

Crafting Jury Instructions To Win Trials And Appeals



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Jurors need clear instructions to guide their deliberations. Crafting good instructions will help you win at trial and on appeal.

JURY INSTRUCTIONS can make a difference in a trial. Well-crafted instructions can focus the jury on the critical issues in the case, ideally in a way that fits your client's story. But, at their worst, ill-conceived instructions can confuse the jury, leaving the jury to decide the case on issues that have little to do with the applicable law.

Jury instructions can also make a difference on appeal. Errors in instructing (or not instructing) the jury on key issues can be the main target of a losing party's appeal. Conversely, clear and concise instructions can illustrate for the appellate court the findings necessarily made by the jury in reaching the verdict.

The difference between jury instructions that succeed and those that fail is matter of preparation and strategy. Trial lawyers too often view the drafting of instructions as a chore, often to be delegated to the most junior member of the trial team. In fact, crafting good instructions is more of an art, requiring skill and foresight.

THE ROLE OF JURY INSTRUCTIONS • At a minimum, jury instructions should identify the issues for the jury to decide and help the jury understand the law that governs their decision. Without instructions identifying the issues, jury deliberations would inevitably become a

free-for-all discussion of who should win and who should lose. And, even if the issues are properly identified, the jury will not know how to decide them unless the instructions clearly articulate the applicable legal principles.

Identifying the issues tells the jury what is important in the case. Significantly, identifying the issues also tells the jury what is not important or relevant in the case. In any trial, there are diversions and distractions in the testimony of witnesses. The instructions focus the jurors on what they should be considering in reaching their verdict.

The instructions also focus the jury on the law. Coming from the judge, the instructions are the jury's source of legal principles. They should also go one step further. The instructions should explain to the jury how to apply those legal principles to the facts at hand. Putting together instructions that do that effectively is easier said than done.

YOUR THEORY OF THE CASE • The foundation for proposing jury instructions is your theory of the case. If you are representing a plaintiff, what are your claims? If you are representing a defendant, what are your defenses?

Answering these questions requires a bit of strategy. Which claims do you really want the jury to decide? Or, which defenses do you really think have a chance of persuading the jury?

In all but the simplest cases, the parties will have different views of the applicable law. In proposing jury instructions, the parties have an opportunity to persuade the trial court to present their view of the law or theory of the case. In this respect, crafting and proposing instructions requires a deep understanding of the governing law, as much so as arguing a summary judgment or post-trial motion.

GETTING STARTED • Here is the key: start early. Getting an early start in preparing your jury instructions will help ensure that your instructions and theory of the case fit together seamlessly. In a

complex case, that may mean giving some thought to your proposed instructions soon after the pleadings are settled.

In almost every case there will be a small handful of key instructions on critical disputed issues. Beginning in the early stages of the case, think about how you would ultimately like those key instructions to be framed—in other words, what view of the law should they reflect, and what facts will you need to win under that view of the law.

With that in mind, you can then proceed through the various stages of pre-trial proceedings, advocating your view of the law and gathering the facts.

When the time comes to draft the jury instructions, it often helps to go back to the basics. The pleadings will identify the various claims and defenses that may be the subject of particular instructions. Any prior briefing on dispositive motions may be the starting point for identifying the elements of those claims and defenses under the governing law.

As in drafting a brief, a detailed outline is essential to making sure that everything is covered in an orderly, logical approach. Listing the topics for your instructions will quickly reveal any gaps in the array of instructions, or any needless duplication or complexity. Once you are satisfied that the outline of instructions is consistent with your litigation strategy, it's simply a matter of excellent execution in drafting the various instructions.

Some instructions will be relatively straightforward. For example, instructions that set forth the basic elements of a contract or tort claim can usually be adapted from model jury instructions. Or, an instruction in an area of law controlled by a particular statute can usually explain the statutory requirements in an objective, step-by-step manner.

When an instruction addresses a complex or contested area of law, however, more reflection is required. Often, it helps to step back for a moment and re-examine the broader principles of law involved, rather than immediately zeroing in on the narrower point of law at issue. Try reviewing the

treatises, law reviews or Restatements of law on the topic, and then read the cases addressing the specific point of law at the center of the instruction.

The goal is to distill the principles of law that apply to the issues, and then to explain those principles in a way that is understandable to the jury and relevant to the facts of the case. When done well, the instructions will serve as the jury’s roadmap in its deliberations.

CLEAR AND SIMPLE • For jury instructions to be effective, they must be clear and simple. That begins with word choice. Instructions should use words that are both accurate and clear. An accurate instruction framed in legal terminology unfamiliar to the jury is of little value.

The same is true of sentence structure. Sentences should be short. Really short. When in doubt, break up complex sentences into several shorter sentences, each of which has a subject, verb, and object (in that order).

Each instruction should contain no more than a few sentences. An instruction that covers several interrelated topics will be harder for the jury to follow than separate instructions, each of which covers one and only one topic. This may later become important on appeal; a trial judge may properly reject a flawed proposed instruction, even if only one part of it is erroneous. If you propose separate instructions each addressing a discrete topic, more of them are likely to be accepted by the trial judge and, to the extent the trial judge rejects the instructions, you are more likely to have grounds for appeal.

An important part of making the jury instructions clear and understandable is to try to relate the instructions to the circumstances of the case. Abstract statements of law will still leave the jury at a loss in its deliberations. Instead, instructions should guide the jury, telling it what to do if it finds that particular elements of a claim or defense are met.

The ultimate test is whether a typical juror will understand the instructions when read aloud by the trial judge. So, go ahead and try reading your instructions aloud, preferably to someone who knows little or nothing about the case. If that works, you’re off to a good start.

MODEL INSTRUCTIONS • Almost all jurisdictions have sets of model instructions that courts are accustomed to use as a starting point. Typically these models have been hammered out by judges and representatives of the plaintiffs’ and defense bars, and they incorporate language that has been approved in appellate decisions. As a result, trial judges tend to view the model instructions as “safe.”

If the model instructions in your jurisdiction cover a point fairly and clearly, there is generally no need to craft your own. If, however, a model instruction might mislead or confuse the jury on a particular aspect of your case, you should prepare your instruction, supported by case authority, and be ready to explain to the court why your proposed instruction is better than the model.

PLAYING DEFENSE • As in basketball, perhaps the toughest part of drafting jury instructions is playing “defense”—what to do when trial judge is intent on addressing a topic that you believe should not really be addressed at all in the instructions. For example, suppose that you represent a defendant and the trial judge intends to instruct the jury on punitive damages. What do you do if your position is that punitive damages are not appropriate at all, either because they are not allowed under the applicable law or not supported by the evidence?

At that point, you need to propose a defensive or “alternative” instruction on the topic, without waiving your objection to the jury being instructed on that topic at all. Be direct; inform the trial court that it is an alternative instruction, requested only if the trial judge disagrees with your position that

the jury should not be instructed at all on (in this example) punitive damages.

Without proposing such an alternative instruction, you could end up with the worst of both worlds. The trial court could end up instructing on punitive damages and doing so in an instruction drafted by the other side. Proposing an alternative instruction at least allows the possibility of a “favorable” instruction on the topic.

The important thing is to make clear your objection to the jury being instructed at all on the topic. To be safe, the objection should be made both in writing and on the record in the trial court. With that, you can argue on appeal that the trial court erred in instructing the jury.

THE DETAILS • First, check the rules! In federal court, the starting point is Rule 51 of the Federal Rules of Civil Procedure, which governs the timing of proposing jury instructions and the making of objections. Many federal district courts (and individual judges) also have local rules on instructions and objections.

State courts also usually have specific rules governing jury instructions. These rules might address format, things such as numbering of instructions, citation of authorities, titles, and indices.

Even without rules, common sense should govern. To ensure an orderly process, proposed instructions should be clearly numbered and titled. Unless barred by the applicable rules, there should be a citation on each instruction to the source or authority for the instruction. If there are a few critical instructions likely to be disputed, a concise brief supporting your proposed version of those instructions may be advisable.

Most importantly, remember to file your proposed instructions. Otherwise, the appellate court will have no way of figuring out what instructions you may have proposed. (And, thus, you will be unable to argue that the trial court erred in refusing

to give your instructions.) Again, file your proposed instructions.

AT TRIAL • The next step is to persuade the trial court to adopt your proposed jury instructions, rather than your opponent’s. This is essentially a matter of good advocacy, explaining to the trial court why your proposed instructions more accurately identify the pertinent issues and explain the applicable law, and will better guide the jury in its deliberations. Be prepared—this is not a task to be taken on lightly.

Most trial courts will settle the jury instructions at a conference, without the jury present. The conference may be in chambers or in open court, depending on the judge’s preference and the local rules and practice. The conference may be after the close of evidence, but many judges prefer to start the process earlier during the course of the trial. Since settling the instructions may take several sessions, starting early ensures that the jury will not be kept waiting while the instructions are being settled.

Many trial lawyers make the mistake of diving in immediately to fight over each and every jury instruction. In order to make sense of the competing sets of proposed instruction, however, the trial court will need to understand your theory of the case—what is the essence of your claims or defenses, and your view of the law?

Even the best of conferences to settle the instructions can be somewhat chaotic at times. Be sure to keep careful notes of everything that happens during the conference. And, be sure to follow up. If the trial court asks you to submit a modified version of one of your instructions, be sure to do so (remembering the rules on alternative instructions).

PRESERVING THE RECORD • Finally, a favorite topic of appellate lawyers—preserving the record for appeal. Even if you anticipate winning at trial, there is always some possibility of losing, in

which case preserving the record for appeal will be essential.

In federal court, Fed. R. Civ. P. 51 establishes the basic framework. The district court must tell the parties which instructions it will give, and which rulings it will make on the parties' proposed instructions, before the jury is instructed and closing arguments are made. Moreover, the parties must be given an opportunity to object on the record, without the jury present.

Rule 51 further specifies that “[a] party who objects to an instruction or the failure to give an instruction must do so on the record, stating distinctly the matter objected to and the grounds for the objection.” If the instructions have been settled off the record in the judge's chambers, it is particularly important to state on the record any objections to the instructions adopted by the court. Importantly, the objection must be made at an appropriate opportunity before the jury is instructed. A later objection will not preserve an issue for appeal, except when a party was not informed of a particular instruction or ruling (and an objection was promptly made once the party learned of the instruction or ruling).

Most state courts have similar rules. The fundamental principle is that it must be clear from the record that a party made known its objection to an instruction given or to the trial court's refusal

to give a proposed objection. In some situations, a party may be required to offer an alternative in addition to objecting. For example, if the other side proposes an ambiguous (but otherwise correct) instruction, you should propose a clearer alternative instruction on the topic.

One last suggestion: Familiarize yourself with the “invited error doctrine.” On appeal, a party cannot challenge an error at trial that the party itself invited. If you object to a proposed instruction, you cannot later argue an appeal that the trial court erred in not giving that instruction. Or, if you propose an instruction, you cannot later argue on appeal that the trial court erred in giving that instruction—unless you have made clear on the record that you were proposing that instruction only as an alternative in the event the trial court rejects your main position.

With these tips in mind, you should be ready in case you need to appeal.

CONCLUSION • Crafting jury instructions should be a part of your trial skills—no less important than cross-examination or closing argument. Focusing on instructions can bring together your entire trial strategy, integrating the law with your theory of the case. Well-crafted instructions can help you win at trial and on appeal.

PRACTICE CHECKLIST FOR

Crafting Jury Instructions To Win Trials And Appeals

- At a minimum, jury instructions should identify the issues for the jury to decide and help the jury understand the law that governs their decision. They should explain to the jury how to apply those legal principles to the facts at hand.
- Start early. In a complex case, that may mean giving some thought to your proposed instructions soon after the pleadings are settled. Beginning in the early stages of the case, think about how you would ultimately like those key instructions to be framed.
- In almost every case there will be a small handful of key instructions on critical disputed issues. When the time comes to draft the jury instructions, it often helps to go back to the basics:

— The pleadings will identify the various claims and defenses that may be the subject of particular instructions;

— Any prior briefing on dispositive motions may be the starting point for identifying the elements of those claims and defenses under the governing law;

— Listing the topics for your instructions will quickly reveal any gaps in the array of instructions, or any needless duplication or complexity.

- For jury instructions to be effective, they must be clear and simple. Sentences should be short; instructions should contain no more than a few sentences, cover only one topic, and be directly related to the circumstances of the case (they should not be abstract statements of the law).
- If the model instructions in your jurisdiction cover a point fairly and clearly, there is generally no need to craft your own.
- Be prepared to propose defensive or “alternative” instructions on the most contentious topics, without waiving your objection to the jury being instructed on that topic at all. Be direct; inform the trial court that it is an alternative instruction, requested only if the trial court disagrees with your position that the jury should not be instructed on that topic at all.

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