

Drafting Jury Instructions That Win Appeals

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Jury instructions are the bane of trial attorneys' existence. Trial attorneys usually wait until the last minute to draft them, leaving the potential for fertile errors.

Careful trial attorneys engage appellate counsel to assist with preparing jury instructions and arguing them at charge conferences. Clear and concise instructions can demonstrate to the appellate court the underpinnings of a jury's verdict. Not so careful trial attorneys submit confusing instructions, which may allow the jury to decide the case on issues that do not jive with the applicable law, making it difficult for the appellate court to determine the reasoning behind the jury's verdict.

Errors in jury instructions or in failing to instruct the jury on key issues will often surface in a losing party's appeal of an adverse jury's verdict. This article will address jury instructions generally and the role of jury instructions at trial and provide practical tips for drafting jury instructions and preserving jury instruction challenges, which, in turn, will help win on appeal.

Jury Instructions in General

Jury instructions are the compass that guides the jury's ultimate deliberations. They are an indispensable road map for trial counsel before and during trial, and one of the key areas of a record that appellate counsel will hone in on to determine if

there was reversible error. They provide a checklist for the facts that must be established and a framework for legal arguments to be made at directed verdict, during closing argument, and later on appeal.

Jury instructions are broken into two categories: standard or non-standard. Standard jury instructions are also referred to as "pattern" jury instructions. Non-standard jury instructions are referred to as "special" instructions that are specially tailored to ensure compliance with the law and rules in a given case.

Most states have pattern instructions that have been approved for use in different types of cases. The use of standardized jury instructions promotes convenience, uniformity, and reliability. Judges are often required to use standard instructions when they are available.

For instance, in Florida, judges must use standard jury instructions unless there is a documented legal basis to deviate. See Fla. R. Civ. P. 1.470(b); see also *Aubin v. Union Carbide Corp.*, 177 So.3d 489, 516-17 (Fla. 2015) ("Generally, the applicable standard jury instructions are presumed correct and should be given unless such instructions are erroneous or inadequate."). In Missouri, to require that the trial court give a non-Missouri approved instruction, a party has to prove that the approved instruction

submitted to the jury misstates the law. *Topper v. Midwest Div., Inc.*, 306 S.W.3d 117 (Mo. Ct. App. W.D. 2010). In Illinois, pattern instructions are presumed to be accurate statements of Illinois law, and the jury is to be instructed using an approved pattern instruction if the trial court determines that it is applicable to the circumstances of the case. See *Luye v. Schopper*, 348 Ill. App. 3d 767, 773 (2004).

However, recently, an Illinois appellate court invalidated the Illinois pattern jury instructions on bad faith claims. See *Hana v. Illinois State Medical Inter-Insurance Exchange Mut. Ins. Co.*, 2018 WL 1384077 (Ill. App. (1st) March 16, 2018). *Hana* involved the alleged bad faith failure to settle an underlying medical malpractice lawsuit. In *Hana*, the trial court instructed the jury using pattern jury instructions for bad faith claims against insurers. On appeal, the appellate court held that the trial court erred in instructing the jury with the pattern instructions since the instructions did not accurately reflect the current state of Illinois law. The Court ruled that, on remand, non-pattern jury instructions should be crafted in place of the pattern instructions.

The Role of Jury Instructions

Jury instructions are communications from the judge that informs the jurors of the law to be applied to the facts of the case. However, jury instructions are not only essential for the jury to understand the case. Jury instructions are critical for three main audiences: the jury, the trial lawyers, and the appellate court.

Jury instructions are crucial to educate the jury on its role, the issues in the case, how the jurors and other participants of the trial will conduct themselves, and the law that applies to the case. Further, jury instructions should explain to the jury how to apply those legal principles to the facts at hand.

Jury instructions should be clear, concise, and organized. The jury must be able to understand what is being asked of them. Without clear instructions identifying the issues and focusing the jury on the law, the jurors may become frustrated and will likely make a decision on irrelevant factors such as which party and/or lawyer is more likeable.

In addition to helping focus the jurors, jury instructions also serve as the law of the case. Attorneys can and should consult jury instructions before filing complaints. Attorneys should review the standard instructions and research the case law supporting those instructions. The law on a given topic may change at any time; thus, the attorney should also research the current state of the law to ensure that the standard instructions accurately reflect the current state of law. If not, there is a risk that the pattern instructions may be invalidated as they were in *Hana*.

Attorneys should also use jury instructions as an opportunity to present the theme of the case. Trial attorneys are keenly aware that the theme of the case can and should be presented during the opening statement and closing argument, and if possible, throughout the examination of the witnesses. However, attorneys often forget that the jury instructions are another avenue to present the theme to the jury.

In addition, attorneys can use jury instructions as an advocacy tool. Attorneys can discuss key instructions and explain how the law should be applied to the evidence presented. Attorneys can weave these instructions into the case as early as during voir dire, opening statements, and the examination of witnesses, and then later in closing arguments. Attorneys can also blow up portions of the jury instructions for the jury to view during closing argument.

Jury instructions are one of the last things the jury will hear before turning to deliberations. The jury will also have an opportunity to review the written instructions during deliberations. Effective jury instructions can have a lasting impression on the jury and will impact the outcome of the case.

Finally, the last key audience is the appellate court. Appellate courts will look at jury instructions for error on appeal. The appellate courts will look to see what instructions were requested, what objections were made, what instructions were ultimately given, and whether or not the instructions given match the instructions as they were written.

Attorneys should make sure the jury instructions given are the same as any written instructions. If there is any difference between the two, the oral instructions will likely control on appeal. And, if there is an error, then the judge should be notified immediately in order to correct the error. A motion for mistrial may be appropriate. If a motion for mistrial is not made and the jury is told that the instruction was incorrect and should be disregarded, then the issue may be waived.

Crafting Clear and Concise Non-standard Jury Instructions That Win on Appeal

There may be circumstances where pattern instructions do not adequately reflect the law. In that case, attorneys will have to craft non-standard or special instructions. Before doing so, attorneys must conduct the necessary research and find supporting authority. To avoid error, attorneys must be prepared to submit the proposed instruction with binding case law or statutory authority.

Once there is supporting authority, then attorneys can begin crafting the instructions. When drafting non-standard jury instructions, there are some important principles to keep in mind:

First, the most effective jury instructions are clear and concise. Clear and concise instructions can illustrate for the appellate court the findings necessarily made by the jury in reaching the verdict. On the contrary, confusing instructions will be difficult for the appellate court to review.

Second, statutory and case law language should be simplified. It is not necessary to use the exact language as long as the instruction accurately reflects the law. The exact language of a complex case or statute might end up confusing the jury, making it impossible to prevail on appeal.

Third, jury instructions must accurately state the law. This is imperative. If the instruction does not accurately state the law, then there will be an issue on appeal. An accurate statement will be upheld on

appeal, but an inaccurate statement will likely be reversed.

Fourth, there must be evidence to support the instruction. Even if the instruction is applicable, it will be reversible error if an instruction is given that is not supported by the evidence.

Fifth, each instruction should contain no more than a few sentences. Each instruction should focus on only one topic. If an instruction contains several inter-related topics, then a judge may outright reject the instruction. However, if each issue is presented in a separate instruction, then the trial judge will more likely accept the instruction. And, if the trial judge still rejects the instruction, then it will create grounds for appeal.

Sixth, each instruction should be impartial and not contain any argument. If an instruction endorses an argumentative position of one of the parties, then it will be reversed on appeal.

Seventh, each instruction should identify the parties by name rather than by plaintiff and defendant. The jury will have a better chance of understanding jury instructions where names are used instead of labels. Jury instructions with proper labels will also be easier for the appellate court to review on appeal.

Eighth, once the instructions are drafted, then they should be organized logically. When drafting case-specific instructions, attorneys should put the most important instructions first. The general rule should be stated before the specific principle and before detailing any exceptions or conditions. Attorneys should also advocate

where the case-specific instruction should be included in conjunction with the other instructions. Improper placement of a jury instruction may diminish the jury's understanding of the instructions as a whole. It might also have an impact on appeal.

Finally, attorneys do not necessarily need to limit the requested instruction to the current state of the law. A requested instruction in accordance with the law as you believe it should be is necessary to preserve the issue on appeal. Attorneys should request instructions under your theory (even if contrary to existing law), and then submit alternative instructions under the current law.

In sum, if a jury instruction does not accurately state the law or there is no evidence to support the instruction, then it will be reversible error. Likewise, if the instruction is argumentative and not impartial, then it will be reversible error. However, if the jury instructions are confusing, then the court will likely affirm because it will be difficult to ascertain the jury's reasoning for making its verdict. Therefore, paying careful attention to the drafting of special jury instructions is critical.

Preserving Jury Instruction Issues for Appeal

After drafting effective special instructions, it is important to present them to the trial court in writing and orally at a charge conference. Merely submitting the written instructions will not be enough to raise any issues on appeal. In addition, the charge conference must be on the record

for the appellate court to review any jury instruction challenges on appeal.

Attorneys should be prepared to clearly object to specific instructions and/or to the trial court's failure to give a specific instruction. Some common objections include: the instruction is not a standard instruction; the instruction misstates the law; the instruction was not pled as an allegation or a defense; the instruction is not supported by the evidence; the instruction is not necessary; the instruction is not clear in content; and the instruction is not in proper context.

Objecting to specific instructions is necessary to preserve the issue for appeal. However, attorneys must also object to the instructions as a whole for failure to include the requested instructions or for including objectionable instructions, in order to preserve the issue for appeal.

In addition, attorneys should be wary of a trap when the trial judge asks whether the parties agree to the modified instructions. If the attorney accepts the instructions, then he or she waives the issues for appeal. Instead, attorneys should accept the instructions subject to the objections already stated on the record. Such a statement or something similar will preserve the issue for appeal.

Finally, prudent attorneys will confirm with the trial judge whether or not

objections are preserved throughout the end of trial and need not be repeated after the charges are given to the jury. Attorneys do not need to object while the trial judge reads the charges to the jury; instead, attorneys should request a sidebar and bring any objections to the judge's attention outside the presence of the jury.

Conclusion

Jury instructions are an essential part of litigation. They can make a difference at trial and on appeal. Attorneys should never assume that the standard or pattern instructions will be sufficient. Carefully tailored non-standard instructions should be presented to the trial judge. And, attorneys should make the appropriate objections to preserve the issue on appeal. If the instructions are clear and concise, they accurately state the law, and there is evidence to support the instructions, then your chances of winning on appeal will increase exponentially.



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