

# Tips for Trial Counsel on Planning, Preparation, and Preservation: Considerations When Drafting Verdict Forms

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The instructions to the jury provide the necessary framework for the verdict form. The verdict form, in turn, formalizes the jury's determination of the case and how it will answer the claims and defenses at issue. Its structure and language could influence the jury's ultimate answers. It may also control what issues may be raised on appeal. Needless to say, it should be carefully crafted, and trial counsel should, if at all possible, consult with appellate counsel in doing so. It goes without saying that the verdict form should include every claim and every defense. Otherwise, the omitted claim or defense may be deemed to have been waived. See *Birmingham Fire Ins. Co. of Penn. v. Politis & Perlman Int'l Realty*, 52 Fed. Appx. 485 (11th Cir. 2002) (unpublished opinion) (verdict form given to jury only presented issue of intentional fraud, not the negligent misrepresentation claim that plaintiff also alleged, and abandonment of claim became dispositive in later coverage suit). The most difficult tactical decision, from both a trial and appellate standpoint, is how detailed the verdict form should be. There are pros and cons of a detailed verdict form, and there is no right answer for all cases. In considering this issue, however, you always take into account the two-issue rule, under which Florida appellate courts will not grant a new trial if the jury rendered a general verdict and there is no error on at least one of the theories on which the jury is instructed. See *Colonial Stores, Inc. v. Scarborough*, 355 So. 2d 1181 (Fla. 1977). But be mindful this may not be the same rule in other forums or in federal court. The Eleventh Circuit has held, for example, that the defendant is entitled to a new trial if the jury renders a general verdict that could be based on several possible grounds, one of which cannot support the verdict. See *Grant v. Preferred Research*, 885 F.2d 795 (11th Cir. 1989). On the other hand, that court also has held that a defendant only is entitled to judgment as a matter of law if each possible ground for the general verdict is shown to be legally insufficient. *Maiz v. Virani*, 253 F.3d 641 (11th Cir. 2001). If there are defects or inconsistencies in the jury's findings when the verdict is actually rendered, [(i.e., a particular question is not answered or not answered

clearly, calculations do not add up or do not make sense (e.g., future and net present value damages are the same number), or findings are legally inconsistent)], you must consider whether to object and raise your concern before the jury is discharged. This is a tough judgment call that unfortunately must be made instantly. On the one hand, failure to raise an inconsistency in the jury's verdict usually will waive any challenge on appeal. See *Pierce v. Southern Pacific Transp. Co.*, 823 F.2d 1366, 1370 (9th Cir. 1987); *Coralluzzo v. Education Mgmt. Corp.*, 86 F.3d 185, 186 (11th Cir. 1996) ("This Court has repeatedly held that all challenges to the inconsistency of special verdicts must be raised before the jury is excused"); but cf. *Heno v. Sprint/United Mgmt. Co.*, 208 F.3d 847, 851 (10th Cir. 2000) ("when the verdicts are special verdicts a party is not required to object to the inconsistency before the jury is discharged in order to preserve that issue for a subsequent motion before the district court"); *U.S. E.E.O.C. v. Massey Yardley Chrysler Plymouth, Inc.*, 117 F.3d 1244, 1251 (11th Cir. 1997) (party waived contention that jury verdict was inconsistent by failing to move post-verdict for new trial or for further jury deliberation). As the court explained in *Progressive Select Ins. Co., Inc. v. Lorenzo*, 49 So. 3d 272 (Fla. 4th DCA 2010):

[l]ooking back over almost eighty years of Florida case law reveals a consistent goal of ensuring that 'the intent of the jury in rendering the verdict may fairly and with certainty be gleaned from the words used....' To that end, Florida courts have required any objection to the form of the verdict to be made before the discharge of the jury to allow correction of a correctable error. When that verdict is rendered and 'no objection appears to have been made to the form of verdict when the same was presented to the court, the form thereof was waived.' (Internal citations omitted.)

On the other hand, if you do raise the inconsistency before the jury is discharged, the jury obviously may resolve it against you. Then, you will have not only lost at trial, you will have lost any inconsistency argument for appeal, unless you can tie the original inconsistency into some defect in the instructions or verdict form and argue that a mistrial was required. The right answer may never be known, and it usually will not be known at the time the trial decision has to be made. Lastly, you may want to get on the record the length of the jury deliberations. You certainly want to get on the record any questions that the jury asks about the verdict form and the jury instructions (or otherwise) and be sure that the jury's note is placed in the record.

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