial, designating the grounds  
4 upon which the motion will be made and whether the same will be made upon affidavits or  
5 the minutes of the court or both, either  
6 1. After the decision is rendered and ~~B~~before the entry of judgment; or  
7 2. Within 15 days of the date of mailing notice of entry of judgment by the clerk of  
8 the court pursuant to Section 664.5, or service upon him by any party of written notice of  
9 entry of judgment, or within 180 days after the entry of judgment, whichever is earliest;  
10 provided, that upon the filing of the first notice of intention to move for a new trial by a  
11 party, each other party shall have 15 days after the service of such notice upon him to file and  
12 serve a notice of intention to move for a new trial.  
13 Said notice of intention to move for a new trial shall be deemed to be a motion for a  
14 new trial on all the grounds stated in the notice. The time above specified shall not be  
15 extended by order or stipulation or by those provisions of Section 1013 of this code which  
16 extend the time for exercising a right or doing an act where service is by mail.

(Proposed new language underlined; language to be deleted stricken.)

**PROPONENT:** Sacramento County Bar Association

**STATEMENT OF REASONS:**

Existing law: Code of Civil Procedure section 659 currently allows a party to make a motion for new trial at any time “before entry of judgment.”

This resolution: Adds the phrase, “after the decision is rendered” before the phrase, “before entry of judgment.” This incorporates the judicial interpretation of the statute and eliminates a dangerous trap for even conscientious attorneys.

The problem: The provision of section 659 that allows a party to move for a new trial before entry of judgment is “obscure, misleading, and a dangerous trap for the uninformed attorney.” 8 Witkin, Cal. Procedure (5th ed. 2008), Attack on Judgment in Trial Court, § 55. A party cannot move for a new trial before there is a decision. *Id.* Under Code of Civil Procedure section 657, the motion can be made by a “party aggrieved,” but until a decision is rendered, there is no aggrieved party. *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 459.

Because the new trial procedure is jurisdictional, a motion filed before the court has rendered a decision is premature and ineffective. *Id.* This has a harsh consequence on appeal. A new trial motion ordinarily extends the time to appeal until 30 days after denial of the motion. (Cal. Rules of Court, Rule 8.108(b).) But a premature motion for new trial cannot extend the appeal time. *Ehrler v. Ehrler* (1981) 126 Cal.App.3d 147, 151–152. The attorney who reads the current language of section 659 literally and files a premature new trial motion then appeals after the motion is denied, when the normal appeal time has run, will fall into the trap.

What constitutes a decision for new trial motion purposes can vary. *See*, 8 Witkin, Cal. Procedure (5<sup>th</sup> ed. 2008), Attack on Judgment in Trial Court, §56. In a jury trial, the decision is ordinarily the verdict, unless it does not determine all of the issues. *Auto Equity Sales, supra*, 57 Cal.2d at 459-460. In a bench trial, the court renders a decision when it issues the statement of decision, if requested, and files the judgment. *Ruiz v. Ruiz* (1980) 104 Cal.App.3d 374, 378. An order granting judgment on the pleadings is a decision, even if the judgment itself has not yet been entered. *Olson v. County of Sacramento* (1969) 274 Cal.App.2d 316, 323. So is an order granting summary judgment. *Sole Energy Co. v. Petrominerals Corp.* (2005) 128 Cal.App.4th 187, 195.

But whatever may constitute the “decision” in a particular case, Code of Civil Procedure section 659 continues to be dangerously misleading in providing that a new trial motion can be made “before entry of judgment” without specifying that the court must have rendered a decision.

**IMPACT STATEMENT:**

This resolution does not affect any other law, statute or rule.

**AUTHOR AND/OR PERMANENT CONTACT:** Jay-Allen Eisen, Jay-Allen Eisen Law Corporation, 2431 Capitol Avenue, Sacramento CA 95816. (916) 444-6171 voice, (916) 441-5810 fax. [jae@eisenlegal.com](mailto:jae@eisenlegal.com)

**RESPONSIBLE FLOOR DELEGATE:** Jay-Allen Eisen