

# **Anthony M. Kennedy American Inn of Court**

**Team 3 Presents:**

**How To Get Away With Mistrial**

**Tuesday, November 15, 2022**

**LIST OF AUTHORITIES**

## CALIFORNIA RULES OF PROFESSIONAL CONDUCT

**Rule 1.2.1** Advising or Assisting the Violation of Law (Rule Approved by the Supreme Court, Effective November 1, 2018)

(a) A lawyer shall not counsel a client to engage, or assist a client in conduct that the lawyer knows\* is criminal, fraudulent,\* or a violation of any law, rule, or ruling of a tribunal.\*

(b) Notwithstanding paragraph (a), a lawyer may:

(1) discuss the legal consequences of any proposed course of conduct with a client; and

(2) counsel or assist a client to make a good faith effort to determine the validity, scope, meaning, or application of a law, rule, or ruling of a tribunal.\*

**Rule 3.3** Candor Toward the Tribunal\* (Rule Approved by the Supreme Court, Effective November 1, 2018)

(a) A lawyer shall not:

(1) knowingly\* make a false statement of fact or law to a tribunal\* or fail to correct a false statement of material fact or law previously made to the tribunal\* by the lawyer;

(2) fail to disclose to the tribunal\* legal authority in the controlling jurisdiction known\* to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel, or knowingly\* misquote to a tribunal\* the language of a book, statute, decision or other authority; or

(3) offer evidence that the lawyer knows\* to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence, and the lawyer comes to know\* of its falsity, the lawyer shall take reasonable\* remedial measures, including, if necessary, disclosure to the tribunal,\* unless disclosure is prohibited by Business and Professions Code section 6068, subdivision (e) and rule 1.6. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes\* is false.

(b) A lawyer who represents a client in a proceeding before a tribunal\* and who knows\* that a person\* intends to engage, is engaging or has engaged in criminal or fraudulent\* conduct related to the proceeding shall take reasonable\* remedial measures to the extent permitted by Business and Professions Code section 6068, subdivision (e) and rule 1.6.

(c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding.

(d) In an ex parte proceeding where notice to the opposing party in the proceeding is not required or given and the opposing party is not present, a lawyer shall inform the tribunal\* of all material facts known\* to the lawyer that will enable the tribunal\* to make an informed decision, whether or not the facts are adverse to the position of the client.

## **2022 CALIFORNIA RULES OF COURT – TITLE 3 – CIVIL RULES**

### **Rule 3.735. Management of short cause cases**

#### **(a) Short cause case defined**

A short cause case is a civil case in which the time estimated for trial by all parties or the court is five hours or less. All other civil cases are long cause cases.

*(Subd (a) amended effective January 1, 2007.)*

#### **(b) Exemption for short cause case and setting of case for trial**

The court may order, upon the stipulation of all parties or the court's own motion, that a case is a short cause case exempted from the requirements of case management review and set the case for trial.

#### **(c) Mistrial**

If a short cause case is not completely tried within five hours, the judge may declare a mistrial or, in the judge's discretion, may complete the trial. In the event of a mistrial, the case will be treated as a long cause case and must promptly be set either for a new trial or for a case management conference.

*Rule 3.735 amended and renumbered effective January 1, 2007; adopted as rule 214 effective July 1, 2002.*

*Chapter 4 adopted effective July 1, 2008.*

## **OVERVIEW ON LAWS RELATED TO MISTRIALS**

### I. PROCEDURAL

*Reimer v Firpo* (1949) 94 Cal.App.2d 798 - Direct review of an order granting or denying a mistrial is not available. The order may be reviewed, however, on appeal from the judgment.

*Warner v O'Connor* (1962) 199 Cal.App.2d 770, 774 - Mistrial requested because judge allegedly ruled improperly on probable cause issue in prosecution case; appellate court upheld trial court's ruling.

*People v Dominguez* (1981) 121 Cal.App.3d 481 - No error in refusing mistrial when evidence that prompted mistrial request was cumulative and trial judge gave strong admonition to jury).

*People v Brandon* (1995) 40 CA 4th 1172 - No error in granting defense counsel's motion for mistrial over objections of defendant).

*Blumenthal v. Superior Court* (2006) 137 Cal.App.4th 672 – Abuse of discretion in declaring a mistrial because parties did not complete a long-cause trial prior to an arbitrary deadline set by the trial judge.

## II. IRREPARABLE PREJUDICE

*People v Romero* (1977) 68 Cal.App.3d 543 - Motion for mistrial may properly be refused when court is satisfied that no injustice has resulted or will result from alleged misconduct).

*People v Ward* (1968) 266 Cal.App.2d 241 - Motion for mistrial is addressed to trial court's sound discretion).

*People v Upshaw* (1974) 13 Cal.3d 29 - In criminal proceeding, defendant's waiver of jury trial without concurrence of counsel violates mandatory provisions of Cal Const art I, §16; if witness is called, putting defendant in jeopardy, court cannot grant mistrial and must dismiss case).

## III. IRREGULARITY IN PROCEEDINGS

Various statutes require the trial judge to declare a mistrial for specified irregularities in the proceedings. These irregularities include:

- Calling the judge presiding at the trial as a witness, over objection. Evid C §703(c).
- Calling a juror in the case as a witness, over objection. Evid C §704(c).
- Absence of a juror in a criminal case at the time the verdict is announced. Pen C §1147.
- Illness of a juror in a civil case if no alternate juror can replace the ill juror and the attorneys do not agree to proceed with fewer jurors. CCP §233.

- Discharge of a juror in a criminal case for good cause when no alternate can take the juror's place. CCP §233. (If there was no legal necessity for discharging the juror and jeopardy had attached, the defendant cannot be retried. *Larios v Superior Court* (1979) 24 Cal.3d 324, 329.)
- Inability of the jury in a civil case to render a verdict "by reason of accident or other cause." CCP §616; Pen C §1141.
- In a criminal case, jurors can be discharged when there is "no reasonable probability that [they] can agree." Pen C §1140.\
- Same as the grounds for a new trial - CCP §657 (1) and (2).

*People v Slocum* (1975) 52 Cal.App.3d 867 (criminal); *Heavy Duty Truck Leasing, Inc. v Superior Court* (1970) 11 Cal.App.3d 116 (civil) - A trial judge's erroneous ruling on a motion for mistrial may constitute an abuse of discretion and result in reversal of the judgment on appeal.

*People v Upshaw* (1974) 13 Cal.3d 29 - This rule is designed to prevent the prosecutor from moving for a mistrial to forestall a probable acquittal, in the hope of subjecting the defendant to a retrial before new jurors who may prove easier to persuade.

*Seffert v Los Angeles Transit Lines* (1961) 56 Cal.2d 498, 509; *Estate of Hart* (1951) 107 Cal.App.2d 60, 70 - This rule is based on a premise that a proper admonition, promptly given, is enough to cure the prejudicial effect of the misconduct. See also *Sabella v Southern Pac. Co.* (1969) 70 Cal.2d 311, 319; *Neumann v Bishop* (1976) 59 Cal.App.3d 451, 469. *Jonte v Key Sys.* (1949) 89 Cal.App.2d 654. See *Horn v Atchison, T. & S.F. Ry.* (1964) 61 Cal.2d 602.

*Tingley v Times Mirror Co.* (1907) 151 Cal.1, 23; *Barajas v. USA Petroleum Corp.* (1986), 184 Cal.App.3d at 986. *Simmons v Southern Pac. Transp. Co.* (1976) 62 Cal.App.3d 341, 355 - No waiver occurs if the misconduct is

so harmful that even a strongly worded admonition cannot cure the problem.

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