



**VF-5001. General Verdict Form—Single Plaintiff—Single Defendant—
Multiple Causes of Action**

Instruction No. 1

Request by Plaintiff	Request by Defendant	Requested by
Given as Proposed	Given as Modified	Given on Court's Motion
Refused		
Withdrawn		

Judge _____

Instruction No. 1

For each claim, select one of the two options listed.
On [name of plaintiff]'s claim for [insert first cause of action]
we find in favor of [name of plaintiff] and against [name of defendant].
[name of defendant] and against [name of plaintiff].

An appellate perspective on verdict forms

ALTHOUGH OFTEN RELEGATED UNTIL THE END OF THE TRIAL, CRAFTING A VERDICT FORM IS AMONG THE MOST IMPORTANT ASPECTS OF A TRIAL

This article provides an overview of California's three verdict formats, when to use each, and their appellate implications.

California courts accept three types of verdict forms: general verdicts, special verdicts, and general verdicts with special interrogatories. (See Code Civ. Proc., §§ 624, 625; Fed. Rules Civ. Proc., Rule 49.) California Code of Civil Procedure, section 624 defines a general verdict as that by which a jury pronounces generally upon all or any of the issues, either in favor of the plaintiff or defendant. Conversely, a special verdict is that by which the jury find the facts only, leaving the judgment to the Court. The special verdict must present the conclusions of fact as established by the evidence, and not the evidence to prove them; and those conclusions of fact must be presented such that nothing shall remain to the Court but to draw from them conclusions of law. (Code Civ. Proc., § 624.)

A third type of verdict is a hybrid of the two: a general verdict with special interrogatories. Code of Civil Procedure

section 625 authorizes the court to "direct the jury to find a special verdict in writing, upon all, or any of the issues, and in all cases may instruct them, if they render a general verdict, to find upon particular questions of fact, to be stated in writing, and may direct a written finding thereon." The section further mandates the court to direct the jury to find a special verdict in writing separating punitive damages from compensatory damages in any case in which the issue of punitive damages is presented to the jury. (*Ibid.*)

The Federal Rules of Civil Procedure are similar, also allowing the three types of verdicts. (Fed. Rules Civ. Proc., Rule 49.) The primary difference between the Federal and State general verdicts with special interrogatories is how courts address discrepancies. Rule 49 explains that where the answers to the written questions are consistent amongst themselves, but one or more of them is inconsistent with the general verdict, the judge may do one of three things: order a new trial, direct the jury to further consider its answers and verdict, or

approve for entry under Rule 58, an appropriate judgment *according to the answers, notwithstanding the general verdict.* (Fed. Rules Civ. Proc., Rule 49(b)(3).) The Rule further states, where the answers to the written questions are inconsistent with each other and one or more is *also* inconsistent with the general verdict, judgment must not be entered; instead, the court must direct the jury to further consider its answers and verdict, or must order a new trial. (Fed. Rules Civ. Proc., Rule 49(b)(4).) Code of Civil Procedure, section 625 directs where a special finding of facts is inconsistent with the general verdict, the special finding of facts controls, and the court *must* give judgment accordingly. (Code Civ. Proc., § 625.)

The title does not determine the category of verdict form; its content governs. (*Chavez v. Keat* (1995) 34 Cal.App.4th 1406, 1409, fn. 1.)

The court's broad discretion

What happens when one party requests a general verdict and the other requests a special verdict or general

verdict with special questions? The answer is largely – whatever the judge decides. Although challenges to the verdict itself will be reviewed de novo on appeal, challenges to the court’s decision as to which kind of verdict form to use will be reviewed with substantial deference. (Cf. *City of San Diego v. D.R. Horton San Diego Holding Co., Inc.* (2005) 126 Cal.App.4th 668, 678; *Klemme v. Hoag Memorial Hospital Presbyterian* (1980) 103 Cal.App.3d 640, 645 [“Utilization of a special verdict rather than a general verdict is a matter committed to the sound judicial discretion of the trial court”].)

Differences in appellate review

The type of verdict selected can strongly impact the likelihood of reversal on appeal, depending on the nature of the alleged error. Appellate review varies for each verdict type.

For general verdicts, the court implies findings in favor of the prevailing party on every fact essential to the claim or defense at issue. (*Bresnahan v. Chrysler Corp.* (1998) 65 Cal.App.4th 1149, 1153; *Clark v. Gibbons* (1967) 66 Cal.2d 399, 415 (conc. opn. of Tobriner, J.)). What this means is, “[w]here several counts or issues are tried, a general verdict will not be disturbed by an appellate court if a single one of such counts or issues is supported by substantial evidence and is unaffected by error, although another is also submitted to the jury without any evidence to support it and with instructions inviting a verdict upon it.” (*Bresnahan, supra*, 65 Cal.App.4th at 1153, citations omitted.)

The circumstance differs, however, where there is demonstrable legal error rather than evidentiary error that affects at least one theory. In that case, the appellate court may *not* presume the jury’s verdict rested on another proper ground because “[j]urors are not generally equipped to determine whether a particular theory ... submitted to them is contrary to law...When, therefore, jurors have been left the option of relying upon a legally inadequate theory, there is no reason to think that their own intelligence

and expertise will save them from that error.” (*People v. Guiton* (1993) 4 Cal.4th 1116, 1125; *Tavaglione v. Billings* (1993) 4 Cal.4th 1150.) The rule differs from factual sufficiency deficiencies because the California Supreme Court has reasoned that jurors are fully equipped to detect purely factual lack of proof. (*Guiton, supra*, 4 Cal.4th at p. 1129.)

Special verdicts, conversely, do not create *any* implied findings. (*Taylor v. Nabors Drilling USA* (2014) 222 Cal.App.4th 1228, 1242, citations omitted.) This rule stems from the nature of a special verdict and its “recognized pitfalls,” namely, that it requires the jury to resolve all of the controverted issues in the case, unlike a general verdict, which merely implies findings on all issues in one party’s favor. (*Ibid.*) Accordingly, the possibility of a defective or incomplete special verdict, or possibly no verdict at all, is much greater than with a general verdict that is tested by special findings. (*Saxena v. Goffney* (2008) 159 Cal.App.4th 316, 325, citing *Myers Building Industries, Ltd. v. Interface Technology, Inc.* (1993) 13 Cal.App.4th 949, 960.) The special verdict is “fatally defective” if it does not allow the jury to resolve *every* controverted issue (including affirmative defenses). (*Ibid.*)

For example, in *Myers*, an owner of a building and its general contractor filed cross-complaints against each other for breach of contract, fraud, and other claims. By special verdict, the jury concluded the building owner breached its contract with the general contractor and awarded the general contractor punitive damages. However, the Court of Appeal struck the punitive damages award because the only special verdict findings submitted to the jury were on the breach of contract cause of action, not the fraud claim.

The general verdict with special interrogatories presents its own peculiarities of review. As previously mentioned, Code of Civil Procedure section 625 maintains where the special interrogatories are inconsistent with the general verdict, the special interrogatories

control. This occurs where the special findings taken by themselves would authorize a judgment different from that which the general verdict would permit. (*Bate v. Marsteller* (1965) 232 Cal.App.2d 605, 614-615.) Despite this scenario, there is no presumption in favor of answers to the special interrogatory and every reasonable intendment in favor of the general verdict should be favored by the court. (*Ibid.*) The purpose of the special interrogatories accompanying the general verdict, as provided in section 625 of the Code of Civil Procedure, is “primarily and principally for the purpose of determining whether the general verdict is or is not against law.” (*Plyer v. Pacific Portland Cement Co.* (1907) 152 Cal. 125, 134-135.)

Using appellate review to inform verdict form selection

The general verdict form is the hardest to challenge on appeal for evidentiary issues because of the favorable presumptions and inferences indulged by the reviewing court. Understanding this, where the facts of the case are hotly disputed but the legal issues are standard and/or settled, the general verdict may be advantageous. Similarly, the general verdict may be most helpful where the jury may reach the same ultimate result under any of a number of alternative factual theories.

The opposite is true where one of the theories of liability presented at trial may later reveal to have been legally erroneous. In such case, if the jury returned a general verdict and the court is unable to determine whether the jury relied on that legally incorrect theory in reaching its verdict, reversal is often warranted.

Because of the appellate court’s refusal to imply findings to a special verdict, in a case involving a novel legal issue or the possibility that the verdict will be affected by legal error, it may be advantageous to request special interrogatories that specify the basis for the jury’s verdict and clarify how damages

are apportioned among various theories of liability. This way, the reversal of one theory will not affect an unrelated portion of the judgment. For instance, in the example described from the *Myers* case earlier, only the punitive damages were reversed, not the entire judgment.

Use of the special verdict can also help a jury parse through the various elements of a complex case. Each question can guide the jurors through the elements and defenses, increasing the ease by which the jurors can reach their decisions. Keep in mind, however, that especially where there are multiple related claims, there will be certain interrogatories that are common to more than one claim. There is no requirement that the jury repeatedly answer the same question and, in fact, if the wording of the question differs slightly, the risk that the jurors will deem the differences significant could result in inconsistent findings. Therefore, if a special verdict form is used or if the general verdict with special interrogatories form is used, make sure to draft the form as simply and streamlined as possible (while carefully including each required element).

Warnings to the wise

Avoid the unfortunately common blunders of detecting problems in the verdict(s) forms and challenging them on appeal: (1) invited error, and (2) forfeiture.

The doctrine of invited error is an application of the estoppel principle that,

“[w]here a party by his conduct induces the commission of error, he is estopped from asserting it as a ground for reversal on appeal.” (*Saxena, supra*, 159 Cal.App.4th at p. 329, quoting *Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383, 403.) The doctrine is thus designed to prevent a party from misleading the trial court in order to profit therefrom on appeal. (*Ibid.*) An example of this would be where a plaintiff deliberately omits an element from the verdict form in order to increase the likelihood that the jurors will find in its favor, and then, after losing, challenges the form in the Court of Appeal.

Taylor v. Nabors, supra, demonstrates the problems with waiver and/or forfeiture of defects. There, the Court of Appeal agreed with the trial judge that the appellant had waived or forfeited his claim that the special verdict was fatally defective because appellant had failed to object *before* the jury was discharged. (222 Cal.App.4th at p. 1242.) The failure to object to a verdict before the jury is discharged and to request clarification or further deliberation precludes a party from later questioning the validity of the verdict if the alleged defect was apparent at the time the verdict was rendered and could have been corrected. (*Keener v. Jeld-Wen, Inc.* (2009) 46 Cal.4th 247, 263-264.) This rule is designed to advance efficiency and deter gamesmanship. (*Ibid.*)

Nevertheless, waiver is not automatic. Courts have discretion in applying the waiver rule and have used that discretion

in instances where the record indicates the failure to object was not the result of a desire to reap a “technical advantage” or engage in a “litigious strategy.” (*Saxena, supra*, 159 Cal.App.4th at p. 327-328.)

What happens if the jury is discharged before the defect has been identified? If the time has not expired, consider filing a new trial motion. Regardless of whether the challenge comes in the form of a new trial motion or appeal, it is essential to demonstrate why the error was not, and ideally, could not have been detected earlier.

Conclusion

Given the fluidity of trials, the drafting and/or finalizing of the verdict forms is often relegated to the eleventh hour. However, because the choice of verdict type, as well as the wording thereof, can be pivotal in upholding or challenging the jury’s findings, where at all possible, craft the verdict forms at the earliest reasonable time.

Janet Gusdorff, Certified Appellate Law Specialist (California Board of Legal Specialization), handles state and federal appeals, with an emphasis on plaintiff’s employment and personal injury matters. Janet owns Gusdorff Law, P.C., in Westlake Village. Janet graduated from Loyola Law School, where she served as Note and Comment Editor on Loyola Law Review.

