

## Choosing the Right Verdict Form

2004-01-19

Most Litigators, as they approach civil jury trials, invest substantial time and money in pursuit of the ideal panel of jurors. The more mundane task of developing the verdict form that will guide the jury's deliberations typically receives far less attention. Yet the design of the verdict form can be just as important as the composition of the jury in influencing the outcome of the trial and the likelihood of success on appeal.

By focusing early in the process on what type of verdict form best serves their clients' interests, trial lawyers increase their chances of shaping the outcome of the case. The specific rules governing verdict forms vary by jurisdiction, but there are three basic types of verdict forms to use in a civil jury trial.

A general verdict form requires the jury to apply the law to the facts and to find for either the plaintiff or the defendant. "A jury may return multiple general verdicts as to each claim, and each party, in a lawsuit, without undermining the general nature of its verdicts." *Zhang v. American Gem Seafoods Inc.*, 339 F.3d 1020, 1031 (9th Cir. 2003).

At the opposite end of the spectrum is the special verdict form. Special verdict forms require the jury to make written findings on issues of fact and nothing more. See, e.g., Fed. R. Civ. P. 49(a). The court then applies the law to the jury's written findings to determine the prevailing party.

The third type of verdict form--a general verdict accompanied by answers to [special interrogatories](#)--is a hybrid of the first two. Here the court not only submits to the jury "written interrogatories upon one or more issues of fact the decision of which is necessary to a verdict," but also asks the jury to render a general verdict. Fed. R. Civ. P. 49(b). This type of verdict form represents a middle ground because it provides a means of guiding the jury's deliberations and determining the basis for its decision, while also leaving it to the jury to determine which party should prevail.

The court summarized the methods as follows: "If the jury announces only its ultimate conclusions, it returns an ordinary general verdict; if it makes factual findings in addition to the ultimate legal conclusions, it returns a general verdict with interrogatories. If it returns only factual findings, leaving the court to determine the ultimate legal result, it returns a special verdict." *Zhang*, 339 F.3d at 1031.

Trial lawyers must weigh competing considerations when choosing which type of verdict form to

promote. Crafting a proposed verdict form requires strategic thinking about the allocation of power between the judge and the jury, the competing benefits of simplicity and structure and the tradeoff between increasing the likelihood of success at trial and maximizing one's chances on appeal. Where to strike the balance in each of these areas depends on a number of case-specific factors, including the type of matter, the party one represents, the quality of the trial judge, the complexity of the issues and whether the law governing the case is well established or in flux.

### **Judges' and jurors' roles**

In comparison to juries that are asked to render a general verdict, juries confronted with special verdict forms have much less control over the outcome of the case. Indeed, some contend that special verdicts and special interrogatories interfere with the parties' right to a jury trial by limiting the jury's involvement.

Legal scholars have pointed out that "one of the purposes of the jury system is to permit the jury to temper strict rules of law by the demands and necessities of substantial justice and changing social conditions," and that the widespread use of special verdicts could unduly limit this role. 9A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2503, at 156 (2d ed. 1995).

In fact, U.S. Supreme Court justices Hugo Black and William O. Douglas opposed the amendment of the Federal Rules of Civil Procedure to incorporate Rule 49 (which authorizes special verdicts and general verdicts accompanied by special interrogatories), stating that "Rule 49 is but another means utilized by courts to weaken the constitutional power of juries and to vest judges with more power to decide cases according to their own judgments." Statement of Mr. Justice Black and Mr. Justice Douglas on the Rules of Civil Procedure and the Proposed Amendments, 31 F.R.D. 617, 618-619 (1963).

Others have criticized general verdicts, however, on the basis that they expand the jury's role beyond that of fact-finder and allow inappropriate factors, such as juror sympathy and prejudice, to influence the outcome of a case. Among the detractors of the general verdict was Judge Jerome Frank of the 2d U.S. Circuit Court of Appeals. In an often-cited opinion enumerating the deficiencies of general verdicts, Frank commented: "The general verdict enhances, to the maximum, the power of appeals to the biases and prejudices of the jurors, and usually converts into futile ritual the use of stock phrases about dispassionateness almost always included in judges' charges." *Skidmore v. Baltimore & O.R. Co.*, 167 F.2d 54, 61 (2d Cir. 1948).

A recent opinion illustrates how the special verdict form constrains the jury's ability to determine the outcome. In *Munafo v. Metropolitan Transp. Auth.*, 277 F. Supp. 2d 163 (E.D.N.Y. 2003), the plaintiff brought a motion to alter or amend a judgment for the defendants, relying on post-trial affidavits from two jurors who claimed that the jury had, in fact, intended to rule for the plaintiff but misunderstood the legal consequence of their answers on the special verdict form.

Chief Judge Edward R. Korman denied the motion, finding that "[t]he jury's province when answering special verdict questions is strictly one of fact-finding, without regard to the legal consequences that ensue." *Id.* at 173. Korman further noted that the "use of special verdict forms is designed precisely to avoid a verdict based upon the jury's sympathies or view of who should prevail

regardless of the controlling law." *Id.*

Trial lawyers involved in cases that are particularly compelling from an emotional or fairness standpoint should strongly consider proposing general verdicts to ensure that the jury has a voice in the ultimate result. By contrast, in cases involving inflammatory facts, unsympathetic clients or theories based on legal technicalities that the judge is more likely than the jury to embrace, the special verdict or general verdict with special interrogatories often will be the more appropriate choice.

### **Simplicity v. Structure**

The general verdict form offers the advantage of simplicity. Jurors tend to work through differing views of the facts and reach consensus more readily when presented with general verdict forms, as opposed to special verdicts or special interrogatories. See, e.g., Samuel M. Driver, "The Special Verdict--theory and Practice," 26 Wash. L. Rev. 21, 24 (1951), quoted in Mark S. Brodin, "Accuracy, Efficiency, and Accountability in the Litigation Process--the Case for the Fact Verdict," 59 U. Cin. L. Rev. 15, 61 (1990).

Furthermore, using a straightforward general verdict form reduces the chance of jury confusion. The longer and more complex the verdict sheet becomes, the greater the likelihood that the jury will make a mistake.

A case in Washington County Circuit Court in Arkansas recently reported in the news illustrates this point. See Brad Branan, "Judge Tosses Award in Waste-Haulers Suit," Ark. Democrat Gazette, Aug. 28, 2003, at 18, available at 2003 WL 62519201. In that case, the court threw out a \$350,000 damages award because the jurors, exhausted after a long trial and confronted with more than 20 verdict forms, erroneously classified the award as punitive damages rather than split it between compensatory and punitive damages as they apparently had intended. See *id.*

Nevertheless, more detailed verdict forms, including special verdicts and general verdicts with special interrogatories, offer competing advantages. Particularly in complex cases, such as intellectual property disputes, special verdict forms and special interrogatories can provide a helpful road map to assist the jurors in performing the analysis required to resolve the case.

In addition, special verdicts and special interrogatories reveal, at least in part, the jury's rationale. As Frank noted, "The general verdict is as inscrutable and essentially mysterious as the judgment which issued from the ancient oracle of Delphi." Skidmore, 167 F.2d at 60. Special verdicts and special interrogatories add transparency to the process, decreasing the likelihood that significant errors will go undetected.

For these reasons, many appellate judges, including Judge Paul R. Michel of the U.S. Court of Appeals for the Federal Circuit, have recommended their use in patent jury trials: "Use of special verdicts and interrogatories that direct juries to sequentially address the specific issues presented could greatly enhance the rationality, reliability, and predictability of jury verdicts, and their reviewability on post-trial motions and on appeal as well." Paul R. Michel and Dr. Michelle Rhyu, "Improving Patent Jury Trials," 6 Fed. Cir. B.J. 89, 95 (1996). See also *Union Oil Co. v. Atlantic*

Richfield Co., 208 F.3d 989, 997 (Fed. Cir. 2000) ("In the course of the lengthy jury trial, the district court heeded this court's counsel to use special verdicts in complex cases").

### **Case-specific considerations**

Whether to opt for the opaque general verdict form or the more transparent special verdict form or special interrogatories depends again on case-specific factors. While the conventional wisdom is that general verdicts work to the advantage of plaintiffs and special verdicts or interrogatories favor defendants, there are some exceptions. See Stephen S. Korniczky and Don W. Martens, "Verdict Forms--A Peek Into the 'Black Box'," 23 Am. Intell. Prop. L. Ass'n Q.J. 617, 635 (Fall 1995). For example, if the defendant is relying heavily on an affirmative defense, it may be to the plaintiff's advantage, and to the defendant's disadvantage, to lay out in detail on the verdict form the elements the defendant must prove and the burden of proof for each. See *id.* In extremely complicated cases, however, it may be in each party's interest to provide the jurors with a structure for their deliberations in the form of a special verdict form or special interrogatories. But care should be taken to curb the length and complexity of the forms to minimize the risk of confusion and error.

### **Trial v. Appeal**

In developing verdict forms, trial lawyers confront a tradeoff between trial and appellate objectives. While the temptation is to advocate aggressively for a verdict form that will maximize one's chances for a favorable verdict, it is important to consider how the form will fare on appeal and to temper one's advocacy accordingly.

For example, as noted above, a general verdict form offers certain advantages at trial because it allows jurors to reach a compromise verdict even if they disagree on the specific facts or the rationale supporting the result. But the same lack of transparency that presents an advantage at trial may be a disadvantage on appeal. If any of the legal theories on which the verdict could have been based was submitted to the jury erroneously, there is a significant risk that the appellate court will vacate the jury verdict and remand for a new trial. See, e.g., *Webber v. Sobba*, 322 F.3d 1032, 1038 (8th Cir. 2003) ("[B]ecause we have no way of knowing that the general verdict for Sobba was not a product of the improper joint-enterprise instruction, we cannot say that the improper instruction on the joint-enterprise defense was harmless error").

The opposite is true for special interrogatories and special verdicts. While use of these forms may decrease the likelihood of jury consensus at the trial level, it also reduces the chance that the appellate court will vacate and remand any verdict ultimately reached. The likelihood of a retrial is substantially reduced because the court may be able to correct any legal error and apply the proper legal analysis to the factual findings enumerated by the jury. See, e.g., *Webb v. Sloan*, 330 F.3d 1158, 1167 (9th Cir. 2003) ("The special interrogatories provide a sufficient record to allow us to affirm the verdict even if Carson City can claim immunity for the state-law claims"), petition for cert. Filed, 72 U.S.L.W. 3248 (U.S. Sept. 26, 2003) (No. 03- 464).

One must look to case-specific circumstances to determine where to draw the line between trial and appellate objectives. In a case in which the law is well established and the likelihood of legal error in the instructions or claims presented to the jury is slim, a general verdict form may be

desirable.

On the other hand, special verdicts or special interrogatories are well advised in cases in which the governing law is unsettled. See, e.g., *Portage II v. Bryant Petroleum Corp.*, 899 F.2d 1514, 1520 (6th Cir. 1990).

There are several practical tips to observe in crafting and promoting a proposed verdict form.

### **Start early, be reasonable**

First, start early. Resist the urge to let the important task of crafting a proposed verdict form yield to more immediate pretrial demands.

Second, be reasonable in the verdict form proposal. Submitting a form that is slanted unfairly in favor of one party increases the risk that the trial judge will reject it and work instead from the opposing party's proposal. Moreover, even if the trial judge accepts the imbalanced form, it is unlikely to withstand an appeal.

Third, preserve objections to the verdict form and to the jury instructions associated with it. Failure to raise such objections in a timely manner may result in waiver. See *Mitsubishi Electric Corp. v. Ampex Corp.*, 190 F.3d 1300, 1304 (Fed. Cir. 1999).

Fourth, take steps to minimize the likelihood that juror confusion will taint the outcome. Craft a form that is understandable, unambiguous and no longer than necessary.

Finally, in the event of an unfavorable verdict, strongly consider polling the jury to ensure that any mistakes can be identified and corrected before the jury is dismissed.

By thinking strategically and striking the right balance among the competing considerations outlined above and following the practical tips described in this article, trial lawyers can harness the power of the verdict form to increase the likelihood of a successful outcome.

1/19/04 NLJ S3, (Col. 1)

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## ***Authors***



## Amy Kreiger Wigmore

PARTNER

Co-Chair, Intellectual Property  
Litigation Practice Group

✉ [amy.wigmore@wilmerhale.com](mailto:amy.wigmore@wilmerhale.com)

☎ +1 202 663 6096



## Howard M. Shapiro

PARTNER

✉ [howard.shapiro@wilmerhale.com](mailto:howard.shapiro@wilmerhale.com)

☎ +1 202 663 6606