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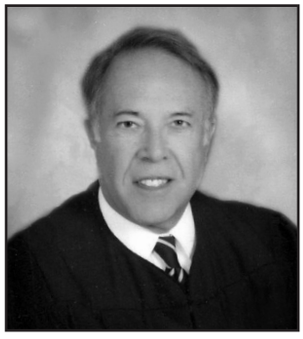
The Preliminaries of Preliminary Injunctions



Hon. James P. Kleinberg

In the daily routine of a law and motion judge a request for a preliminary injunction is rare. Such a request usually causes a heightened level of attention because the judge knows he or she is venturing onto an unchartered landscape which could have immediate and profound effects on the litigants. To make it even more stressful, this important decision is typically made early in the case, with either limited or no prior interaction between the court and lawyers which would help make any decision better informed, if not correct.

Thus, it is not surprising that preliminary injunctions are hard to obtain, even before the facts and law are presented. They typically arise from an immediate need that by its nature cannot wait for a judge or jury to award damages months or years in the future. But to obtain one, counsel is asking the court to act in haste, without the usual time to reflect. Therefore, to have any chance of success, the request must be prepared with great care.

This article is not intended to substitute for the

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Also in This Issue

Lessons Learned from Reading Other People's Records

Jerome B. Falk, Jr.

Collectively, the four of us have been doing appeals for about 120 years. We often come to the case after the trial and, like the appellate court that will decide the case, learn about it by reading the pleadings, transcript, verdict form and judgment. Over the years, we've encountered numerous problems — and struggled to find solutions — arising from the various arcane rules about what trial counsel must do to preserve a point for appeal. And we've learned some other lessons from reading trial records — usually records made by very experienced and capable trial lawyers. As a result, we've gained a healthy respect for the burdens trial lawyers bear, and the challenges they face in making a proper record that ensures that every legitimate issue can be raised and resolved in the eventual appeal. As the readers of this article know very well, commercial trial litigation is not work for the faint of heart; truth be told, it is just too easy to make a mistake.

If you've read this far and wonder if you should stay with us, perhaps just one horror story will encourage you to read on. (Do have a supply of Maalox handy.) We might just help you avoid a controversy over whether an issue was properly preserved for appeal.

A few years ago, we were engaged by a company that had just lost a jury trial resulting in a $90 million judgment on a verdict finding promissory fraud. The trial court had instructed the jury that the applicable measure of damages was "benefit of the bargain." That would have been fine on a claim for breach of contract, but (as we knew from an earlier case) the correct measure of dam-

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The Preliminaries of Preliminary Injuctions

The Bond

Because a preliminary injunction interferes with at least some aspect of the defendant's business or other actions going forward, a bond or undertaking is generally required so that if the defendant later shows that an injunction should not have been issued — for example, by winning the case — the defendant can recover damages to compensate for the effect on its business. The undertaking should be set at the amount of damage the defendant may sustain because of the injunction. The undertaking is required for the preliminary injunction to become effective.

Since the opposing party doesn't want to admit that a preliminary injunction might be granted, the bond issue is often tossed in at the end of the opposition brief with limited thought or proof. The plaintiff similarly focuses on the merits and the equities, and devotes little attention to the amount of the bond. Both sides should consider focusing more attention on this issue, because a substantial bond requirement may mean that the plaintiff wins the motion but never actually obtains the relief because the business decides not to pay the expense. Because a high bond amount can stymie the request relief entirely, the plaintiff should consider taking the offensive and spell out in the moving papers what it thinks the bond should be, and why.

Both sides should include portions of their respective briefs and declarations that cover the bond issue. For example, from the opposing party's perspective in a trade secrets case, the financial consequences of an injunction to a start-up accused of using trade secrets would be devastating, as follows:… From the party seeking the injunction, consider a showing that the consequences are not as severe as argued, and that the size of the bond can be revisited when more is known of the facts through discovery.

Meanwhile, the client should understand the necessity of the bond, and with the lawyer's help make all the preparations in advance, so that a bond may be filed within hours of the hearing if the motion is granted.

Consequences

The good news for lawyers is the preliminary injunction process is at such an accelerated pace that you and your client know quickly where you stand, as the Court usually issues a decision the same day as the hearing or shortly thereafter.This is also bad news because the granting of a preliminary injunction may effectively end, or at least severely damage the case for one side. Therefore, it may be wise to try and reach a compromise — at least on the points of the injunctive relief — before your client learns of the Court's decision.

The Honorable James P. Kleinberg is a judge on the Superior Court of California for the County of Santa Clara, and is currently assigned to the Complex Civil Litigation Department. He is also a member of the Board of Governors for the Northern California chapter of ABTL.

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ages for fraud in a case governed by Civil Code Section 3333 other than a case of intentional fraud by a fiduciary is "out-of-pocket." *See Alliance Mortgage Co. v. Rothwell*, 10 Cal. 4th 1226, 1240 (1995); *Lazar v. Superior Court*, 12 Cal. 4th 631, 646, 648-49 (1996); *Fragale v. Faulkner*, 110 Cal. App. 4th 229, 237-38 (2003). We were initially optimistic that an appellate court would say that the damages instruction was wrong. That meant that the judgment was highly vulnerable because in this case plaintiff had offered *no* evidence of out-of-pocket-damages.

But there turned out to be an awful problem: the issue had not been raised until late in the trial because defense counsel didn't realize that the applicable measure was out-of-pocket. In fact, the issue wasn't raised until the trial judge raised it *sua sponte*, causing the lawyers to head for the law library. They then briefed the issue thoroughly, arguing (correctly) that the appropriate measure of damages was the out-of-pocket measure. Eventually, the judge decided to instruct the jury to apply the benefit-of-the-bargain measure. Because defense counsel hadn't tumbled onto the issue until the judge drew it to their attention, they had said nothing earlier in the trial when the plaintiff's damages expert opined on what profits plaintiff would have earned had there been no fraud.

But, alerted by the trial judge and fortified by their own research, defense counsel objected to the benefit-of-the-bargain damages instruction. Moreover, under Section 647 of the Code of Civil Procedure, all instructions are deemed objected to. Unfortunately, plaintiff found a California Supreme Court case holding that a defendant who believes the plaintiff's claimed damages are based on the wrong legal standard must object *at the time the damages testimony is offered*. Failure to do so waives any objection as to the measure of damages. *Durkee v. Chino Land & Water Co.*, 151 Cal. 561, 569 (1907). We argued that this rule only meant that defendant couldn't complain of the admission of that damages evidence on appeal, but that defendant could still object to the erroneous measure-of-damages jury instruction. No luck: the Court of Appeal held that trial counsel's failure to object to the damages study waived both the right to object to the damages evidence and the right to challenge the measure-of-damages instruction on appeal. Judgment was affirmed because of the trial lawyers' failure to spot the problem in time to object to the testimony of the plaintiff's expert on the issue of damages.

The Overarching Concept. Protecting the record for appeal really isn't rocket science. There's an underlying principle that should guide you every step of the way: make sure you tell the trial judge — on the record — what your position is on every conceivable point of contention, ask the court to rule accordingly, and in all events make sure that the record reflects how the court ruled. To do that effectively, you need to think ahead — if you win the case, how will you defend it on appeal? And if you lose the case, how will you challenge the judgment

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on appeal? That kind of forward thinking shouldn't wait until after the judgment is entered; indeed, it shouldn't wait until the trial is under way. Your trial preparations should include constant thought about the eventual appeal in the case, what the issues will be when it gets to that stage, and what the record will look like to an appellate court that wasn't present and *only* knows what happened from the record on appeal. If you do that well, the necessary foundation will almost build itself.

Beware Of Appealable Orders. Most pretrial orders are not immediately appealable. But, in California, some are. One example is judgments that are final as to some but not all of the parties. For instance, if a plaintiff sues several defendants, and the litigation is terminated as to one defendant (such as by dismissal after a demurrer or summary judgment), the loser can immediately appeal, even though the plaintiff's action against the remaining defendants remains pending. *Millsap v. Federal Express Corp.*, 227 Cal.App. 3d 425, 430 (1991). Conversely, where two plaintiffs sue a single defendant, and the suit of one of them is terminated by a final judgment, the loser can appeal. *Justus v. Atchison*, 19 Cal. 3d 564, 567-68 (1977), *disapproved on other grounds*, *Ochoa v. Superior Court*, 39 Cal. 3d 159, 171 (1985). Similarly, an order denying class certification as to an entire class, or sustaining a demurrer to class allegations in a complaint without leave to amend, is an appealable order because it terminates the action as to the unknown class members. *See, e.g., Linder v. Thrifty Oil Co.*, 23 Cal. 4th 429, 435 (2000); *Wilner v. Sunset Life Ins. Co.*, 78 Cal. App. 4th 952, 957 & n.1 (2000). If no appeal is taken from this type of judgment — final as to some parties but not all — the decision will *not* be reviewable on appeal from a subsequent final judgment as to the remaining parties. *See Morrissey v. City & County of San Francisco*, 75 Cal.App. 3d 903, 907 (1977) (applying rule to denial of class certification); *see generally* Cal. Code Civ. Proc. § 906. (Note that in federal court, the general rule is that no appeal may be taken until final judgment is entered as to all claims and all parties. Fed R. Civ. P. 54(b).)

Some interlocutory decisions, like orders pertaining to changes of venue or disqualification of a judge, are reviewable by pretrial writs pursuant to statute. *See, e.g.*, Cal. Code Civ. Proc. § 170.3(d) (orders pertaining to judicial disqualification); *id.* § 400 (venue rulings); *id.* § 437c(m)(1) (orders denying summary judgment and granting or denying summary adjudication). In some cases, such as venue rulings, the order may also be reviewable after a final judgment, although prejudice may be difficult to establish. *Calhoun v. Vallejo Unified Sch. Dist.*, 20 Cal.App. 4th 39, 42 (1993) (venue); *Waller v. TJD, Inc.*, 12 Cal.App. 4th 830, 835-36 (1993) (order denying summary judgment). In other cases, writ review is the exclusive remedy. Cal. Code Civ. Proc. § 170.3(d) (judicial disqualification). Each "statutory writ" is subject to its own unique and jurisdictional deadlines.

When In Doubt, Object. Trial lawyers often hesitate to make an objection for fear they will annoy the jury or the judge. That judgment can often be tactically sound; but there are consequences to consider. In general, a failure to object will preclude a claim of error on appeal. *See Doers v. Golden Gate Bridge, Highway & Transp. Dist.*, 23 Cal. 3d 180, 184 n.1 (1979); *Leonardini v. Shell Oil Co.*, 216 Cal.App. 3d 547, 584 (1989). Take, for example, the requirement of objecting to inadmissible evidence. The trial court may have denied your motion *in limine*; so when that evidence is offered, must you object again? If you don't, you can count on hearing from the opposing party that your failure to object waived the right to argue evidentiary error on appeal. Then there will be an argument that the ruling on the motion *in limine* was not definitive, and left open the possibility of a different ruling in the context of trial. Although you will be in the clear if the appellate court thinks the trial court's MIL ruling was conclusive (*see, e.g., City of Long Beach v. Farmers & Merchants Bank*, 81 Cal.App. 4th 780, 783-85 (2000), *disapproved on other grounds, Reid v. Google, Inc.*, 50 Cal. 4th 512, 532 n.7 (2010)), do you want to run that risk? *See, e.g., Tennison v. Circus Circus Enters., Inc.*, 244 F.3d 684, 688-89 (9th Cir. 2001) (objection must be renewed at trial if MIL ruling was tentative); *People v. Demetrulias*, 39 Cal. 4th 1, 20 (2006); Cal. Evid. Code § 353(a). Similarly, if you have objected to similar evidence earlier in the trial, do you need to object again? You probably do — unless the trial court has agreed that your original objection continues in force. *See United States v. Gomez-Norena*, 908 F.2d 497, 501 n.2 (9th Cir. 1990) (continuing objection obviates need for renewed objections on the same, rejected ground). But be careful: a continuing objection only preserves the objection *to like questions on the ground of the prior objection* that was overruled. *See Smith v. County of Los Angeles*, 214 Cal.App. 3d 266, 285 (1989); compare *C.P. Interests, Inc. v. California Pools, Inc.*, 238 F.3d 690, 696-97 (5th Cir. 2001).

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Be sure that your objection includes the specific ground. *See McKnight ex rel. Ludwig v. Johnson Controls, Inc.*, 36 F.3d 1396, 1407 (8th Cir. 1994). This need not be a lengthy statement (evidentiary objections can usually be succinct), but it should be sufficient to fairly inform the judge of the objection's legal basis. If the evidence slips in before you can object, promptly make a motion to strike. Waiting until the witness has finished testifying may well be too late. *Terrell v. Poland*, 744 F.2d 637, 638-39 (8th Cir. 1984).

Frequently, a court will deny (or defer ruling on) an objection until after the testimony has been received, saying that it will entertain a motion to strike or otherwise revisit the issue when it has the full context. We've seen many instances in which the issue thereafter falls between the cracks and the objection is not renewed. *E.g., United States v. Dougherty*, 895 F.2d 399, 403 (7th Cir. 1990).

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Misconduct by opposing counsel during the presentation of evidence or in argument to the jury *must* be met with an immediate objection. To be sure, it's awkward; and juries may not like the interruption. But there is a very high risk that if you do not object on the spot, the claim of misconduct will be foreclosed. *Moylan v. Maries County*, 792 F.2d 746, 751 (8th Cir. 1986) (a three-day delay in asserting an objection to inflammatory and bad faith opening statements rendered the objection untimely and insufficient to preserve the issue for appeal); *Cassim v. Allstate Ins. Co.*, 33 Cal. 4th 780, 794-95 (2004) (timely objection to improper closing argument must be made to preserve issue for appeal); *Weeks v. Baker & McKenzie*, 63 Cal. App. 4th 1128, 1163 (1998) (claim of misconduct foreclosed on appeal absent a timely and proper objection at trial).

Make An Offer Of Proof. If the court has excluded evidence by ruling on a motion in limine, or during trial, make sure that the record reveals just what that evidence would have been. That usually will take the form of a formal offer of proof. These require care. The offer must include a statement of the "substance of the evidence" (Fed. R. Evid. 103(a)(2); Cal. Evid. Code § 354(a)), including the names of the witnesses, the substance of their testimony, the items of evidence, and any necessary foundational facts to establish admissibility. *See James v. Bell Helicopter Co.*, 715 F.2d 166, 174-75 (5th Cir. 1983); *Gordon v. Nissan Motor Co.*, 170 Cal. App. 4th 1103, 1113-14 (2009); *United Sav. & Loan Ass'n v. Reeder Dev. Corp.*, 57 Cal. App. 3d 282, 294 (1976); *In re Mark C.*, 7 Cal. App. 4th 433, 444-45 (1992). Don't be afraid to be detailed; this offer of proof will be the basis for an appellate showing not only of the error in excluding the evidence but the prejudice caused by that ruling.

Try To Get The Judge To State The Reasons For Every Adverse Ruling. Many decisions trial judges make are exercises of discretion, which means that appellate courts won't reverse unless the ruling was an abuse of that discretion. You have a much better chance of securing a reversal if the ruling was based on an erroneous legal ground, or if the court applied the wrong standard in exercising discretion. For example, if the court excluded material evidence because it was hearsay, that ruling could lead to reversal if the evidence wasn't hearsay (or if an exception applied) and its exclusion was prejudicial; conversely, if the judge excluded the evidence as an exercise of discretion under Evidence Code Section 352, an appeal from that ruling is likely to be problematic. So don't let the record leave ambiguity as to the reasons the judge ruled against you. Politely ask the court to state the reason for the ruling.

Make A Detailed Record On Instructions, Both Objected-To And Proposed. In federal court, erroneous instructions must be objected to, in sufficient detail as to fairly draw the court's attention to the ground for the objection. Fed. R. Civ. P. 51(d); *Norwood v. Vance*, 591 F.3d 1062, 1066 (9th Cir. 2010). As noted earlier, under Section 647 of the Code of Civil Procedure, erroneous instructions are deemed objected to, but reliance on that principle can be risky: if the proposed instruction is generally correct but objectionable because it is vague, overbroad or underinclusive, the objecting party needs to propose a legally correct alternative. *Metcalf v. County of San Joaquin*, 42 Cal. 4th 1121, 1130-31 (2008). And in order to preserve a failure-to-instruct claim on appeal, you must be sure that the record includes a well-drafted, legally solid proposed instruction. *Mesecher v. County of San Diego*, 9 Cal. App. 4th 1677, 1686 (1992). Trial lawyers may forget to do this after the trial judge has indicated (perhaps in chambers) that the court will not give an instruction on such-and-such a subject, or on a defense. You can argue on appeal that this ruling made submitting an instruction "futile" but, here again, why knowingly run this risk? Draft the instruction with care so that your appeal brief can describe with clarity exactly what you contend the trial court should have told the jury.

Be Careful What You Propose. Lead trial counsel usually has a lot on his or her plate, and it is tempting to assign the task of drafting instructions to a junior lawyer — perhaps one who has remained at the office during the trial. Get all the help you want and need, but before those proposed instructions are submitted to the judge, lead counsel needs to pay careful attention to what is being requested. (This advice applies equally to the proposed special verdict form, a subject discussed separately below.) In California, appellate courts generally apply very tough standards when passing on a claim that the trial court erred in refusing to give an instruction. In California, the proposed instruction must be entirely correct. Coming close doesn't count, and if the proposed instruction is wrong in any material respect, the trial court is not required to correct the errors: "A trial court has no duty to modify or edit an instruction offered by either side in a civil case. If the instruction is incomplete or erroneous the trial judge may…properly refuse it." *Boeken v. Philip Morris, Inc.*, 127 Cal. App. 4th 1640, 1673 (2005) (quoting *Truman v. Thomas*, 27 Cal. 3d 285, 301 (1980)). (The rule in federal court is different, and District Courts sometimes have an obligation to repair erroneous proposed instructions. *See Merrick v. Paul Revere Life Ins. Co.*, 500 F.3d 1007, 1015-17 (9th Cir. 2007); 9C Charles A. Wright & Arthur R. Miller, *Federal Practice & Procedure* § 2552, at 28-31 & nn.20-21 (3d ed. 2008).) That means that if parts of the instruction are correct, but other parts are not, the court can reject the entire instruction. So where the instruction covers more than one point, consider breaking it up into two or more shorter instructions. The court is also not required to draft additional language to correct the omission of a necessary element of the rule covered by the proposed instruction; the instruction you proposed must therefore be complete as well as correct.

Be sure that the instructions you propose fit the facts of the case. Obvious as that point is, we had a case on appeal in which the parties stipulated to an instruction specifying the benefit-of-the-bargain rule in a fraud case

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governed by California Civil Code Section 3333. As mentioned above, that was a legally incorrect measure of damages, but the stipulation waived any objection to it. The bizarre thing about this case was that the plaintiff had not proven *any* benefit-of-the-bargain damages — the only damages claimed and proved were out-of-pocket damages, for which no instruction was given. Neither side's trial counsel seems to have noticed. Nor did the judge. Nor did the jury, which ignored the instruction and awarded out-of-pocket damages! (See what we mean when we say that lead counsel — not a junior lawyer toiling at the office who is not privy to the big picture — must pay careful attention to the instructions?)

Finally, if you are considering proposing an instruction that is not taken directly from CACI or the applicable federal model instructions (*see, e.g., Ninth Circuit Manual of Model Jury Instructions* — Civil (2007 ed.)) or at the very least well supported by precedent, be careful. To be sure, complex cases have a way of inviting instructions that have not found their way into the approved form books. But when you step outside the safe harbor of approved forms of instruction and precedent, the risk of reversible error goes up exponentially. Trial counsel needs to ask if that risk is worth running and to assess its magnitude.

Be Cautious About Stipulating. Good lawyers don't pick unnecessary fights. Indeed, there often are useful brownie points to be collected from both the trial judge and the jury for being cooperative and accommodative. It is often tempting to say, "That's fine, Judge." But there are consequences to stipulating. For example, although as earlier noted all instructions are deemed objected to in the California courts (Cal. Code Civ. Proc. § 647), a party's stipulation to the giving of an instruction (or a set of instructions) waives the right to complain of instructional error on appeal. If your objection to an instruction is overruled, you can subsequently stipulate that the form of the instruction is acceptable *in light of the court's ruling* (*see Mary M. v. City of Los Angeles*, 54 Cal. 3d 202, 212-13 (1991)), but you need to be clear that your stipulation does not amount to a withdrawal of your prior objection. There are many points in a trial in which counsel may, as a matter of courtesy to the court, agree that something may be done or not done given a prior ruling of the court; just be clear on the record that your agreement is based on respect for the court's prior ruling rather than acquiescence in it.

Pay Attention To The Special Verdict Form. There are many pitfalls for the plaintiff here, and many opportunities for the defendant. For one thing, where a special verdict form is used, the form must solicit a jury finding covering every element of each claim. *Trujillo v. N. County Transit Dist.*, 63 Cal. App. 4th 280, 285 (1998). In federal court, if the form does not cover a necessary element, the issue is deemed not to have been submitted to the jury, and the trial court may then make its own ruling on the omitted issue. If it does not do so expressly, on appeal the trial court will be deemed to have impliedly found in favor of the prevailing party on that issue. Fed. R. Civ. P. 49(a); Bradway v. Gonzales, 26 F.3d 313, 316-17 (2d Cir. 1994). If there are inconsistencies, ambiguities or questions about the special verdict form, the trial judge may be able to resolve them by submitting appropriate questions to the jury prior to discharge. *See Duk v. MGM Grand Hotel, Inc.*, 320 F.3d 1052, 1057-58 (9th Cir. 2003). Counsel for the prevailing party must be swift and vigilant, though, because juries are often discharged very quickly after the verdict is returned. In federal court, post-discharge objections are likely to be too late. *See DiBella v. Hopkins*, 403 F.3d 102, 117 (2d Cir. 2005). In California courts, if the inconsistencies are not resolved by pre-discharge inquiry of the jury or interpretation by the court, the judgment will be reversed. *Woodcock v. Fontana Scaffolding & Equip. Co.*, 69 Cal. 2d 452, 457 (1968); *Singh v. Southland Stone, U.S.A., Inc.*, 186 Cal. App. 4th 338, 358 (2010); *Zhang v. Am. Gem Seafoods, Inc.*, 339 F.3d 1020, 1037 (9th Cir. 2003).

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One frequently observed problem concerns damages where there are multiple claims or theories of liability. In such cases, the special verdict form usually asks the jury to proceed claim by claim, and directs the jury to state what the damages are for those claims that have been sustained. When it comes time to convert the verdict into a money judgment, the court will have to determine whether the various amounts are to be "stacked" — *i.e.*, cumulated — or, alternatively, whether they are redundant or overlapping. There are many ways that this can be handled, but it requires anticipating the question and dealing with it in the language of the special verdict form or in the instructions. If there is uncertainty about the amount the jury intended to award, the appellate court may have to reverse the damages award if it cannot resolve the uncertainty by interpretation. *Hallinan v. Prindle*, 220 Cal. 46, 56-57 (1934); *Zagami, Inc. v. James A. Crone, Inc.*, 160 Cal. App. 4th 1083, 1093-94 (2008); *Demkowski v. Lee*, 233 Cal. App. 3d 1251, 1263 (1991).

Make Sure The Trial Judge Has Made A Ruling On Every Issue, And That The Ruling Is On The Record. Appellate judges are understandably reluctant to reverse trial judges for a ruling they never made. It is not enough to make a motion *in limine*, or assert an objection; parties also bear responsibility for securing a ruling. *See Ramirez v. City of Buena Park*, 560 F.3d 1012, 1026 (9th Cir. 2009). The presumption of correctness will fill any gap; the appellate court will therefore presume that the trial court denied the motion in limine (exercising whatever discretion it had) or overruled the objection — unless the record affirmatively shows the contrary. *See, e.g., Kemp Bros. Constr., Inc. v. Titan Elec. Corp.*, 146 Cal. App. 4th 1474, 1477 (2007).

Trial judges often conduct business in chambers, without a reporter present. This often causes enormous

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headaches after the trial is over. Was evidence excluded as a result of something that happened in chambers? Was an instruction refused? Did the parties stipulate to something — the giving of an instruction, for example? The appellate court will not presume that you objected and that the objection was overruled. *See Boeken v. Philip Morris, Inc.*, 127 Cal.App. 4th 1640, 1671-72 (2009). We once had an appeal momentarily go south when the Court of Appeal *assumed* (in an opinion that was originally certified for publication) that defendant's trial counsel stipulated in chambers to a particular instruction. Although, fortunately, we were able to salvage the situation by a successful petition for rehearing that demonstrated the error of the court's assumption, the pain of the several weeks of uncertainty could have been avoided if the parties had taken the trouble of putting all in-chambers rulings and stipulations on the record. *See* L.A. Super. Ct. R. 3.132. There is an established procedure for doing this: either file a declaration setting out what occurred in chambers, or put it on the record in open court. *See People v. Pinholster*, 1 Cal. 4th 865, 922 (1992), disapproved on other grounds, *People v. Williams*, 49 Cal. 4th 405, 459 (2010); *Lipka v. Lipka*, 60 Cal. 2d 472, 480-81 (1963). Among other things, this process should yield a clear record as to what instructions were proposed, and the fate of each of them. If the parties stipulated as to the giving of particular instructions (or anything else), the record should make that clear; otherwise, it would be prudent to include a statement as to which instructions (again, or anything else) you objected.

Special Considerations In Cases Involving Contract Interpretation. If your case involves an issue of contract interpretation, you need to pay close attention to the issue of *how* and *by whom* the contract will be interpreted. Unless the contract interpretation you are advancing is implausible, you probably will want the judge to interpret it as an issue of law. But contract interpretation becomes an issue of fact, and a jury can interpret the contract, when there is a material conflict in the extrinsic evidence. *Parsons v. Bristol Dev. Co.*, 62 Cal. 2d 861, 865 (1965); *F.B.T. Prods., LLC v. Aftermath Records*, 621 F.3d 958, 963-64 (9th Cir. 2010), *cert. denied*, 131 S. Ct. 1677 (2011). In such cases, the appellate court does not apply the usual *de novo* standard of review applicable to issues of law; instead, it will uphold the jury's interpretation unless it is unreasonable. *Estate of Kaila*, 94 Cal.App. 4th 1122, 1133 n.6 (2001); *Morey v. Vannucci*, 64 Cal.App. 4th 904, 913 (1998).

If you want to avoid jury interpretation of the contract (and the consequent loss of meaningful appellate review on the interpretation issue), you need to persuade the trial judge that there are no material extrinsic fact disputes. Opposing counsel may claim that the material fact dispute is over the inference that should be drawn from historical facts that are themselves undisputed; that's not enough to convert a question of law into a question of fact. *Parsons*, 62 Cal. 2d at 865. Unless there is a real conflict in the parol evidence — such as who said what in the negotiations — the issue of interpretation is a question of law for the court. *See F.B.T. Prods.*, 621 F.3d at 963-64; *United Commercial Ins. Serv., Inc. v. Paymaster Corp.*, 962 F.2d 853, 856 (9th Cir. 1992)

If there *is* a genuine dispute of fact, you can urge the trial judge to submit that factual dispute to the jury by special interrogatory, while retaining for the court the responsibility of interpreting the contract in light of the jury's determinations on those factual issues. *See, e.g., Med. Operations Mgmt., Inc. v. Nat'l Health Labs., Inc.*, 176 Cal.App. 3d 886, 890-92 (1986). That approach preserves *de novo* appellate review on the ultimate question of the contract's meaning. Unfortunately, the trial court has discretion to reject such a request, and therefore to submit the whole question of contract interpretation to the jury. *City of Hope Nat'l Med. Ctr. v. Genentech, Inc.*, 43 Cal. 4th 375, 395-97 (2008). That was the result in *City of Hope*, in which a jury was allowed to give a commercially strange — though evidently not wholly "unreasonable" — interpretation of a complex commercial agreement negotiated and drafted by counsel.

Make Sure Closing Argument Guides The Jury Through Instructions And Special Verdict Form. We were engaged to draft a petition for certiorari to the U.S. Supreme Court in an antitrust case. The trial court had severed the issue of liability from damages. Shortly before the case went to the jury in the liability phase, the court decided to submit a special interrogatory, asking the jury if it agreed that — in the event it found liability — the appropriate measure of damages (which would be determined in the second phase) would be a formula in which A is subtracted from B. Although that formula seemed intuitively plausible at first blush, in fact there were complications that should have led to a "no" answer to that question. We scoured the transcript of the closing argument to see how defense counsel — who had a reputation as one of the country's leading business trial lawyers — tried to explain to the jury why the seemingly obvious "yes" answer would be wrong. To our surprise (and horror), there was no such argument. Even though counsel knew that question was going to be decided by the jury — and even though a "yes" answer would result in a phase 2 damages award of about $1 *billion* — counsel did not devote one minute of closing argument to that crucial issue.

Surprising as this is, in fact we have seen many transcripts of closing arguments — usually in cases with highly qualified trial lawyers — in which counsel spends little or no time walking the jury through the special verdict form. Similarly, we have seen many closing arguments in which counsel fails to discuss key instructions in order to explain how those instructions, applied to the facts of the case, should lead to a verdict in favor of their client. Given the unfamiliarity of most jurors with the legal concepts embodied in jury instructions and special verdict forms, trial counsel should always seek to give the jury a little self-serving help.

Finally, counsel should use closing argument to clarify

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any ambiguity in the special verdict form. Not only is this good advocacy, but the failure to do so may waive a claim on appeal that the form confused the jurors. *See Bly-Magee v. Budget Rent-A-Car Corp.*, 24 Cal. App. 4th 318, 325-26 (1994).

In State Court Bench Trials, Request A Statement Of Decision If You Contemplate Appealing The Judgment. In California, when a case is tried to the court, the rule on appeal is that in the absence of a statement of decision, the judgment will be treated just as the court would treat a jury's general verdict. That means that the court will apply the doctrine of "implied findings" by presuming that the trial court found every fact necessary to sustain the verdict in favor of the prevailing party. *See, e.g., Michael U. v. Jamie B.*, 39 Cal. 3d 787, 792-93 (1985). If you lose and may wish to appeal, then to avoid the implication of findings you need to make a timely (*see* Cal. R. Ct. 3.1590) demand for a Statement of Decision so that the only findings attributable to the trial judge will be findings that the court actually made. The procedure is arcane and counter-intuitive. You need to ask twice: first, you must demand a statement of decision, and then after you have the tentative statement of decision, you must object to findings with which you disagree. *See Californians for Population Stabilization v. Hewlett-Packard Co.*, 58 Cal. App. 4th 273, 291 (19976). Failure to dance this "two-step" will trigger the doctrine of implied findings. *In re Marriage of Arceneaux*, 51 Cal. 3d 1130 (1990).

The prevailing party needs to pay careful attention here. If the other party has requested a statement of decision, and has identified particular factual issues on which it wants findings, the court's failure to make such a finding is reversible error if it is on a "controverted issue." Cal. Code Civ. Proc. § 634; *In re Marriage of Hardin*, 38 Cal. App. 4th 448, 453 & n.4 (1995). The prevailing party should be sure that the trial court makes clear findings on every material fact necessary to support the judgment, especially on issues for which the other party has made a specific request for a finding.

Make Objections To Jury Verdict Before Jury Is Discharged. If the jury's verdict is ambiguous, or if there are any other questions as to its legal sufficiency, raise the issue by an appropriate objection before the jury is discharged. Failure to do so may result in a finding that the objection was waived by failure to raise it when the problem might have been corrected before the jury was sent home. *See Keener v. Jeld-Wen, Inc.*, 46 Cal. 4th 247, 264-68 (2009) (failure to object to incomplete polling of jury prior to discharge waives issue); *Zagami, Inc. v. James A. Crone, Inc.*, 160 Cal. App. 4th 1083, 1092 & n.4 (2008); *Resolution Trust Corp. v. Stone*, 998 F.2d 1534, 1545 (10th Cir. 1993) (failure to raise verdict inconsistency issue prior to discharge waives objection to general verdict, but not to special verdict).

Post-Trial Motions (And Motions For Directed Verdict Or JMOL). As a general matter, issues of law do not have to be raised by motion at the close of the evidence, or by post-trial motion, *if they have been raised previously*. That qualification is important, because in some circumstances issues of law that have never been raised in the trial court may not be raised for the first time on appeal. (That's a complicated subject beyond the scope of this article; suffice it to say that you ought to make every effort, at the earliest possible time, to raise in the trial court every issue of law that might be raised on appeal, and be sure that the trial court has made a definitive ruling on each issue.)

In federal court, a different rule governs claims that the evidence is insufficient to support the verdict. Such claims cannot be made on appeal unless they are preserved by appropriate motions in the trial court. That means a motion for judgment as a matter of law ("JMOL") must be made at the close of evidence and before submission to the jury (Fed. R. Civ. P. 50(a)). If that motion is denied and the jury returns an adverse verdict, then the issue must be raised again by a renewed JMOL motion under Rule 50(b). Failure to file the appropriate JMOL motions pre-and post-verdict precludes appellate review for insufficiency of evidence (which of course would include a claim of insufficient or excessive damages). *Ortiz v. Jordan*, — U.S. —, 131 S. Ct. 884, 891-92 (2011); *Unitherm Food Sys., Inc. v. Swift-Eckrich, Inc.*, 546 U.S. 394, 400-01 (2006); *Nitco Holding Corp. v. Boujikian*, 491 F.3d 1086, 1089-90 (9th Cir. 2007). Any doubts as to whether JMOL motions should be filed should be resolved in favor of filing them, just to avoid possible disputes. We recently had a case in which there had been extensive pre-trial proceedings over the meaning of the contract at issue, and the trial court had (over our client's objection) decided to leave the question of contract interpretation to the jury. After the jury ruled against our client, trial counsel made a JMOL motion, but that motion did not include the legal issue of whether the court should have interpreted the contract and what the correct interpretation should be. Our appeal on the contract interpretation issue was straightforward and relatively easy, but we were met with a vigorous claim that trial counsel had forfeited the client's right to raise the contract interpretation issue on appeal by failing to include that issue in the JMOL motion. Fortunately, the Ninth Circuit held that the issue of contract interpretation was a question of law that could be raised even though no JMOL motion on that issue had been filed. *See F.B.T. Prods.*, 621 F.3d at 962-63 (failure to file a JMOL did not waive a challenge to a contract issue that presented a legal question and did not rest on the sufficiency of evidence presented to the jury). But much wear and tear could have been avoided had a JMOL been filed on that issue.

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In California courts, no pre-verdict or post-trial motion need be filed to preserve a claim of legal error. *Tahoe Nat'l Bank v. Phillips*, 4 Cal. 3d 11, 21-24 (1971); *Estate of*

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Barber, 49 Cal. 2d 112, 118-19 (1957). However, there is a significant exception: a motion for new trial *must* be made to preserve an appellate claim of excessive (or insufficient) damages. *Jamison v. Jamison*, 164 Cal. App. 4th 714, 719-20 (2008); *County of Los Angeles v. S. California Edison Co.*, 112 Cal. App. 4th 1108, 1121 (2003); Cal. Code Civ. Proc. § 657(5).

New trial orders in state court require special scrutiny. Where a motion for new trial has been granted, counsel should promptly review the order to be sure that it meets the statutory requirements. Section 657 of the Code of Civil Procedure requires an order granting a new trial to specify the ground(s) of the ruling *and* the court's reason(s) for granting the new trial upon each such ground. If the court fails to do this, the appellate court cannot affirm the order granting a new trial on either the ground of insufficiency of the evidence to support the verdict or upon the ground of excessive or inadequate damages. *Id.* And in reviewing the other possible grounds on which the new trial order might rest, the appellate court will not apply the usual abuse of discretion standard, but instead will review the record independently and reverse the new trial order if the evidence is in conflict. *Oakland Raiders v. NFL*, 41 Cal. 4th 624 (2007). In that case, the trial court granted a new trial on the ground of juror misconduct, but failed to specify reasons. The Supreme Court independently reviewed the record and reversed the grant of a new trial because the "testimonial evidence [of misconduct]…is sharply conflicting on every material issue" and, as a consequence, the moving party "failed to discharge [its] burden to persuade us of jury misconduct warranting the grant of a new trial." *Id.* at 642.

Protecting The Record Sometimes Means "Be Cautious." In the midst of the battle that is a trial, counsel understandably look for every edge. As zealous advocates, it is tempting to seek the exclusion of every bit of evidence that could sting, to push hard for the admission of everything that could help, to ask for an unprecedented instruction or to seek anything else that could assist your case. In the cold light of briefing an appeal, you may wonder whether some of those decisions were such a good idea. Again and again, we see instances of trial lawyers who created problems for their client by pushing too hard. There's a need to balance the value of the ruling you seek in the battle before the jury with the risk that an appellate court will think it was prejudicial error. Trial counsel ultimately has to make the call — and sometimes the risk is worth running; as one trial lawyer put it to us, "most of the time I just want to be sure I get a favorable jury verdict, and take my chances with the appeal." We don't necessarily disagree; the point here is that thought should be given to the possible appellate consequences of "winning" the point before the trial judge.

There may be collateral benefits in backing off. The message in a graceful withdrawal — "Your Honor, in light of counsel's objections to my proposed instruction, I think that this may be a gray area in the law and I would prefer not to run the risk that the appellate court would disagree with my position; so I withdraw the instruction" — is that the trial judge can rely on you to protect the record. That's a pretty comfortable position to occupy.

Avoid Or Explain Inconsistent Positions. Another common problem we see, particularly in long-running and fiercely fought cases, is lack of consistency in positions taken in the trial court. It does not bolster one's position on appeal to have taken inconsistent or even conflicting positions on issues (or even facts!) in the course of various skirmishes. Be mindful of this pitfall, particularly in substantial cases with large teams because lack of coordination can lead to an unflattering record. If you do take inconsistent positions, where possible make a record as to the reasons for the change so that on appeal, your explanation doesn't sound like a post hoc rationalization.

Don't Hesitate To Call On Your Appellate Partners Or Colleagues For Advice Before Or During Trial. Many of you have partners who specialize in appeals who may become involved in the eventual appeal. Others may work with an appellate specialist who will become involved down the road. If you wait until after the trial to involve them, you are missing an opportunity to get some good advice and help with shaping the issues on appeal and with preserving the record. Most appellate specialists will be only too happy to lend a hand to your trial preparations or trial work. We have to confess that being asked to participate before a verdict has, in our experience, been the exception rather than the rule, but it makes sense and we wish it happened more often. In one recent case, we consulted in the last couple of weeks of a very long trial, and were able to suggest certain instructions and an approach to a special verdict procedure that set the stage for interesting issues on appeal.

In other cases, we have been brought in just after an adverse verdict, in time to consult on — and sometimes even draft — the post-trial motions. Sometimes, issues that haven't been properly (or fully) raised during the trial can be raised, and thereby preserved for appeal, in the post-trial motions. So it's gratifying — and invariably productive — when we have the opportunity to participate in that important phase of the case rather than wait until the proceedings in the trial court have been concluded.

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