10 Strategies For A Special Verdict Form

Law360, New York (June 07, 2013, 1:30 PM ET) -- Just as the special verdict form plays a starring role in a jury trial, it can make or break your arguments on appeal. In fact, it is likely the first document that an appellate lawyer will want to see. To build a strong appellate record, you must use a thoughtful and strategic approach when crafting the language you propose for the special verdict form, and for any objections you make to the forms proposed by the court or opposing counsel. Here are 10 strategies for crafting a special verdict form that will help you win at trial, and help position your client for any appeal.

1. Say What You Mean

Be clear and precise in your proposed verdict form. On appeal, you do not want any questions about what language you sought, or why. If your proposed verdict form is unclear, you will have little chance of persuading an appellate court that the trial court erred by not adopting it. See, e.g., Lore v. City of Syracuse, 670 F.3d 127, 160 (2d Cir. 2012) (holding it was "well within the court's discretion not to adopt the [defendant's] proposed blunderbuss" verdict-form questions). Explain terms of art directly in the question, if necessary; for example, "Has Mr. Smith proven that Mr. Thompson acted with 'actual malice,' meaning hatred or ill will?" Use straightforward language that a jury of laypeople can understand, to minimize any later claim of jury confusion, or an ambiguous verdict.

2. Tell the Jury What Their Answers Mean

A verdict form should tell the jury exactly what their answers mean, so that on appeal, there can be no claim of jury confusion or error. For example, explain: "If you answered 'yes' to number 6, you have found for Smith Corporation on the hostile-work-environment claim. If you answered 'no' to number 6, you have found for Laura Jones on the hostile-work-environment claim." A clear roadmap in the form itself will minimize any ambiguity as to the jury's intent on appeal, where the appellate court's focus will be on ensuring that the verdict form is not "confusing, misleading or prejudicial," and "accurately reflects the law." Coggins v. KLLM, Inc., 146 Fed. Appx. 9, 11-12 (6th Cir. 2005).

3. Match Your Proposed Verdict Form and Jury Charge

A common error that will damage your record for appeal is a proposed verdict form and jury charge that do not match. That is, you propose or object to language for the jury charge, but fail to follow through with a corresponding proposal or objection to the verdict form. This sort of mismatch can result in a waiver of an argument on appeal. Do a painstaking comparison to ensure you mirror your proposed language, and objections, in both documents. In the charge conference, ask to take each of the verdict form's questions separately, on the record, so nothing is missed. Make your objections crisp and specific. Global objections may not be sufficient to preserve important arguments for appeal. See Lore, 670 F.3d 127, 160 ("An objection 'to the entire verdict form' does not suffice to alert the court to a specific error in a particular question").

4. Get It In Writing

Document your proposed language and objections for the verdict form in writing. Do not rely solely on oral argument at the charge conference, because you may well end up forgetting — and waiving — an argument that may become important. File an initial proposed verdict form. If the evidence that comes in during trial requires a new question, or adjusted language, file a supplemental written submission. Consider filing a written objection to your opponent's proposed form, or the one the court ultimately adopts. Make sure the written submissions are filed on the docket, rather than simply handed up to the clerk or bench during argument. Date and number the filings so that the sequence is clear later. These written submissions will bolster your appellate record and guard against any inadvertent waiver. As one federal circuit court held: "A party who fails to bring to the trial court's attention ambiguities created by ...

special verdict forms may not seek to take advantage of such ambiguities on appeal." Northern Natural Gas Co. v. Trans Pacific Oil Corp., 248 Fed. Appx. 882, 888 (10th Cir. 2007).

5. Keep It Simple

The verdict form should be a roadmap, not a labyrinth. Keep it as straightforward — and short — as possible. An overly long or complex form increases the risk of the jury becoming confused or making a mistake, such as by giving inconsistent answers. By contrast, a succinct form is easier to defend to an appellate court. As the First Circuit has observed with respect to verdict forms: "Less is sometimes more." Santos v. Posadas de Puerto Rico Assoc. Inc., 452 F.3d 59, 65 (1st Cir. 2006) (rejecting claim of error in denying party's proposed verdict form as "too complicated"). A shorter and simpler form is also more palatable to the trial judge. Judges have been known to flip through a 10-page verdict form and reject it out of hand based solely on its length and apparent complexity. A shorter and simpler form is also easier for you to explain to the jury in the closing, or to enlarge and show to the jury as a demonstrative.

6. Guard Against Duplication

Defense counsel should look carefully for any possibility of duplication in the verdict form. If two causes of action are duplicative, object to any attempt to include them both in the verdict form, even if you lost the same argument at the summary-judgment or directed-verdict stage. Also be wary of verdict forms that invite the jury to award the same damages twice, since the consequences can be significant. See, e.g., ClearOne Comm. Inc. v. Biamp Sys., 653 F.3d 1163 (10th Cir. 2011) (holding that verdict form, which asked how much the jury awarded against each defendant rather than how much the plaintiff had been damaged, created ambiguity over whether the jury intended to award a total of $956,000 in lost profits, or double that amount). If the verdict form invites duplication, object on the record and propose a written alternative that eliminates the risk.

7. Beware of Compound Questions

Be aware of the risk inherent in compound questions. Compound questions can later put an appellate court in the untenable position of having to "guess as to what the jury found." See, e.g., Fidelity & Guaranty Ins. Underwriters Inc. v. Rodriguez, 141 Fed. Appx. 11, 12-13 (2d Cir. 2005) (vacating judgment based on jury's verdict in response to verdict form question that was "doubly or triply compound"). Look for ways to break down compound questions into simpler parts. Avoid the dreaded phrase "and/or" in any verdict-form questions; the phrase is an invitation to ambiguity.

8. Don't Overreach

Keep your proposed verdict form reasonable. Use neutral language that credibly tracks the relevant cases and statutes. You do not want to find yourself in the unpleasant position of having to defend a stretch to the appellate court, or worse, having a favorable verdict reversed. See, e.g., Malone v. ReliaStar Life Ins. Co., 558 F.3d 683, 685, 687-88, 694 (7th Cir. 2009) (remanding for new trial based on "flawed special verdict form" that misled the jury about the showing required for a key issue in the case). An overreaching form can also damage your credibility with the trial judge, who may then look to opposing counsel for a more sensible option.

9. If You Don't Want a Question Asked, Say So

If you do not want the jury to be asked a particular question on the verdict form, make sure you say so clearly, and on the record. For example, if you argued unsuccessfully on summary judgment or directed verdict that the plaintiff should not recover punitive damages, object again in the context of the verdict form to the submission of the question to the jury. You can still propose your own version of the punitive-damages questions for the jury, but make clear that you do without waiving your objection, and only in case the judge gives the jury the question over your objection. You do not want your proposed verdict

form to be taken as an implicit admission that you agreed to the jury getting the question. See, e.g., Niemiec v. Union Pacific Railroad Co. 449 F.3d 854, 858 (8th Cir. 2006) (finding no plain error in mitigation-of-damages instruction to jury, where plaintiff objected to the instruction's language, but failed to object either to the instruction being given in the first place, or to the verdict-form question that incorporated a reduction for mitigation of damages).

10. Pay Attention When There Are Multiple Defendants

Special issues arise in crafting a special verdict form when you represent multiple defendants. It is imperative to make sure that your proposed verdict form asks the jury to provide a separate, specific answer for each defendant. Carefully think through, and make sure the verdict form accurately captures, the applicable law concerning joint-and-several liability or individual liability, as applicable.

The verdict form's importance cannot be overstated. Start preparing your proposed verdict form as soon as you have a trial date, even months before trial. Consider all the ways that a jury could respond to the form, to minimize the chance of inconsistency or ambiguity. If you use a mock jury, have them complete your proposed form to see how it works. In the flurry of activity before and during trial, do not let your attention to the verdict form wane. Carefully review each proposal from opposing counsel, and from the court, and note detailed objections. Submit counter-proposals if necessary. Filing written proposals and objections help promote clear, thorough thinking about the issues, and will provide the clarity you need on appeal.

One way to ensure that you have your appellate bases covered despite the frenzy of trial is to have an appellate specialist review your proposed verdict form for preservation issues. This modest investment at the trial stage can help ensure that any appellate arguments you may make will have a solid basis in the record, and will withstand the scrutiny of an appellate court.

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