Protecting the Record for State Criminal & Civil Appeals

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I. Errors of Omission:

A. Not moving to strike testimony or requesting a curing instruction after a sustained objection

> Evidence Code § 766: A witness must give responsive answers to questions, and answers that are not responsive shall be stricken on motion of any party.

If the cat's out of the bag, how do you mitigate the damage, i.e., what the jury heard? Does asking the judge to "strike" the testimony and to order the jury to disregard it make any difference? In the right case, it can. First, failure to move to strike forfeits any claim of error. (*Pineda v. Los Angeles Turf Club, Inc*. (1980) 112 Cal.App.3d 53, 61 [failure to object and make motion to strike when testimony is given results in failure to preserve the point for appeal].) Second, if the trial court *denies* the request, a record is made to support the claim of evidentiary error, including preservation of the issue (although the abuse of discretion standard will apply to the refusal to grant the motion to strike). Third, while there's no un-ringing the bell, if the court grants the request and orders the jury to disregard the evidence, there is a means to stop the bell from ringing again *on appeal*—so long as you protected the record—in this case by moving to strike. For example, in the right case, where the only evidence to support an element of a claim is testimonial evidence that was stricken upon request, then that evidence is not "substantial" evidence to support a verdict. Fourth, bear in mind that all the foregoing notwithstanding, claims of error are subject to the prejudicial error standard. (See *Young v. Tassop* (1941) 47 Cal.App.2d 557; *Rayii v. Gatica* (2013) 218 Cal.App.4th 1402; *People v. Virgil* (2011) 51 Cal.4th 1210.)

B. Failing to obtain a final ruling on a motion in limine to exclude evidence

> Evidence Code § 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:

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> (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 ground stated and that the error or errors complained of resulted in a miscarriage of justice.

A motion in limine to exclude evidence will preserve the objection for appellate review if the following criteria are met: "(1) a specific legal ground for exclusion is advanced and subsequently raised on appeal; (2) the motion is directed to a particular, identifiable body of evidence; and (3) the motion is made at a time before or during trial when the trial judge can determine the evidentiary question in its appropriate context." (*People v. Morris* (1991) 53 Cal.3d 152, 190.) "When such a motion is made and denied, the issue is preserved for appeal." (*Ibid.*)

It is sometimes (indeed, often) the case, however, that a trial court will defer ruling on a motion in limine for a variety of reasons—e.g., admissibility of the challenged evidence depends on whether other evidence is ultimately presented to the jury, or the body of evidence being challenged cannot be identified with sufficient particularity before trial. When that happens, counsel must renew the objection (in a manner that satisfies the requirements of Evidence Code § 353(a)) when the pertinent evidence is actually offered at trial and obtain a final ruling in order to protect the record on appeal. (See *id.* at p. 191.)

C. Failing to include every ground (including federal constitutional grounds) for an objection

The California Supreme Court has enforced with a vengeance the statutory rule limiting appellate review to "the specific ground" stated in the objection or motion. (Evidence Code § 353.) The Court has frequently refused to consider the federal constitutional infringements caused by various evidentiary rulings (e.g., hearsay, other offenses) where the objection at trial referred only to the state law ground. (See, e.g., *People v. Barnett* (1998) 17 Cal.4th 1044, 1119 fn. 54; *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1116, fn. 20; *People v. Ashmus* (1991) 54 Cal.3d 932, 972, fn. 10.) In *People v. Partida* (2005) 27 Cal.4th 428, 431, the Court retreated somewhat from this hard line, holding that on appeal a defendant may argue that a state-law evidentiary violation (e.g., Evidence Code § 352) had the additional legal consequence of violating the federal constitution (e.g., due process), as long as the constitutional claim is not based on a reason not included in the trial court objection.

As many constitutional claims require exclusion of evidence for reasons different than the reasons for exclusion under state law, the better practice remains to assert in the trial court both the state and federal grounds for the error. While until recently, confrontation clause argument closely paralleled state hearsay rules, that is no longer true after *Crawford v. Washington* (2004) 541 U.S. 36. Evidence which would be admissible under the terms of certain hearsay exceptions will often still violate the confrontation clause under the revised standards articulated in *Crawford*. For instance, in an elder abuse case, a challenge under Evidence Code § 1380 to the admission of an unavailable witness's statement on the basis that it was not made under circumstances indicating trustworthiness, would not preserve a *Crawford* challenge.

Consequently, counsel should always state on the record every potentially applicable ground for his or her objection or motion. For example, in opposing admission of priors or other misconduct, argue *both* that the evidence violates the specific statutes limiting "other offenses" (Evidence Code § 1101 et seq.) *and* that the prejudicial impact of the evidence outweighs its probative value (Evidence Code § 352). Likewise, counsel should be sure to "federalize" their objections. As a matter of course, whenever raising a traditional state evidentiary objection (e.g., hearsay, other offenses) or challenging a restriction on defense evidence, also assert the analogous federal constitutional claim. (Cross-refer "Federalization Table" published by the First District Appellate Project in February 2005; available online at https://www.fdap.org/wp-content/uploads/2020/11/FederalizationChart02-05.pdf.)

D. Omitting the offer of proof

> Evidence Code § 354(a): 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 . . . [t]he substance, purpose, and relevance of the excluded evidence was made known to the court by the questions asked, an offer of proof, or by any other means[.]

You're in trial, and your key witness, perhaps an expert, is precluded from testifying on certain issues or in certain areas. If that happens, the factfinder will not have the evidence. And on appeal, you need to show not just error but prejudicial error. But how, if your witness is not allowed to speak? First, at the time your witness is being precluded from testifying at trial—as you are hearing the judge say "objection sustained"—request a sidebar for an offer of proof that is on the record (reporter present taking it down). Make a succinct statement establishing the *substance, purpose*, and *relevance* of the proffered evidence.

If the court still rules against you, then as a prophylactic measure for appeal, as soon as possible, prepare a detailed *written* offer of proof, citing to deposition transcripts, any prior hearing regarding your witness's testimony, and so on. File or lodge this if the clerk will not file it, no later than the next day when possible, and alert the court to the filing, asking the court to revisit the issue. Even if the court rejects you, the detailed written offer of proof will become part of the record on appeal—as will the fact that the trial judge was aware of its existence.

This level of effort and detail will not always be necessary. For example, if the scope of your witness's testimony was documented as part of a motion in limine and the exclusionary ruling occurs prior to trial. Usually when that happens, you know going in whether the witness will be allowed to testify and in what areas. But if you get blind-sided *during trial*, consider documenting the issue using a written offer of proof. You're making a record to establish error in exclusion, and to establish the necessary prejudice. (See *Espinoza v. Calva* (2008) 169 Cal.App.4th 1393 [improper use of offer of proof by trial court]; *Semsch v. Henry Mayo Newhall Mem. Hosp.* (1985) 171 Cal.App.3d 162 [offer of proof lacking required specificity]; *In re Mark C*. (1992) 7 Cal.App.4th 433; *Bowman v. Wyatt* (2010) 186 Cal.App.4th 286.)

There are times when an offer of proof may not be necessary. As noted, when substance, purpose, and relevance have already been made known to the court through a motion in limine or say, a 402 hearing, an offer of proof is generally speaking, not required. (Evidence Code § 354(a); see *Delta Dynamics, Inc. v. Arioto* (1968) 69 Cal.2d 525.) Another exception is when an offer of proof would be futile due to the court's ruling. (Evidence Code § 354(b); see *Caira v. Offner* (2005) 126 Cal.App.4th 12.) And generally speaking, offers of

proof are not necessary for evidence offered as part of cross-examination because questions on cross are often exploratory, for impeachment, etc. (Evidence Code § 354(c); *Julrik Productions, Inc. v. Chester* (1974) 38 Cal.App.3d 807; but see *People v. Foss* (2007) 155 Cal.App.4th 113 [offer of proof required to preserve issue if cross-examination is not within scope of direct].)

When is an offer of proof sufficient? The "vague and nebulous" offer of proof is insufficient to establish "substance, purpose and relevance" and thereby preserve the error for appeal. (*People v. Sperl* (1976) 54 Cal.App.3d 640; see also *Alexander v. Community Hosp. of Long Beach* (2020) 46 Cal.App.5th 238 [failure to specify purpose for evidence barred argument that trial court erred in sustaining relevance objection].) Think, *how* will the facts be proven when making an offer of proof, i.e., describe the *evidence* that will establish those facts: "Witness X will testify, based on personal knowledge, that he heard D state . . . when X was with D at the . . . " and not the *conclusion* "Witness X will prove that Witness D is lying." The latter is a conclusion that tells the court nothing about the "substance, purpose, and relevance" of the evidence.

E. Unreported conferences

Memorialize on the record any unreported conferences at the bench or in chambers. There are numerous situations where unreported conferences can occur over the course of a trial. For example, the status conference immediately preceding trial is often held in chambers, and involves final rulings by the court re the scope and conduct of trial. Even with the sweeping trend of one judge for all purposes, final conferences still occur making final decisions on procedural and other details about trial. Rulings will be made. If not from the beginning of the conference, at some point the court will ask the court reporter to join. Thereafter, the court will summarize the various rulings made.

But the court may conclude that the reporter is not necessary, or that a summary of some items is not necessary to be put on the record. Counsel must be ready then and there to request that all stipulations, rulings, orders made in the conference, etc. be included on the record. Waiting until later risks omissions and disputes about the conference. (See, e.g., *American Modern Home Ins. Co. v. Fahmian* (2011) 194 Cal.App.4th 162 ["this debate over whether an objection was made could and should have been avoided if the trial judge and counsel had put the objection and ruling on the record immediately after the chambers conference"]; *People v. Tuggles* (2009) 179 Cal.App.4th 339.) Sometimes, waiting until later will be the only option, and again it's up to counsel to make sure it happens. (See *Mary M. v. City of Los Angeles* (1991) 54 Cal.3d 202.)

F. Electronic recordings have inherent problems for record preservation

Problem: When you hit play, the reporter usually takes a break.

1. Videotaped Depositions

See Cal. Rules of Court, rule 2.1040(a): For videotaped depo testimony, lodge a transcript with the court (concurrently or within 5 days) with relevant pages marked showing parts presented. During trial, state on the record the page and line numbers of the transcript where the testimony to be played appears.

Better alternative: Ask the reporter to take down all the video testimony (just as the reporter would if live testimony is taking place), so that the entire video excerpts played appears in the same trial transcripts. Now the trial transcript is complete, i.e., there are no gaps with brackets saying only [Video Deposition Played].

2. Other Electronic Recordings

If there is no transcript, such as for electronic recordings other than deposition testimony, state on the record (know ahead of time) the starting point and end points in the video segments being played if the entire recording is not being played. (See Cal. Rules of Court, rule 2.1040(b).) Provide a transcript of the recording to the court; provide a copy of the transcript and the recording to counsel; file the transcript and move the transcript into evidence as an exhibit.

3. Preserve Objections to Electronic Evidence

For example, if a PowerPoint is being played, orally state which slide is being objected to by slide number and describing it.

G. Demonstrative aids

Make any demonstrative aids part of the record, preferably by having hard copies submitted so that these end up in the clerk's transcript/appendix as "lodged" materials used during trial.

H. Failing to request a desired jury instruction

1. Civil Cases

In civil cases, all proposed jury instructions covering issues disclosed by the pleadings must be delivered to the judge and served on opposing counsel before the first witness is sworn. (See Code Civ. Proc. § 607a.) Thereafter, additional instructions can be submitted as to issues "developed by the evidence" at trial. (*Ibid*.) Local rules can also come into play.

While parties have the right to have the jury instructed on all applicable theories (see Code Civ. Proc. §§ 607a, 608), the party must request the appropriate instructions. "A party is entitled upon request to correct, nonargumentative instructions on every theory of the case advanced by him which is supported by substantial evidence. The trial court may not force the litigant to rely on abstract generalities, but must instruct in specific terms that relate the party's theory to the particular case." (*Soule v. General Motors Corp*. (1994) 8 Cal.4th 548, 572 (emphasis added); *Vine v. Bear Valley Ski Co*. (2004) 118 Cal.App.4th 577, 582, 593–594 [court erred in refusing defendant's primary and secondary assumption of risk instructions and giving only ordinary and contributory negligence instructions].)

Failure is forfeiture: failure to propose an instruction on a particular issue forfeits the right to have the jury instructed on that issue. (*Metcalf v. County of San Joaquin* (2008) 42 Cal.4th 1121, 1130–1131 [by requesting instructions given and by not requesting additional instructions, plaintiff forfeited right to argue on appeal that trial judge misinstructed jury; *McCloud v. Roy Riegels Chemicals* (1971) 20 Cal.App.3d 928, 934 [immaterial that counsel mistakenly believed

it was opposing counsel's burden to propose instruction on issue in question]; *Hasso v. Hapke* (2014) 227 Cal.App.4th 107 [court "will not consider" theory of liability on issue for which party failed to offer jury instructions].)

2. Criminal Cases

In criminal cases, instructional issues provide some of the most fruitful grounds for appeal. Many of the most crucial instructions (e.g., reasonable doubt burden, elements of the charged offense, etc.) come within a trial judge's sua sponte instructional duties, but the safest course is to request *all* desired instructions.

The following are some of the general types of instructions that are contingent upon defense requests:

- Cautionary instructions and limiting instructions.

  - Admonition to view jailhouse informant's testimony with caution (Penal Code § 1127a).

  - Instructions limiting purposes for which jurors may consider particular evidence (Evidence Code § 355), e.g., other offenses (*People v. Padilla* (1995) 11 Cal.4th 891, 950); limitation of un-*Mirandized* statement for impeachment (*People v. Torrez* (1995) 31 Cal.App.4th 1084, 1088–1091).

- Pinpoint instructions. Instructions which relate the general legal concepts (such as elements of the offense or affirmative defenses) to particular categories of evidence or otherwise highlight types of circumstances which may give rise to a reasonable doubt. "Such instructions relate particular facts to a legal issue in the case or 'pinpoint' the crux of a defendant's case, such as mistaken identification or alibi." (*People v. Saille* (1991) 54 Cal.3d 1103, 1119.)

  - Many instructions which state theories of defense or other crucial matters are considered mere "pinpoint instructions," which it is up to defense counsel to request;

  - Alibi (*People v. Freeman* (1978) 22 Cal.3d 434);

  - Identification, including reliability factors (CALJIC Nos. 2.91, 2.92) (*People v. Wright* (1988) 45 Cal.3d 1126);

  - Relevance of intoxication to specific intent or other mental state (CALJIC No. 4.21) (*People v. Saille* (1991) 54 Cal.3d 1103, 1120);

  - Relevance of provocation to premeditation and deliberation (choice between 1st and 2nd degree murder), even when provocation insufficient to reduce to manslaughter (CALJIC No. 8.73) (*People v. Middleton* (1997) 52 Cal.App.4th 19);

- ❖ Bearing of victim's prior threats or violence on self-defense issues (*People v. Pena* (1984) 151 Cal.App.3d 462, 474–478; *People v. Moore* (1954) 43 Cal.2d 517, 527–529);

- ❖ "After-formed intent" rule in robbery cases (*People v. Webster* (1991) 54 Cal.3d 411, 443–444).

- ➢ "Clarifying" or "amplifying" instructions. "Generally, a party may not complain on appeal that an instruction correct in law and responsive to the evidence was too general or incomplete unless the party has requested appropriate clarifying or amplifying language." (*People v. Andrews* (1989) 49 Cal.3d 200, 218.)

I. Failing to object to attorney/prosecutorial misconduct

1. Civil Cases

"To preserve a claim of attorney misconduct for appeal, a timely and proper objection must have been made at trial; otherwise, the claim is forfeited. [Citations.] 'In addition to objecting, a litigant faced with opposing counsel's misconduct must either "move for a mistrial or seek a curative [jury] admonition" [citation]' unless an admonition would have been inadequate under the circumstances." (*Regalado v. Callaghan* (2016) 3 Cal.App.5th 582, 598–599; see *Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 794–795; *Rayii v. Gatica* (2013) 218 Cal.App.4th 1402, 1411–1412; *Garcia, supra,* 204 Cal.App.4th 144, 148.) "A claim of misconduct is entitled to no consideration on appeal unless the record shows a timely and proper objection and a request that the jury be admonished." (*Dominguez v. Pantalone* (1989) 212 Cal.App.3d 201, 211.)

2. Criminal Cases

Claims of prosecutorial misconduct are frequently forfeited for appellate review due to inadequate "preservation" at trial. Such claims are cognizable on appeal only if (1) defense counsel raises a contemporaneous objection to the improper question or statement; (2) a specific ground for the objection is stated; and (3) defense counsel requests that the jury be admonished to disregard the impropriety. (*People v. Hill* (1998) 17 Cal.4th 800, 820.)

The following are common types of prosecutorial misconduct (see FDAP's "Federalization Table," *supra*, for corresponding federal constitutional rights violated by different types of prosecutorial misconduct):

- ➢ *Griffin* error: Commenting on defendant's failure to take the stand.

- ➢ *Doyle* error: Commenting on defendant's post-arrest, post-Miranda silence.

- ➢ Commenting on defense's failure to present witness at preliminary hearing. (*People v. Conover* (1966) 243 Cal.App.2d 38, 49.)

- ➢ Urging adverse inferences from defendant's exercise of any other constitutional rights, including the right to counsel.

- Other misconduct toward defense counsel: “derisive comments and actions towards defense counsel” (*Hill, supra*, 17 Cal.4th 800, 832–834); disparaging defense function (*People v. Herring* (1993) 20 Cal.App.4th 1066) or characterizing defense counsel as another “attacker” of the victim or witness (*People v. Turner* (1983) 145 Cal.App.3d 658, 674; *People v. Pitts* (1990) 223 Cal.App.3d 606, 704).

- References, in argument or questioning, to matters outside the record. (*People v. Lima* (2020) 49 Cal.App.5th 523).

- Unsubstantiated insinuations in cross-examination questions, where prosecutor has no bona fide belief he will be able to prove the suggested facts. (*People v. Wagner* (1975) 13 Cal.3d 612.)

- Admission of or reference to co-defendant’s (or other alleged co-principal’s) plea or conviction. (*People v. Cummings* (1993) 4 Cal.4th 1233, 1294–1295.)

- Intimidation of defense witness.

- Appeals to racial, ethnic or religious prejudices (violation of equal protection and due process clauses).

- <u>Potential due process implications of other forms of misconduct:</u> Even where the prosecutorial tactic does not directly infringe a specific enumerated constitutional right, like the examples above, prosecutorial misconduct may still rise to the level of a due process violation if it is sufficiently inflammatory or pervasive. If the misconduct could potentially affect the fairness and outcome of the trial, assert a due process objection. (See *People v. Cole* (2004) 33 Cal.4th 1158, 1202 [“A prosecutor’s misconduct violates the Fourteenth Amendment to the United States Constitution when it ‘infects the trial with such unfairness as to make the conviction a denial of due process,” internal quotation marks omitted].)

- Examples of common appeals to passion or prejudice:

    - Exhortations about “war on crime,” “war on drugs,” “sending a message to drug dealers,” “get this poison off our streets,” etc. (See, e.g., *United States v. McLean* (11th Cir. 1998) 138 F.3d 1398, 1405 [prosecutorial comments about “crack addicted babies”]; *United States v. Beasley* (11th Cir. 1993) 2 F.3d 1551; *United States v. Boyd* (11th Cir. 1997) 131 F.3d 951.)

    - Urging jurors to view the crime through victim’s eyes, to put themselves in victim’s place, or imagine that their own children had been victims. (*People v. Stansbury* (1993) 4 Cal.4th 1017, 1057; *People v. Pensinger* (1991) 52 Cal.3d 1210, 1250; *People v. Simington* (1993) 19 Cal.App.4th 1374.)

    - Warnings about the consequences of an acquittal, including exhortations to “take the defendant off the streets” or references to reactions of neighbors or community. (*People v. Purvis* (1963) 60 Cal.2d 323, 342; *People v. Mendoza* (1974) 37 Cal.App.3d 717, 727.)

- ❖ Appeals to religious principles, especially where prosecutor implies that some "higher law" applies–e.g., suggestions of Biblical support for capital punishment. (*People v. Wash* (1993) 6 Cal.4th 215, 260; see also, e.g., *People v. Pitts* (1990) 223 Cal.App.3d 606, 698–702 [reminding jurors in molestation case of Jesus Christ's praise for the innocence of children].)

- ➢ Misstating or mischaracterizing the trial testimony or misstating legal principles during closing argument. (*Hill, supra*, 17 Cal.4th at pp. 823–826, 829–832.)

  - ❖ Examples of misstating the law include lowering the prosecution's burden of proof or shifting the burden of proof to the defense. (*People v. Marshall* (1996) 13 Cal.4th 799, 831 ["it is improper for the prosecutor to misstate the law generally [citation], and particularly to attempt to absolve the prosecution from its . . . obligation to overcome reasonable doubt on all elements"]; accord, *Hill, supra*, 17 Cal.4th at p. 829; see also *People v. Bradford* (1997) 15 Cal.4th 1229, 1340 [it is improper for a prosecutor to state that "a defendant has a duty or burden to produce evidence, or a duty or burden to prove his or her innocence"]; accord, *People v. Ellison* (2011) 196 Cal.App.4th 1342, 1353.)

- ➢ Knowingly arguing a falsehood. (*People v. Varona* (1983) 143 Cal.App.3d 566, 570 [in prosecution for kidnapping, rape, sodomy, and oral copulation, it was misconduct for prosecutor to argue to jury that there was no proof that prosecutrix was a prostitute, as contended by defendants, when prosecutor had, by his objections, prevented defense from proving that fact].)

- ➢ <u>Other deceptive or misleading tactics:</u> commenting on absence of defense evidence on a point where prosecution blocked discovery or introduction of evidence on that point.

- ➢ <u>Creative forms of prosecutorial vouching:</u> repeated references to crucial witness' plea agreement requiring him to testify truthfully (where prosecutorial argument and police evidence imply that government has monitored and verified truth of witness' testimony) (*United States v. Rudberg* (9th Cir. 1997) 122 F.3d 1199; *People v. Fauber* (1992) 2 Cal.4th 792, 822); use of police testimony on veracity of a key witness' account (such as victim-complainant, informant, or even another officer) (*People v. Sergill* (1982) 138 Cal.App.3d 34; *United States v. Sanchez-Lima* (9th Cir. 1998) 161 F.3d 545).

- ➢ <u>Lying argument:</u> Forcing defendant to comment on whether police or other prosecution witnesses are "lying." (*United States v. Akitoye* (1st Cir. 1991) 923 F.2d 221, 224; *United States v. Richter* (2d Cir. 1987) 826 F.2d 206, 208–209.) This form of cross-examination violates the general principle that jury is judge of credibility and "[l]ay opinion about the veracity of particular statements by another is inadmissible." (*People v. Melton* (1988) 44 Cal.3d 713, 744.)

- ➢ Inconsistent prosecutorial factual theories in separate trials of co-defendants. (See *In re Sakarias* (2005) 35 Cal.4th 140.)

J. Failing to object to sentencing errors

An objection is almost always required to preserve a sentencing issue for appellate review. (*People v. Scott* (1994) 9 Cal.4th 331, 351.) For example, an objection is necessary if a defendant later wishes to challenge any of the following on appeal: (1) denial of probation; (2) imposition of the upper term; (3) imposition of consecutive sentences; (4) dual use of a fact as an element of the offense and an aggravating factor; (5) the trial court's failure to state its reasons for its sentencing choices; (6) errors in the probation report; (7) probation conditions (but see *In re Sheena K.* (2004) 40 Cal.4th 875, 888–889 [challenges to probation conditions as unconstitutionally vague or overbroad are not forfeited by failure to raise the issue in the trial court, so long as the issue presents a pure question of law that can be resolved without reference to the particular sentencing record]); and (8) restitution (method of calculation and amount).

A narrow exception to this general rule is that no objection is necessary to preserve a challenge to an "unauthorized" sentence. (*Scott, supra*, 9 Cal.4th at p. 354.) "[A] sentence is generally 'unauthorized' where it could not lawfully be imposed under any circumstance in the particular case." (*Ibid.*) Thus, issues involving Penal Code section 654 (prohibiting double punishment for the same act), miscalculation of presentence custody/conduct credits, and imposition of a full term on a consecutive sentence where not authorized by statute generally need not be raised at sentencing to be preserved for appellate review. Nevertheless, given a meaningful opportunity, counsel should object to any and all perceived flaws in sentencing in order to permit the trial court to consider and, if appropriate in the exercise of its informed judgment, correct the error.

II. Errors in Action:

A. Jury instructions – inviting error

Standard of Review: Review is de novo, and prejudicial error must be demonstrated. Instructional error is prejudicial when it is likely to mislead the jury, such as when it appears probable that the jury would have reached a different result but for the instructional error. (*Seaman's Direct Buying Service, Inc. v. Standard Oil Co. of Calif.* (1984) 36 Cal.3d 752; see *Ayala v. Arroyo Vista Family Health Ctr*. (2008)160 Cal.App.4th 1350 ["error was harmless because it is not reasonably probable plaintiffs would have obtained a more favorable result in its absence"].) "Probability" of different result absent the instructional error means "a reasonable chance, more than abstract possibility." (*Little v. Amber Hotel Co*. (2011) 202 Cal.App.4th 280.)

"[W]e view the evidence in the light most favorable to the losing party because 'we must assume the jury might have believed the evidence upon which the proposed instruction was predicated and might have rendered a verdict in favor of the losing party had a proper instruction been given.'" (*Morales v. 22nd Dist. Agricultural Assn*. (2016) 1 Cal.App.5th 504, quoting *Bourgi v. West Covina Motors, Inc*. (2008) 166 Cal.App.4th 1649.)

The entire record is considered: courts have a constitutional and statutory duty to examine the entire record of the case, including the evidence, counsel's arguments and other instructions given. (*Soule v. General Motors Corp*. (1994) 8 Cal.4th 548; *Orichian v. BMW of North America, LLC* (2014) 226 Cal.App.4th 1322.) Appellant has the duty to supply the instructions given and refused and any court rulings on proposed instructions, when appealing based on instructional error. (*Bullock v. Philip Morris USA, Inc*. (2008) 159 Cal.App.4th 655.)

Courts consider "insofar as relevant, (1) the degree of conflict in the evidence on critical issues [citations]; (2) whether respondent's argument to the jury may have contributed to the instruction's misleading effect [citation]; (3) whether the jury requested a rereading of the erroneous instruction [citation] or of related evidence [citation]; (4) the closeness of the jury's verdict [citation]; and (5) the effect of other instructions in remedying the error [citations]." (*Soule, supra*, 8 Cal.4th at pp. 570–571, internal quotation marks omitted.)

Since the parties are entitled to correct jury instructions, the danger here is *invited error*. Are the jury instructions you submit correct? No appellate relief is available when instructional error was induced by appellant's conduct. (See *Mary M., supra*, 54 Cal.3d 202; *McCarty v. State of Calif. Dept. of Transp*. (2008) 164 Cal.App.4th 955; *Saxena v. Goffney* (2008) 159 Cal.App.4th 316.)

And avoid agreeing to erroneous instructions proposed by your opponent or a co-party. (*Gherman v. Colburn* (1977) 72 Cal.App.3d 544; *Transport Ins. Co. v. TIG Ins. Co*. (2012) 202 Cal.App.4th 984 [no reversal based on improper instructions because appellant agreed to use the erroneous instructions].)

Examples: Submission of instructions on design immunity defense—a legal question for the court to decide. (*Mozzetti v. City of Brisbane* (1977) 67 Cal.App.3d 565.) A party cannot challenge on appeal instructions given by the court sua sponte or requested by the other party, if the party also requested *similar* instructions (even though those similar instructions were not chosen by the court). (*Smith v. Americania Motor Lodge* (1974) 39 Cal.App.3d 1 [since attractive nuisance was no longer a valid legal theory, appellant's request for instruction on same, though different than the attractive nuisance instructions given by the court, could not provide the basis for relief].)

Exceptions: No invited error when court overrules your objection to an erroneous instruction, and thereafter, you submit instructions in accordance with the ruling the court made. "An attorney who submits to the authority of an erroneous, adverse ruling after making appropriate objections or motions, does not waive the error in the ruling by proceeding in accordance therewith and endeavoring to make the best of a bad situation for which he was not responsible." (*Mary M., supra*, 54 Cal.3d 202, internal quotation marks omitted; *American Master Lease LLC v. Idanta Partners, LTD* (2014) 225 Cal.App.4th 1451.)

And leaving the jury instructions to the last minute, toward the end of trial, increases the risk of mistakes—even when using standard instructions. Have the court reporter present for all jury instruction colloquies and if anything happens in chambers, make objections on the record immediately thereafter or the next morning when the reporter is present.

B. Verdict forms

Three types:

General Verdict—in conclusory fashion, the jury decides all issues in favor of one party or the other (and any damages);

General Verdict with Special Interrogatories—in addition to rendering the ultimate verdict itself, the jury is also asked to answer certain questions designed to test the validity of

the verdict (establish the elements of the causes of action by answering "yes" or "no" re: ultimate facts); and

Special Verdict—whereby the jury makes factual findings only, and then the court draws legal conclusions and renders judgment based on the jury's findings.

The trend is the general verdict form with special interrogatories. The jury determines key facts and also, ultimate conclusions as to each cause of action. This verdict form, if done correctly, tends to be immune from appeal. However, the thing to avoid (when preparing a verdict form) or look for (on appeal) is the *inconsistent* verdict form. For example, is the ultimate conclusion in conflict with the facts found on the form; do the facts found in the form in different causes of action prevent either one from being established; does the way the verdict form is written and the way the jury answers the interrogatories result in a "yes" and a "no" conclusion to a cause of action or infecting other ultimate conclusions? What looks plain when hurrying to reach an agreement on a verdict form during late nights as trial winds down, may look a lot less clear on appeal.

Forfeiture: Claims of error may be forfeited by failure to raise them in the trial court. (See *Morales, supra*, 1 Cal.App.5th 504 [appellants forfeited special verdict form defect claims by failing to raise them in the trial court, failing to ask the jury to correct or clarify verdict before being discharged, and failing to preserve issue by raising it in motion for new trial].)

"An objection to the form of questions in a special verdict must be raised in the trial court or the issue is waived on appeal. (*Orient Handel v. United States Fid. & Guar. Co*. (1987) 192 Cal.App.3d 684, 700.) After the trial court rejected their proposed verdict form, appellants did not attempt to revise their verdict form, nor did they ask the court to revise its proposed verdict form." (*Morales, supra*, 1 Cal.App.5th at pp. 534–535.)

"Moreover, after the jury rendered its verdict, appellants did not raise their concern with the trial court, nor did they ask to have the jury correct or clarify the verdict before the court discharged the jury. (Code Civ. Proc. § 619 ['When the verdict is announced, if it is informal or insufficient, in not covering the issue submitted, it may be corrected by the jury under the advice of the court, or the jury may be again sent out.'].) Finally, appellants did not preserve the issue by raising it in a motion for new trial. (*All–West Design, Inc. v. Boozer* (1986) 183 Cal.App.3d 1212, 1220 [challenge to use of verdict forms may be raised for first time in motion for new trial].)" (*Morales, supra*, 1 Cal.App.5th at p. 535.)

What about the general verdict with special interrogatories specifically?

"Under section 625 of the Code of Civil Procedure, the trial court is permitted to direct the jury 'to find upon particular questions of fact . . . . Where a special finding of facts is inconsistent with the general verdict, the former controls the latter, and the court must give judgment accordingly.' (See also *Hasson v. Ford Motor Co*. (1977) 19 Cal.3d 530, 540–541 [special verdict or finding primarily used to test validity of general verdict]; *Hurlbut v. Sonora Community Hospital* (1989) 207 Cal.App.3d 388, 403 [same]; *Bond v. DeWitt* (1954) 126 Cal.App.2d 540, 544 [special interrogatory response finding no fraud by defendants deemed inconsistent with general verdict awarding plaintiff damages, where fraud only viable cause of action].) Nothing in section 625 or California case law suggests that the section is inapplicable to special findings regarding damages as were made here. (See *Pressler v. Irvine Drugs, Inc*. (1985) 169 Cal.App.3d 1244, 1249 [approving use of special interrogatories to allocate general

verdict damages between medical expenses, lost earnings, and general damages].)" (*Tavaglione v. Billings* (1994) 4 Cal.4th 1150, 1156–1157.)