Appellate Tips for Trial Lawyers

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California civil and criminal litigation overlap in a crucial area: preserving your record for appeal. Although this series of short articles is mainly designed for civil trial lawyers, some "best practices" apply in every trial. Keep an eye on what our appellate-lawyer writers have to say about how to preserve your trial court victory or how to lay the groundwork for a successful challenge when you've lost.

Don't Lose Track: Handling Jury Instructions at Trial

by Jens Koepke

Even if you've followed the tips in the previous issue and started early to prepare correct, nonargumentative jury instructions supported by substantial evidence in the case, you're still only halfway there. How you keep track of what happens to your proposed instructions during trial has a direct bearing on how successful you will be in attacking or defending the verdict on appeal.

This article provides tips to ensure that any good appellate issue concerning jury instructions is preserved for appeal.

Avoiding Invited Error

No claim of instructional error can be raised on appeal if the appellant proposed or stipulated to the instruction (Stevens v. Owens Corning Fiberglas Corp. (1996) 49 Cal. App. 4th 1645, 1653-55). Moreover, even if your client did not invite the error, a failure to create a clear record of who requested what jury instructions and what became of those instructions could mean your client is charged with having done so.

Appellate courts presume that a judgment or order is correct: "'All intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown.'" (Denham v. Superior Court (1970) 2 Cal. 3d 557, 564). It is therefore the appellant's burden to provide a record sufficient to show the asserted error (Maria P. v. Riles (1987) 43 Cal. 3d 1281, 1295). So, for example, if the record does not show which party requested an erroneous instruction, the reviewing court must presume that the appellant requested the instruction and therefore cannot complain of error (Lynch v. Birdwell (1955) 44 Cal. 2d 839, 846 48). Similarly, if the record is silent on whether an instruction was refused by the court or withdrawn, the reviewing court must presume that the appellant withdrew the instruction (Bullock v. Philip Morris USA, Inc. (2008) 159 Cal. App. 4th 655, 679; see also Boeken v. Philip Morris, Inc. (2005) 127 Cal. App. 4th 1640, 1671-72 (since record devoid of whether appellant's proposed instruction was eventually submitted to and rejected by court, issue of instructional error waived)). Along the same lines, it's not unusual for instructions to be revised in handwriting, and unless the record shows who asked for what changes, they will be attributed to the appellant.

Keeping Track of Instructions

- **Clear Record.** It is vital that the trial record be clear about which party requested which jury instructions. The failure to have a clear record could make it impossible to argue that your client was the one who requested or didn't request a certain jury instruction, and this failure could torpedo potential winning arguments on appeal. Make sure you file a document (and obtain a conformed copy) that shows precisely what standard and special jury instructions you are requesting. Should you choose to withdraw any instructions, file something as soon as possible that indicates that withdrawal.
- **Trial Court Rulings.** Trial courts often consider jury instructions during pre-trial proceedings or during breaks in a trial. This may sometimes happen in chambers rather than in open court. Wherever it happens, you should always try to have the proceeding reported by the court reporter. Otherwise, there may be no record of how the trial court ruled on certain jury instructions, and, equally important, there may be no record of the trial court's reasoning or the parties' positions on those instructions. If the court refuses to put the proceeding on the record, take careful notes. If, when you go back on the record, the court does not itself put the necessary rulings and reasoning on the record, ask to do it yourself. Don't be shy about this; failure to make an adequate record can cost you dearly in the appellate courts.
- **Objections and Offers of Proof.** When the trial court has refused to give a requested instruction, it is paramount that your objections to that ruling and the reasons for your objections be put on the record. If the court's reason is that there is no evidence to support giving the instruction, you should state what evidence you believe supports giving the instruction, as well as why the law requires the instruction. If the issue is important enough, ask leave to file a short brief, so that you can be sure you don't overlook any issues—but be prepared to proceed without one.
- **Meet-and-Confers.** Trial courts will sometimes require counsel to meet and confer to harmonize or to work out competing requests for jury instructions in which case there will be no record of your exchange with opposing counsel. Any agreements you reach must be described in detail on the record, particularly when they involve an agreement to abandon jury instructions or modify the requested language of an instruction.

Reading of the Instructions

Some trial courts may ask or encourage trial lawyers to agree to waive the reporting of the reading of the jury instructions. Don't. It is important to have a record of exactly how the trial judge instructed the jury, and thus whether the judge deviated from the precise language of the printed instructions (which some judges have a tendency to do). Without a transcript you can't even bring the error to the trial court's attention, much less argue it on appeal. For the same reason, follow along as the judge reads the instructions so you can nip any reading error in the bud.

Likewise, work with the judge and court clerk to ensure that the court file contains complete sets of the instructions given and whether the instructions were refused or withdrawn, and get copies right away so you can be sure they're accurate. Although these filings are supposedly standard procedure, they sometimes get overlooked—but they will be among the first things your appellate lawyer will want to see.

Contributed by Jens B. Koepke, who is an attorney with Greines, Martin, Stein & Richland LLP, a firm specializing in appellate practice.

He is a member of the Appellate Courts and State Appellate Judicial Evaluation Committees of the Los Angeles County Bar Association.

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