

Appellate Tips for Trial Lawyers

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California civil and criminal litigation overlap in a crucial area: preserving your record for appeal. Although this series of short articles is mainly designed for civil trial lawyers, some "best practices" apply in every trial. Keep an eye on what our appellate-lawyer writers have to say about how to preserve your trial court victory or how to lay the groundwork for a successful challenge when you've lost.

Down to the Details: Crafting a Special Verdict

by Carolyn Oill

Let's face it: Common though they are, special verdicts may not always be a good idea. Appellate courts like them because they can narrow the focus and even eliminate issues on appeal (*McCloud v. Roy Riegels Chemicals* (1971) 20 Cal. App. 3d 928, 937; see *All West Design, Inc. v. Boozer* (1986) 183 Cal. App. 3d 1212, 1221 (A special verdict that takes a sequential approach to the case "is much more helpful to our review than if a general verdict form had been used.")). Yet, when they are not done properly, they can doom a party's case in the court of appeal.

What Is a Special Verdict

Special verdicts are often confused with general verdicts accompanied by special interrogatories or findings. Although they look similar at the trial level, they are entirely different beasts once the case gets to the court of appeal.

Special findings can be used to test a general verdict, and when the special findings conflict with the general verdict, the special findings prevail (*Tavaglione v. Billings* (1993) 4 Cal. 4th 1150, 1156). However, the failure of the special findings to address every element of a claim is not fatal to the judgment. In fact, it affords a means of affirming the judgment: The appellate court will simply presume that, as to all issues on which the special findings are silent, the jury made factual findings that support the general verdict.

In contrast, no general verdict accompanies a true special verdict, and no favorable presumptions are available for a special verdict. Once the jury has answered all the questions in a special verdict, there is supposed to be nothing left for the court to do except enter a judgment consistent with the findings. If the verdict is silent on a material element or if it is internally inconsistent, any judgment on the verdict will be reversed on appeal and a new trial ordered (*City of San Diego v. D.R. Horton San Diego Holding Co., Inc.* (2005) 126 Cal. App. 4th 668, 682).

Requirements for a Special Verdict

- A special verdict must ask the jury to make specific findings on every material, controverted fact.

- The special verdict should ask about each cause of action separately. For example, the appellate court will want to know if the jury found the defendant liable for negligence or breach of contract or both.
- The special verdict should address each plaintiff and each defendant separately.
- The special verdict should track the jury instructions. There should be questions on every element of every claim that actually goes to the jury. Since claims may have been resolved or dropped during the trial, double-check both the instructions and the special verdict form just before the jury begins deliberations to ensure that they match.
- The special verdict must separate punitive damages from other damages (Code Civ. Proc. §625). It should also separate compensatory damages into economic and noneconomic, as well as past and future. "Without a special verdict separating the various damage components, 'we have no way of determining what portion—if any' of an award was attributable to a particular category of damages challenged on appeal" ([Greer v. Buzgheia](#) (2006) 141 Cal. App. 4th, 1150, 1158).

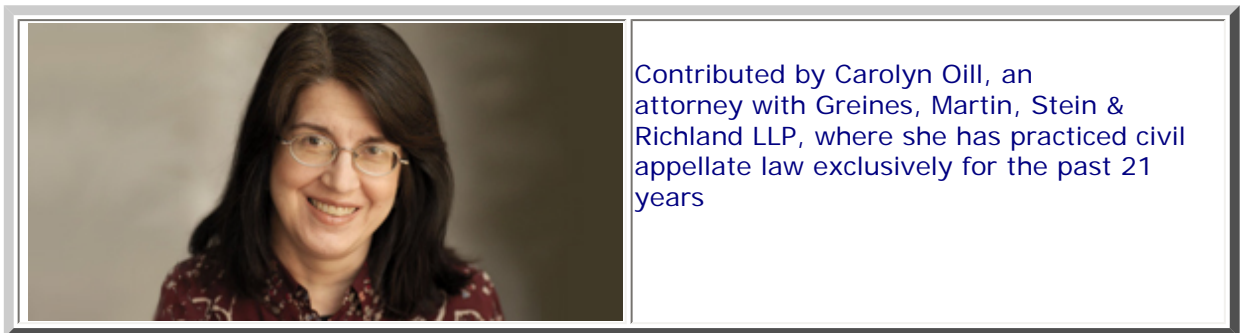
Generally, the more complicated the case, the more useful a special verdict will be—but the more time-consuming to prepare and the easier to leave something out or make some other mistake. Properly prepared, however, the special verdict will provide a roadmap or template for the jury to follow, making its job easier which in turn makes the appellate court's job easier down the line.

Potential Pitfalls

Even a properly prepared special verdict has its downside. For example, even a blatant error in jury instructions will be considered harmless if the instruction is on an issue that the special verdict shows the jury never actually reached (see [Murrell v. State of California ex rel. Dept. Pub. Wks.](#) (1975) 47 Cal. App. 3d 264, 271 (Error in causation instruction did not adversely affect verdict where jury found no negligent conduct.)).

Moreover, an improperly prepared special verdict can backfire and turn a trial-court victory into a loss on appeal. The omission of even one element of one cause of action, if disputed and material, will be fatal to any judgment entered on the verdict and will require a retrial. For example, if the case is tried on theories of negligence and fraud, and the special verdict only asks about negligence, there will be no basis for upholding the fraud claim or any associated punitive damages on appeal (see [Myers Building Industries, Ltd. v. Interface Technology, Inc.](#) (1993) 13 Cal. App. 4th 949, 960-61).

Special verdicts can be powerful tools. However, as with any power tools, you must handle them with care.



Contributed by Carolyn Oill, an attorney with Greines, Martin, Stein & Richland LLP, where she has practiced civil appellate law exclusively for the past 21 years