



The verdict

Preparing and using the special verdict form in trial



Cooper

BY MILES B. COOPER

“Judge, we need to meet again about the verdict form” said one of the lawyers. The special verdict was thirteen pages long and as user-friendly as an IRS form – and not the 1040-EZ. Unfortunately, it contained a directional error. A function of last-minute rulings on a case with multiple issues. Even more unfortunate, the jury was already deliberating, and they had the problem form.

Start early

How did this happen? How could the jury receive a verdict form with an error? Because trial, baby. Where one prepares and plans and despite all that effort, things turn out different than anyone expects. More on that later.

That said, the best way to win a case is to think about the verdict form at a case’s beginning – just like one considers jury instructions. A detailed proof analysis for each element helps focus the case. It serves as the backbone for a discovery plan and coalesces themes. It is a time to cast a wide net. In a premises case, one might consider a form that includes multiple parties, a negligence charge, and a premises liability charge. One may even have some creative causes of action. The way to discover whether that creativity may stick is to know the destination at the outset.

Hone it

As the evidence comes in, consider what will stick and what won’t. What makes the case easier? What makes it more challenging? Simpler is always better. If ownership and control in that premises case are not in dispute, consider stipulating on these issues and using a negligence verdict form. That results in fewer verdict form questions. Likewise, if there are three potential defendants but only one is really needed, consider what dismissals or agreements can be made to simplify things. Sometimes a lengthy verdict form cannot be avoided but it can often be more focused without losing anything.

Get agreement

Chance favors the prepared. Reach out to the defense a few months before trial to coordinate a trial readiness plan. Take some cues from federal scheduling orders. While many find these daunting because of the significant advance time required, they are a great guide for trial-readiness. Reaching out early with a draft verdict form greatly increases the chances of completing a trial-ready verdict form before closing argument. A side benefit? It telegraphs trial-willingness and readiness in an industry where 98% of cases settle.

Visual appeal

We prefer a form without pleading lines that uses a sans-serif font like Arial or Helvetica. Why? Every extra bit of ink is a

visual distraction. Keep questions and answers on the same page, even if that means extra white space and a longer form. Make sure the parties have been cleaned up on the caption. There is no reason to list Does 1 – 25 there, nor parties who have been dismissed.

Approve it and use it

Put any unresolved verdict form issues before the trial judge as early as one can. This allows one to present the verdict form visually to the jury in closing. A multi-page form with lots of questions and “if this, then that” language can be daunting without an introduction. But if one shows it to the jury and then uses the verdict form as the frame for closing, one can then go over the evidence that supports each finding. It helps arm favorable jurors with the tools, language, and evidence to be one’s surrogate in the jury room.

Best-laid plans...

As you read this, you may be thinking, “Yeah, Cooper, that’s all fine and dandy, but what about pending directed verdicts and conforming the form to the proof?” That’s a reasonable response. Some cases have so many moving parts that nailing down the final verdict form doesn’t happen until the final days and hours before closing. Most trial lawyers have a story about a judge who was still contemplating a ruling that forced one to close without the verdict form being finalized. Do everything in your power to avoid this. But recognize it can happen and that you’ll have to be nimble. Know when to fight and when to flex, and that taking a stand on this issue may not get the result you want.

Outro

Back to our lawyers, judge and jury. The judge, frustrated with fights about the verdict form, had ordered a finalized verdict form, “within the next ten minutes.” And counsel delivered. Despite six sets of very smart eyes reviewing the form, there was a misdirection lurking in the finalized form, a misdirection identified after the jury received the form. Fortunately, the judge allowed the bailiff to go into the jury room and substitute the corrected verdict form, an action that occurred before the jury reached any error in deliberations. The form substituted, the jury reached a verdict. More importantly, because the error was removed, the verdict did not harbor appealable issues.

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