



BLOG

# The Jury System: A Brief Comparison Between Federal and California Practices

November 29, 2018 | Tyler Atkinson

## Introduction

Attorneys who appear in both state and federal courts must be familiar with the differences between the two systems. While some rules have harmonized over time,<sup>[1]</sup> other procedures are entirely distinct. As a matter of competence, lawyers who practice in state and federal courts should stay familiar with these differences. As a matter of strategy, when a party has the option to litigate in either forum, the differences may present a tactical edge.

This article, comparing the jury system in federal and state court, is one of a five-part series of articles highlighting particular differences in California versus federal civil procedure. Other articles in this series examine differences in punitive damages, citation to unpublished authority, evidentiary privileges, and class actions.

## The Right to A Civil Jury

Under both federal<sup>[2]</sup> and California<sup>[3]</sup> law, parties in civil litigation enjoy a right to a jury in cases arising at common law, or when a jury is provided by statute. Neither system requires a jury in cases at equity, i.e., cases that historically were decided by a judge, or legal proceedings that have no common law analogy.<sup>[4]</sup>

The federal right to a jury is stronger than its state corollary, due to a quirk in the development of federal Constitutional law. The Bill of Rights, which includes the right to a civil jury, was ratified in 1791. The Bill of Rights originally only restricted the powers of the federal government.<sup>[5]</sup> As a result, no rights guaranteed by the Bill of Rights bound the individual states. However, after the Civil War and the enactment of the 14th Amendment, and particularly in the 1960s, the Supreme Court has “incorporated” individual protections of the Bill of Rights, and applies them against the states.<sup>[6]</sup> Over the last century, nearly all of the rights contained in the Bill of Rights have been held by the Supreme Court to apply to the states.

The right to a jury in civil actions is one of five rights not incorporated against the states.<sup>[7]</sup> Thus, in state cases, the right is based entirely on state law, and California courts have enjoyed free reign to shape its contours.

In federal court, when a lawsuit concerns both equitable claims—claims tried by a judge—and common law claims—claims for which there is a right to a jury—the Court must not decide the equitable claims in a manner that limits the jury-triable claims. In other words, legal claims will be tried to the jury, and any remaining equitable claims will be decided by the judge.<sup>[8]</sup> A judge may not decide equitable issues that would infringe on this right.<sup>[9]</sup> This practice is consistent with a view that the right to a jury is an overriding interest.

In contrast, California case law has established a strong preference for trying equitable claims to a judge *before* any claims are tried to a jury.<sup>[10]</sup> The policy interest is efficiency. On deciding the equitable cause of action, the judge may decide issues overlapping with jury-triable claims. In the process, potential issues for the jury may be narrowed or eliminated. This is precisely the result federal law seeks to avoid.

In addition, the right to a jury in California may be waived more easily, even accidentally, compared to in federal court. Subdivision (f) of Code of Civil Procedure section 631 enumerates the ways in which a party may waive jury, including:  
[11]

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.

By failing to timely pay the fee described in subdivision (b) [of Code of Civil Procedure section 631], unless another party on the same side of the case has paid that fee.

By failing to deposit with the clerk or judge, at the beginning of the second and each succeeding day's session, the sum provided . . . .

## **Jury Composition And Voting**

The number of jurors to be empaneled, and the number of jurors needed for a verdict, are also different. A leading treatise observes that most federal courts use significantly smaller juries in civil actions than state courts typically empanel.<sup>[12]</sup> Whereas California courts generally empanel twelve members, federal courts empanel as few as half this number.

The jury pool, sometimes referred to as the venire, is also different. In California state court, actions are tried to a jury of residents from within the county. In federal court, the jury is drawn from a region within the federal district. Thus, the jury pool, and eventually the jury, is typically comprised of individuals from multiple neighboring counties.

In federal civil cases, a verdict must be unanimous.<sup>[13]</sup> In California, a verdict requires three-fourths, i.e., 75%, of the panel.<sup>[14]</sup>

## **Conclusion**

Demographics and voting thresholds should be considered whenever a plaintiff has a choice to file in federal or state court, or when a defendant has an option to remove or remand. Parties should also be aware of California's "equity first" doctrine, and how it may affect their overall case strategy.

---

## **Endnotes**

For purposes of citation to California authorities, this article follows the *California Style Manual* (4th ed. 2000). Federal authorities are cited using the *Bluebook* (20th ed. 2015). Code citations are to California state codes, e.g., the California Evidence Code, unless otherwise specified.

[1] For example, California's electronic discovery rules have generally caught up with their federal counterparts. California's Electronic Discovery Act, enacted in 2009, was largely modeled on the federal rules. See Assem. Com. on Judiciary, Analysis of Assem. Bill No. 5 (2009-2010 Reg. Sess.) ("[m]any of the bill's specific provisions are drawn from recently enacted federal rules . . .").

[2] U.S. Const. amend. VII:

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any court of the United States, than according to the rules of the common law.

See Fed. R. Civ. P. 38:

Right to a Jury Trial; Demand

(a) Right Preserved. The right of trial by jury as declared by the Seventh Amendment to the Constitution—or as provided by a federal statute—is preserved to the parties inviolate.

(b) Demand. On any issue triable of right by a jury, a party may demand a jury trial by:

(1) serving the other parties with a written demand—which may be included in a pleading—no later than 14 days after the last pleading directed to the issue is served; and

(2) filing the demand in accordance with Rule 5(d).

(c) Specifying Issues. In its demand, a party may specify the issues that it wishes to have tried by a jury; otherwise, it is considered to have demanded a jury trial on all the issues so triable. If the party has demanded a jury trial on only some issues, any other party may—within 14 days after being served with the demand or within a shorter time ordered by the court—serve a demand for a jury trial on any other or all factual issues triable by jury.

(d) Waiver; Withdrawal. A party waives a jury trial unless its demand is properly served and filed. A proper demand may be withdrawn only if the parties consent.

(e) Admiralty and Maritime Claims. These rules do not create a right to a jury trial on issues in a claim that is an admiralty or maritime claim under Rule 9(h).

[3] Cal. Const., art. I, § 16:

Jury trial; three-fourths verdict; waiver of jury trial; number of jurors

Sec. 16. 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. A jury may be waived in a criminal cause by the consent of both parties expressed in open court by the defendant and the defendant's counsel. 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.

. . . .

[4] For a discussion of the Law-Equity distinction, see *Cong. Research Serv., The Constitution of the United States of America: Analysis and Interpretation, S. Doc. No. 112-9, at 1706-08 (2d Sess. 2017)*.

[5] *Barron v. City of Baltimore*, 32 U.S. 243, 250 (1833) (“Had the framers of these amendments intended them to be limitations on the powers of the state governments, they would have imitated the framers of the original constitution, and have expressed that intention.... [¶] These amendments contain no expression indicating an intention to apply them to the state governments. This court cannot so apply them.”).

[6] Jerold H. Israel, *Selective Incorporation: Revisited*, 71 *Geo. L.J.* 253, 336-38 (1982).

[7] The Seventh Amendment, which provides for a civil jury, has not been incorporated. See *Minneapolis & St. Louis R.R. Co. v. Bombolis*, 241 U.S. 211 (1916). Freedom from quartering soldiers has only been incorporated by the Second Circuit. See *Engblom v. Carey*, 677 F.2d 957, 961 (2d Cir. 1982). The prohibition on excessive fines has not been incorporated. See *McDonald v. City of Chi., Ill.*, 561 U.S. 742, 765 fn. 13 (2010). The right to a criminal grand jury has not been incorporated. See *Hurtado v. California*, 110 U.S. 516 (1884). The right to a jury of local residents has not been incorporated. See *Caudill v. Scott*, 857 F.2d 344 (6th Cir. 1988).

[8] Fed. R. Civ. P. 42(b) (emphasis added):

### Separate Trials

For convenience, to avoid prejudice, or to expedite and economize, the court may order a separate trial of one or more separate issues, claims, crossclaims, counterclaims, or third-party claims. When ordering a separate trial, the court must preserve any federal right to a jury trial.

[9] See *Beacon Theatres, Inc. v. Westover* (1959) 359 U.S. 500 (finding that the discretion to try equitable claims first is “very narrowly limited and must, wherever possible, be exercised to preserve jury trial.”).

[10] “It is well established that, in a case involving both legal and equitable issues, the trial court may proceed to try the equitable issues first, without a jury..., and that if the court’s determination of those issues is also dispositive of the legal issues, nothing further remains to be tried by a jury.” *Raedeke v. Gibraltar Savings and Loan Assn.* (1974) 10 Cal.3d 665, 671.

[11] Code of Civil Procedure section 631 states more fully:

(a) The right to a trial by jury as declared by Section 16 of Article I of the California Constitution shall be preserved to the parties inviolate. In civil cases, a jury may only be waived pursuant to subdivision (f).

(b) At least one party demanding a jury on each side of a civil case shall pay a nonrefundable fee of one hundred fifty dollars (\$150), unless the fee has been paid by another party on the same side of the case. The fee shall offset the costs to the state of providing juries

in civil cases. If there are more than two parties to the case, for purposes of this section only, all plaintiffs shall be considered one side of the case, and all other parties shall be considered the other side of the case. Payment of the fee by a party on one side of the case shall not relieve parties on the other side of the case from waiver pursuant to subdivision (f).

(c) The fee described in subdivision (b) shall be due on or before the date scheduled for the initial case management conference in the action, except as follows:

(1) In unlawful detainer actions, the fees shall be due at least five days before the date set for trial.

(2) If no case management conference is scheduled in a civil action, or the initial case management conference occurred before June 28, 2012, and the initial complaint was filed on or after July 1, 2011, the fee shall be due no later than 365 calendar days after the filing of the initial complaint.

(3) If the initial case management conference occurred before June 28, 2012, and the initial complaint in the case was filed before July 1, 2011, the fee shall be due at least 25 calendar days before the date initially set for trial.

(4) If the party requesting a jury has not appeared before the initial case management conference, or first appeared more than 365 calendar days after the filing of the initial complaint, the fee shall be due at least 25 calendar days before the date initially set for trial.

(d) If a party failed to timely pay the fee described in subdivision (b) that was due between June 27, 2012, and November 30, 2012, the party will be relieved of a jury waiver on that basis only if the party pays the fee on or before December 31, 2012, or 25 calendar days before the date initially set for trial, whichever is earlier.

(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.

(f) A party waives trial by jury 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.

(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 timely pay the fee described in subdivision (b), unless another party on the same side of the case has paid that fee.

(6) By failing to deposit with the clerk or judge, at the beginning of the second and each succeeding day's session, the sum provided in subdivision (e).

(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.

(h) The court shall transmit the fee described in subdivision (b) to the State Treasury for deposit in the Trial Court Trust Fund within 45 calendar days after the end of the month in which the fee is paid to the court.

[12] Weil & Brown, Cal. Prac. Guide: Civ. Proc. Before Trial (The Rutter Group 2018) ¶ 3:658.

[13] Fed. R. Civ. P. 48:

(a) Number of Jurors. A jury must begin with at least 6 and no more than 12 members, and each juror must participate in the verdict unless excused under Rule 47(c).

(b) Verdict. Unless the parties stipulate otherwise, the verdict must be unanimous and must be returned by a jury of at least 6 members.

...

[14] Cal. Const., art. I, § 16.

---



#### **ABOUT THE AUTHOR**

Tyler Atkinson

Tyler represents plaintiffs and defendants in civil cases, public entity litigation, and high-stakes disputes. His clients range from individuals and closely held businesses to Fortune 500 companies.

---

©2019 McManis Faulkner