

Memorandum 2001-67

Trial Court Unification: Waiver of Jury Trial

The statute governing waiver of a jury trial in a civil case (Code Civ. Proc. § 631) differentiates in one respect between an unlimited civil case and a limited civil case. The Commission examined that distinction as part of the test project for its joint study with the Judicial Council on revising civil procedure in light of trial court unification. The Commission tentatively proposed to eliminate the distinction in treatment of limited and unlimited civil cases, but it suspended work on the matter when the Judicial Council decided to form a working group to review the statute more comprehensively. That working group (the Joint Working Group on Waiver of Jury Trial) has since developed a more extensive proposal (Exhibit pp. 1-7), which is being circulated to interested parties for comment, with the expectation that legislation approved by the Judicial Council will be introduced in early 2002. The Commission needs to determine whether to take any action in light of these developments.

THE COMMISSION'S PROPOSAL

In its tentative recommendation on *Elimination of Unnecessary Procedural Differences Between Limited and Unlimited Civil Cases (July 2000)*, the Commission proposed to amend Code of Civil Procedure Section 631(b) to apply to both limited and unlimited civil cases. As fine-tuned to address concerns raised, the proposed amendment reads:

631. (a) Trial by jury may be waived by the several parties to an issue of fact in any of the following ways:

- (1) By failing to appear at the trial.
- (2) By written consent filed with the clerk or judge.
- (3) By oral consent, in open court, entered in the minutes or docket.
- (4) By failing to announce that a jury is required, at the time the cause is first set for trial, if it is set upon notice or stipulation, or within five days after notice of setting if it is set without notice or stipulation.

(5) By failing to deposit with the clerk, or judge, advance jury fees 25 days prior to the date set for trial, except in unlawful detainer actions where the fees shall be deposited at least five days prior to the date set for trial, or as provided by subdivision (b). An advance jury fee deposited pursuant to this paragraph may not exceed a total of one hundred fifty dollars (\$150).

(6) By failing to deposit with the clerk or judge, promptly after the impanelment of the jury, a sum equal to the mileage or transportation (if allowed by law) of the jury accrued up to that time.

(7) By failing to deposit with the clerk or judge, at the beginning of the second and each succeeding day's session a sum equal to one day's fees of the jury, and the mileage or transportation, if any.

~~(b) In a superior court action, other than a limited civil case, if a jury is demanded by either party in the memorandum to set the cause for trial a party and the party, prior to trial, by announcement or by operation of law, waives a trial by jury, then all adverse parties shall have five days following receipt of the notice of the waiver that party shall promptly notify all other parties of the waiver, in writing or in open court. Each party adverse to the party who waived the trial by jury has five days after notice of the waiver is given to file and serve a demand for a trial by jury and to deposit any advance jury fees that are then due. If the party who waived a trial by jury does not promptly notify all other parties of the waiver, any other party, or the clerk or judge, may provide notice of the waiver, but is not required to do so. Where more than one notice of the same waiver is given to a party, the five-day period to file and serve a demand for a trial by jury and to deposit advance jury fees commences on giving of the first notice.~~

(c) When the party who has demanded trial by jury either (1) waives the trial upon or after the assignment for trial to a specific department of the court, or upon or after the commencement of the trial, or (2) fails to deposit the fees as provided in paragraph (6) of subdivision (a), trial by jury shall be waived by the other party by either failing promptly to demand trial by jury before the judge in whose department the waiver, other than for the failure to deposit the fees, was made, or by failing promptly to deposit the fees described in paragraph (6) of subdivision (a).

(d) The court may, in its discretion upon just terms, allow a trial by jury although there may have been a waiver of a trial by jury.

Comment. Subdivision (a)(3) of Section 631 is amended to delete the reference to a "docket," because courts no longer maintain a record denominated a "docket" in civil cases. Formerly, justice courts maintained a docket in civil cases, which was a record of actions taken in open court, as well as documents filed and other proceedings in the case. See former Gov't Code §§ 71614 (1953 Cal.

Stat. ch. 206, § 1, repealed by 1977 Cal. Stat. ch. 1257, § 71) (judge of justice court shall keep a book denominated a “docket”), 71614.5 (1959 Cal. Stat. ch. 671, § 2, repealed by 1977 Cal. Stat. ch. 1257, § 72) (clerk or judge of justice court shall keep the “docket” and other records of the court). Now actions taken in open court are recorded in the minutes of a superior court. Gov’t Code § 69844; see also *Copley Press v. Superior Court*, 6 Cal. App. 4th 106, 110, 7 Cal. Rptr. 2d 841 (1992). Documents filed or lodged and other proceedings in a civil case are recorded in the register of actions. See Gov’t Code §§ 69845 (clerk of superior court may keep a register of actions), 69845.5 (alternative to maintaining register of actions in superior court). Because the minutes are the proper record for reflecting oral consent in open court, and Section 631 already refers to the minutes, the reference to the “docket” may be deleted without substituting a reference to the register of actions.

Subdivision (b) is amended to apply to both limited and unlimited civil cases. This codifies existing law. See Cal. R. Ct. 521, 709. For limited civil cases, see Section 85 & Comment. For unlimited civil cases, see Section 88. For waiver of a jury in a criminal case, see Cal. Const. art. I, § 16.

Subdivision (b) is also amended to delete the reference to the memorandum to set the cause for trial. The reference is unnecessary and may also be obsolete because in many cases an at-issue memorandum is no longer required. See R. Weil & I. Brown, Jr., *California Practice Guide: Civil Procedure Before Trial, Case Management and Trial Setting* § 12:101, at 12(I)-36 (2000).

As amended, subdivision (b) also clarifies that the party who waives a jury after demanding one is responsible for providing notice of the waiver. If that party fails to provide notice of the waiver as required, another party (or the clerk or judge) is permitted but not required to provide the notice instead. Failure to provide timely notice may be grounds for a continuance or other remedial action. See *Leslie v. Roe*, 52 Cal. App. 3d 686, 688, 125 Cal. Rptr. 157 (1975).

Where a party is given multiple notices of the same jury waiver, the five-day period to demand a jury is triggered by the first notice. Where more than one jury demand is made and later waived, notice of each waiver is required. For example, suppose:

- (1) Party A requests a jury trial but later waives that right.
- (2) Party B requests a jury trial within five days after Party A gives notice of Party A’s jury waiver.
- (3) Party C relies on Party B’s jury demand.
- (4) Party B ultimately decides to waive a jury.

Under Section 631(b), Party B must notify the other parties of Party B’s jury waiver and Party C has five days from the giving of that

notice within which to demand a jury trial. (For guidance on whether Party A may request a jury despite Party A's previous jury waiver, see Section 631(d); *Taylor v. Union Pac. R.R. Corp.*, 16 Cal. 3d 893, 549 P.2d 855, 130 Cal. Rptr. 23 (1976); *Simmons v. Prudential Life Ins. Co.*, 123 Cal. App. 3d 833, 836, 177 Cal. Rptr. 37 (1981).)

Finally, the amendment provides that the time period for demanding a jury trial and depositing jury fees runs from the date of giving notice rather than from the date of receiving notice. This is intended to facilitate proof of whether a jury demand is timely. For extension of the five-day period where notice is given by mail or Express Mail, see Section 1013.

Minutes (Dec. 2000), pp. 14-15; see also Tentative Recommendation on *Civil Procedure: Technical Corrections* (Oct. 2000), pp. 13-14; Minutes (Feb. 2001), p. 16; Recommendation on *Civil Procedure: Technical Corrections*, 30 Cal. L. Revision Comm'n Reports 479, 493-96, 498-99, 503-05 (2000).

The proposed amendment would only delete the obsolete docket reference and revise the subdivision that differentiates between limited and unlimited civil cases, which applies where a party demands but later waives a trial by jury. The amendment would not specify the timing of a jury demand in other circumstances, nor would it alter the existing rule that a party is entitled to rely on another party's jury demand.

The Commission has not incorporated this proposed amendment in a final recommendation.

THE WORKING GROUP'S PROPOSAL

The Joint Working Group on Waiver of Jury Trial ("Working Group") proposes major changes in Section 631, to prevent "gamesmanship over the deposit of fees." (Exhibit p. 1.) Instead of permitting a party to rely on another party's jury demand, the proposed statute would require each party to file and serve its jury demand, if any, at the time that the party files and serves its initial pleading. *Id.* at 2, 5. Each party demanding a jury trial would be required to deposit advance jury fees 25 days before the date initially set for trial. *Id.* at 3, 5. It would no longer be possible for a party to rely on another party's deposit.

Under this approach, a party would not be given an opportunity to demand a jury upon another party's withdrawal of its jury demand or failure to deposit

jury fees. Section 631(b) would be deleted, not revised as proposed by the Commission. *Id.* at 3-4, 6-7.

The Working Group's proposal is modeled on federal and Illinois law. Comments on the proposal are due on September 17. (The original September 3 deadline was extended due to a mailing problem.) We will supplement this memorandum when we receive the comments.

OPTIONS

At this point, the Commission has a number of options:

(1) **Take a position on the Working Group's proposal.** The Commission could assess the merits of the Working Group's proposal. Ordinarily, the Commission does not take positions on legislation proposed by others. See Memorandum 99-85, p. 2. This is a joint study, however, and the Working Group's proposal would address the point that drew the Commission's attention to the jury waiver provision (the differentiation between limited and unlimited civil cases), albeit in a manner dramatically altering the existing statutory scheme.

If the Commission were inclined to support the proposal (as is or with revisions), it might be appropriate to short-cut the Commission's normal study process, because the Judicial Council has already circulated the Working Group's proposal to the persons and organizations that the Commission would normally contact to obtain input. The comments on the Working Group's proposal could be treated the same way as comments on a tentative recommendation. This would make it easier to finalize a recommendation in time for the 2002 legislative session.

If the Commission were inclined to criticize the Working Group's proposal, it should voice its concerns promptly, so that the Judicial Council can take them into account in determining its position.

(2) **Take no position until the Judicial Council acts.** Another option would be to wait until the Judicial Council approves the Working Group's proposal (or an alternative proposal) before examining the proposal on the merits. This would spare Commission resources if the Working Group's proposal is not adopted by the Judicial Council. However, it might be more difficult to influence the content of the proposal after the Judicial Council takes a position than before the Council acts.

(3) **Take no position until the fate of the Working Group's proposal is determined.** Another alternative would be to wait until

the fate of the Working Group's proposal is determined before devoting further resources to this matter. If the proposal is enacted, it will be unnecessary to proceed with the Commission's proposed revisions of Section 631(b), because that provision will have been deleted. The docket reference in Section 631(a)(3) will also have been deleted (Exhibit p. 6), making further Commission action unnecessary.

If the Working Group's proposal (or similar proposal) is not enacted, the Commission could then reassess whether to proceed with its proposed revisions.

This approach has the advantage of conserving Commission resources, which are stretched thin due to the demands of the trial court restructuring project and other ongoing studies.

(4) **Alert the Working Group to concerns raised by Prof. Slomanson.** A further option (not inconsistent with any of the preceding options) would be to alert the Working Group to a suggestion that Prof. William Slomanson (Thomas Jefferson School of Law) made regarding the 25-day deadline for depositing jury fees. Prof. Slomanson proposed that the deadline be closer to the trial date. Memorandum 2001-3, p. 5. This would eliminate the need to deposit jury fees in many instances, because many cases settle as trial approaches. *Id.* This effect would be magnified under the Working Group's proposal, because the proposal calls for multiple jury deposits where more than one party requests a jury.

RECOMMENDATION

The staff recommends that the Commission await the outcome of the Working Group's proposal (Option #3) before taking any further action on the jury waiver provision. Although the comments on the Working Group's proposal are not yet available, it is clear that the Commission is inundated with other projects. Its resources are likely to be better spent on these matters than on studying the process for demanding and waiving a jury trial. While that topic arose in a joint study, the focus of the joint study is on reexamining procedural distinctions between traditional superior court cases and traditional municipal court cases. See *Trial Court Unification: Revision of Codes*, 28 Cal. L. Revision Comm'n Reports 51, 82-83 (1998); Gov't Code § 70219. The Working Group's proposal would eliminate such a procedural distinction, but would also do much more than that. Given the Commission's limited resources, it might be better not to get involved in such an effort.

The Commission should, however, alert the Working Group to Prof. Slomanson's suggestion regarding the 25-day deadline for depositing jury fees (Option #4). His suggestion deserves careful consideration before legislation is introduced.

Respectfully submitted,

Barbara S. Gaal
Staff Counsel

Title	Legislative Proposal: Amend Code of Civil Procedure Section 631 ¹
Summary	The statute on jury waiver would be amended to reduce or eliminate the element of gamesmanship and create greater certainty on whether a case will be a jury trial.
Source	Joint Working Group on Waiver of Jury Trial ²
Staff	Daniel Pone, 916-323-3121
Discussion	<p><u>Statement of the Issue</u></p> <p>Code of Civil Procedure section 631, the statute on jury waiver, creates difficulty and uncertainty for parties, counsel, and the court. Specifically, the present version of the statute results in gamesmanship over the deposit of fees. A party can presently rely on another party to deposit fees and, if that other party fails to do so, may preserve its right to a jury trial by later depositing its own fees. As a result, a party sometimes engages in a game of wait-and-see. If no other party has deposited fees, only then will a party do so. In addition, a party may make an advance deposit of jury fees and then waive the jury on the first day of trial. The other party is then faced with paying the jury fees at the last minute or proceeding to trial without a jury after having prepared for a jury trial. Finally, under the current statute, it is sometimes unclear whether a party has ever demanded a jury trial. This entire statutory scheme creates uncertainty immediately before trial as to whether there will or will not be a jury trial.</p> <p>Gamesmanship before trial can be quite disruptive. On the eve of trial, the court may not really know whether a trial will be by a jury. To the extent parties themselves are unclear whether there will actually be a jury trial, this may affect their trial preparation. Furthermore, this uncertainty can result in delays of trial and pretrial</p>

¹ The Judicial Council's Policy Coordination and Liaison Committee has approved this legislative proposal to be circulated for public comment. Based on the comments, the Judicial Council may decide on whether to sponsor the proposed legislation or some version of it.

² The group includes members of the Trial Court Presiding Judges Advisory Committee, the Court Executives Advisory Committee, the Civil and Small Claims Advisory Committee, and the Task Force on Jury System Improvements.

litigation over whether a jury trial has been waived.

The Proposed Legislation to Amend Section 631

The primary California statute on jury waiver is Code of Civil Procedure section 631. This statute was originally enacted in 1872, and has been amended a number of times. The proposed amendments would add five new subdivisions, amend one, and delete two. The proposed amendments are described below.

First, a new subdivision (a) would be added. This provision contains a general statement that the right to a jury trial under article 1, section 16 of the California Constitution is preserved inviolate and, in civil cases, may be waived only in the ways specified in the statute. This prefatory provision is modeled on Rule 38(a) of the Federal Rules of Civil Procedure.

Second, new subdivision (b) specifies the time when a jury demand must be made—namely, when a party files and serves its initial pleadings. This subdivision further provides that the demand may be made by including a statement in the caption of the pleading that a jury trial is demanded. The timing provision is similar to the Illinois statute that requires a plaintiff to file a demand at the time the action is commenced and requires the defendant to do so at the time the answer is filed. The federal rule and some state rules are somewhat similar. They require the filing of the jury demand no later than a certain number of days after the service of the last pleading. Because the Illinois approach is the clearest and simplest, it is proposed.

Third, subdivision (b) contains a further provision that would allow a party, if the initial pleadings do not contain any issues triable by a jury and are amended to contain such an issue, to make a jury demand within 10 days after service of the amended pleadings. This provision would preserve the right to a jury in cases where this right only becomes available later in the proceedings. This provision was based on certain provisions in the Illinois statute on jury demand. Subdivision (b) also contains a transitional provision to deal with cases pending on the date when the amended statute becomes effective. In such cases, a party would have 30 days from the effective date of the statutory amendments to serve and file a jury demand, if the party has not already done so.

Fourth, new subdivision (c) provides that a party may specify the issues that the party wishes to be tried by a jury. If the party specifies only some issues, any other party may specify other issues to be tried by a jury. This provision is based on rule 38(c) of the Federal Rules of Civil Procedure. Some states have similar provisions. This provision is intended to assist the parties and the court in determining, and sometimes narrowing, the issues to be tried to a jury.

Fifth, new subdivision (d) concerns the deposit of advance jury fees. It requires *all* parties demanding a jury trial to deposit such advance fees. It also requires that the deposit be made by a specified date. The current date for the deposit of at least 25 calendar days before trial would be retained for several reasons: (1) practitioners are familiar with it; (2) it does not require early or lengthy deposits of fees; (3) if cases settle early, no fees will need to be deposited; and (4) if a party needs to apply for a waiver of jury fees under rule 985, it will have sufficient time to do so.

Sixth, new subdivision (e) provides that each party demanding a jury trial must pay jury fees and mileage at the beginning of the second and each succeeding day's session. This provision is based on current subdivision (a)(7). New subdivision (e) further provides that if more than one party has demanded a jury trial, the respective amount to be paid by each party shall be determined by stipulation of the parties or by court order.

Seventh, subdivision (f) specifies the ways in which a party may waive a jury trial. It adds a new provision that a party may waive a jury by failing to make a jury demand in accordance with subdivision (b). It deletes, as no longer necessary, a provision that failure to announce a jury demand at the time the cause is first set for trial constitutes a waiver.

Eighth, current subdivisions (b) and (c) of section 631 contain provisions regarding how, if one party waives a jury trial, other parties may demand or waive a jury. The proposed amendments in new subdivisions (a)-(e) would render these subdivisions obsolete. Under the revised scheme, the element of gamesmanship over the deposit of fees would be eliminated. All parties that want a jury must comply with new subdivisions (b), (d), and (e). If they do so, they preserve their right to a jury trial; if they do not, they waive it. Thus, present

subdivisions (b) and (c) would no longer be necessary and would be eliminated.

Finally, the last subdivision, which allows the court, in its discretion upon just terms, to allow a trial by jury although there may have been a waiver, is retained and relettered as (g). This provision protects litigants from waiving the important right to a jury trial through inadvertence, mistake, or other error.

Comments are invited on this legislative proposal. They should be submitted no later than **5:00 p.m., Monday, September 3, 2001.**

Attachment

LEGISLATIVE PROPOSAL

Code of Civil Procedure section 631 would be amended to read:

631. Right to jury trial; demand for jury trial; issues to be tried by jury; jury deposit; manner of waiver of jury trial; manner; demand for jury trial; exception

- (a) The right to a trial by jury as declared by article 1, section 16 of the California Constitution shall be preserved to the parties inviolate. In civil cases, a jury may be waived only in the ways stated in subdivision (f).
- (b) A party seeking a trial by jury of any issue triable of right by a jury shall file a demand therefor in writing and serve the demand on all other parties to the action at the time the party files and serves its initial pleadings. The demand for a jury trial may be made by including a statement in the caption of the pleadings that a jury trial is demanded. If the initial pleadings do not contain any issue triable of right by a jury and the pleadings are amended to include a cause triable by jury, any party may demand a jury trial by serving a demand therefor in writing within 10 days after the date of the service of the amended pleading or such lesser time as the court may order. In an action pending as of January 1, 2003, a party seeking a jury trial shall file and serve its demand therefor, if it has not already done so, within 30 days of that date or such lesser time as the court may order.
- (c) In the jury demand, a party may specify the issues that the party wishes to be tried by a jury; otherwise, the party shall be deemed to have demanded trial by jury of all issues so triable. If the party has demanded trial by jury for only some issues, any other party, within 10 days after service of the demand or such lesser time as the court may order, may serve a demand for trial by jury of any other or all issues triable by jury.
- (d) Each party demanding a jury trial shall deposit advance jury fees with the clerk or judge. The total amount of the advance jury fees shall not exceed one hundred fifty dollars (\$150) for each party. The deposit shall be made at least 25 calendar days before the date initially set for trial, except in unlawful detainer actions where the fees shall be deposited at least 5 days before the date set for trial.
- (e) The parties demanding a jury trial shall deposit with the clerk or judge, at the beginning of the second and each succeeding day's session, a sum equal to that day's fees and mileage of the jury, including the fees and mileage for the

trial jury panel if the trial jury has not yet been selected and sworn. If more than one party has demanded a jury, the respective amount to be paid daily by each party demanding a jury shall be determined by stipulation of the parties or by order of the court.

~~(a)(f)~~ A party waives trial by jury by ~~may be waived by the several parties to an issue of fact in any of the following ways:~~

~~(1)~~ Failing to demand a jury trial as provided in subdivision (b).

~~(1)(2)~~ By Failing to appear at the trial.

~~(2)(3)~~ By Written consent filed with the clerk or judge.

~~(3)(4)~~ By Oral consent, in open court, entered in the minutes or docket.

~~(4)~~ By failing to announce that a jury is required, at the time the cause is first set for trial, if it is set upon notice or stipulation, or within 5 days after notice of setting if it is set without notice or stipulation.

~~(5)~~ By Failing to deposit with the clerk, or judge, advance jury fees as provided in subdivision (d). 25 days prior to the date set for trial, except in unlawful detainer actions where the fees shall be deposited at least five days prior to the date set for trial, or as provided by subdivision (b). An advance jury fee deposited pursuant to this paragraph may not exceed a total of one hundred fifty dollars (\$150).

~~(6)~~ By failing to deposit with the clerk or judge, promptly after the impanelment of the jury, a sum equal to the mileage or transportation (if allowed by law) of the jury accrued up to that time.

~~(7)(6)~~ By Failing to deposit with the clerk or judge, at the beginning of the second and each succeeding day's session, the a sum equal to one day's fees of the jury, and the mileage or transportation, if any provided in subdivision (e).

~~(b)~~ In a superior court action, other than a limited civil case, if a jury is demanded by either party in the memorandum to set the cause for trial and the party, prior to trial, by announcement or by operation of law, waives a trial by jury, then all adverse parties shall have five days following the receipt of notice of

~~the waiver to file and serve a demand for a trial by jury and to deposit any advance jury fees that are then due.~~

- ~~(e)~~ When the party who has demanded trial by jury either (1) waives the trial upon or after the assignment for trial to a specific department of the court, or upon or after the commencement of the trial, or (2) fails to deposit the fees as provided in paragraph (6) of subdivision (a), trial by jury shall be waived by the other party by either failing promptly to demand trial by jury before the judge in whose department the waiver, other than for the failure to deposit the fees, was made, or by failing promptly to deposit the fees described in paragraph (6) of subdivision (a).
- ~~(d)~~(g) The court may, in its discretion upon just terms, allow a trial by jury although there may have been a waiver of a trial by jury.