PROTECT THE TRIAL RECORD

TO WIN ON APPEAL

By

Daniel U. Smith, Esq.

Daniel U. Smith, Esq.
Smith & McGinty
220 16th Ave., Suite 5
San Francisco CA 94118
Certified Appellate Specialist
State Bar Board of Legal Specialization
dusmith@pacbell.net
www.appealsmith.com

TABLE OF CONTENTS

Protect The Trial Record to Win on Appeal

by

Daniel U. Smith[1]

Obtaining a reversal on appeal often depends on the trial lawyer's diligence in taking the essential steps to "protect" the record so the appellate court can review the claims of error. Conversely, obtaining an affirmance often depends letting the record remain murky, so that the appellate court cannot tell if objections were timely, what was their basis, and whether the trial court erroneous ruling was erroneous.

I.
Factors governing reversal of judgments.

Reversals for judicial error rest on the following factors:

- Whether a ruling is erroneous.
- Whether the record reflects the ruling, the position of counsel, and related evidence (or offer of proof).
- Whether the ruling prejudiced appellant.
- Whether the appellate claim is barred by waiver, estoppel, or invited error.

A. Did the trial court make an erroneous ruling?

Judicial error requires an erroneous *ruling*. Therefore the appellant-to-be must press the court for a ruling:

> When a trial court, through inadvertence or neglect, fails to rule or to reserve its ruling, `the party who objected must make some effort to have the court *actually rule*. If the point is not pressed and is forgotten, he may be deemed to have waived or abandoned it, just as if he had failed to make the objection in the first place.' [Citation.]"

People v. Hill (1992) 3 Cal.App.4th 16, 43-44; *accord, People v. Rhodes* (1989) 212 Cal.App.3d 541, 554 (failing to press the trial court for a ruling waives the right to raise his claims of error).

B. Does the record reflect counsel's objection or motion, related evidence, and the ruling?

The record must reflect the position of counsel, related evidence, and the ruling. If the record does not reflect these developments, the silence of the record will compel affirmance because on matters as to which the record is silent, all intendments and presumption are indulged to support the judgment. *Denham v. Superior Court* (1970) 2 Cal.3d 557, 564; *Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1133. "It is elementary that the burden is on an

---

[1] Mr. Smith has specialized in civil appeals since 1976. He is a member of the California Academy of Appellate Lawyers. For California Continuing Education of the Bar, he teaches "Persuasive Legal Writing," showing how to write briefs in the style judges want to read, a style marked by brevity, simplicity, clarity, and candor. In 2003, Mr. Smith was selected by the Consumer Attorneys Association of Los Angeles as "Appellate Lawyer of the Year."

appellant to show sufficient basis for the reversal of the order or judgment from which he appeals." *Buckhart v. San Francisco Residential Rent Etc., Bd.* (1988) 197 Cal.App.3d 1032, 1036.

Note: Parties may be able to plug a gap in the record by filing a post-trial declaration reciting the position that was advanced and the court's adverse ruling (but opposing counsel may not recall it the same way, and may create a disputed factual issue for the trial court to resolve in its discretion).

C. Is appellate review barred by waiver, estoppel, or invited error?

1. Waiving claim at rial bars appellate review.

Reversal is not available if the appellant *waived* the claimed error by failing to present it to the trial court.

> A party is not permitted to change his position and adopt a new and different theory on appeal. To permit him to do so would not only be unfair to the trial court, but manifestly unjust to the opposing litigant.

In re Marriage of Broderick (1989) 209 Cal.App.3d 489, 501.

> [I]f the new theory contemplates a factual situation the consequences of which are open to controversy and were not put in issue or presented at the trial the opposing party should not be required to defend against it on appeal.

Adelson v. Hertz Rent-A-Car (1982) 133 Cal.App.3d 221, 226; *accord*, *Richmond v. Dart Industries, Inc.* (1987) 196 Cal.App.3d 869, 879.

> Defendants cannot play `Heads I win, Tails you lose' with the trial court. After proceeding, without objection, . . . they may not, after losing, raise the procedural issue.

Tyler v. Norton (1973) 34 Cal.App.3d 717, 722 (request for jury made but not ruled on in the master calendar department waived by failure to motion again in the trial department).

When an objection is denied as untimely, the appellant-to-be must timely renew the objection to preserve error for appellate review. *Pineda v. Los Angeles Turf Club, Inc.* (1980) 112 Cal.App.3d 53, 61.

Exception: A question of law or an issue resting on undisputed facts may be considered for the first time on appeal. *Richmond v. Dart Industries, Inc.* (1987) 196 Cal.App.3d 869, 879.

2. Estoppel or invited error–Appellant may not complain of proceedings that appellant induced at trial.

The appellant is *estopped* to assert error in proceedings that appellant induced at trial.

"Where a party by his conduct *induces the commission of error,* he is *estopped* from asserting it as a ground for reversal. This application of the estoppel principle is generally known as the doctrine of *invited error*." B. Witkin, 9 California Procedure, Appeal (4th. ed. 1997) § 383, p. 434 (emphasis in original). "Under the doctrine of `invited error' a party cannot successfully take advantage of error committed by the court at his request." *Mary M. v. City of Los Angeles* (1991) 54 Cal.3d 202, 225.

For example, estoppel bars reversal of an inconsistent verdict in a form the appellant helped draft. *Mesecher v. County of San Diego* (1992) 9 Cal.App.4th 1677. Plaintiff sued a sheriff for battery and the county for violation of civil rights. On a jury verdict jointly drafted by the parties, the jury was asked whether the deputy used excessive force. The parties, the jury answered affirmatively as to battery but negatively as to the civil rights violation, and then awarded damages to plaintiff. The appellate court rejected the defendants' claim that the verdict was inconsistent because the defendants had invited the inconsistent findings:

> Under the doctrine of invited error, where a party, by his conduct, induces the commission of an error, he is estopped from asserting it as grounds for reversal. [Citations]. Similarly, an appellant may waive his right to attack error by expressly or impliedly agreeing at trial to the ruling or procedure objected to on appeal. [Citation].

Id. at 1685.

> Absent unusual circumstances . . . appellate courts generally are unwilling to second guess the tactical choices made by counsel during trial. Thus where a deliberate trial strategy results in an outcome disappointing to the advocate, the lawyer may not use that tactical decision as the basis to claim prejudicial error.

Id. at 1686.

D. Did the ruling prejudice appellant?

Reversals are granted only to cure "prejudicial" error, i.e., where, in the absence of the error, a result more favorable to the appellate would have been probable. The prejudice standard is defined in the constitution as a "miscarriage of justice":

> No judgment shall be set aside, or new trial granted, in any cause, on the ground of misdirection of the jury, or of the improper admission or rejection of evidence, or for any error as to any matter of pleading, or for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a *miscarriage of justice*.

Cal. Const. art. VI, § 13 (emphasis added).

The prejudice standard is also defined in Cal. Code Civ. Proc. section 475:

> The court must . . . disregard any error, improper ruling . . . or defect . . . in the proceedings which, in the opinion of said court, does not affect the substantial rights of the parties. No judgment, decision, or decree shall be reversed or affected by reason of any error, ruling . . . or defect, unless it shall appear from the record that such error, ruling, instruction, or defect was *prejudicial*, and also that by reason of such error, ruling, instruction, or defect, the said party complaining or appealing sustained and suffered *substantial injury*, and that a *different result would have been probable* if such error, ruling, instruction, or defect had not occurred or existed. There shall be no presumption that error is prejudicial, or that injury was done if error is shown. (Emphasis added.)

Courts impose a high threshold for prejudice. For example, in a product liability case, the Supreme Court affirmed judgment for plaintiff, finding no prejudice to defendant from (1) an erroneous instruction on the consumer expectation test that was inapplicable because the behavior of the auto body during collision was too complex, and (2) the denial of defendant's proper instruction requiring that the defect in design must have enhanced the plaintiff's injury. *Soule v. General Motors Corp*. (1994) 8 Cal.4th 548, 574. Under *Soule*, whether erroneous instructions are prejudicial defenses on (1) the conflict in the evidence, (2) the argument of counsel, (3) the closeness of the jury's vote, and (4) the curative effect of other instructions.

II.
Protect the record at each stage.

To ensure that erroneous trial court rulings will be reviewed on appeal, the appellant-to-be should take the following actions to protect the record at each stage of trial.

A. The complaint.

The complaint should assert all theories of recovery upon which the judgment is sought. Claims not alleged in the complaint may be deemed waived at summary judgment or at trial.

1. Factual allegations should be general and inclusive.

Factual allegations that are general give plaintiff the most leeway at trial. The risk from a complaint that is too factually specific is illustrated by an unpublished appellate decision involving a complaint that specifically alleged benzene in solvent as causing leukemia. When defendant showed the solvent contained no benzene, plaintiff's attempt to prove that toluene in the solvent could also have caused the leukemia was barred because the complaint had alleged benzene only.

2. Circumstances may require amendment to make allegations specific.

The complaint should be amended to allege greater factual specificity or to include all legal theories:

- After a demurrer is sustained (to show the court of appeal all the reasons for the defendant's liability);
- When a summary judgment motion exposes a weakness in the complaint;
- At trial to conform to proof.

B. Summary judgment.

1. Objections to evidence–obtain a ruling.

Appellant must object to evidence and obtain a ruling. Objections not ruled on "are waived and are not preserved for appeal." Code Civ. Proc., § 437c, subds. (b) & (c); *Sharon P. v. Arman Ltd.* (1999) 21 Cal.4th 1181, 1186, fn. 1, disapproved on other grounds by *Aguilar v. Atlantic Richfield Co.* (2001) 26 Cal.4th 826, 854, fn. 19; *Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal.4th 666, 670, fn. 1.

Though one appellate court held that a trial court's failure to rule on evidentiary objections allows the appellate court to presume that no irrelevant or incompetent evidence was relied on, *Biljac Associates v. First Interstate Bank* (1990) 218 Cal.App.3d 1410, more recent rulings hold that the judge's failure to rule waives the objection. *E.g., Swat-Fame, Inc. v. Goldstein* (2002) 101 Cal.App.4th 613, 623, disapproved on other grounds in *Zamos v. Stroud* (2004) 32 Cal.4th 959, 973.

The Supreme Court will decide whether the lack of a trial court ruling on a specific evidentiary objection waives the objection on appeal. *Reid v. Google* (2007) 155 Cal.App.4th 1342, review granted, S158965.

2. After losing summary judgment, file a motion for new trial to add issues by amending the complaint and add newly discovered evidence.

A motion for new trial is proper after summary judgment and other pretrial judgments. *Green v. Del-Camp Investments, Inc.* (1961) 193 Cal.App.2d 479, 481. "[T]here may be a `trial' and hence a situation proper for a new trial motion where only issues of law are determined." *Carney v. Simmonds* (1957) 49 Cal.2d 84, 90 (approving the new trial procedure after judgments without a conventional trial, e.g., judgment after demurrer sustained, judgment on the pleadings, and judgment of dismissal generally); *accord*, *Hendershot v. Superior Court (Southwest Investment)* (1993) 20 Cal.App.4th 860, 865.

Evidence that could not reasonably have been presented in response to the motion may be supplied on a new trial motion (but plaintiff should probably have requested a continuance of the hearing to submit the evidence for the original hearing. Code Civ. Proc. § 437c, subd. (h)).

C. Motions in limine–obtain a ruling on the record.

Failure to obtain a ruling on a motion in limine waives the issue on appeal. Hence, if the trial court does not rule on your motion *in limine*, renew the motion at the appropriate time and "press" the trial court for a ruling. *People v. Morris* (1991) 53 Cal.3d 152:

> The trial court held a pretrial hearing [defendant's motion *in limine* to exclude the testimony of a jailhouse informant] but made no ruling. *Defendant failed to request a ruling and made no objection when Brooks's testimony was offered*. As a result of these events, defendant has *waived any claim of error . . . .* Defendant was *obligated to press for such a ruling and to object to Brooks's testimony until he obtained one*. He failed to do so, thus depriving the trial court of the opportunity to correct potential error.

Id. at 195 (emphasis added).

D. Jury voir dire–questions on bias must be specific.

To establish a juror's concealed bias, the appellant-to-be must ask questions "sufficiently specific to elicit the information" that assertedly was not disclosed. *People v. Blackwell* (1987) 191 Cal.App.3d 925, 929. If the questions do not request that information in a "direct and unambiguous" manner, then the juror has not concealed information. *People v. Kelly* (1986) 185 Cal.App.3d 118, 126.

Examples of voir dire questions that were too general:

Could juror "put aside natural sympathy, listen to the evidence objectively," and not apply "passion or prejudice?" *Moore v. Preventive Medicine Medical Group*, (1986) 178 Cal.App.3d 728 (too general to elicit bias from the jurors' experiences with pain and suffering).

Had jurors or anyone they knew had ever been accused of molestation or involved in a molestation case? *People v. Kelly* (1986) 185 Cal.App.3d 118 (too general to elicit a juror's experience of being molested as a child).

Did "anything" in the jurors' "background"–"come to mind" as a "skeleton in the closet"? *People v. Jackson* (1985) 168 Cal.App.3d 700 (too general to elicit that a juror's nephew had died of a drug overdose).

E. Evidence.

1. Objections must be timely, on the record, and state a specific ground.

Objections to the admissibility of evidence must state all grounds: any ground not stated at trial may not be asserted on appeal (waiver), under Evidence Code section 353:

> A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous admission of evidence unless: [¶ (a) there appears *of record* an objection to or a motion to exclude or to strike the evidence that was *timely made* and so stated as to make clear the *specific ground* of the objection or motion; and ¶ (b) the court which passes upon the effect of the error or errors is of the opinion that the admitted evidence should have been excluded on the grounds stated and that the error or errors complained of resulted in a miscarriage of justice.

See also People v. Mattson (1990) 50 Cal.3d 826, 853-854.

To make a "continuing objection," state the scope of evidence the objection applies to (to avoid a later claim of waiver from your failure to object anew). If the questioning takes a new turn covering subject matter outside the scope of your original objection, make a new objection.

If evidence comes in before you object, protect the record by moving to strike, addressing the specific defect in the testimony.

2. Offers of proof: state substance, purpose, and relevance.

An appellate challenge to a ruling excluding evidence requires that the appellant offered the trial court the evidence's "substance, purpose, and relevance," under Evidence Code § 354:

> A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous exclusion of evidence unless the court which passes upon the effect of the error or errors is of the opinion that the error or errors complained of resulted in a *miscarriage of justice* and it appears of record that:
> (a) the *substance*, *purpose, and relevance* of the excluded evidence was made known to the court by the questions asked, and offer of proof, or by any other means. . . ." (Emphasis added.)
>
> One court stated the requirement of section 354(a) as follows:
> An offer of proof must consist of material that is admissible, it must be specific in indicating the purpose of the testimony, the name of the witness and the content of the answer to be elicited. . . . Merely setting forth the substance of facts to be proved does not constitute compliance with Evidence Code section 354, subdivision (a).

Semsch v. Henry Mayo Newhall Memorial Hosp. (1985) 171 Cal.App.3d 162, 167-168.

3. Reading depositions–make a record.

To protect the record when the court reporter does not transcribe a deposition that is read to the jury, file as exhibits (1) a copy of the deposition and (2) a list of the pages and lines being read. Keep an unmarked copy of the deposition and the list, showing the exhibit label.

F. Help the court reporter and the appellate court understand trial proceedings.

Help the court reporter get the record straight. Speak slowly and loud enough for the reporter to get everything. Make sure a critical answer got into the record. If several people were speaking or the witness dropped his or her voice, ask if the reporter got the answer.

During demonstrations or when the witness uses a physical gesture to indicate size or distance, explain in words what is happening. In questioning a witness about a document, identify the document or exhibit by name and number. Identify parts of documents by page or line.

To speed preparation of the appellate record, get the name and phone number of each reporter who reports any part of the proceeding.

G. Exhibits.

The appellant-to-be should obtain a ruling on admissibility of each exhibit.

Retain a copy of each exhibit (*including opposing party's exhibits*) to use on appeal for your own reference or to augment the record.

If the case depends on diagrams, maps and charts, help the Court of Appeal by:

- Creating an 8.5 x 11 reduction or an 8 x 10 photograph to offer at trial and use on appeal.
- Having witnesses testify specifically to locations, times, and distances. A transcript of the witness saying "here," or "this long," or at "point X," is meaningless to the appellate court. Have the witness state the place or time by its relationship to another fact easily grasped by the appellate court.

H. Instructions.

1. Guidelines for the appellant-to-be.

a. Make five sets of your requested instructions and proposed verdict form.

Provide copies of your requested instructions and proposed verdict form to: (1) opposing counsel; (2) the judge; (3) the clerk (for filing); (4) to the clerk to file-stamp and return to your file; (5) for your use at the conference on instructions and on the verdict form.

By filing a separate set of requested instructions and keeping a file-stamped copy of that set, you create a record to avoid the presumption that an unidentified instruction was given at appellant's request. *Lynch v. Birdwell* (1955) 44 Cal.2d 839, 846-847; *Phillips v. Noble* (1958) 50 Cal.2d 163, 168 (where original form of the instructions was not in the record, appellant's claim that the trial court erroneously modified the instructions failed because the record did not show that appellant had not invited the error).

b. Put adverse rulings and modifications on the record.

Because instructions conferences are usually not reported, after the conference, memorialize the position you stated to the judge and the judge's adverse ruling.

Where the court modifies an instruction you proposed, make clear whether you object or agree to the modification substantively and with respect to the modification's phrasing.

When the court reads the instructions to the jury, follow along to detect any changes; object if there are.

c. Request modifications.

Request modifications of instructions on the record (to avoid waiver). "If the court gives an instruction correct in law, but the party complains that it is too general, lacks clarity, or is incomplete, he must request the additional or qualifying instruction in order to have the error reviewed." *Dorsic v. Kurtin*

(1971) 19 Cal.App.3d 226, 239; *see also Finn v. G.D. Searle & Co.* (1984) 35 Cal.3d 691, 701-702.

d. State the purpose of protective instructions.

When you object that a issue should not go to the jury at all but are overruled, you may propose an alternate instruction to cover that issue. But state on the record that you offer the instruction for protective purposes only, and that you oppose the giving of any instruction on the subject.

2. Guidelines for respondent-to-be.

To prevent juror misconduct, have the judge instruct the jury:

- Do not view the scene.
- Do not perform experiments.
- Do not consult dictionaries or texts.
- Do not consider evidence from outside the courtroom.
- Do not have conversations with anyone about the case.
- Do not relate to the jury any conversations with others about the case.
- Do not relate your personal experiences that would constitute evidence to resolve any question submitted to you (e.g. experience with law enforcement, or experience with the product or the injury).
- Do not allow your verdict to be influenced by bias.
- Do not allow your verdict to be influenced by prior dealings between a party (e.g., a hospital) and yourself or anyone you know.

See California Civil Jury Instructions, CACI 100.

I. Closing argument.

When objecting to opposing counsel's misconduct, "assign" the specific actions as misconduct, object to them, and request a curative admonition. *Horn v. Atchison, T. & S.F.Ry.Co.* (1964) 61 Cal.2d 602, 609-611.

After objecting to opposing counsel's closing argument, appellant must object anew to a rephrasing of closing argument to preserve error for appellate review. *Sand v. Mahan* (1967) 248 Cal.App.2d 679, 689-690.

J. Form of verdict.

1. Failure to object leads to waiver.

Scrutinize the verdict form for problems (e.g. inconsistent findings) because appellant waives any appellate objection to the verdict form by not making that objection at trial. *Lynch v. Birdwell* (1955) 44 Cal.2d 839, 851; *Green v. Rancho Santa Margarita Mortgage Co.* (1994) 28 Cal.App.4th 686, 696; *Ateeq v. Najor* (1993) 15 Cal.App.4th 1351, 1359; *Martinides v. Mayer* (1989) 208 Cal.App.3d 1185, 1193; *Moore v. Preventive Medicine Medical Group, Inc.* (1986) 178 Cal.App.3d 728, 745; *Niles v. City of San Rafael* (1974) 42 Cal.App.3d 230, 240.

If the court adopts your adversary's suggestions for the verdict form, so state on the record.

2. A general verdict may be more readily affirmed than a special verdict.

General verdicts are more easily affirmed on appeal because, where several counts are tried to a general verdict, the appellate court assumes the jury found on the theory supported by substantial evidence and free from error. *McCloud v. Roy Riegels Chemicals* (1971) 20 Cal.App.3d 928, 935-936; *Gillespie v. Rawlings* (1957) 49 Cal.2d 359, cited with approval in *Carr v. Barnabey's Hotel Corp.* (1994) 23 Cal.App.4th 14, 17; *Codekas v. Dyna-Lift Co.* (1975) 48 Cal.App.3d 20, 25. The judgment "will be sustained if any one count is supported by substantial evidence and is unaffected by error, despite possible insufficiency . . . as to the remaining counts." *Tavaglione v. Billings* (1993) 4 Cal.4th 1150, 1157 (stating the rule for affirming a general verdict); *accord, Henderson v. Harnischfeger Corp.* (1974) 12 Cal.3d 663, 673 (where plaintiff pursues several causes of action, the judgment will be affirmed "if the evidence supports it on any one sufficient count"); *Selden v. Dinner* (1993) 17 Cal.App.4th 166, 172. Where multiple theories are resolved in a general verdict, reversal is possible only if there is error in all theories. *Liberty Transport, Inc. v. Harry W. Gorst Co.* (1991) 229 Cal.App.3d 417, 427-428.

But there is contrary authority: *DeTomaso v. Pan American World Airways, Inc.* (1987) 43 Cal.3d 517, 533, *cert. denied* 484 U.S. 829. (reversal where the general verdict "does not reveal whether" liability and damages were based on proper or improper causes of action); *Cobbs v. Grant* (1972) 8 Cal.3d 229, 238 (reversing general verdict where it was impossible to determine whether liability was based on proper or improper cause of action); *Rodriguez v. Kline* (1986) 186 Cal.App.3d 1145, 1150 (reversal where Court of Appeal could not determine from general verdict whether the jury compensated plaintiff for a loss of future earnings and if so, whether its award was based on evidence of his earning capacity in this country or in Mexico).

A damage award that is unsegregated may prevent the appellant from showing that one element of damages was erroneously included or omitted from

the award, thus barring a showing of prejudicial error. *Moore v. Preventive Medicine Group* (1986) 178 Cal.App.3d 728, 746, 747; *English v. Lin* (1994) 26 Cal.App.4th 1358, 1369 (unsegregated award did not show compensation for lost future earnings); *Enriquez v. Smyth* (1985) 173 Cal.App.3d 691, 700 (unsegregated award did not show whether interest was awarded). "In order to preserve this issue for appeal, it was incumbent upon Kmart to request a special verdict that would have segregated the elements of damages." *Heiner v. Kmart Corp.* (2000) 84 Cal.App.4th 335, 346; *Brokaw v. Black-Foxe Military Institute* (1951) 37 Cal.2d 274, 280 (defendant must request a verdict form that segregates the elements of damages to challenge a separate components of the damage award). .

3. Damages–only one award for one injury.

The verdict should not separate awards for different wrongs that contributed to a single harm. "Regardless of the nature or number of legal theories advanced by the plaintiff, he is not entitled to more than a single recovery for each distinct item of compensable damage supported by the evidence." *Tavaglione v. Billings* (1993) 4 Cal.4th 1150, 1158.

4. Prepare and file your verdict *before* trial.

The first party to present a form of verdict has the best chance to control the final verdict form. Moreover, if you draft the form of verdict before trial, you can ask questions that will elicit answers tailored to the issues on the verdict. Always file your proposed verdict forms so the appellate court will know if your opponent's form was used.

5. Avoid potentially inconsistent findings.

Where inconsistent verdict findings cannot be harmonized, the verdict is "against the law," requiring a new trial. *Shaw v. Hughes Aircraft Co.* (2000) 83 Cal.App.4th 1336, 1344 (finding of no breach of contract was inconsistent with finding that defendant breached the implied covenant of good faith). Inconsistent verdicts require reversal because the fact finder is not permitted to make inconsistent determinations of fact based on the same evidence. *Cavallaro v. Michelin Tire Corp.* (1979) 96 Cal.App.3d 95, 101. "The verdict's correctness must be analyzed as a matter of law." *Trujillo v. North County Transit Dost.* (1998) 63 Cal.App.4th 280, 285. The appellant is not required to have called the inconsistent verdict to the trial court's attention to preserve the issue for appeal. *Remy v. Exley Produce Express, Inc.* (1948) 148 Cal.App.2d 550, 554-555.

Example: A jury cannot find that a product design was defective but not negligent, or vice-versa. *Lambert v. General Motors* (1998) 67 Cal.App.4th 1179. Therefore, the question on negligence should simply ask: "Was [defendant] negligent?" (not "was defendant negligent in design?). The more general question on negligence will support contrary findings on defect and negligence only if the negligence finding is based on conduct not related to design (e.g., failure to warn or failure to recall or retrofit).

But if the appellant participated in drafting the inconsistent verdict form, doctrines of waiver or invited error may bar reversal. *Mesecher, supra,* 9 Cal.App.4th 1677.

K. Court trial.

Request a Statement of Decision (or file objections to the Proposed Statement of Decision) under Rule 232. Specify the particular issues to be covered, to avoid the rule of appellate review that any issue omitted from the Statement of Decision and not requested by a party supports the conclusion on

appeal that the particular factual finding is supported by substantial evidence. In jury trials, a statement of decision may be available for post-trial motions, such as attorney fees, ruled on by the court.

L. Post-trial motions.

1. Juror interviews.

Juror candor usually diminishes after the first contact. Therefore, the attorney should be the first to interview jurors–in person–armed with a note pad to create an immediate handwritten declaration for filing, signed by the juror under penalty of perjury.

When you win, advise the jurors that the other side will likely file a new trial motion and seek juror declarations to upset their verdict, but that the jurors do not have to talk to the other side.

2. Challenge insufficiency of damages.

A post-trial challenge to the amount of damages is a prerequisite to appellate review of the damage award. *Campbell v. McClure* (1986) 182 Cal.App.3d 806 (failure to challenge punitive damage award on new trial as unsupported bars appellate review); *Jamison v. Jamison* (2008) 164 Cal.App.4th 714 (appellate challenge to amount of award barred for lack of new trial motion).