

How to Decide Which Verdict Form to Use

Ben Feuer, *The Recorder*

September 30, 2014 | 0 Comments



Preparing a verdict form is like going to the chiropractor. It's probably going to be fine and may help, but if something gets twisted the wrong way, you could end up in trouble.

Courts in California and the Ninth Circuit accept three types of verdict forms in jury trials. A general verdict form asks the jury to determine only ultimate liability and damages—nothing more than, "Is the defendant liable and how much should he pay?"

A special verdict form, in contrast, asks the jury to determine everything *except* ultimate liability—"Did the defendant sign the contract?" works, but "Is the defendant liable for breach of contract?" doesn't.

Finally, a general verdict with special interrogatories or special questions asks both types of questions—"Did the defendant sign the contract and did he then breach it?"

Sometimes, trial lawyers leave verdict forms for an afterthought. That's a mistake. At trial, the wording and structure of the verdict form can help lay out a claim or affirmative defense to the jury one last time. But just as importantly, on appeal, the verdict form can play a critical role: Depending on the type of verdict form used, the chances of reversal from errors or inconsistencies can change dramatically.

Easiest to Defend

A general verdict form is easiest to prepare and hardest to challenge on appeal. The form asks the ultimate questions: did the defendant commit the tort; did he establish his affirmative defense; how much does he owe? The appellate court will look to whether substantial evidence exists in the record to support any legal or factual theory that can carry the judgment. That makes general verdict forms difficult to challenge on appeal, but reversible error can still occur.

If an appellate court determines one of the theories of liability presented at trial was legally erroneous, the court may be unable to determine whether the jury relied on the legally incorrect theory in reaching its verdict. If that happens, the appellate court could reverse. But this applies only to situations in which the theory presented to the jury is *legally* erroneous, because insufficiency of evidence on one of multiple theories of liability will not lead to reversal. Thus, a general verdict form is the way to go if you think you're going to win at trial or you're more likely to win if the jurors don't have to agree on the same theory of the case to come to an ultimate result.

Easiest to Challenge

If you're less confident in the way trial is going, or your opponent has a multi-pronged factors test to meet while your defense is straightforward, consider proposing a special verdict form. This asks the jury to determine just the discrete factual elements necessary for each of the plaintiff's legal claims and defendant's affirmative defenses. A special verdict form in a defamation action might ask the jury to decide whether the defendant made a false statement, published it with malice, and whether the statement caused harm. But the final question, "Is the defendant liable to the plaintiff for the tort of defamation?" remains for the court alone.

On appeal, a special verdict narrows the range of factual findings the court will consider in reviewing the judgment for substantial evidence, making it easier to find reversible error due to inconsistencies or contradictions in the form. That's because courts will not imply any findings in favor of a special verdict. Rather, the court will evaluate the record only to find whether it contains substantial evidence to support the findings the jury actually made.

The problem with a special verdict form arises if there's friction between the findings and the result they imply. If the jury fails to decide a necessary element of a cause of action, for example, or reaches two factual conclusions at odds with one another, the entire verdict may be tossed out. Attorneys should ensure special verdict forms track jury instructions carefully, include every element in the claims and defenses and clearly delineate what findings could conflict with others so the jury knows exactly what it is doing.

A hybrid form

The third type of verdict form, a general verdict form with special interrogatories, is a hybrid of the other two. This form requires the jury determine the discrete factual elements comprising the parties' claims and defenses, as well as the final win-lose verdict on each. That allows attorneys to use a verdict form to walk the jury through

all the pieces of legally complex trials while ensuring jurors still decide the ultimate result.

In California, appellate courts considering this verdict form will take all reasonable inferences in favor of the general jury verdict, only reversing if the special interrogatories and the general verdict are so totally irreconcilable that the special interrogatories, on their own, would necessarily lead to the opposite result of the general verdict. If they're irreconcilable, Code of Civil Procedure section 625 commands the interrogatory responses control.

At the Ninth Circuit, however, the ultimate effect of a conflict between the general verdict and the special interrogatories is highly discretionary with the district judge. Federal Rule of Civil Procedure 49 establishes that where a general verdict and special interrogatories are in tension, the trial court may either enter judgment in line with the result compelled by the interrogatories, direct the jury to conduct further deliberations, or order a new trial.

Appellate arguments based on verdict forms are vulnerable to invited error and forfeiture contentions. To avoid these, object on the record to any provisions you find problematic in an opponent's proposed verdict form or one the court issues, and either file your proposed verdict form first or file your own alternative verdict form.

After you get a verdict, be sure to raise any inconsistencies in the jury's responses on the verdict form before the jury is discharged so the court can order the jury to clarify its responses. If you don't recognize the inconsistencies until later, raise the form's problems in a timely motion for new trial. Appellate nuances can get tricky, so we generally recommend litigators with complex or high-stakes trials think about verdict forms well in advance or consult an appellate specialist.

Much like a chiropractor, whatever you decide to do with your verdict form, do it carefully.

Ben Feuer is a civil appellate attorney with the California Appellate Law Group and the chair of the Appellate Section of the Bar Association of San Francisco's Barristers Club. He's a regular contributor to The Recorder and can be reached at ben@calapplaw.com .
