

A long time ago (well, actually, today) in a galaxy far, far away (or in Martinez, California)....

THE LAW & MOTION SAGA



EPISODE VI: RETURN OF THE MOTION

DISCLAIMER

- I am happy to take questions during and after the program, time permitting.
- I am a quasi-judicial court employee bound not only by the Rules of Professional Conduct, but by the Canons of Judicial Ethics.
- I cannot answer questions about cases that are pending in the Contra Costa County Superior Court.
- I cannot answer questions about how particular judges would rule on any issue. Nothing in this seminar should be construed as any indication of how a judge would rule.
- All fact patters, examples and sample forms are fiction.

ABBREVIATIONS

APJ – All-Purpose Judge	MSJ/MSA – Motion for Summary Judgment/Summary Adjudication
COA – Cause of Action	MTC – Motion to Compel
CoCoCo – Contra Costa County	NOE – Notice of Entry
F&S – File & Serve	POD – Request for Production of Documents
j/x – Jurisdiction	RFA – Request for Admission
M&C – Meet & Confer	RFJN – Request for Judicial Notice
MIL – Motion <i>In Limine</i>	Rog – Interrogatory (either Special or Form)
MJOP – Motion for Judgment on the Pleadings	SOL – Statute of Limitations
MPA – Memorandum of Points and Authorities	

THE LAW & MOTION UNIVERSE

All of the Episodes of the Law & Motion Saga will give examples based on the following set of hypothetical facts:

Darth Vader (fka Annikan Skywalker) died during the Battle of Endor. At the time of his death, Vader was unmarried. His wife, Padme Skywalker (nee Amidala), predeceased him in childbirth. Vader was survived by twin children, Luke Skywalker and Princess Leia Solo (nee Organa).

Approximately two months after Vader's death, Luke and Leia received a Trustee's Notification pursuant to Probate Code § 16061.7. The Trustee's Notification included a copy of The Darth Vader Revocable Living Trust. The Trust provides that the successor trustee following Vader's death is to be Emperor Palpatine or, if he does not survive (he didn't), then "Supreme Leader Snoke" is to serve as successor trustee. Upon Vader's death, all of the assets of the Trust (assumed to be worth approximately 10 million Galactic Credits) are to be distributed to Vader's Grandson, Ben Solo, except that Luke and Leia are to each receive a bantha, if any are assets of the Trust.

Shocked, Luke (but not Leia) hired an attorney to file a Petition in the Probate Division of the Contra Costa County Superior Court alleging, among other claims, that the Trust is invalid because (1) Vader lacked the requisite mental capacity to execute the Trust; (2) Vader was unduly influenced by Emperor Palpatine, Ben Solo and/or "Supreme Leader Snoke" into executing the Trust; and (3) Vader was under duress when he executed the Trust.

Assume that CoCoCo has personal and subject matter jurisdiction over this case and that service of the petition was proper and timely.

EPIISODE V: RETURN OF THE MOTION POST-JUDGMENT MOTIONS



EPIISODE V: RETURN OF THE MOTION

- **Motions for a New Trial (CCP §§ 656 et seq.)**
- **Motions to Vacate and Enter a New Judgment (CCP §§ 663-663a)**
- **Memoranda of Costs/Motions to Strike or Tax (Prob. Code § 1002; CCP §§ 998, 1032, 1033.5; R. of Ct. 3.1700)**

EPIISODE V: RETURN OF THE MOTION

- **Other post-judgment procedures:**
 - **Motion for Reconsideration (CCP § 1008)**
 - **Motion for Relief from Judgment (CCP § 473(b))**
 - **Motion for Judgment Notwithstanding the Verdict (JNOV) (CCP § 629)**
 - **Motion for Entry of *Nunc Pro Tunc* Judgment (CCP § 473(d))**

MOTIONS FOR NEW TRIAL/VACATE JUDGMENT

- What situations can you file a Motion for New Trial?
 - After judgment of dismissal after demurrer sustained. Carney v. Simmonds (1957) 49 Cal.2d 84, 88.
 - Judgment of dismissal. *Id.*
 - After MJOP. *Id.*
 - Judgment of nonsuit per CCP §§ 581c or 631.8. *Id.* at 89.

MOTIONS FOR NEW TRIAL/VACATE JUDGMENT

- What situations can you file a Motion for New Trial?
 - Summary judgment. Aguilar v. Atlantic Richfield Co. (2001) 25 Cal.4th 826, 858.
 - Judgment entered as a discovery sanction. Sirv Inv., L.P. v. Farkhondehpour (2020) 45 Cal. App. 5th 1098, 1130.

MOTIONS FOR NEW TRIAL/VACATE JUDGMENT

- **Grounds for Motions for New Trial (CCP § 657)**
 - **Irregularity of the proceedings or abuse of discretion**
 - Irregularity results in an unfair trial & miscarriage of justice to the moving party.
 - Conduct of the trial court, jury, counsel or adverse party amounting to misconduct. Montoya v. Barragan (2013) 220 Cal. App. 4th 1215, 1229.
 - Motion must be “made upon affidavits”. CCP § 658.
 - Example: use of the Jedi Mind Trick on the trier of fact.

MOTIONS FOR NEW TRIAL/VACATE JUDGMENT

- **Grounds for Motions for New Trial (CCP § 657)**
 - **Jury misconduct**
 - Must be made by affidavit. CCP § 658.
 - Concealment of bias on *voir dire*.
 - Prejudicial communication by or to juror.
 - “Chance” verdicts (e.g., rolling a chance cube).

MOTIONS FOR NEW TRIAL/VACATE JUDGMENT

- **Grounds for Motions for New Trial (CCP § 657)**
 - **Accident or surprise which ordinary prudence could not have guarded against.**
 - **Must be shown by affidavit. CCP § 658.**
 - **Negligence not sufficient. In re Marriage of Liu (1987) 197 Cal. App. 3d 143, 154-155.**

MOTIONS FOR NEW TRIAL/VACATE JUDGMENT

- **Grounds for Motions for New Trial (CCP § 657)**
 - **Newly discovered material evidence that could not with reasonable diligence have been discovered and produced at trial. People v. Williams (1962) 57 Cal.2d 263, 270:**
 - **The evidence, and not its materiality, is newly discovered.**
 - **Not cumulative.**
 - **Different result at trial is probable.**
 - **Could not have reasonably discovered and produced it.**
 - **Presented by affidavit. CCP § 658.**

MOTIONS FOR NEW TRIAL/VACATE JUDGMENT

- **Grounds for Motions for New Trial (CCP § 657)**
 - **Excessive or inadequate damages**
 - After examining the entire record, the trier of fact clearly should have reached a different decision.
 - Established by the minutes of the court. CCP § 658.

MOTIONS FOR NEW TRIAL/VACATE JUDGMENT

- **Grounds for Motions for New Trial (CCP § 657)**
 - **Insufficient evidence to justify the decision**
 - After examining the entire record, the trier of fact clearly should have reached a different decision.
 - Established by the minutes of the court. CCP § 658.

MOTIONS FOR NEW TRIAL/VACATE JUDGMENT

- **Grounds for Motions for New Trial (CCP § 657)**
 - **Decision is against law**
 - Failure to find on a material issue
 - Findings are irreconcilable
 - Evidence is insufficient in law and without conflict
 - Insufficient Statement of Decision. Renfer v. Skaggs (1950) 96 Cal. App. 2d 380, 383.
 - Motion is on the court minutes. CCP § 658.

MOTIONS FOR NEW TRIAL/VACATE JUDGMENT

- **Grounds for Motions for New Trial (CCP § 657)**
 - **Error in law**
 - Erroneous rulings on evidence. Richard v. Scott (1978) 79 Cal. App. 3d 57, 63.
 - Erroneous grant of nonsuit. Castillo v. Warren (1941) 44 Cal. App. 2d 903, 907.
 - Made on the court's minutes. CCP § 658.

MOTIONS FOR NEW TRIAL/VACATE JUDGMENT

- **Grounds for Motions to Set Aside Verdict (CCP § 663)**

- **Incorrect or erroneous legal basis for the decision, not consistent with or not supported by the facts, and the Statement of Decision must be amended or corrected.**
 - **Legal conclusion that is contrary to an express statutory provision. Gibson v. Hammang (1904) 145 Cal. 454, 456.**
 - **Motion only granted where substantial rights of a party are materially affected.**

MOTIONS FOR NEW TRIAL/VACATE JUDGMENT PROCEDURE

- **Initial Filing:**
 - **“Notice of Intention” ONLY (CCP §§ 659(a), 663a(a)) initiates the procedure.**
 - **Must designate grounds for the motion.**

MOTIONS FOR NEW TRIAL/VACATE JUDGMENT PROCEDURE

- **Timing for Filing Notice of Intention:**
 - After the decision is rendered and before the entry of judgment; OR
 - Within 15 days of the date of mailing notice of entry of judgment by the court per CCP § 664.5; OR
 - Within 15 days of service of a notice of entry of judgment by a party; OR
 - Within 180 days after the entry of judgment.
 - CCP § 1013 or 1010.6 does not apply (CCP §§ 659(b), 663a(c), 1013, 1010.6(a)(3)(B))

MOTIONS FOR NEW TRIAL/VACATE JUDGMENT PROCEDURE

- **CAUTION RE: TIMING**
 - Notice of Entry of Judgment per CCP § 664.5.
 - Van Beurden Ins. Servs. v. Customized Worldwide Weather Ins. Agency (1997) 15 Cal.4th 51.
 - Holding: Duty to serve Notice of Entry is on the parties, NOT THE COURT.

MOTIONS FOR NEW TRIAL/VACATE JUDGMENT PROCEDURE

•CAUTION RE: TIMING

- Therefore, unless the proof of the court's service of the judgment or Notice of Entry *specifically states* that it is served "pursuant to court order" or "pursuant to CCP § 664.5" or similar language, the 15 day deadlines for filing a Notice of Intention at CCP § 659(a)(2) and 663a(a)(2) **DO NOT APPLY!!!**

MOTIONS FOR NEW TRIAL/VACATE JUDGMENT PROCEDURE

•CAUTION RE: TIMING

- Practical reality in CoCoCo: The court **NEVER** includes § 664.5 language! Thus, it is the duty of the prevailing party to a judgment to serve NOE.

MOTIONS FOR NEW TRIAL/VACATE JUDGMENT PROCEDURE

- **WHY IS THIS SO IMPORTANT?**
 - **Affects deadline to file Notice of Intention.**
 - **The court has a *jurisdictional time limit* by which it must rule! CCP §§ 660(c), 663a(c)**
 - **75 days from mailing NOE by the court per CCP § 664.5;**
 - **75 days from service of NOE by a party; or**
 - **75 days after filing of the first Notice of Intention.**

MOTIONS FOR NEW TRIAL/VACATE JUDGMENT PROCEDURE

- **If the court doesn't rule in time, the Motion is *deemed denied without further order. Id.***

MOTIONS FOR NEW TRIAL/VACATE JUDGMENT PROCEDURE

- **WHY ELSE IS TIMING SO IMPORTANT?**
 - **Appeal deadlines are extended!**
 - **General rule (R. of Ct. 8.104(a)):**
 - **60 days after NOE or copy of filed-endorsed judgment served by court;**
 - **60 days after a party serves NOE or a copy of the filed-endorsed judgment; or**
 - **180 days from judgment entry.**

MOTIONS FOR NEW TRIAL/VACATE JUDGMENT PROCEDURE

- **WHY ELSE IS TIMING SO IMPORTANT?**
 - **Appeal deadlines are extended!**
 - **If Motion for New Trial or to Vacate filed (R. of Ct. 8.108(b), (c)):**
 - **30 days after court or party serves NOE or order denying the motion;**
 - **30 days after denial by operation of law; or**
 - **180 days after judgment**

MOTIONS FOR NEW TRIAL/VACATE JUDGMENT PROCEDURE

- **WHY ELSE IS TIMING SO IMPORTANT?**
- **THEREFORE:**
 - The Notice of Intention must be *timely* in order to extend the time to appeal. Reyes v. Kruger (2020) 55 Cal. App. 5th 58, 74.

MOTIONS FOR NEW TRIAL/VACATE JUDGMENT PROCEDURE

- **Filing Supporting and Opposing Papers (CCP §§ 659a, 663a(d)):**
 - Opening MPA + evidence, if any, due **10 days** after filing Notice of Intention;
 - Opposing briefs + evidence: **10 days** after service of opening papers;
 - Reply due **5 days** after service of Opposition.

MOTIONS FOR NEW TRIAL/VACATE JUDGMENT PROCEDURE

- **Setting the Hearing (CCP §§ 660, 661, 663a(d)):**
 - **Trial judge must hear motion, if available.**
 - **Court must set hearing after deadline to oppose motion, clerk must notify judge that motion was filed and hearing must be set.**
 - **Clerk must give at least 5 days notice of hearing.**

MOTIONS FOR NEW TRIAL/VACATE JUDGMENT PROCEDURE

- **Ruling on the Motion:**
 - **Court has discretion to grant a motion for new trial or to vacate.**
 - **On a Motion to Vacate, court may not reopen the case and consider further evidence.**
Grossman v. Grossman (1942) 52 Cal. App. 2d 184, 196.

MOTIONS FOR NEW TRIAL/VACATE JUDGMENT PROCEDURE

• Ruling on the Motion:

- **Court may grant alternative relief.**
 - **New Trial Motion: may change or add to statement of decision, modify the judgment in whole or in part, or grant a new trial on less than all of the issues.**

MOTIONS FOR NEW TRIAL/VACATE JUDGMENT PROCEDURE

• Ruling on the Motion:

- **Order granting new trial vacates the judgment and returns the case to its exact state before trial. Bloomquist v. Haley (1928) 204 Cal.258, 261.**
- **Order granting new trial must state the grounds for granting. The Order must also specify the reasons for granting. CCP § 657.**
- **Court, not counsel, must prepare the order.**
- **Order denying new trial need not state the reasons. CCP § 657.**

MOTIONS FOR NEW TRIAL/VACATE JUDGMENT PROCEDURE

- **Ruling on the Motion:**

- **Motion to vacate: If granted, court must enter a new judgment that supersedes prior judgment. If that doesn't happen, order granting motion is void. Dolan v. Superior Court (1920) 47 Cal. App. 235, 241.**

MOTIONS FOR NEW TRIAL/VACATE JUDGMENT PROCEDURE

- **Appeal Rights**

- **Order granting new trial or motion to vacate is appealable. Order denying new trial or motion to vacate is appealable from the judgment. CCP § 904.1(a)(4), 904.2(e).**

MEMORANDA OF COSTS/MOTIONS TO STRIKE OR TAX

- Prob. Code § 1002; CCP § 1032, 1033.5; R. of Ct. 3.1700-3.1702.
 - Basic civil rule: Prevailing party is entitled to recover costs as a matter of right *unless otherwise provided by statute*. CCP § 1032(b).
 - Probate rule: Exactly the opposite! Court has discretion to award costs payable by any party or from an estate or trust. Prob. Code § 1002; Hollaway v. Edwards (1998) 68 Cal. App. 4th 94, 99.

MEMORANDA OF COSTS/MOTIONS TO STRIKE OR TAX

- **Claiming Costs:**
 - Use mandatory Memorandum of Costs (Summary) (Judicial Council Form MC-10) and optional Memorandum of Costs (Worksheet) (Form MC-11).
 - **Deadline (R. of Ct. 3.1700(a)(1)):**
 - 15 days after service of NOE of Judgment per CCP § 664.5 or by party; or
 - 180 days after entry of judgment, whichever is first.

MEMORANDA OF COSTS/MOTIONS TO STRIKE OR TAX

- **Claiming Costs:**
 - **Memorandum of Costs is verified under penalty of perjury, so no evidence is needed to support claim until challenged by motion.**
 - **Must list each cost individually so that the parties and the court can evaluate allowability of the claim.**

MEMORANDA OF COSTS/MOTIONS TO STRIKE OR TAX

- **Contesting Costs: Motion to Strike or Tax (R. of Ct. 3.1700(b)(1))**
 - **Due 15 days after service of Memo (extended by CCP § 1013 & 1010.6(a)(4).**
 - **16/9/5 Rule applies.**
 - **Motion to Strike: Entire memo is stricken;**
 - **Motion to Tax: Individual line items are reduced or eliminated.**

MEMORANDA OF COSTS/MOTIONS TO STRIKE OR TAX

- **Contesting Costs: Motion to Strike or Tax (R. of Ct. 3.1700(b)(1))**
 - **Motion to Tax must refer to each item objected to by the same number and same order as claimed in the Memorandum. R. of Ct. 3.1700(b)(2).**

MEMORANDA OF COSTS/MOTIONS TO STRIKE OR TAX

- **Allowable Costs (CCP § 1033.5(a))**
 - **Filing fees; depo fees; ordinary witness fees; service of process, etc.**
 - **Note re: Expert Witness Fees:**
 - **Only allowable if the expert witness is ordered pursuant to Evid. Code § 730 (Evid. Code § 733; Sanchez v. Bay Shores Medical Group (1999) 75 Cal. App. 4th 946, 949-950) or pursuant to statutory offer to compromise under CCP § 998.**

MEMORANDA OF COSTS/MOTIONS TO STRIKE OR TAX

- **Allowable Costs (CCP § 1033.5(a))**
 - **Note re: Attorney Fees (CCP § 1033.5(a)(10)):**
 - Only allowable pursuant to “contract, statute or law”.
 - Only available by separate motion, not in the Memorandum, unless fees are fixed without the need for court determination. R. of Ct. 3.1702(b), (e).
 - Must be filed not later than the deadline to appeal the judgment. R. of Ct. 3.1702(b)(1).

MEMORANDA OF COSTS/MOTIONS TO STRIKE OR TAX

- **Disallowed costs: CCP § 1033.5(b):**
 - Expert witness fees not ordered by the court; postage, telephone, and photocopying, except for exhibits; transcripts not ordered by the court.
 - Example: Legal research costs are not allowed. Ladas v. California State Auto. Ass’n (1993) 19 Cal. App. 4th 761, 776.

MEMORANDA OF COSTS/MOTIONS TO STRIKE OR TAX

- **Discretionary Costs (CCP § 1033.5(c)(4)):**
 - Items not mentioned in 1033.5(a) or (b) may be allowed or denied in the court's discretion.
 - Example: Mediation fees. Berkeley Cement, Inc. v. Regents of the University of California (2019) 30 Cal. App. 5th 1133, 1143.

MEMORANDA OF COSTS/MOTIONS TO STRIKE OR TAX

- **General rules governing amount to be awarded (CCP § 1033.5(c)(1)-(3)):**
 - Costs are allowable if incurred, whether or not paid;
 - Allowable costs must be reasonably necessary to the conduct of litigation and not merely convenient or beneficial to its preparation;
 - Must be reasonable in amount.

MEMORANDA OF COSTS/MOTIONS TO STRIKE OR TAX

- **Ruling on Motion:**
 - Items in the Memo that appear to be proper is *prima facie* evidence that they were necessarily incurred. Nelson v. Anderson (1999) 72 Cal. App. 4th 111.
 - If cost is expressly permitted by § 1033.5(a), burden is on the moving party to show that they are not properly chargeable or are unreasonable. *Id.*

MEMORANDA OF COSTS/MOTIONS TO STRIKE OR TAX

- **Ruling on Motion:**
 - Items in the Memo that appear to be proper is *prima facie* evidence that they were necessarily incurred. Nelson v. Anderson (1999) 72 Cal. App. 4th 111.
 - Court must first determine whether the statute expressly allows the item and whether it appears proper on its face. Whatley-Miller v. Cooper (2013) 212 Cal. App. 4th 1103, 1113.

MEMORANDA OF COSTS/MOTIONS TO STRIKE OR TAX

- **Ruling on Motion:**
 - **Burden of proof shifts to party claiming costs where the item is properly objected to. When the party offers no proof of costs beyond the Memo, the trial court has discretion to disallow the costs. Levy v. Toyota Motor Sales, Inc. (1992) 4 Cal. App. 4th 807, 816.**

MEMORANDA OF COSTS/MOTIONS TO STRIKE OR TAX

- **Entry of Costs on Judgment:**
 - **Ordinarily, court will enter a *nunc pro tunc* judgment that includes the amounts of costs awarded, either after the time to move to strike or tax expires, or after the court rules on a motion. R. of Ct. 3.1700(b)(4).**
 - **Costs awards are entitled to a direct appeal. CCP § 904.1(a)(2).**

QUESTIONS???



Presented by:
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6 SUPERIOR COURT OF CALIFORNIA

7 COUNTY OF CONTRA COSTA

8 In re the

Case No.: P74-00001

9 DARTH VADER REVOCABLE LIVING
10 TRUST.

11 NOTICE OF INTENTION TO MOVE FOR
12 NEW TRIAL [TO VACATE AND ENTER
NEW AND DIFFERENT JUDGMENT]

13 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

14 NOTICE IS HEREBY GIVEN that BEN SOLO intends to move this court, at a time and
15 place to be set by the court, to vacate and set aside the decision of the court rendered in favor of
16 LUKE SKYWALKER and against BEN SOLO, and the judgment entered on that decision and
17 to grant BEN SOLO a new trial on the following grounds:

- 18 1. Irregularity in the proceedings of the court prevented BEN SOLO from having a
19 fair trial as shown by the declarations of Darth Maul and Bib Fortuna;
- 20 2. The evidence is insufficient to justify the decision as shown by the minutes of the
21 court;
- 22 3. There was an error in law, occurring at trial and excepted to by the moving party,
23 as shown by the minutes of the court.

24 This motion is also based on a memorandum to be served and filed hereafter.

25 Date: _____

26 DARTH MAUL, ESQ.
27 Attorneys for BEN SOLO