

## Expedited Jury Trials Offer Innovative Procedures to Reduce Costs

**NOT ALL CASES ARE SUITABLE** for a traditional California jury trial. For example, the ratio of cost to the potential award may doom an otherwise worthy case. In other cases, liability may be undisputed, but both sides disagree on the damages. Or, the damages may be undisputed while liability is not. For these examples and others, an expedited jury trial may be the answer.

In 2011, expedited jury trials<sup>1</sup> became legal in California. EJTs provide for an alternative, progressive, and streamlined method for handling civil actions. EJTs are designed to promote the speedy and economical resolution of cases and the conservation of judicial resources.<sup>2</sup> The California EJTs were modeled on similar programs in South Carolina and New York.

An EJT is a voluntary, consensual, and binding jury trial before a reduced jury panel and a judicial officer.<sup>3</sup> An EJT is a flexible litigation procedure that incorporates binding verdicts, relaxed rules of evidence, and limited posttrial motions and appeals. The trial itself is intended to last a single day.<sup>4</sup> The administration of EJT programs, including the schedule of proceedings, is left to each superior court.<sup>5</sup> Parties must stipulate to the use of an EJT.<sup>6</sup> Consent is indicated when parties and their counsel sign and submit to the court a proposed consent order granting an EJT, which will include representations that the clients have been informed of the applicable rules and procedures and given the Judicial Council information sheet regarding EJTs.<sup>7</sup> These stipulations can be entered into at any time up to 30 days before trial.<sup>8</sup>

In addition to the representations concerning the stipulation of the parties, the proposed consent order must also include the agreement that 1) the parties generally waive their rights to appeal and to make posttrial motions, 2) each party has three hours to present its case, with cross-examination charged to its time, 3) the jury is composed of eight or fewer jurors, with no alternates, 4) each side is limited to three peremptory challenges, except as provided, and 5) unless the parties agree otherwise, pretrial and trial matters will proceed under the rules governing EJTs.<sup>9</sup>

Except for these five mandatory elements, the parties may agree to modify by stipulation all other rules and procedures that apply to their trial. Their agreements will be reflected in the proposed consent order and can include modifications of the time lines for pretrial submissions, limits on the number of witnesses per party, modifications of rules and statutory provisions regarding exchange of expert witness information, presentation of testimony by witnesses, and any other evidentiary matter.<sup>10</sup> Innovative methods of presentation are at the heart of the EJT rules. For example, in an EJT, "Upon agreement of the parties and with the approval of the judicial officer, the parties may present summaries and may use photographs, diagrams, slides, electronic presentations, overhead projections, individual notebooks

of exhibits for submission to the jurors, or other innovative methods of presentation approved at the pretrial conference."<sup>11</sup>

The court may only deny the proposed consent order if it finds good cause why the case should not be handled as an EJT. The presumption is that the court will approve parties' stipulations to an EJT unless the court makes a judicial finding of good cause that the stipulation should not be approved.<sup>12</sup>

### Trial Deadlines

Unless the parties stipulate otherwise, the EJT rules provide that no

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later than 25 days before trial, documentary evidence; witness lists; deposition lists; copies of any electronic media files or the like; copies of proposed jury questionnaires and jury instructions, pre-instructions, and instructions to be read by the judge to the jury; proposed special jury instructions; proposed verdict forms; and special glossaries and motions in limine be exchanged between the parties. The rules provide that within five days after this initial exchange, a party may serve a supplemental documentary evidence list of additional witnesses. Also, 20 days before trial, a party must file all motions in limine and must lodge with the court any items served.<sup>13</sup>

No later than 15 days before trial, a pretrial conference will be held for ruling on objections to any of the documentary evidence. If no objections are presented, counsel will stipulate in writing to the admissibility of the evidence.<sup>14</sup> Unless good cause is shown for any omission, the failure to serve documentary evidence as required under these rules will be grounds for preclusion of that evidence at trial.<sup>15</sup>

### The Trial

The EJT is scheduled to be completed in one day. Approximately one hour will be devoted to voir dire, with 15 minutes each allowed for

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the judicial officer and each side. Parties are encouraged to submit joint form questionnaires to help expedite voir dire.<sup>16</sup> In July 2011, the Judicial Council EJT working group approved a one-page, short-form jury questionnaire for use in EJTs and finalized a detailed proposed consent order that will become a Judicial Council form.<sup>17</sup>

In the EJT, each side will have three hours to present its case, including opening and closing arguments, unless the court finds good cause to allow additional time. The parties are encouraged to streamline the trial by limiting the number of live witnesses.<sup>18</sup> The parties are also encouraged to use innovative presentation methods and to stipulate to factual and evidentiary matters as much as possible.<sup>19</sup> Traditional rules of evidence apply in EJTs, but the parties may stipulate otherwise.

The rules allow for stipulation to relaxed rules of evidence, but these stipulations cannot affect the right of a witness or a party to invoke any applicable evidentiary privilege or any other law that protects confidentiality.<sup>20</sup> The verdict in an EJT is binding, subject to any written high-low agreement or other stipulations between the parties. Six of the eight jurors must vote for a verdict, unless the parties stipulate otherwise. The jury's deliberation time is not limited.<sup>21</sup>

#### After Trial

In EJTs, posttrial procedures differ significantly from traditional ones. Parties must waive their rights to appeal, except on the grounds of alleged misconduct of the judicial officer that materially affects the substantial rights of a party; misconduct of the jury; or corruption, fraud, or other undue means employed in the proceedings of the court, jury, or adverse party. These are also the only grounds upon which a party may seek a new trial.<sup>22</sup> Parties stipulating to an EJT also waive any motions for directed verdicts, motions to set aside the verdict, any judgment rendered by the jury, or motions for a new trial on the basis of inadequate or excessive damages.<sup>23</sup> Additionally, the EJT rules do not affect any statutes or rules governing costs and attorney's fees unless the parties stipulate otherwise.<sup>24</sup>

In EJTs, parties are free to innovate in a dozen areas: 1) modifications of the time line for pretrial submissions, 2) limitations on the number of witnesses per party, including expert witnesses, 3) modification of statutory or rule provisions regarding exchange of expert witness information and presentation of testimony, 4) allocation of the time periods, including how argument and cross-examination may be used by each party in the three-hour trial, 5) evidentiary matters agreed to by the parties, including any stipulations or admissions regarding factual matters, 6)

any agreements about what constitutes necessary or relevant evidence for a particular factual determination, 7) agreements about admissibility of particular exhibits or demonstrative evidence that are presented without the legally required authentication or foundation, 8) agreements about admissibility of video or written depositions or declarations, 9) agreements about any other evidentiary issues or the application of any rules of evidence, 10) agreements to use photographs, diagrams, slides, electronic presentations, overhead projections, notebooks of exhibits, or other methods for presenting information to the jury, 11) agreements concerning the time frame for filing and serving motions in limine, and 12) agreements concerning numbers of jurors required for jury verdicts in cases with fewer than eight jurors.<sup>25</sup>

Further, parties in an EJT are permitted but not required to enter into a high-low agreement governing damages. A high-low agreement is to be kept confidential and may not be disclosed to the jury. A high-low agreement may be disclosed to the court only by stipulation of the parties, in cases involving a minor, an incompetent person, or a person for whom a conservator has been appointed, or if necessary, for enforcement of the judgment.

The goal of EJTs is to hold a jury trial in one court day. Innovation by way of stipulation is one important means to that end. EJTs

offer cost savings (including no court reporter, unless a party wants to pay for one), a smaller jury, and limited witnesses. For many suits for which the time and expense of a traditional jury trial may not be suitable, EJTs offer a worthy alternative. ■

<sup>1</sup> See CODE CIV. PROC. §§630.01-630.012, CAL. R. CT. 3.1545-3.1552.

<sup>2</sup> See Memorandum from the Small Civil Cases Working Group to the Members of the Civil and Small Claims Advisory Comm. 1 (Feb. 19, 2010).

<sup>3</sup> CODE CIV. PROC. §630.01(a).

<sup>4</sup> CODE CIV. PROC. §630.01(b).

<sup>5</sup> CAL. R. CT. 3.1546.

<sup>6</sup> CODE CIV. PROC. §630.03.

<sup>7</sup> CAL. R. CT. 3.1547.

<sup>8</sup> *Id.*

<sup>9</sup> See CODE CIV. PROC. §§603.04(a)(b), 603.09(a); CAL. R. CT. 3.1550, 3.1548(b)(2).

<sup>10</sup> CAL. R. CT. 3.1547(b)(1-12).

<sup>11</sup> CAL. R. CT. 3.1551(a).

<sup>12</sup> CODE CIV. PROC. §630.03(b)(2).

<sup>13</sup> CAL. R. CT. 3.1548.

<sup>14</sup> CAL. R. CT. 3.1548(f).

<sup>15</sup> CAL. R. CT. 3.1548(e).

<sup>16</sup> CAL. R. CT. 3.1549.

<sup>17</sup> See CAL. R. CT. 3.1547, 3.1548; CODE CIV. PROC. §630.03.

<sup>18</sup> CAL. R. CT. 3.1550.

<sup>19</sup> CAL. R. CT. 3.1551(a).

<sup>20</sup> CODE CIV. PROC. §630.06(a-b).

<sup>21</sup> See CODE CIV. PROC. §§630.07(a-b), 630.05.

<sup>22</sup> CODE CIV. PROC. §630.09.

<sup>23</sup> CODE CIV. PROC. §630.08(a).

<sup>24</sup> CODE CIV. PROC. §630.10.

<sup>25</sup> CAL. R. CT. 3.1547(b).

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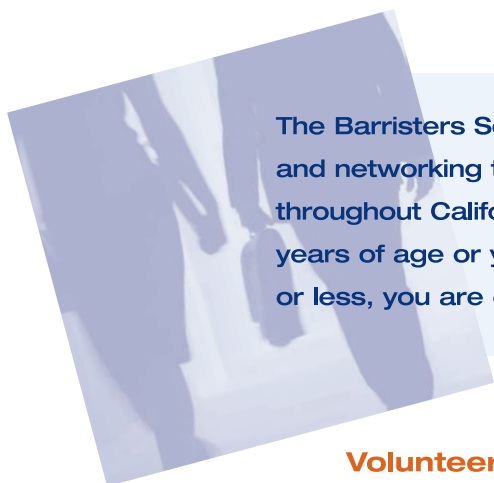
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