



Jury instructions front and center

PREPARE YOUR CASE WITH THE JURY INSTRUCTIONS IN MIND RATHER THAN TREAT THEM AS AN AFTERTHOUGHT

As trial judges, it is our constitutional duty to ensure that the parties before us receive a fair trial. Perhaps that is why we are so obsessed with getting your trial documents in on time and making sure that neither side is prejudiced by late submittal of witness or exhibit lists or “sandbagged” by new theories of liability that have not been properly pled and alleged. We take great effort in preparing for your trial, making sure we’ve covered all the bases, studied and researched complex issues which may arise, anticipated potential problems, to make sure the trial runs smoothly, because after all, we are the “directors” of this short play.

Surprisingly however, jury instructions are often an afterthought, thrown together at the last minute, literally. It is not uncommon for counsel to review and prepare the instructions just prior to closing argument. I, too, am guilty of not formalizing jury instructions prior to trial, often persuaded by counsel that preparation of the instructions is an act of futility until all the evidence is in. Trials are certainly stressful for all involved, and it is understandable that parties are more concerned with garnering evidence, scheduling witnesses, reviewing key documents, as well as writing an opening statement.

I propose that preparing your case with jury instructions in mind will alleviate stress and allow you to focus on the elements you must prove to prevail in trial, as well as, and most importantly, create a simple road map for the jury to follow. This strategy should be employed by plaintiff and defense counsel alike.

California Rules of Court and Los Angeles County Court Rules

First, a not so subtle reminder as to what is required by the rules in terms of jury instructions prior to trial. California Rules of Court, rules 2.1050 through

2.1058 address the use of Judicial Council of California Civil Jury Instructions (CACI). The goal of CACI instructions is to provide a standardized instruction that is an accurate statement of the law and easily understandable to the average juror. (Cal. Rules of Court, rule 2.1050, subd. (a).) Use of CACI instructions are highly encouraged. If an instruction is applicable to a case, it is recommended that the judge give the instruction. (Cal. Rules of Court, rule 2.1050, subd. (e).) However, CACI instructions are not themselves the law, are not entitled to a “presumption of correctness,” and may be challenged for the court to determine whether the instruction is a correct statement of the law. (*Bowman v. Wyatt* (2010) 186 Cal.App.4th 286, 298 n.4.) Each set of proposed jury instructions should contain a title page with caption, identifying the name of the filing party, followed by an index of instructions identified by reference numbers, with a checklist to allow the court to indicate whether the instruction was given as proposed, modified, refused, or withdrawn. (Cal. Rules of Court, rule 2.1055, subd. (b)(2-3).) The instructions must be loosely bound, not stapled, on separate pages, include the instruction number and title at the top of the first page, and be prepared without blanks or brackets, so that they can be easily read to the jury. (Cal. Rules of Court rule 2.1055, subd (b)(4), & subd. (c)(1-3).)

It goes without saying that the court would be displeased with a set of instructions that is one continuous run-on with more than one instruction on a page, or with instructions that have not been edited or modified. Failing to prepare your instructions as set forth by the California Rules of Court will lead to needless delays, as well as add to the stress, as we try to prepare and print the instructions moments before closing arguments. Perhaps more importantly,

the jurors become frustrated and feel their time is being wasted, as they wait in the hallways for counsel and the court to get done what should have been prepared days ago, at the Final Status Conference.

In a direct-calendar case, the court will set a Final Status Conference not more than 10 days prior to the trial date. (Los Angeles County Court Rules, Rule 3.25, subd. (f).) Proposed jury instructions must be filed *five days* prior to the Final Status Conference. Again, reference the California Rules of Court in terms of what is required to comply with the proper filing of your instructions. These rules also allow the court to make “discretionary” Final Status Conference orders, such as a required “in person meeting” between counsel to discuss the submission of joint trial documents, as well as ordering the parties to prepare a separate set of agreed-upon instructions and those not agreed upon, in the manner required by California Rules of Court, rule 2.1055. (Los Angeles County Court Rules, Rule 3.25, subd. (g)(1-8).) It is always a good idea to access the Los Angeles Superior Court website (www.lacourt.org) and look up the requirements of your trial judge. Most will have specific instructions to follow as to their preferences regarding the preparation and filing of jury instructions.

As an aside, in a civil case, the parties must propose jury instructions and the court is not required to draft instructions should counsel fail to do so. (*Metcalf v. County of San Joaquin* (2008) 42 Cal.4th 1121, 1130-31.) However, some cases have held that the trial court is required to instruct jurors on issues raised by the evidence or on elements of a claim or defense. To be safe, most judges will inquire if they feel an instruction is missing. The court *is required* by statute to instruct on the burden of proof. (Evid. Code, § 502.)

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Special jury instructions

As discussed earlier, CACI instructions have been prepared and approved by the Judicial Council of California and are meant to be an accurate reflection of California law. If it is covered in a CACI instruction, there's no real reason to submit a special instruction and no real incentive for the Court to grant your request. The Rules of Court do offer us some guidance in this regard. "Whenever the latest edition of the Judicial Council jury instructions does not contain an instruction on a subject on which the trial judge determines that the jury should be instructed, or when a Judicial Council instruction cannot be modified to submit the issue properly, the instruction given on that subject should be accurate, brief, understandable, impartial, and free from argument." (Cal. Rules of Court, rule 2.1050, subd. (e).)

For a special instruction to be given, the trial judge would first have to determine that the jury needs to be instructed on the specific issue. Next, there would have to be an absence of a CACI instruction on that issue, or if an instruction exists, it cannot be modified to fit your specific scenario. Meeting these two requirements would probably be grounds for you to submit a special instruction. An example could be liability arising from a statute which CACI does not address. Ordinarily, a special instruction would be crafted, mirroring the elements of the statute.

However, in my experience, the problems do not arise from these two requirements, but from the last phrase referenced in the Rule. The special instruction must be accurate, impartial, and free from argument. Special instructions are often offered by Plaintiff or Defense to provide additional emphasis or firepower on an element which has already been addressed. They are for the most part neither impartial nor free from argument. Oftentimes counsel argue for special instructions that quote language from an appellate opinion. However, make sure that the quote is not misleading, out of context,

and the facts of the published opinion are not distinguishable from your case. The court may also refuse a special instruction because it is repetitive or cumulative, incomplete, overbroad, or too complicated for the average juror to understand. An instruction defining a term commonly understood by one familiar with the English language is improper. (*People v. Ibarra* (2007) 156 Cal.App.4th 1174, 1198.) In short, if the element or issue has been addressed in a CACI instruction, a special instruction regarding the same is most likely superfluous.

Weaving the instructions into your theme

We've all heard and read about the importance of presenting your case to the jury through a story, with a beginning, a middle, and an end. It allows the jury to follow your presentation of the case and leads them down the path you would like them to follow. The use of or reference to jury instructions through every phase of your case, be it during your opening, direct or cross-examination, introduction of evidence, or closing, may be the most important aspect of your case. I would go so far as to say, as soon as you pick up the file, or after the initial client interview, start thinking of the case in terms of jury instructions and the theme of your case.

The story or theme may go like this: Mr. X is a successful businessman, in the prime of his career. He is married to a loving wife who spends her time raising their two young children. She is also an aspiring author; her first children's book is slated to be published in a few months. They take yearly family vacations. Mr. X's career is on the rise, in fact he anticipates being appointed executive vice-president at the board meeting later in the month, which would entitle him to a larger salary as well as substantial benefits. On his way back to the office from lunch one afternoon, his vehicle is T-boned while passing through an intersection. His vehicle is struck by a UPS vehicle. The driver of the vehicle was intoxicated. UPS was aware of his drinking problem as he

had received three warnings for drinking while on the job. Mr. X became a quadriplegic as the result of the accident, could no longer work or provide for his family. He required around-the-clock medical care and therapy. As a result, Mrs. X had to give up her promising career as an author, and her relationship with Mr. X became strained. (Sound like a law school exam scenario?)

While this appears to be a sympathetic story, you can never be quite sure how a jury will react. Will they see the damages as you would hope, or minimize them as they may be struggling financially as well? Will they believe a large award against UPS would affect UPS financially, resulting in laying off employees? Some may be jealous of such a picture-perfect family.

Now, think of the dozens of jury instructions you could propose, the language and elements of each, which would make the jury more comfortable in finding in your favor. For example, you may want to introduce the following terms to the jury through your opening statement and examination of expert witnesses, so the jurors become acquainted with the terms and are comfortable hearing them when they are instructed on the law: more likely true than not true (burden of proof), use of reasonable care (negligence), substantial factor in causing accident/damages (negligence per se) unfitness/incompetence and knew or should have known (negligent retention of employee), an extreme departure from what a reasonably careful person would do (gross negligence), right of way (vehicle code) and impairment (intoxication), reasonably necessary expenses (past/future medical care), reasonably certain (loss of earnings), physical pain, mental suffering, loss of enjoyment of life, physical impairment (emotional distress damages), companionship, affection, loss of relations (loss of consortium). This is certainly not an all-inclusive list but is provided simply as an example of acquainting the jurors with these essential

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terms prior to the court instructing on the law.

Effectively used, the terms and elements set forth in the instructions compel the jury to find in your favor, should the elements be satisfied with the facts and evidence you've presented. As mentioned earlier, use the terms and language throughout the presentation of your case. Introduce exhibits and extract testimony with the goal of linking the evidence to the elements in the instructions. A PowerPoint presentation during closing argument, referencing evidence and testimony to each specific instruction from liability through damages would be most effective. Make it simple for the jury to follow your road map. Giving them the information they need, and rationally connecting it with

the law they've been provided, may take away a bit of the unpredictability you've come to expect with juries.

This is not a novel or new concept. As lawyers, we have all been taught to argue the facts with the law. But use of instructions to argue your case is sadly often overlooked. Don't rely on the judge reading the instructions and the jurors absorbing them. Your cases are document and expert intensive. So much effort is put into the details, the entirety of discovery and preparation, that sometimes you lose sight of your goal; linking the facts and evidence to the law (the instructions). The beauty of it is the instructions are undisputed, printed, and ready to use. Judges want you to use them, and in fact we rarely allow law other than those approved in

CACI. Take advantage of this opportunity and educate the jury through the course of your case so they are comfortable rendering a verdict in your favor.

Judge Gregory Keosian was appointed to the Los Angeles Superior Court by Governor Gray Davis in 2002. He currently presides over an Independent Calendar courtroom in the Stanley Mosk Courthouse, where he hears unlimited civil matters. Prior, he served on the Appellate Division of the Los Angeles Superior Court, reviewing both limited civil and misdemeanor cases. He was initially assigned to the Van Nuys courthouse, handling civil trials, limited jurisdictions matters, as well as unlawful detainers. In his prior life, he was a civil trial attorney for 15 years with the Law Offices of Keosian & Keosian.