

# California Eviction Defense: Protecting Low-Income Tenants 2017

*Co-Chairs*

Madeline S. Howard  
Jith Meganathan

Practising Law Institute  
1177 Avenue of the Americas  
New York, New York 10036

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## Unlawful Detainer Trial Practice Outline

Monique Farris

*Centro Legal de la Raza*

Shirley Gibson

*Legal Aid Society of San Mateo County*

Lorraine López

*Inner City Law Center*

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## PREPARATION FOR TRIAL

### 1. Timing

- Since UD's are summary proceedings, trial must be set no later than 20<sup>th</sup> day after request to set is filed (CCP § 1170.5(a)).
  - Opposing counsel will likely file a Request to Set Trial once service of the Answer(s) is complete.
- Initiate discovery as close to the date of Answer as possible, otherwise impractical to complete.
  - Consider personal service or overnight delivery if economically feasible.
- If parties need more time to complete discovery, include discussion of trial continuance in meet and confer process.
- Continuances by stipulation of the parties are most likely to be granted.

### 2. Discovery tools

- Full discovery is permitted in all unlawful detainer proceedings. The "Economic Litigation" rules (CCP § 90 et seq.) restricting discovery in limited civil cases do not apply to unlawful detainers. (CCP § 91(b))
- Landlord and tenant may utilize all available discovery devices authorized by the Civil Discovery Act. (CCP § 2019.010)
- The normal ten-day "hold" on certain discovery by plaintiff is shortened in UD actions to *five days* after service of the summons and complaint on defendant (or defendant's appearance, whichever first occurs). Special statutes shorten the normal discovery time-frames otherwise applicable in general civil actions.
  - a. Interrogatories - CCP § 2030.020(c); responses are due within five days after service. (CCP § 2030.260(b))
  - b. Inspection demand - CCP § 2031.020(c), (d); Inspection of documents: the party upon whom a demand is served must be given at least five days from date of service of the demand to respond. (CCP § 2031.260 (b))
  - c. Request for admissions - CCP § 2033.020(c); the party must be given at least five days after service of the requests to respond. (CCP § 2033.250(b))

- d. Depositions: at least five days after service of the deposition notice but not later than five days before trial. (CCP § 2025.270(b))
- Cost of Discovery: Costs should be a consideration if it is uncertain whether tenant will prevail at trial and there is a written lease with no cap on attorney's fees for prevailing party.
  - Court Reporters Board of CA: Transcript Reimbursement fund can cover the cost of transcript of deposition or Court proceedings. Includes one additional copy and expedited fees. See: <http://www.courtreportersboard.ca.gov/licenses/trfguide.shtml>
- Using Discovery Effectively: Your time and resources will be used more efficiently if you are selective with your Discovery tools.
  - Actually review the responses you receive. May provide leads for development of defenses or additional witnesses.
- Motion to Compel: Can be filed at any time upon 5 days notice. (CCP §1170.8)
  - Meet and Confer is not technically required if no responses have been received, but in practice Court is more likely to grant sanctions if you made an attempt to meet and confer prior to filing.
  - Meet and Confer declaration and separate statement required to compel further answers (CRC 3.1345)
- Timing Considerations
  - Discovery must be completed 5 days prior to trial. Completed = due date for responses and depositions completed before then.
  - Serve discovery shortly after Answer is filed. Have a strategy for common cases (e.g. non-payment cases, habitability cases, etc.).
  - If you will be noticing multiple depositions, professional courtesy to meet and confer after service of notices to coordinate dates and times for depositions. Counsel is almost never available on the date you originally set.

- Be prepared for “retaliation.” If you serve a lot of discovery, be prepared for discovery propounded by plaintiff.
3. Investigation and Evidence Gathering
- Visit the premises: Your storytelling and advocacy will be greatly improved if you get to know the home you are defending.
    - Take photos for use as evidence or demonstrative exhibits. For purposes of authentication, better practice to have someone who isn’t trial counsel take the photos.
    - Interview neighbors and household members. Get names and contact information in the event you need to subpoena as a trial witness.
    - Walk around the property; get a sense of the layout of the building (if relevant to case).
  - Code enforcement: Obtain copies of inspection reports and orders. Interview inspectors/investigators as you may want to subpoena them as witnesses. Do a CPRA request if there’s a lengthy history of code violations.
  - Expert witnesses: consider whether your case benefits from experts such as private habitability inspectors or medical professionals. If so, interviewing and retaining these witnesses must happen early in your case.
  - Keep your client involved: Give your client a list of additional evidence they may have in their possession with a deadline.
    - Review client documents: rent receipts, maintenance requests, lease agreement, correspondence to/from landlord, prior notices, invoices for repairs, etc.
    - Get a list of potential witnesses: neighbors, other landlord agents not already disclosed

### **JURY TRIAL OR BENCH TRIAL?**

1. Defendant is entitled to jury trial on issues of fact, unless waived (CCP §1171, CCP §631(f))
  - a. Waiver by failure to timely demand within five days of the Notice of trial setting.

- b. Waiver by failure to post jury fee or have it waived (CCP §631(b))
  - c. Failure to appear at trial
  - d. Written consent or oral consent in open court
  - e. Failure to post daily juror fees and mileage fees per CCP §631(e)
2. Factors to consider
- Credibility & Likability
    - Is the client an appealing/credible witness? If you have client control issues or if their credibility could be questionable in front of a jury.
    - Is the landlord an appealing/credible witness? It's disappointing, but if the landlord doesn't come off as a bad actor, they could garner the sympathy and votes of the jury.
  - Would the primary defenses make common sense to a non-lawyer, or are they more technical?
    - Very technical defenses such as illegal rent increases over the span of many years, compliance with rent control statutes, etc. can sometimes be too convoluted for a jury to follow.
  - "Damage Control:?" Are you hurting your client's interests by pursuing a jury trial?
    - Example: Section 8 cases might hinge on technical defenses; you might have a better result in front of a judge rather than 12 jurors who might not be sympathetic to someone who is already receiving a government subsidy.
    - In cases with weaker defenses, counsel may be willing to agree to an alternate stipulated judgment for a "soft-landing" if you waive jury.
  - Risk of attorney's fees award:
    - If fees are not capped and significant chance of judgment in landlord's favor.
  - Is the prospect of a jury trial likely to motivate the plaintiff to settle the case?

- The answer is usually – YES.
- Is there time to adequately prepare for a jury trial?
- Client concerns: Ultimately you still need to discuss how you will proceed to trial with your client and obtain their consent.
  - Financial concerns: Will your client miss a lot of work (i.e. income)? Can they get fired for asking for too much time off?
  - Fear: Many clients fear the judicial system, so much so that they would rather settle or have an expedited proceeding in front of a judge. “I just want to get it over with.”

## **DAY OF TRIAL**

### 1. Witness Management

- Make sure that you have secured witness attendance. You will typically need your witnesses to be available by the afternoon of the first day of trial.
- Subpoena nonparty witnesses
  - If any of your witnesses refuse to appear voluntarily, they must be subpoenaed. The subpoena must be served at least 24 hours prior to the trial by someone who is over the age of 18 and not a party to the lawsuit. (CCP §1987(a)-(c))
  - It is also sometimes strategically wise to subpoena friendly witnesses.
  - If the witness requests, you must pay them a \$35.00 witness fee when the subpoena is served, plus 20 cents per mile each way. (CCP §1987 (a)-(c))
- Notice to Appear for party witnesses
  - No subpoena necessary for adverse party or agent, service of notice to appear is sufficient. (CCP §1987(b))
- Prepare your client for the possibility of being called as a Plaintiff’s witness. (Evid. Code §776)

### 2. Trial Documents

- Have originals and three copies of all of your documents with you.



- Plaintiff's attorneys are often unused to unlawful detainer cases being pushed to trial. They will often show up without documents. If you have your documents ready, the judge may elect to rely only on your documents, disadvantaging the landlord. To the contrary, if you don't have your documents ready to go, the judge may rely on the landlord's documents, disadvantaging your client.
- Review local rules for any standing pre-trial orders. Local rules will typically specify which documents are required on the first day of trial and which documents must be exchanged prior to trial.
  - Pay particular attention to document exchange requirements, as some local rules require exchange several days prior to trial. Many landlord attorneys do not comply with these exchange rules. If you have complied and opposing counsel has not a judge may refuse opposing counsel's filings.
- Trial Brief
  - Some courts require preparation of a trial brief describing the case, the issues to be resolved, your client's arguments, and points and authorities in support thereof.
  - Why you should prepare a trial brief:
    - You're dealing with a judge who is unfamiliar with unlawful detainer law or you anticipate a unique legal issue that the judge will need to be educated on.
    - Allows you an early opportunity to present your story to the judge. You can include facts so that the judge sees the big picture. Present sympathetic or outrageous facts up-front, let the judge know this isn't just another unlawful detainer.
    - Effective trial preparation tool. Forces you to organize your case in advance and make sure you do not overlook any essential points of law.
  - Be prepared to submit additional briefing on specific issues as they arise during pre-trial discussions, motions in limine, jury instruction negotiations, etc.

- Examples of common trial briefs to keep handy in non-payment cases:
      - Actual notice not required to assert a defense based on breach of the implied warranty of habitability.
      - Three-day notice overstates the amount of rent due because it includes illegal late fees (liquidated damages).
- Jury Instructions
  - Special Jury Instructions
    - Examples: instructions pertaining to local ordinances, reasonable accommodation defenses, unclean hands, waiver/estoppel.
  - Some judges will require a full set of customized CACI instructions as opposed to a list of instructions to be used.
  - Study CACI's and the accompanying instructions. Do not hesitate to supplement CACI instructions.
- Jury Verdict Form
  - Craft carefully. Make sure all your defenses get in. Rank your defenses, list best defenses first, habitability last.
- Statement of the Case
- Motions in Limine
  - Plaintiff's attorneys rely heavily on motions in limine.
  - Common Plaintiff's motions in limine:
    - Motion in limine arguing that all evidence of the breach of implied warranty of habitability should be excluded because the plaintiff did not have notice of the defects or because the defense was not properly pled.
    - Motion to preclude question of breach of warranty of habitability from going to jury.
    - Motion to preclude retaliation defense in non-payment cases.

- In cases involving a defense based upon retaliation or discrimination, you can expect a motion in limine by plaintiff seeking to shift the burden of proof regarding the plaintiff's dominant motive or good faith from the plaintiff to the defendant.
  - Another likely motion in limine is one to exclude evidence of other property owned by the plaintiff.
  - Motion to exclude any mention of the fact that the Defendant will become homeless if evicted/that the Defendant has nowhere else to go.
- Common Defendant's motions in limine:
  - Motion to exclude any evidence of behavior allegations not stated in the notice. Especially important in nuisance cases where notice does not contain facts sufficient to show a pattern and practice.
  - Motion to exclude any evidence of bad conduct by your client that is unrelated to the ground for eviction stated in the notice to quit.
  - Motion to preclude any evidence not turned over in discovery. Make your discovery requests very specific as to the categories you know will be litigated. Will prevent Plaintiff from producing new fake notices/ledgers/other documents at trial.
  - Motion to preclude evidence of rent alleged to be owed before or after the notice period.
  - Motion to preclude evidence of prior unlawful detainer actions or other lawsuits.
  - Motion to preclude evidence of any criminal convictions.
- Examples of other useful motions in limine to consider:
  - Presence of Plaintiff's agent at counsel table during trial
  - Presence of other non-party witnesses in the courtroom during trial.
- Notice(s) to Appear
- Subpoenas

- Request for Written Decision
    - Especially if you do not have a court reporter.
  - Proposed Voir Dire Questions for Jurors
  - Witness List
  - Exhibit List
  - Exhibits
    - Check with court clerk regarding specific exhibit labeling instructions.
3. Assignment to Trial
- Master Calendar→ In some jurisdictions, you will report to a presiding judge on the day of trial for assignment to a trial department. A presiding judge will often require the parties to see a settlement judge before assigning a trial judge. If your case does not settle the presiding judge will assign your case out to trial, often forthwith. Counsel must come to trial assignment prepared to start trial.
  - Commissioner→ If the parties so stipulate, the case may be tried before a judge pro tem or commissioner. (Cal Const. Art. VI Section 21; and CCP 259, defining powers and duties of commissioners.) Depending on the knowledge and experience of any particular commissioner or pro tem, you may or may not decide to stipulate to this person hearing your case. Like challenging a trial judge, refusal to stipulate should be a careful decision.
  - CCP §170.6 Peremptory Challenge
    - Code of Civil Procedure §170.6 guarantees the right to exercise one peremptory challenge per case to the trial judge, which must be raised at the time of assignment. (CCP §170.6) If timely and properly raised it immediately disqualifies the assigned judge for general prejudice. No specific cause need be alleged or proved. (CCP §170.6)
    - Challenge must be timely. For cases assigned to trial under the master calendar system, a 170.6 challenge must be made in the master calendar department *immediately* upon trial assignment.

- Cannot be raised after the case has been sent out to a trial department. (CCP §170.6(a)(2))
    - This rule applies where the parties personally appear before the court where the assignment is made.
    - Outside of the master calendar system, generally, a CCP §170.6 challenge may be raised any time before trial commences. (CCP 170.6(a)(2); *People v. Sup.Ct. (Lavi)* (1993) 4 C4th 1164, 1171, 17 CR2d 815, 817.)
  - Motion may be oral or written, without prior notice.
  - Tactical considerations, alienating judges
    - Consider who else you might get.
    - At the end of the day duty is to your current client.
4. Court Reporter
- Typically want reporter present for Motions in Limine
  - Depending on cost, may or may not want reporter for voir dire
5. Interpreter
- For interpreting witness testimony, you need someone court certified in that language. To find interpreters registered with Judicial Council: [www.courts.ca.gov/programs-interpreters.htm](http://www.courts.ca.gov/programs-interpreters.htm).
  - Few Courts provide interpreters for unlawful detainer trials. However, the Judicial Council encourages trial courts to use surplus funds from previous years to provide interpreters for indigent non-English speaking persons in civil cases, with unlawful detainers being one area of priority.
  - Some trial courts will permit the use of a non-certified interpreter if the parties stipulate.

## **CONDUCTING YOUR TRIAL**

1. Pretrial Conferences
- Provides an opportunity to discuss logistics, ground rules, and other preliminary matters.
  - Logistics
    - Courtroom schedule.

- Time Estimates: A jury trial in a simple unlawful detainer action will usually take two to three days. Be sure not to underestimate the length your case will take. The judge will relay your representation to the jury and will not be pleased if you go over.
- Who is paying for the jury? Make sure your client has paid jury fees or has an additional fee waiver on file.
- Review of pleadings and issues
  - Can any issues be narrowed by stipulation? Can parties stipulate to any facts?
  - What issues remain to be tried?
- Witnesses
  - Order and estimated time for each witness.
  - Be prepared to explain what each witness will testify to/why they are necessary.
  - Avoid being duplicative.
- Jury Selection
  - Every judge has a unique jury selection procedure. Make sure you know exactly how things will proceed before the jurors arrive.
  - Some judges will give you a brief summary on how they conduct voir dire, what method of selection they use, how much you have for questions, and how they will handle challenges for cause.
  - Be prepared to have a strategy if the Court asks you about how to handle alternates, indicates they will limit attorney questions, and any hardship pleas from jurors
  - Remember that if you do not exercise your peremptory challenge then you accept the jury as paneled, you do not get a second chance!
- Settlement Possibilities
  - Settlement on day of trial is common. Judge may urge parties to explore last-minute settlement possibilities.
  - Both sides must stipulate to settlement discussions with trial judge

- Discuss Motions in Limine
    - Briefing/argument schedule
    - Request time to file opposition briefing.
    - Motions that do not comply with the applicable local rules are likely to be disregarded by the trial judge.
2. Other Pretrial Motions
- Motions for Judgment on the Pleadings
    - Can be made on day of trial, orally or in writing.
    - May have picked up case after Defendant already answered, or may opt to not demur and wait to bring motion on day of trial to leverage better settlement/get more time.
    - Examples: Failure to include language required by local ordinance or CCP §1161(2).
  - Motions to bifurcate → have judge decide legal issues before deciding to proceed to jury trial. Can help with settlement.
  - Never underestimate judge's willingness to get rid of your unlawful detainer.
  - Common Plaintiff motions:
    - Motion to strike jury trial
    - Motion to strike second amended complaint
    - Motion to bifurcate issue of habitability
3. Jury Selection
- Establish a system (seating chart)
  - Voir Dire Questions
    - Scope: "trial judge should permit liberal and probing examination calculated to discover bias or prejudice with regard to the circumstances of a particular case." (CRC 3.25(a)(1))
    - Craft questions that signal defense theories.
    - Avoid pitfalls: being boring, grandstanding (if you are talking more than the prospective jurors, you are talking too much).

- Keep it conversational. You can use “polling” questions.
  - Have you as a tenant ever had a conflict with a landlord?
  - Do you think that, regardless of the conditions in a rental unit, the tenant should have to pay 100% of the rent?
- Who is your ideal juror?
- Landlords on your jury
  - Think about keeping them on. No landlord wants to identify with a bad landlord.
  - Use questions to establish best practices for landlords in contrast to Plaintiff’s actions. (e.g. How long does it take you to respond to tenant requests for repairs? Would you allow mold, rodents, etc. in your property?)
- Client specific questions:
  - Does anyone have any strong opinions about immigrants in our community?
  - Language issues
  - What about immigrants who have become citizens, any problem with them working in our community and receiving public benefits to subsist?
- Challenges for Cause
  - Unlimited number of for cause challenges.
  - General disqualification (e.g. language)
  - Implied bias→ knowledge of facts or parties/enmity against or bias toward either party. (CCP §229)
  - Actual Bias→ “the existence of a state of mind on the part of the juror in reference to the case, or to any parties, which will prevent the juror from acting with entire impartiality, and without prejudice to the substantial rights of any party.” (CCP §225)
- Peremptory challenges→ Six strikes per side. (CCP §231(c))



#### 4. Evidentiary Issues

- Bad Faith intent to evict in Rent Control Jurisdictions
  - Use indirect evidence to prove that landlord lacks a legitimate reason to evict a tenant:
    - The tenant's rent is lower than all other rents in the landlord's building.
    - The tenant has lived in the building the longest.
- Retaliation: rebuttable presumption
  - Civil Code §1942.5(a): "If the lessor retaliates against the lessee because of the exercise by the lessee of his rights under this chapter or because of his complaint to an appropriate agency as to tenantability of a dwelling, and if the lessee of a dwelling is not in default as to the payment of his rent, the lessor may not recover possession of a dwelling in any action or proceeding, cause the lessee to quit involuntarily, increase the rent, or decrease any services within 180 days of any of the following: (1) After the date upon which the lessee, in good faith, has given notice pursuant to Section 1942, or has made an oral complaint to the lessor regarding tenantability; (2) After the date upon which the lessee, in good faith, has filed a written complaint, or an oral complaint which is registered or otherwise recorded in writing, with an appropriate agency, of which the lessor has notice, for the purpose of obtaining correction of a condition relating to tenantability; (3) After the date of an inspection or issuance of a citation, resulting from a complaint described in paragraph (2) of which the lessor did not have notice..." (CCP §1942.5(a))
  - Tenant has initial burden of producing evidence of the retaliation.
  - Tenant must offer evidence of each element:
    - (1) Complaint to a government agency
    - (2) Landlord terminated the tenancy before expiration of the 180-day protective period; and
    - (3) The tenant's rent payments are not in default or the tenant has a lawful basis for nonpayment

- An inference (rather than presumption) of prohibited retaliatory motive is then established. The landlord then has the burden of producing rebuttal evidence of their other good faith motive.
5. Burden of proof: Judgment will be entered for the party who proves his or her case or defense by a preponderance of the evidence. (Evidence Code 115, CACI 200)
  6. Opening statements
    - a. Content
      - i. Introduce your case theme, which will be a unifying thread throughout your trial presentation.
      - ii. Outline the facts you intend to prove. This is the road map of the case that will help the jury anticipate and follow your trial presentation.
      - iii. Say what you want from the jury.
      - iv. Do not argue points of law or refer to inadmissible evidence.
    - b. Presentation
      - i. Outline your points and practice delivering your opening with minimal reference to your outline. Do not read from a written statement.
      - ii. Use plain language and simple concepts, without being condescending. Avoid legalese. Practicing in front of non-lawyers can garner the best feedback.
      - iii. Consider use of visuals such as diagrams and photos if your case is complicated or very visual.
      - iv. Keep it short.
  7. Plaintiff's Prima Facie Case will include:
    - existence of the landlord-tenant relationship
    - ownership or management authority
    - lease or rental agreement (written, verbal, implied)
    - termination of that relationship
    - service of a valid notice to quit
    - expiration of the notice

- the tenant’s continued possession of the premises
  - rental value damages (usually predicated on contract rent)
8. Motion for nonsuit after Plaintiff’s presentation if one or more elements are missing
- a. CCP § 581c(a) challenge to the sufficiency of plaintiff’s evidence at an early stage of trial without waiving the right to present a defense if the motion is denied
  - b. Argument is similar to a demurrer
9. Cross exam of Plaintiff’s witnesses
- Likely witnesses to anticipate are:
    - Landlord or property manager: to authenticate the lease and notice, testify to the breaching conduct, service of the notice, and continued occupancy by the defendants.
    - Complaining witnesses: neighbors with first hand knowledge of defendant’s conduct that breaches lease or creates a nuisance, “victims” of defendant’s conduct(e.g., “I live next door and I hear a dog barking in their apartment all day long.”)
    - Law enforcement: to confirm nuisance behavior or illegal conduct by tenants or guests, authenticate police report.
  - Be professional and polite.
  - Ask leading questions that have “yes” and “no” answers. Avoid asking “why.”
  - Outline your main questions and the anticipated answers.
  - Listen to the answers given by the witness. Do not get so attached to your outline that you miss following up on something useful.
  - Many trial attorneys prefer a system of organizing a folder or trial binder section for each witness that includes all the related exhibits and outline of questions.
  - Motive-based defenses depend on excellent cross-examination of the landlord.

10. Direct exam of Defendant's witnesses
  - Witnesses you'll likely want call
    - Your client: Jurors always want to hear from the defendant. Practice at least twice with your client (for both direct and cross). Most of your most important defense evidence will come from your defendant.
    - Supportive witnesses (friends, neighbors): witnesses who can give first hand accounts of the events that are the basis of the notice or defense
    - Code enforcement officers: Certified copies of citations are admissible, but in person testimony is usually better.
11. Closing Argument
  - a. Re-emphasize the case theme
  - b. Review the evidence and state the conclusions the jury should draw from it.
  - c. Reiterate what you want from the jury.
12. Motion for directed verdict
  - a. Either Plaintiff or Defendant may move for a directed verdict at the close of the evidence, per CCP § 630(a).
  - b. Similar to Motion for Nonsuit (like a demurrer)
  - c. May be made orally and without notice, outside the presence of the jury

## **VERDICT**

1. Three-fourths of jury must agree: concurrence of at least nine on a 12-member jury is required to render a general or special verdict. (Cal. Const. Art. I, § 16; CCP § 618)
2. A special verdict may be requested prior to argument, and a special verdict form proposed to record the jury's findings on the ultimate facts. (CRC 3.1580; CCP § 624)
3. Requesting use of a special verdict form is recommended, to enable the tenant to shield future claims by the landlord, or appeal a judgment if necessary.

4. Polling the Jury: Either party may request to poll the jury to see how jurors voted on the verdict.
5. Interviewing jurors after the trial is permissible and can be very informative.
6. Statement of Decision
  - a. After a nonjury trial, and upon timely request, the court must issue a “statement of decision” that includes findings of fact and conclusions of law. (CCP § 632)
  - b. Having a statement of decision is essential to most unlawful detainer appeals. If you even slightly suspect that an appeal may be needed, make the request!
  - c. Written or verbal request on the record
  - d. Short trials: if concluded within one calendar day or in less than eight hours over the course of more than one day, the request must be made *prior to submission of the matter for decision*.

## NOTES

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