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Instructions Manual

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"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.*, 8 Cal.4th 548 (1994). Sounds simple, right? But there are many potential potholes on jury instruction road. How you prepare proposed instructions, keep track of what happens to them during trial and make a clear record has a direct bearing on how successful you will be in attacking or defending the verdict on appeal.

If the road is well-paved, though, your appellate lawyer will greet you with a glint in his eye about what you've given him to work with on appeal.

Preparing Jury Instructions

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*, 206 Cal.App.3d 1528 (1988).

Ask for legally correct instructions. Parties often propose instructions that aggressively state the law in their favor, but that approach is risky. If the losing party's only proposed instructions 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*, 50 Cal.2d 153 (1958). 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*, 120 Cal.App.4th 1077 (2004). 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. 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*, 21 Cal. 3d 869 (1978).

Object to instructions with which you disagree. Although some erroneous instructions are automatically "deemed excepted to," as articulated in Code of Civil Procedure Section 647, don't rely on this principle. The automatic objection covers only instructions that misstate the law. *Lund v. San Joaquin Valley R.R.*, 31 Cal.4th 1 (2003). The principle does not apply to instructions that are correct as far as they go but are incomplete given the state of the evidence. 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.

Make a Clear Record

No claim of instructional error can be raised on appeal if appellant proposed or stipulated to the instruction. *Stevens v. Owens-Corning Fiberglas Corp.*, 49 Cal.App.4th 1645 (1996). But 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 that instruction 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*, 2 Cal.3d 557 (1970). It is therefore the appellant's burden to provide a record sufficient to show the asserted error. *Maria P. v. Riles*, 43 Cal.3d 1281 (1987). 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*, 44 Cal.2d 839 (1955). 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.*, 159 Cal.App.4th 655 (2008). 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

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 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 importantly, 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; as shown in the preceding section, failure to make an adequate record can cost you dearly in the appellate courts.

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 for 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.

Trial courts will sometimes require counsel to meet and confer to harmonize or 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 as to 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 the instructions 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.

Appealing Instructional Error

If you've prepared proper jury instructions (or timely objected to improper ones), kept good track of them at trial and make a clear record, your appellate lawyer will have powerful weapons to win your client's appeal. The standard for reviewing jury instruction issue on appeal is well known.

An instructional error is not prejudicial, and therefore not grounds for reversal, unless there is a reasonable probability that in the absence of the error, a result more favorable to the appealing party would have been reached. In conducting that prejudicial error analysis, as the court in Soule explained, a reviewing court "must also evaluate (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." That evaluation is done by looking at the facts in the entire trial record.

Equally importantly, the reviewing court must view the evidence in the light most favorable to the requesting party, and "must assume that the jury, had it been given proper instructions, might have drawn different inferences more favorable to the [requesting party] and rendered a verdict in [the requesting party's] favor on those issues as to which it was misdirected." *Whiteley v. Philip Morris Inc.*, 117 Cal.App.4th 635 (2004).

This presents a very advantageous standard of review for an appellant. It is no wonder that jury instructions are one of the first places an appellate practitioner will look to find winning issues on appeal. Now go post those jury fees and wow them at the courthouse.

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