

Trade Secret Litigation: Strategic Use of Verdict Forms

by [Sara C. Fish](#) and [Christopher O. Green](#), Fish & Richardson P.C., with Practical Law Commercial Litigation

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A Practice Note discussing the use of verdict forms with specific questions when defending trade secret misappropriation cases. This Note addresses the difference between general and special verdict forms, the risks of general verdict forms, the benefits and risks of using specific questions on verdict forms, and preparing specific questions for verdict forms in trade secret cases.

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Verdict forms with specific questions in a trade secret case can be a critical tool in a jury trial to both achieve a favorable outcome and to challenge an unfavorable outcome on appeal. Trade secret cases often involve multiple claims and defendants, especially in federal court. For example, it is not uncommon for plaintiffs to assert state or federal law trade secret misappropriation claims with copyright or trademark infringement, breach of contract, tortious interference, and other business tort claims. Additionally, determining damages in trade secret misappropriation cases is often complex because of the inherently fact-specific and abstract nature of trade secrets. Multiple theories of recovery permitted under differing state laws may further complicate the damages analysis. Because of these complexities and the fact-specific nature of trade secret claims and related damages, a general verdict form that simply asks the jury for their verdict is typically not the best option for a defendant in a trade secret trial.

This Note discusses the strategic use of verdict forms in a trade secret case, including the risks of using a general verdict form for the defense and the benefits and risks of a verdict form that asks the jury to answer specific factual questions. It also provides practical tips and considerations when drafting a verdict form in a trade secret case. While this Note focuses on trade secret verdict forms in federal court, the practical tips and analysis in this Note may also apply to state court trade secret cases.

For more on drafting verdict forms in federal court generally, see [Practice Note, Drafting Jury Instructions and Verdict Forms: Verdict Form](#). For an overview of trade secret litigation, see [Practice Note, Trade Secrets Litigation](#).

General Verdicts and Special Verdicts

Three broad categories of jury verdicts are available in civil litigation in federal court:

- A general verdict, where the jury decides on legal claims (and sometimes damages) without providing the factual basis or reasoning behind the verdict (*Toney v. Sullivan*, 2022 WL 1044920, at *2 (D. Kan. Apr. 7, 2022)).
- A special verdict, where the jury makes specific findings on factual questions, without declaring which party prevails. The trial court then applies the law to the jury's answers and renders a verdict. The court must give instructions and explanations to enable the jury to make its findings on each submitted factual issue. (FRCP 49(a).)
- A general verdict with answers to written questions (sometimes referred to as interrogatories), which is a hybrid between a general verdict and a special verdict. The jury answers specific factual questions, and also declares which party prevails. With this type of verdict form, the court must:
 - give instructions and explanations to enable the jury to render its verdict and answer the questions in writing; and
 - direct the jury to do both.

(FRCP 49(b).)

The distinction between a special and general verdict under Federal Rule of Civil Procedure (FRCP) 49 is sometimes unclear (see, for example, *Team Contractors, L.L.C. v. Waypoint Nola, L.L.C.*, 976 F.3d 509, 517 n.2 (5th Cir. 2020); *Lavoie v. Pac. Press & Shear Co., a Div. of Canron Corp.*, 975 F.2d 48, 52-53 (2d Cir. 1992)). Depending on the court, the inclusion of a question on a general verdict form asking for the amount of damages sustained by the plaintiff may or may not convert a general verdict to a general verdict with written questions (*Toney*, 2022 WL 1044920, at *2 (discussing various approaches by federal courts and finding that a verdict announcing the ultimate legal result of claim and the amount of damages was a general verdict)).

In practice, federal trade secret cases typically involve general verdict forms or general verdict forms with answers to written questions. For example, counsel can request that a verdict form include, for example:

- Carefully crafted factual "yes" or "no" questions about each element of a trade secret claim or defense, which may make it easier to guide the jury to a certain verdict or reveal a basis for challenging the verdict if unfavorable.
- Specific questions on damages for each alleged trade secret or claim, and in multi-defendant cases, for each defendant, which may help minimize damages for a defendant.

Risks of a General Verdict Form

Using a purely general verdict form can have negative consequences for the defense in a trade secret case because the burden a plaintiff must meet to obtain a favorable general verdict is often much lower when the jury does not have to answer questions about the facts they relied on or the damages they award. A general verdict form may allow the plaintiff to:

- Ultimately prevail in a trade secret misappropriation case:
 - despite presenting relatively broad evidence at trial; and

- without having to present or prove specific facts on each element of a trade secret claim.
- Recover damages using relatively broad damages evidence and against multiple defendants without:
 - a specific determination of liability for each defendant;
 - providing a precise measurement of damages; or
 - identifying a breakdown of damages each defendant allegedly caused.

Further, in a case with multiple theories or claims, a court is more likely to uphold a general verdict for the plaintiff without specific questions if it finds sufficient evidence to support any single trade secret claim or theory. (See, for example, *Masters v. UHS of Del., Inc.*, 631 F.3d 464, 475 (8th Cir. 2011) (noting that if a jury's general verdict is supported by sufficient evidence, no new trial is warranted); *Equate Media, Inc. v. Suthar*, 2023 WL 7297328, at *1-2 (9th Cir. Nov. 6, 2023) (ordering trial court to reinstate general verdict for plaintiffs in case involving multiple theories because sufficient evidence supported at least one trade secret theory and declining to decide validity of other asserted trade secrets in part because of general verdict form); *Crabar/GBF, Inc. v. Wright*, 2023 WL 6125519, at *5-6 (D. Neb. Sept. 19, 2023) (on appeal) (denying defendants' post-trial motions challenging general verdict for plaintiff on multiple claims, including award of punitive damages on trade secret claim, because sufficient evidence supported that at least some information could have been a trade secret, even though general verdict form did not indicate what information the jury considered trade secrets)).

In addition to making it difficult to overcome liability, the use of a general verdict form without questions about damages can also make it difficult for a defendant to successfully challenge a jury's damages award (see, for example, *Equate Media*, 2023 WL 7297328, at *1-2 (upholding general verdict as to damages because defendants did not ask to apportion damages among plaintiffs' various theories and evidence of damages was not tied to each trade secret theory separately); *Crabar/GBF*, 2023 WL 6125519, at *12-13 (upholding jury's multiple, separate damages awards for claims arising from same facts and finding no improper double recovery where jury was presumed to have followed instructions on general verdict form that plaintiff could only be compensated once for any injuries)).

Benefits of Specific Questions on Verdict Forms

Because trade secret cases are often closely intertwined with other legal claims and issues, juries may have difficulty distinguishing facts that are important to a trade secret claim from facts that are more relevant to other claims. However, strategic use of specific questions on a verdict form may enable a jury to more easily focus on the facts relevant to a trade secret claim when deciding liability on that claim, while allowing counsel to highlight key facts and circumstances that expose the weaknesses of an opponent's case.

A well drafted verdict form in a trade secret case typically contains questions that require a jury to make specific, ultimate conclusions on numerous factual issues, including the fact-intensive elements of a trade secret misappropriation claim and damages. This can benefit a party in various ways, such as by:

- Forcing the plaintiff to present specific factual evidence to support each legal element of the claim (and for each alleged trade secret) to be able to prevail in the jury's mind.

- Offering the jury more opportunities to determine that the defendant should prevail if a plaintiff has not proven each fact required to support each element of the claim for each trade secret.
- Requiring the jury to think more carefully about whether a particular defendant is liable for trade secret misappropriation and the extent of damages the defendant did or did not cause, especially in multi-defendant cases involving various claims.
- Helping the jury follow the multi-pronged instructions required in trade secret cases in a sequential manner, which may enable the jury to more easily reach a verdict for the defendant.
- Providing a clearer picture of the bases for the verdict, which:
 - allows the trial court to consider specific, underlying factual determinations from the jury when making ultimate conclusions on issues of law;
 - may make it easier for the defendant to bring and prevail on post-judgment motions, which generally require movants to meet very high standards to successfully challenge a jury verdict based on the evidence (for more on post-judgment motions in federal court, including motions for judgment as a matter of law under [FRCP 50](#) and motions for a new trial under [FRCP 59](#), see [Post-Judgment Motion Toolkit \(Federal\)](#));
 - may reveal additional issues for a defendant to challenge in post-judgment motions or on appeal; and
 - is more useful to appellate courts in resolving jury verdict challenges on appeal.

Risks of Specific Questions on Verdict Forms

Despite the potential benefits to the defense, the use of special verdict forms or general verdict forms with written questions in trade secret cases also carries certain risks, such as:

- Opening the door to confusing the jury as to how to answer each of the numerous questions (see, for example, *John Bean Techs. Corp. v. B GSE Grp., LLC*, 2023 WL 6164322, at *6 (D. Utah Sept. 21, 2023)).
- Creating the potential for inconsistencies with other answers or with the ultimate verdict itself, as [FRCP 49\(b\)\(3\)-\(4\)](#) contemplates.
- Leading to an unfavorable verdict if a question on the form is not carefully worded or structured (see, for example, *Highland Consulting Grp., Inc. v. Minjares*, 74 F.4th 1352, 1353, 1357-60 (11th Cir. 2023) (question to jury on special verdict form asking if plaintiff proved it owned "any" of the trade secrets at issue led to court upholding verdict in part because evidence was sufficient to show that plaintiff owned at least one trade secret); *Avery Dennison Corp. v. Four Pillars Enter. Co.*, 45 F. App'x 479, 488-89 (6th Cir. 2002) (noting "strangeness" of verdict form but upholding separate damages award for trade secret misappropriation in part because plaintiff's argument was supported by jury's responses to interrogatories on verdict form)).

- Making it easier to determine what the jury's inferences were and the specific evidence on which they based their verdict, which may:
 - make it harder for a defendant to argue after trial or on appeal what those inferences should have been based on the evidence presented at trial; and
 - result in a court being more likely to deny relief when required to draw all reasonable factual inferences in the non-movant's favor, such as on a defendant's motion for judgment as a matter of law under [FRCP 50](#) (see, for example, *Highland Consulting Grp.*, 74 F.4th at 1358 n.2).

Depending on the unique circumstances of every trade secret case, counsel for the defendant must carefully balance these risks with the benefits of asking a jury specific factual questions (see [Benefits of Specific Questions on Verdict Forms](#)).

Preparing Questions on Trade Secret Claims for the Verdict Form

Once the defense counsel decides that a special verdict form or general verdict form with written questions to the jury is beneficial, a variety of options exist for crafting proposed verdict forms that address key aspects of trade secret claims and that may help better preserve critical issues for post-judgment motions and appeals. Counsel should keep in mind that the court has wide discretion in the use of a verdict form, and may not necessarily approve the exact form that a defendant proposes, especially if other parties object (see, for example, *Hirston v. Costco Wholesale Corp.*, 2022 WL 1555220, at *6 (S.D. Ind. May 17, 2022); see also [Practice Note, Drafting Jury Instructions and Verdict Forms: Verdict Form](#)).

Tips for Drafting

To address the fact-intensive elements of a trade secret claim, counsel often must draft unique verdict forms for every case. However, when drafting special verdict forms or written questions for the jury, counsel should generally:

- Draft questions as simply and clearly as possible to avoid confusing the jury, while including enough detail to allow the jury to distinguish which facts relate to which element, claim, defense, and, in multi-defendant cases, which defendant.
- Avoid creating an overly long and complicated verdict form. Counsel should try to include only strategically chosen questions that highlight key features in the defense and expose weaknesses in the plaintiff's case.

Specific considerations for defense counsel when drafting the form for a trade secret case include:

- If multiple trade secrets are at issue, whether they can be easily identified and separated into individual concepts or related groups and whether it may be beneficial to the defense to isolate each concept or group.
- Whether evidence exists to support damages only on certain trade secrets, which may warrant structuring the form to isolate each trade secret to help minimize damages.
- In multi-defendant cases, whether it is beneficial to:

- group the defendants together on the form;
 - ask specific, different questions with respect to each defendant; or
 - ask the same questions in different sections for each defendant.
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- Given the evidence in the case, whether it is beneficial to the defense for the jury to separately make findings on each legal element of each claim for each separate trade secret, or to make findings only on some of the elements. One approach to help make this determination is to evaluate the available defenses and evidence on each element, and include specific questions only on those elements for which the defenses are strongest. This approach can also highlight the weakness of the plaintiff's case on those elements. For example, if the defense can viably argue that the plaintiff took insufficient steps to maintain secrecy, the defense should consider asking the jury to determine whether any alleged trade secrets were actually secret on the verdict form. Similarly, if there is a viable argument that the defendant obtained the alleged trade secrets publicly or with permission, the defense counsel should consider asking specific questions regarding misappropriation on the verdict form.
 - In cases involving multiple theories of liability or damages, whether to include separate, individual questions on each legal theory to identify more clearly which claims are susceptible to a challenge on appeal. For example, the feasibility of itemizing individual bases for both liability and damages depends on whether the trade secrets were reasonably separable into individual concepts or related groups. Likewise, whether evidence for apportioning damages to each individual trade secret exists (or not) will influence the form's structure.

Common Approaches to Verdict Forms in Trade Secret Misappropriation Cases

Defense counsel has a wide variety of options when proposing a verdict form in a trade secret misappropriation case. For example, counsel may propose a verdict form that asks the jury to decide:

- Whether the plaintiff has proven liability on the trade secret misappropriation claim for each defendant separately, and, if so, the amount of damages for each defendant, without asking specific questions on the elements of the claim (see, for example, *Dasso Int'l, Inc. v. Moso N. Am., Inc.*, 17-cv-01574, D.E. 438, at 6-7 (D. Del. Jun. 9, 2023) (verdict form); *Crabar/GBF*, 16-cv-537, D.E. 505, at 2-3, 6, 8, 10, 12 (D. Neb. Apr. 12, 2023) (verdict form); *Equate Media*, 21-cv-00314, D.E. 157, at 2-6 (C.D. Cal. May 27, 2022) (verdict form)).
- In a separate question for each asserted trade secret, the amount of profits the defendant earned based on misappropriation of each, which may help limit damages in cases involving multiple trade secrets (see, for example, *Ford Motor Co. v. InterMotive, Inc.*, 17-cv-11584, D.E. 247, at 5 (E.D. Mich. Nov. 2, 2023) (verdict form)).
- Additional questions on damages, such as asking the jury to:
 - answer whether misappropriation occurred during relevant time frames for each defendant;
 - decide on an amount of compensatory damages for each defendant; and

- expressly determine whether there was any "overlap between" trade secret damages and damages for other claims at issue.

(See, for example, *Softketeers, Inc. v. Regal W. Corp.*, 19-cv-00519, D.E. 823, at 8-15 (C.D. Cal. Sept. 24, 2021) (verdict form).)

- Whether the plaintiff established each element of a trade secret claim, with the verdict form containing separate questions for each element, including whether:
 - the plaintiff owned the trade secret;
 - the trade secret was not generally known and provided economic value;
 - the trade secret was not readily discoverable through proper means;
 - the trade secret information derives independent economic value from being secret;
 - the plaintiff took reasonable steps to keep information secret;
 - the trade secret information relates to an actual product or service;
 - the trade secret information was acquired without express or implied consent;
 - the defendant knew or should have known the trade secret information was acquired by improper means;
 - the defendant should have known of a duty to keep the information secret; and
 - the plaintiff established compensatory damages and, as appropriate (such as under statute), exemplary damages.

(See, for example, *Highland Consulting Group*, 19-cv-81636, D.E. 228, at 1-5 (S.D. Fla. Jan. 14, 2022) (verdict form).)

- Questions on only some of the specific elements of a trade secret misappropriation claim, such as whether:
 - the asserted information was in fact a trade secret, and, if so, whether the defendant misappropriated the trade secret (see, for example, *Ford Motor Co.*, 17-cv-11584, D.E. 247, at 5; see also *Radiant Global Logistics, Inc. v. Furstenau*, 18-cv-12783, D.E. 234, at 4-5 (E.D. Mich. Oct. 6, 2023) (verdict form) (jury answered "no" to question of whether plaintiff proved it owned information that qualified as a trade secret, and therefore did not answer remaining questions as to whether defendants misappropriated information); or
 - each defendant demonstrated the requisite intent (see, for example, *John Bean Techs. Corp.*, 17-cv-142, D.E. 262, at 2 (D. Utah Oct. 6, 2022) (amended verdict form); *Softketeers*, 19-cv-00519, D.E. 823, at 9).

Counsel may also include some specific instructions to the jury on the form to aid them in answering the questions. For example, the verdict form may:

- Preface questions by referencing specific instructions previously given to the jury (for example, "As explained in instruction number 5, the plaintiff may only be compensated once for any injuries proven").
- Instruct the jury whether to answer certain questions based on previous responses (for example, "Answer this question only if you find in favor of the plaintiff in question number 4" or "If you found in favor of plaintiff on question 4, you have completed your deliberation for this claim and may skip to question number 6").

(See, for example, *Crabar/GBF*, 16-cv-537, D.E. 505, at 6; *Softketeers*, 19-cv-00519, D.E. 823, at 7.)

For more on drafting jury instructions in federal court generally, see [Practice Note, Drafting Jury Instructions and Verdict Forms](#).