

Appellate Tips for Trial Lawyers

LOS ANGELES COUNTY BAR ASSOCIATION

Volume I, Number 10 ● An E-Publication of the Los Angeles County Bar Association ● September 2008

Selected

Benefits

[Renew Your Membership](#)

[Superior Court Civil Register](#)

[Member Benefits](#)

[Calendar of Events](#)

Proceed with Caution: Pitfalls in Preparing Jury Instructions

In the rush of preparing for trial, lawyers often leave the task of drafting jury instructions until the last minute. After the trial, however, the instructions are among the first things that an appellate specialist will want to review. Why? Because they are an unusually fertile source of trial court error—often precisely because the parties and trial court didn't pay enough attention to them.

Regardless of what the jury thinks about the instructions, the appellate court, and therefore appellate counsel, will likely care a lot. As a result, it's essential both to prepare your own instructions carefully and to make a clear record when the court refuses to give your correct instruction or agrees to give your opponent's erroneous instruction. Tips on preparation follow; tips for making a clear record will appear in the next newsletter.

The Governing Rules

"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," (*Soule v. General Motors Corp.*, (1994) 8 Cal. 4th 548, 572). This rule highlights several important aspects of instruction drafting with an eye toward a potential appeal:

- *Ask for comprehensive instructions.* An appellant cannot complain of the trial court's failure to give an instruction that it did not request at trial, (*Null v. City of Los Angeles* (1988) 206 Cal. App. 3d 1528, 1535).
- *Ask for correct instructions.* It's not unusual for parties to propose instructions that aggressively state the law in their favor, but that approach is risky. If the losing party's only proposed instructions on a certain point misstate the law, the trial court is free to reject them, and the party cannot seek reversal based on the lack of instruction on point, (*Shaw v. Pacific Greyhound Lines* (1958) 50 Cal.2d 153, 158). If the prevailing party's proposed instructions misstate the law and the trial court gives them anyway, the invited error may lead to reversal of the judgment.
- *Ask for nonargumentative instructions.* The court can refuse to give a legally correct instruction that is argumentative or slanted, (*Munoz v. City of Union City* (2004) 120 Cal. App. 4th 1077, 1108). The result can be just as bad as with a legally incorrect instruction—waiver of an appellate argument regarding the trial court's failure to instruct or reversal because the instruction should not have been given.
- *Ask for instructions only on theories supported by substantial evidence.* Limit your proposed instructions to theories for which there is evidence. Otherwise, you could have a verdict overturned on appeal because the jury may have relied on a theory unsupported by substantial evidence, (*LeMons v. Regents*

[of University of California \(1978\) 21 Cal. 3d 869, 875-876\).](#)

- *Object to instructions you disagree with.* Although some erroneous instructions are automatically “deemed excepted to,” (Code Civ. Proc., § 647), it is dangerous to rely on this principle. The automatic objection covers only instructions that misstate the law, ([Lund v. San Joaquin Valley R.R. \(2003\) 31 Cal. 4th 1, 7.](#)) It does not apply to instructions that are correct as far as they go but are incomplete given the state of the evidence (*Id.*). To preserve that contention for appeal, a party must object and offer a qualifying instruction. Err on the safe side by objecting to any instruction with which you disagree.

Sources of Instructions

While jury instructions should be tailored to each specific case, they don’t have to be drafted on a blank slate. The Judicial Council of California Civil Jury Instructions, or “CACI,” are a good place to start. The court rules strongly encourage using these instructions when applicable, (Cal. Rules of Court, rule 2.1050(e)). But experience teaches that standard instructions are not necessarily error-free or suitable for use without modifications to tailor them to the needs of the case, ([Mitchell v. Gonzales \(1991\) 54 Cal. 3d 1041, 1056](#) (judgment reversed because of error in long-used proximate cause instruction)). If the trial court or opposing counsel insists on a form instruction that you believe is wrong, resist, propose the instruction you believe is correct, and make your reasons clear.

When there are no form instructions on point, counsel are free to propose their own special instructions. Each special instruction should be followed by citations to supporting legal authority, (Cal. Rules of Court, rule 2.1055(d)). This is where you should resist the temptation to propose instructions that argue the case and slant the result. Keep things simple and accurate.

Format of Instructions

The court rules impose several formatting requirements on proposed jury instructions. Among other things, instructions must include a cover page that shows which party proposed them and an index with a checklist where the court can indicate whether each instruction was given as proposed, given as modified, refused, or withdrawn, (Cal. Rules of Court, rule 2.1055(b)). As next month’s appellate tip newsletter will discuss, these requirements are more than mere formalities. They help create a clear record, which can make all the difference on appeal.



Contributed by Alana H. Rotter, Associate, Greines, Martin, Stein & Richland LLP.

Alana practices civil appellate law. Before entering private practice, she was a law clerk to the Honorable Kermit V. Lipez of the U.S. Court of Appeals for the First Circuit.