



# Appeals

## Preserving the Win/ Preserving the Argument

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# Pretrial Law and Motion

## ■ Demurrer Appeals

- De novo; assumes allegations in complaint are true

## ■ Summary Judgment

- Also de novo review – no deference and thus more likely to be reversed.

## ■ Anti-SLAPP

- Immediately appealable and *must* appeal then.
- Automatically stays proceedings (state and federal courts are somewhat different)

# Motions in Limine

- **Be as case-specific as possible** – e.g., if you are asking for an in limine order that opposing counsel can't make certain inappropriate arguments to the jury, attach transcripts showing that he/she has a track record of making those arguments.
- **MIL orders are rarely final.** You will need to **object again** during trial to preserve your evidentiary objections for appeal.
- **Standard of review** – on evidentiary issues, it will be abuse of discretion review. Judges can make their rulings excluding evidence somewhat bullet-proof by excluding under Evid. Code 352.
- **Must show prejudice:** e.g., evidentiary rulings – the appellant must show the admission/exclusion likely changed the outcome of the case. File an **offer of proof**. If the evidence was cumulative, you will be unlikely to prevail on appeal.

# Evid. Code 402 Hearings

Can be very helpful in narrowing evidence; judge will appreciate having time to consider these issues *before* the jury is empaneled.

E.g., *Sargon v. USC* – eight-day evidentiary hearing to determine whether plaintiff's damages expert should be excluded. Trial court's exclusion of expert opinion evidence affirmed by the California Supreme Court.

# Jury Instructions

Number one cause of reversal of a trial judgment

- Focus on instructions early in your trial preparation
- Gear your preparation in light of the relevant instructions
- Think about proposing modified CACI instructions as needed
- Consider proposing special instructions
- Appellate review of instructional error (either erroneous instruction or refusal of an instruction): the appellate court assumes that the jury might have believed the evidence upon which the instruction was based

# Jury Instructions

A party is entitled upon request to correct nonargumentative instructions on every theory of the case they advance which is supported by substantial evidence.

The appellate court reviews the propriety of the jury instructions de novo and in the context of all the other instructions.

The judgment will not be reversed for instructional error unless the error is prejudicial, i.e., a different result is reasonably probable. *Caldera v. Dep't of Corr. & Rehab.* (2018) 25 Cal. App. 5th 31, 44-45.

But: the appellate court considers the evidence in the light most favorable to appellant.

# When can instructional error be raised on appeal?

Claim that instruction was wrong can't be raised if appellant proposed the instruction (except when proposed as a defensive measure following an erroneous ruling).

Claim that instruction should have been given or that a clarification was needed can't be raised unless appellant requested it.

Claim that an instruction misstates the law can be raised without a prior objection.

Strategic consideration: so long as you do not propose, stipulate, or agree to the other side's proposed instructions, a claim that the instructions were erroneous is preserved for appeal.

# Jury Instructions

Take-aways from these rules

Pay close attention to the instructions

Make a clear record of objection and proposal of instructions

Propose appropriate instructions (standard and/or special) as applicable to the case

Make sure your instructions are correct on the law



# Special Instructions

Special instructions must “be accurate, brief, understandable, impartial, and free from argument” (Cal. Rules of Ct. 2.1050(f)) and must be in gender-neutral language (*id.* At 2.1058).

The main reasons special instructions are rejected at the trial level, and the trial court’s failure to give them is affirmed on appeal, are:

- They are duplicative of concepts covered by the standard CACI instructions. (*Ghezavat v Harris* (2019) 40 Cal.App.5th 555, 559.)
- They amount to a jury argument in the guise of a statement of law and/or recite evidence in an argumentative manner. (*Uriell v Regents of Univ. of Cal.* (2015) 234 CA4th 735, 742–743.)
- They are overbroad, incomplete and/or misleading. (See *Checking for Improper Instructions: Cal. Judges Benchbook Civ. Proc. Trial § 12.23.*)

# Appellate Review of the Sufficiency of Verdicts

- In reviewing a general verdict (no special factual findings), the appellate court infers findings in favor of the prevailing party on all material issues and does not speculate on what particular ground the jury may have found in favor of the prevailing party. (*Wilson v. County of Orange* (2009) 169 Cal.App.4th 1185, 1193)
- In reviewing a special verdict (contains factual findings), the sufficiency and validity of the verdict is reviewed de novo. The court does not imply findings. If specific findings are inconsistent (meaning they cannot possibly be reconciled with each other) on issues necessary to the verdict, the inconsistency is reversible error. (*Singh v. Southland Stone, U.S.A., Inc.* (2010) 186 Cal.App.4th 338, 357.)

# Take-Aways re: Verdicts

1. General verdicts are rarely given.
2. Special verdicts must be drafted carefully to cover all elements of claims and defenses. Failure to include findings on any essential element could lead to an invalid verdict and reversal on appeal. (See *Falls v. Sup.Ct. (Montgomery Ward & Co.)* (1987) 194 CA3d 851, 855 [“the requirement that the jury must resolve every controverted issue is one of the recognized pitfalls of special verdicts”].)
3. To avoid inconsistent verdicts, be clear on which questions must be answered and in what order, and avoid asking the jury to answer the same question multiple times.
4. Review the special verdict and have the jury clarify any ambiguous findings. (See *Mendoza v. Club Car, Inc.* (2000) 81 CA4th 287, 303 [where inconsistency is identified before jury is discharged, court has duty to order its correction by either advising jury or sending jurors back for further deliberations].)

# Preserve the Record During Trial

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- Make sure a **reporter** is present.
- Ask for **continuing objections** to an improper category of evidence.
- **Move to strike** evidence that came in even though an objection was sustained.
- **Offers of proof** are critical to proving an evidentiary ruling was **prejudicial**.
- **Emails with court** are an increasing problem.
- Prepare **pocket briefs** on key issues as they arise. Get a ruling on the record.
- Be careful about **stipulations**.
- Make a record of **misconduct or interactions** and request **admonitions**.
- Keep track of **trial exhibits, depositions, and demonstratives** - [CRC rule 2.1040](#)
- Carefully review the **special verdict form** - [CCP § 619](#)

# Post-trial

## Types of Motion/Filing

### JURY TRIAL

- Motion for New Trial
- JNOV

### BENCH TRIAL

- Statement of Decision  
*avoids implied findings*

## Needed to Preserve Issues

- New trial motion:
  - excessive damages
  - jury misconduct
  - newly discovered evidence
- Statement of decision:
  - CCP 632 – request
  - CCP 634 – objections

## Timing to appeal

Deadline extended if  
new trial and JNOV  
motions are *timely filed*

# Consulting an Appellate Specialist and/or Appellate Mediator

## Case Evaluations

- Typically before appeal filed
- Attorneys for both sides present a summary of their cases to a neutral evaluator
- Evaluator renders a non-binding opinion

## Consultations

- One-sided process
- A party may seek a neutral's view of their own litigation position and strategy
- Neutral typically cannot subsequently act as mediator.

## Moot Court

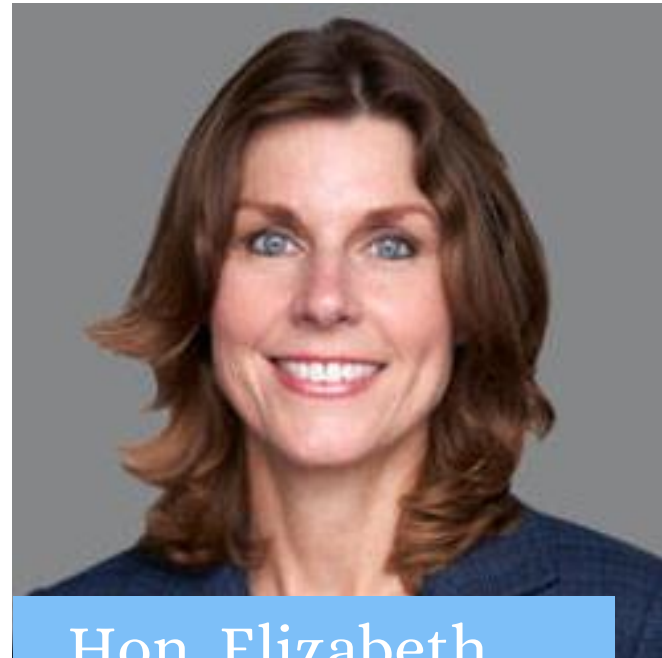
- Counsel present their appellate arguments in a practice setting modeled on the appellate procedures
- Individual, or multi-member panels
- Test theories, practice presentation skills, and gain feedback

## Mediation

- Avoid even more time-consuming and costly litigation
- Mediator will help the parties reevaluate their positions and consider the risks and benefits of potential appellate decisions
- Can also prevent the creation of unfavorable precedent

There is a fine article on appellate mediation written by appellate specialist Herb Fox in the December 2021 issue of Advocate Magazine and available online at <https://www.advocatemagazine.com/article/2021-december/effective-appellate-mediation>

# Thank You



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