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Your jury instructions on appeal

There are few appellate issues that command as much scrutiny as instructional error

During trial, few proceedings are more solemn or important than the giving of jury instructions. Like Moses on Mt. Sinai, the judge hands down the law that the jurors must apply to the evidence they have just heard and seen. But unlike the Ten Commandments, jury instructions can be complicated. And if those instructions are inaccurate, incomplete or incomprehensible, the jury's verdict is tainted by a misapplication of the law – a fundamental and potentially reversible error on appeal.

Thus we need to think outside the jury box while choosing, drafting, offering and arguing jury instructions. Trial attorneys often focus on the most obvious and immediate goal: stating the law in a manner most favorable to their client's case. But there is another potential audience that we need to keep in mind: the Court of Appeal.

There are few appellate issues that command as much scrutiny as instructional error (and its cousin, erroneous verdict forms, discussed in the accompanying sidebar.) Appellate courts, at least in the State court system, apply a rigorous standard of review to smoke out prejudicial instructional error, and such errors are among the most common bases for reversal. And for that reason, instructional-error issues comprise fertile ground or quicksand for appellate counsel – depending on which side of the verdict they represent.

What follows is a brief primer for trial counsel on avoiding your own instructional errors, and preserving those of your opponent.

Appellate scrutiny of instructional error

Jury instructions are a matter of right. Each party is entitled, upon request, to correct, non-argumentative instructions on every theory of the case advanced by him that is supported by substantial evidence (*Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 572).

Further, the appellate court reviews de novo the issue of whether a party was entitled to an instruction, or whether an instruction that was given was a correct statement of the law as it applies to the facts and theories of a particular case (*People v. Berryman* (1993) 6 Cal.4th 1048, 1089).

In considering whether an instruction was improperly refused, the appellate court views the evidence in the light most favorable to the *appellant* and assumes "that the jury might have believed the evidence upon which the instruction favorable to the appellant was predicated." (*Maureen K. v. Tuschka* (2013) 215 Cal.App.4th 519, 536).

As favorable as these factors are to the appealing party, there is more. Instructional error invokes a daunting review for prejudice that can leave the respondent, who is defending the verdict, sweating bullets.

Once instructional error is established, the appellate court undertakes a comprehensive review of the trial proceedings to determine whether the error was prejudicial, i.e., whether it is "reasonably probable" that the error "prejudicially affected the verdict." This review includes an evaluation of (1) the state of the evidence, (2) the effect of other instructions, (3) the effect of counsel's arguments, and (4) any indications by the jury itself that it was misled, including the closeness of the jury's vote (*Soule v. Gen. Motors Corp.* 8 Cal.4th at pp. 580-581.)

Further, this "reasonably probable" standard is met if there is a reasonable chance that the jury would have reached a different result had it been provided the correct instruction more than an abstract possibility. (*Kinsman v. Unocal Corp.* (2005) 37 Cal.4th 659, 682). This relatively low standard for demonstrating prejudice helps explain why jury instruction error is one of the most common bases for reversal of jury verdicts in the state Courts of Appeal.

In the 9th Circuit, however, the standards for instructional error are less generous to the appellant. A district court's formulation of jury instructions is reviewed for an abuse of discretion, unless the issue is whether the trial court misstated the elements that must be proved at trial, which is reviewed de novo as a question of law (*Ostad v. Oregon Health Sciences University* (9th Cir. 2003) 327 F.3d 876, 883.) If the instruction was erroneous, the Ninth Circuit applies a standard "harmless error" analysis to determine if the error was prejudicial. (*Tritchler v. County of Lake* (9th Cir. 2004) 358 F.3d 1150, 1154.)

Tips for avoiding instructional error

First and foremost, you should very, very carefully draft your own set of proposed instructions that accord with your

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theory of the litigation; the court has no duty to instruct on its own motion. (*Metcalf v. County of San Joaquin* (2008) 42 Cal.4th 1121, 1130-1131.) That means, *inter alia*, drafting instructions early and often, reviewing and revising as discovery proceeds and, especially, as the trial evidence comes in.

In drafting your instructions, you certainly should adopt CACI forms; indeed, the Rules of Court encourage you to do so. (Rule 2.1050(e).) But a CACI form does not carry the imprimatur of a rule of law, and does not bind an appellate court to the statement of the law in the instruction. See Rule of Court 2.1050(b): "The articulation and interpretation of California law, however, remains within the purview of the Legislature and the courts of review." (See, e.g., *Bowman v. Wyatt* (2010) 186 Cal.App.4th 286, 303 [finding that CACI No. 3704, which defines the factors that jurors consider in deciding whether someone is an employee or an independent contractor, provided an erroneous statement of the law, and reversing on that basis]; *Joaquin v. City of Los Angeles* (2012) 202 Cal.App.4th 1207, 1230 [criticizing a CACI instruction on retaliation claims under FEHA].)

So you must carefully review and think through the CACI forms and make an independent assessment of whether the form instruction correctly states the law as applied to your client's claims. Bear in mind that there is no rule against proposing or adapting an old BAJI instruction, or writing a new one from scratch, if it fits the bill and the CACI instruction is insufficient.

If you do draft a special instruction, it must be accompanied by citations to supporting legal authority (Rule of Court 2.1055(d)), and it should be non-argumentative and simple but accurate. Asking for a proposed instruction that aggressively states the law in your favor may be asking for trouble later.

Equally important, make sure that your proposed instruction is supported by substantial evidence. A jury verdict based on an instruction that is not supported by the evidence is ripe for reversal. (*LeMons v. Regents of University of California* (1978) 21 Cal.3d 869, 875-876).

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This principle applies to the instructions proposed by your opponent as well. Successfully objecting to a proper instruction proposed by the defendant – one that is supported by their theory of the case and evidence – can lead to trouble at the Court of Appeal. All parties are entitled to have the jury instructed on their particular theory of the case, as long as the instruction is "reasonable and finds support in the pleadings and evidence or any inference which may properly be drawn from the evidence." (*Moore v. Preventive Medicine Medical Group, Inc.* (1986) 178 Cal.App.3d 728, 744.)

Depriving your opponent of an instruction that sets forth a theory of their case may make for a short-term victory.

The invited-error trapdoor

Of course, you do want to preserve for your own possible appeal any adverse erroneous instruction, whether given by the trial court sua sponte or at the request of the opposing party. The standards for preserving such errors, however, contain numerous trapdoors, and care and attention is required to avoid waiver.

First and foremost, do not be lulled by section 647 of the Code of Civil Procedure into believing that all instructional errors are automatically preserved for appeal without the necessity of an objection. That section states that "giving an instruction, refusing to give an instruction, or modifying an instruction requested" is "deemed excepted" for appeal purpose, and appellate courts will sometimes rule that a party may challenge an erroneous instruction without objecting at trial. (See, e.g., *Lund v. San Joaquin Valley R.R.* (2003) 31 Cal.4th 1, 7.)

But whether that section will automatically preserve the instructional error in your particular case depends on the nature of assigned error and other criteria, such that the exceptions swallow the rule. For example, if the instruction is correct as a matter of law

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but the appellant contends that it is "too general, lacks clarity or is incomplete," failure to object and to offer a clarifying instruction, waives the error.

You can also waive the instructional error by proposing or stipulating to the instruction. Thus jointly drafting and submitting the instruction with opposing counsel; failing to object to the court's response to questions from the jury; and failing to request any instruction at all on one of the legal theories that the jury should have considered, are all common examples of "invite error." (*Reilly v. Inquest Technology Inc.* (2013) 218 Cal.App.4th 536, 552; *Transport Insurance Co, v. TIG Insurance Co.* (2012) 202 Cal.App.4th 984, 1000.)

Equally fatal to an appellate claim of instructional error is an inadequate record that does not clearly show how the erroneous instruction came about. If the appellate record fails to identify which party requested the challenged instruction, the appellate court will presume that it was given at appellant's request (!) and find the error invited (*Morehouse v. Taubman Co.* (1970) 5 Cal.App.3d 548, 559.)

If that presumption is not harsh enough, consider the rule that where an appellant contends that the trial court erroneously refused to give a proper instruction, the appellant must affirmatively demonstrate that the instruction was actually rejected, and not withdrawn or "lost in the shuffle" of the paperwork at trial. Absent such a showing, the appellate court will presume that the omitted instruction was withdrawn by the appellant – and any error was thereby invited. (*Huber, Hunt & Nichols, Inc. v. Moore* (1977) 67 Cal.App.3d 278, 312.)

Preserving the instructional error for appellate review

Avoiding these trapdoors requires organization, diligence and common sense, tied together by remembering that beyond the jury box there is, potentially, an appellate audience looking over your shoulder at the instructions. Here are some ideas on how to do so:

- You must create a clear record of which party requested the instructions, and whether they were refused, given as requested, or given as modified, or withdrawn (as required by Rule of Court 2.1055(b)). Using commercially obtainable forms that provide that information is a great tool, as long as the judge correctly completes them and there is a full set of those actual forms file-stamped and in the record. If the judge makes handwritten changes to the proposed instructions, ask that he clarify in writing whether those modifications are sua sponte or in accordance with the position of one of the parties.
- Make sure that you file (and obtain a file-stamped copy of) the original set of your proposed instructions – both form and specials. Try to do the same with any last-minute proposals.
- Make a record of all rulings on instructions, including those that are made in chambers. If there is a chambers' conference on the proposed instruction, try to get the court reporter in to record the proceedings. If that fails, when court recommences ask to make a record of the rulings before the jury returns, and if the judge resists, push hard. Your client's case may be at stake!
- If your concern is that an instruction is correct as a matter of law but is too

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Verdict form confusion: Generals, specials and hybrids

Avoiding or preserving jury instruction error requires both an understanding of the rules and great diligence during the heat of trial. Equally fraught with risk and opportunity, and equally complex, are the rules for appellate review of jury verdict forms. General verdicts and special verdicts garner different levels of appellate scrutiny, and it is not always obvious what type of verdict form is at issue.

There are three types of verdict forms: a general verdict; a general verdict with special findings; and a special verdict. (Code Civ. Proc., §§ 624, 625.) (All citations are to the Code of Civil Procedure.)

A general verdict form simply asks the jury to generally find in favor of the plaintiff or defendant, and if for the plaintiff, to set forth an amount of damages. (§ 624.) A simple example: We, the jury in the above-entitled action, find for the [plaintiff or defendant] and against the [plaintiff or defendant] and assess damages in the sum of $[ ].

Note, however, that in all cases where punitive damages are awarded, even a general verdict form must separately identify the punitive and the general damages. (§ 625).

In reviewing a general verdict, the appellate court infers that the jury made all necessary findings in favor of the prevailing party. Further, where there are several causes of action, a general verdict will be sustained if the evidence supports it on any one theory, even if the causes of action are inconsistent, such as negligence and intentional tort (*Codekas v. Dyna-Lift Co.* (1975) 48 Cal.App.3d 20, 24-25.) Whether this is the preferred standard of appellate review depends, of course, on whether you are defending or attacking the verdict.

A special verdict form is a wholly different animal on appeal. A special verdict is defined by statute as one where the jury finds the facts only, leaving the judgment to the Court:

> The special verdict must present the conclusions of fact as established by the evidence, and not the evidence to prove them; and those conclusions of fact must be so presented as that nothing shall remain to the Court but to draw from them conclusions of law.

(§ 624.)

In contrast to review of a general verdict, if the jury returns a special verdict, the reviewing court will *not* infer findings to support the verdict (*Zagami Inc. v. James A. Crone, Inc.* (2008) 160 Cal.App.4th 1083, 1092.) Thus if there is an inconsistency in the special verdict findings, there is no presumption in favor of upholding the special verdict, and the correctness of the verdict is reviewed as a matter of law (*City of San Diego v. D.R. Horton San Diego Holding Co., Inc.* (2005) 126 Cal.App.4th 668, 678.)

For example, if a jury awards a certain amount of damages on a breach of contract claim, and a different amount for a common counts' claim, the special verdict on both questions are equally against the law (*Zagami Inc. v. James A. Crone, Inc.,* 160 Cal.App.4th at 1092).

However, in order to preserve an inconsistent special verdict for appellate review, the appealing party must object to the verdict *before the discharge of the jury*, and allow the trial judge to interpret the verdict with consideration of the pleadings, evidence, and instructions (*Woodcock v. Fontana Scaffolding & Equip. Co.* (1968) 69 Cal.2d 452, 456-57.) A satisfactory explanation of the verdict is sufficient to uphold it (See *Roby v. McKesson Corp.* (2009) 47 Cal.4th 686, 705.)

The third type of verdict form is a hybrid: the general verdict accompanied by special findings. Section 625 says that the court may instruct the jury, if they render a general verdict, "to find upon particular questions of fact, to be stated in writing, and may direct a written finding thereon."

If such a hybrid form is used, the question on appeal may be whether the special findings conflict with the general verdict; if they do, the special findings will prevail. (*Zabaglione v. Billings* (1993) 4 Cal.4th 1150, 1156.)

Further complicating matters, it is not always obvious whether the verdict form is a true special verdict, or a general verdict accompanied by special findings. The determination is not controlled by the label attached to the form. Where the verdict does not merely ask the jury to find the facts, but instead calls for the jury to find for or against the plaintiff on a particular claim or group of claims, the verdict is a general verdict even if denominated a "Special Verdict" (*Chavez v. Keat* (1995) 34 Cal.App.4th 1406, 1409 at fn. 1.)

Special verdict forms, or general verdicts with special findings, are useful for complex cases. But they must be drafted with great care so to avoid confusion and the possibility of inconsistent findings or other errors. Some drafting tips for special verdict questions:

- Each plaintiff and each defendant should be listed separately with a full set of questions for each party.
- The questions should separately identify each cause of action that the jury is considering.
- The special finding questions should track each element of the various claims and defenses for each cause of action, and accurately track the jury instructions; and,
- The special findings should separately identify each type of damages being requested.

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general, is not clearly written or is incomplete, be sure to object and to also offer the court (and file!) a corrected version of the instruction.

- If the court refuses to give a proposed instruction, object on the record and, if necessary, make an offer of proof as to that evidence that supports the instruction. If you anticipate the problem early enough, bring and file a "pocket brief" that sets forth the issue.
- If you engage in meet-and-confers with opposing counsel over disputed instructions, make sure to create an oral record of any lingering objections or disagreements, and clearly identify which party is withdrawing or modifying a proposed instruction; and,
- Do not waive the reporting of the reading of the instructions, and follow along with the printed final set to make sure that the court reads them correctly. Speak up if the judge blunders!

An erroneous jury instruction can help you snatch appellate victory after trial court defeat. But it has the same potential for your opponent, and many would-be lucrative verdicts have fallen by the wayside because of a prejudicially erroneous instruction. Plan well and prosper.

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