

What Must be Proven

By C. Barry Montgomery
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Closely paralleling jury instructions with trial preparation and presentation allows the jury to decide what must be proven.

Link Trial Presentation



Attorneys who specialize in the prosecution or defense of civil lawsuits are a special breed. They are experts at developing the evidence needed at trial to either prove their case or defeat the other side's claims. They focus



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a great deal of time and attention on gathering documents, preserving testimony, laying the foundation for the admission of evidence, developing the opinions of experts, and doing many of the other things necessary to winning the lawsuit at hand. But the one area of trial practice where many lawyers fail to devote the requisite time and attention is in the formulation and drafting of jury instructions.

In what may be one of the greatest errors a trial lawyer can make, many counsel spend little or no time thinking about jury

instructions before the trial. And, once the trial begins, those same lawyers spend a few hours, usually the day before closing arguments are to be given, leafing through a pattern jury instruction book identifying the instructions that may need to be given to the jury and inserting case specific facts into the pattern instructions. This approach is a prime example of “too little, too late.”

Many lawyers forget that jury instructions are a very critical part of the trial process. The instructions are, literally, the rules by which the jury is told to determine the issues in the case and decide a fair verdict for the parties. Unless the jury knows and understands the applicable law, the entire trial process is subverted and the outcome will be inaccurate and unfair. The United States Supreme Court has recognized for years the importance of jury instructions: “Jurors are not experts in legal principles; to function effectively, and justly, they must be accurately instructed in the law.” *Carter v. Kentucky*, 450 U.S. 288, 302 (1981). “It is quite simply a hallmark of our legal system that juries be carefully and adequately guided in their deliberations.” *Gregg v. Georgia*, 428 U.S. 153, 193 (1976).

The purpose of this article is to provide practitioners with practical advice regarding the development, drafting and use of jury instructions as an integral part of defending a civil lawsuit. To that end, the authors will provide a history of jury instructions and explain the goals to be accomplished through the use of jury instructions.

The History of Jury Instructions

Originally, under English common law, there was a rule that judges were not to instruct jurors on the law; judges could only answer questions from jurors. When faced with questions about the law, many judges avoided an explanation of legal principles and instead told the jurors to do what they felt was right. Peter Tiersma, *The Rocky Road to Legal Reform: Improving the Language of Jury Instructions*, 66 Brook.

L. Rev. 1081, 1082 (Summer 2001). This in turn led to problems, for if a judge does not explain to the jury what it is supposed to do, it will do what it feels is best (which is not always right).

Eventually, judges in England did begin to instruct juries on the law. But even today, English jury instructions, which are part of the judge’s summation of the case, remain oral and relatively informal. The judge summarizes the facts of the case and the inferences to be drawn from the facts and then tells the jury, in his or her own words, what the relevant law is. *Id.* at 1083.

The American legal system is based on the English model and, not surprisingly, American judges originally did not instruct jurors on the law. Jurors were expected to use their common sense. Common sense may have worked well enough when this country was largely rural, but as the country became more industrialized, legal disputes became more complex and the need for consistently applied rules of law became more pressing. *Id.* Eventually, jurors lost the right to decide questions of law. Toward the end of the nineteenth century, many states took away the power of the judge to charge juries on the facts. *Id.* Thus began the American tradition in which the judge decides the law and the jury decides the facts. *Id.* As a result of this division of labor, many jurisdictions began to require the judge to instruct the jury on the relevant law. *Id.*

Many in the legal profession soon came to realize that instructing the jury could involve much time and duplication of effort. With every trial, judges and attorneys would spend hours drafting the jury instructions. Often, instructions were inconsistent from judge to judge and from case to case. In addition, judges were often reversed for instructional error. *Id.*

In 1935, Judge William Palmer of the Superior Court of Los Angeles addressed jury instructions in an article recommending that a committee be formed to compile approved instructions in civil cases. *Id.* Based on his recommendation, a committee of judges and lawyers was formed

and, after a few years of tireless work, a book of jury instructions was published. The descendant of that book, known as the Book of Approved Jury Instructions, is still used to this day in California. *Id.*

The next significant step in pattern jury instruction development began in Illinois. Patrick J. Kelley and Laurel A. Wendt, *What Judges Tell Juries about Negligence: A*

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Review of Pattern Jury Instructions, 77 Chi.-Kent L. Rev. 587, 593 (2002). In 1933, the Illinois Legislature passed an act requiring judges to provide jurors with narrative instructions. Over the course of the next two decades, it became apparent to all concerned that this provision of the Code of Civil Procedure made trial judges little more than speaking agents of slanted, argumentative instructions authored by counsel on a case-by-case basis. *Illinois Pattern Jury Instructions (Civil)*, 2005 edition, Foreword to the First Edition (1961), p. XVII. The system actually encouraged counsel to turn the instructions of the impartial judge into partisan weapons. Kelley and Wendt, *supra*, p. 594.

In 1954, the Illinois Judicial Conference undertook a study of the jury instruction problem. A committee was appointed, and under the leadership of Judge Robert F. Cotton, it diligently investigated the subject of jury instructions. The committee found, among other things, that 38 percent of all cases reversed between 1930 and 1955 were reversed in whole or in part by reason of errors in instructions. *Illinois Pattern Jury Instructions (Civil)*, 2005 edition, Foreword to the First Edition (1961), p. XVII. The committee determined that this breakdown at the trial level could only be corrected by a change in the manner of preparing and giving instructions and

it enlisted the aid of the Illinois Supreme Court. *Id.*

In early 1956, the Illinois Supreme Court appointed a blue-ribbon panel of judges, lawyers and law professors to study the jury system—specifically the problem of jury instructions—and to propose recommendations on how to deal with the problem. Over the course of the next four years, the Supreme Court Committee on Jury Instructions met on a monthly basis and carefully analyzed the issues associated with instructing a jury. *Id.* at p. XVIII. After an extensive examination of the system of instructing juries in states throughout the nation, the committee decided that to promote substantial justice, pattern jury instructions should be drafted based on four fundamental qualities: the instructions must be: 1) “conversational”; 2) “understandable”; 3) “unslanted”; and 4) “accurate.” *Id.*

By 1961, the Supreme Court Committee on Jury Instructions had drafted a large number of pattern jury instructions designed to cover many types of civil cases. That same year, the Illinois Supreme Court adopted Rule 25-1, which made the use of pattern jury instructions mandatory in those situations in which a pattern instruction applies to the facts of a case and the judge determines that it accurately states the law in that area. *Id.* at p. XXI.

The publicity surrounding the Illinois pattern jury instruction project sparked interest in their development throughout the country. The highest courts of 15 states followed the Illinois example and ordered the preparation of pattern jury instructions. In other states, the responsibility for developing sets of standardized jury instructions was assumed by state bar associations, judicial conferences, judges’ associations, administrative offices, lawyers’ associations, law schools and private individuals. Kelley and Wendt, *supra*, p. 594. Forty-eight states now have pattern or recommended jury instructions, leaving only Texas and West Virginia without pattern instructions (although jury instruction forms for Virginia cover both Virginia and West Virginia). *Id.*

Practical Advice Concerning the Drafting and Use of Jury Instructions

As the authors have previously noted, it is

a grave error to wait until the day before closing arguments to begin thinking about jury instructions. Trial counsel must think about jury instructions early and often and should always follow a few time-tested rules that apply to the drafting and use of jury instructions.

Research and Draft Proposed Instructions Early in the Case

“Preparation is still the greatest technique for winning.” Larry S. Pozner, *Lessons Learned*, The Champion, p. 7 (NACDL June 1999). An essential part of such preparation is the early consideration of jury instructions. The chances of winning later battles over jury instructions will be greatly increased if the groundwork is laid both before and during the trial. Thomas Lundy, *Going Beyond the Standard Pattern Instructions, Part II: Strategies for Persuading the Trial Judge to Modify or Supplement the Pattern Instructions*, p. 1 (July 2001) (available at <http://juryinstruction.com/>). Education of the judge is crucial to a successful instruction argument and the educational process is more likely to be effective if it is done as part of a consistent, integrated defense strategy rather than as a last minute request that comes without prior notice. *Id.* According to one set of commentators, trial lawyers who desire certain instructions “are less likely to get [them] if they wait for the end of the case and then request [them]. The best means for persuading a judge [to give a certain instruction] is to wage a case-long campaign of education. Pretrial motions, offers of expert testimony [footnote omitted], and the cross-examination process should all have as their subsidiary goal the acceptance of a request for [a specific] instruction.” Loftus and Doyle, *Eyewitness Testimony—Civil & Criminal*, §12.2, p. 330 (Lexis, 3d ed. 1997).

Because jury instructions tell juries what has to be proven and what is appropriate evidence to prove it, researching jury instructions early in the case can reveal to trial counsel what has to be proven and by whom, what has to be defended and by whom, and what is the appropriate way to do either or both. Reviewing and drafting instructions early in the case also helps counsel develop a theme for trial. The more closely trial preparation and presentation

parallel what will be in the instructions, the more comprehensible that presentation will be and the more likely it is that the jury will find that the presentation satisfies what the instructions say must be proven in the case. In addition, early preparation of jury instructions avoids the discovery that counsel has missed some key element of his or her claim, that there is something that must be proven at trial upon which no proof has been gathered, or that there is some defense available to the opponent for which no response has been crafted. Dennis C. Kolenda, *Jury Instructions: A Judicial Perspective*, Michigan Criminal Defense Newsletter, Volume 20, Number 2, pp. 2-3, (November 1996).

During the course of early preparation of jury instructions, counsel should carefully consider the issue of choice of law. It is important to remember that just because a case is going to be tried in a certain state's courtroom does not mean that the substantive jury instructions of that state will be given. Carlton D. Fisher, *How to Prepare Well-Crafted Jury Instructions*, CBA Record, p. 28 (November 1996). Making such an assumption can have disastrous consequences. The case of *Walters v. Maren Engineering Corp.*, 246 Ill. App. 3d 1084, 617 N.E.2d 170 (1993), provides an example of what can happen when one side assumes that the jury instructions of the state where the case will be tried will be given to the jury.

In the *Walters* case, the accident in question occurred in Kansas, the plaintiff and one defendant were citizens of the state of Illinois at the time of trial, one defendant's place of incorporation and place of business was in Ohio and a non-party did its manufacturing work in Tennessee. No choice of law motion was made by any party during the discovery phase of the case. When the trial began, the defendants asked the judge to apply Kansas law and use Kansas jury instructions. The judge granted the defendants' request, finding that the substantive law of the state of Kansas should apply to the parties' dispute. The Kansas jury instructions and verdict forms allowed the defendants to receive credit on the verdict not only for the plaintiff's contributory fault, but also for the actions of the plaintiff's employer (who had been previously dismissed from the case) and a phantom

defendant who was never made a party to the suit. The jury concluded that the plaintiff's injuries and damages were due to his own fault and the fault of his employer. Use of the Kansas jury instructions and verdict forms, which was affirmed by the appellate court, cost the plaintiff his verdict. *Id.*

Review All Pattern Instructions Critically and Skeptically

Do not accept pattern instructions simply because they are standard. Counsel should do his or her own research and not hesitate to redraft a form instruction where appropriate. Even if the pattern instructions are not inaccurate, it is useful to redraft standard instructions to fit the particulars of the case. Pattern instructions may not accommodate the "personality" of the individual case. The more case-specific instructions the jurors receive, the more likely they are to understand the case and to accurately evaluate the issues. Kolenda, *supra*, p. 3. Although most judges will use the standard instructions and ignore the proposed substitutes, in most jurisdictions, submitting a non-standard instruction is required to preserve the issue for appeal (see below).

In most states the verbatim use of the state's pattern jury instructions is mandatory. However, while pattern instructions have the sanction of the state courts, it would be an error to conclude that their unvarying use is required. Even in states where the use of pattern jury instructions is "mandatory," counsel can prevail upon the court to issue a modified pattern instruction (or a non-pattern instruction) if the pattern instructions do not accurately state the law, are inapplicable to the particular case, or do not address the matter at issue. See *Los Amigos Supermarket, Inc. v. Metropolitan Bank & Trust Co.*, 306 Ill. App. 3d 115, 713 N.E.2d 686 (1999) (the fact that instruction was drawn from the Illinois Pattern Jury Instructions does not mean that it is automatically an accurate and correct statement of the law, as there has not been any advance approval of the IPI instructions and they are open to challenge); *Lay v. Knapp*, 93 Ill. App. 3d 855, 417 N.E.2d 1099 (1981) (an approved instruction does not automatically preclude the use of a non-IPI instruction on the same subject; in limited circumstances,

amplification or clarification of IPI instructions may be permitted in the discretion of the trial court); *Sherrard v. Stevens*, 176 Mich. App. 650 (1988) (where a standard jury instruction does not adequately cover a particular area, the trial court is obligated to give additional instructions when requested where those instructions properly instruct on the applicable law); *State v. Nuetzel*, 606 P.2d 920 (Hawaii 1980) (instructions should be flexible with wide discretion vested in the trial judge to clarify the terms of the definition).

It is important for counsel to remember that every litigant is entitled to have the jury instructed as to the law governing his or her theory of the case. Where there is a defense to a claim, the defendant is entitled to an instruction regarding that defense. See *Malek v. Lederle Laboratories*, 125 Ill. App. 3d 870, 466 N.E.2d 1038 (1984); *Conde v. Henry*, 198 F.3d 734 (1999); *McKenzie v. State*, 521 S.W.2d 637 (Texas 1975). It is axiomatic that a party has a right to have the jury instructed on his or her theory of the case as long as there is some evidence to support the theory. *Lundquist v. Nichols*, 238 Ill. App. 3d 410, 605 N.E.2d 1373 (1992); *Lara v. Nevitt*, 19 Cal. Rptr. 3d 865 (Cal. App. 2004); *Humes v. Fritz Companies, Inc.*, 105 P.3d 1000 (Wash. App. 2005); *Jordan v. Sava, Inc.*, 2005 WL 1189645 (Tex. App. 2005) If the pattern instructions do not cover a certain claim or defense or do not accurately reflect the elements of the claim or defense because the law has changed since the pattern instructions were last updated, counsel must be prepared to tender alternative instructions to the court and argue for their use at trial.

Example: Punitive Damages

The issue of punitive damages provides a good example of how the pattern jury instructions do not accurately reflect the elements of the claim. Many state court pattern jury instructions provide little or no guidance to the jury regarding the imposition of punitive damages. See, e.g., Ill. Pattern Jury Instructions, Civil §35.01 (2005 edition) ("If you find that the defendant's conduct was willful and wanton and proximately caused injury to the plaintiff, and if you believe that justice and the public good require it, you may, in addition to any other damages to which

you find the plaintiff entitled, award an amount which will serve to punish the defendant and to deter the defendant and others from similar conduct.”); 1 Ind. Pattern Jury Instructions, Civil §11.100 (2d ed. 1989) (“You may award punitive damages in any amount you believe will serve to punish the defendant and will deter the defendant and others from like conduct in the future”); Mo. Approved Jury Instructions §10.01 (6th ed. 2002) (“[I]f you believe the conduct of defendant... was outrageous... you may award plaintiff an additional amount as punitive damages in such sum as you believe will serve to punish defendant and to deter defendant and others from like conduct.”); Ga. Suggested Pattern Jury Instructions, No. 15 (3d ed. 1996) (“In tort actions there may be aggravating circumstances which may warrant the awarding of additional damages called punitive damages. In order for punitive damages to be awarded, the plaintiff must prove by clear and convincing evidence that the defendants’ actions showed willful misconduct... Punitive damages, when authorized, are awarded not as compensation to a plaintiff, but solely to punish, penalize, or deter a defendant. The measure of such damages is your enlightened conscience as an impartial jury.”). And yet, the United States Supreme Court has issued a series of opinions that clearly delineate the factors that a jury should consider when deciding the issue of punitive damages in order to reflect proper due process limitations on punitive damages awards. *See, e.g., Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1 (1991); *State Farm Mutual Automobile Insurance Co. v. Campbell*, 123 S.Ct. 1513 (2003).

In order to comport with the recent decisions of the U.S. Supreme Court regarding the substantive due process rights of defendants who are faced with an award of punitive damages, counsel should prepare instructions that accurately reflect these due process limitations on punitive damages awards. In cases involving punitive damages, jurors should (where appropriate) be provided with instructions that:

- explain the nature and purpose of punitive damages;
- explain the principle that punitive damages constitute punishment for civil wrongdoing;

- provide an explanation that the imposition of punitive damages is within the jury’s discretion;
- inform the jury that it cannot base the amount of punitive damages on a defendant’s out-of-state conduct;
- inform the jury that it cannot punish the defendant for harms suffered by non-parties;
- inform the jury that it cannot increase a punitive damages award simply because the defendant is wealthy or a large corporation;
- inform the jury that any punitive damage award must bear a reasonable relationship to the compensatory damages award;
- explain that the deterrent goal of punitive damages may be satisfied where compensatory damages are substantial or include a punitive element; and
- advise the jury to consider the “reprehensibility” of the defendant’s conduct.

Most, if not all, of these elements are not included in state pattern jury instructions regarding punitive damages. It is incumbent upon counsel to include these factors in one or a series of instructions regarding the issue of punitive damages in order to properly instruct the jury on the subject and preserve the issue for appeal.

Although the authors have focused on the issue of punitive damages to highlight the potential inadequacy of pattern jury instructions, counsel must remember that the same analysis applies to all pattern instructions. Review the case law. Compare the elements of the claim or defense to the language of the pattern instructions. Formulate new or modified instructions if the standard instructions are inadequate. If no instruction exists for the claim or defense at issue (for example, Illinois has no pattern jury instruction regarding claims for tortious interference with a contract, libel, slander and a host of other torts) great care should be taken to draft an instruction that fairly and accurately sets forth the law.

When modifying pattern instructions, or drafting non-pattern instructions, counsel should keep the following guidelines in mind:

- Use plain language (say “the contract” as opposed to “the instrumentality”);
- Draft in the singular number (refer to “an issue” rather than “issues”);

- Use base verbs, not nominalizations (“we discussed” rather than “we had a discussion”);
- Use the active voice over the passive voice (say “the clerk must tax costs” as opposed to “costs must be taxed by the clerk”);
- Draft in the present tense and address the jury directly (say “is required” rather than “will be required” and “you must find” rather than “the jury must find”);
- Use short, understandable sentences that avoid legalese (“The practice of lifting sentences from court opinions and converting them into jury instructions is not a good one as it often leads to serious error” *DeRosa v. Albert F. Amling Co.*, 84 Ill. App. 3d 64, 404 N.E.2d 564 (1980);
- Arrange words with care and use numbering or listing where appropriate;
- Avoid double negatives (don’t say “not uncommon”); and
- Avoid simplified jargon (say “upon receiving” rather than “upon receipt”).

James D. Wascher, “The Long March toward Plain English Jury Instructions”, 19 CBA Record 50, 54–55 (February/March 2005). Following these simple rules can result in the crafting of highly understandable—and therefore useful—instructions.

Consider Preliminary Instructions at the Commencement or During Trial

Instructions at the end of trial are far less useful than instructions before or during trial. It does not do much good to tell a jury, days or weeks after they have heard testimony, that that testimony is not evidence to be considered by them or is evidence that is to be considered only for a limited purpose. The instruction must be given when the evidence is presented. If, as recent research has suggested, most cases are decided early, quality preliminary instructions may be crucial. Kolenda, *supra*, p. 4.

Jury instructions, and the rules that govern the giving of instructions, have been amended in many states to specifically allow the trial court to read instructions to the jury prior to opening statements and during the trial. *See* Ill. S.Ct. Rule 239 and the Illinois Pattern Jury Instructions (which allow the trial judge to instruct the jury on cautionary and preliminary matters and on the substantive law applicable to the case prior to opening state-

ments and on other matters during the trial) and Michigan Court Rule 2.516(B) (which says that preliminary instructions “shall” be given and that the instructions to be given must go beyond simple instructions concerning the duty of the jury and trial procedure). Arizona has also instituted provisions that provide for pre-trial jury instruction. Fisher, *supra*, p. 30.

In those jurisdictions where the courts or legislatures have authorized the reading of jury instructions prior to the presentation of evidence and during the course of the trial, counsel should remind the trial judge of the statutes or directives that allow them to give properly requested preliminary instructions. Creative and innovative counsel should strive to advance the presentation of instructions to the beginning of and during the trial in order to provide the jury with early and repeated information concerning the issues to be decided in the case.

Make a Record Regarding Jury Instructions

At the jury instruction conference, counsel must make sure that a court reporter is present and everything that is said about the instructions is taken down on the record. Unless a proper record is made, and the arguments before the court are preserved, counsel may be unable to argue about the jury instructions on appeal. The case law is very clear on this point: an objection to an instruction must be clear and on the record. See *People v. Pollick*, 448 Mich. 376 (1995); *Hamilton v. Raftopoulos*, 575 N.Y.S.2d 531 (N.Y.A.D. 1991); *Knudson v. Hess*, 556 N.W.2d 73, 1996 SD 137 (S.D. 1996); *Pennington v. State*, 697 S.W.2d 387 (Tex. Crim. App. 1985); *Wingad v. John Deere & Co.*, 523 N.W.2d 274, 187 Wis.2d 441 (Wis. App. 1994); *Grossman v. Gebarowski*, 315 Ill. App. 3d 213, 732 N.E.2d 1100 (2000); *Sewell v. Wofford*, 131 Ill. App. 3d 62, 475 N.E.2d 575 (1985) (holding that in order to preserve an issue for appeal concerning jury instructions, an appellant must preserve the content of the instruction conference in the circuit court and establish that a specific objection was made and an alternative instruction was offered). Counsel must identify with specificity the nature of the claimed impropriety of any tendered instruction. Failure to do so may

result in waiver of that objection. *Saldana v. Wirtz Cartage Co.*, 74 Ill.2d 379, 385 N.E.2d 664 (1978); *Anton v. Thomas*, 806 P.2d 744 (Utah App. 1991); *Steinberg v. Jensen*, 553 N.W.2d 820, 204 Wis.2d 115 (Wis. App. 1996); *Southport Little League v. Vaughan*, 734 N.E.2d 261 (Ind. App. 2000).

In addition, a specific objection to an instruction does not preserve any other ground for objection which might have also been available. *Auton v. Logan Landfill, Inc.*, 105 Ill.2d 537, 475 N.E.2d 817 (1984). It is important to remember that a party may not appeal her overruled objection to an instruction when she fails to tender an alternate instruction that she deems proper. *People v. Almo*, 108 Ill.2d 54, 483 N.E.2d 203 (1985); *State v. Hage*, 532 N.W.2d 406 (S.D. 1995); *State v. Glass*, 620 N.W.2d 146 (N.D. 2000). When a party tenders an instruction that is refused, however, that party does not waive the right to claim error by reason of his or her failure to object to a different instruction on the same point tendered by his opponent. *King v. Casad*, 122 Ill. App. 3d 566, 461 N.E.2d 685 (4th Dist. 1984); *Thomasko v. Poole*, 561 N.E.2d 597 (S.C. 2002); *McMinn v. Rounds*, 591 S.E.2d 694 (Va. 2004). Whenever the court modifies a pattern instruction, the reasons for the modification should be stated on the record and a transcript of the instruction conference pertaining to the change should be included in the record on appeal. *Ruffiner v. Material Service Corp.*, 116 Ill.2d 53, 506 N.E.2d 581 (1987); *State v. Hamilton*, 660 So.2d 1038 (Fla. 1995). In addition, when counsel believes that a non-pattern instruction should be given to the jury regarding a particular subject, counsel should place on the record his or her argument why the pattern instructions are deficient and why the proposed non-pattern instruction would better serve the interests of justice.

During the jury instruction conference, after hearing argument from counsel about whether a certain instruction should be given or not, the court will often write the word “given” on each instruction that is to be read to the jury and “refused” on each instruction that will not be presented to the jury. The judge’s notation is placed on his copy of the instructions that are made part of the court record. It is important for counsel to keep their own stacks of the “given” and “refused” instructions and to obtain a

copy of the given and refused instructions that are made a part of the court record. In addition, counsel must make sure that an order is entered reflecting the court’s rulings on the various instructions and that the order is also made part of the court record in case there is a question on appeal concerning the jury instructions. Fisher, *supra*, p. 32.

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**Reviewing and
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Use the Jury Instructions throughout the Trial of the Case

The jury instructions that will ultimately be given to the jury can provide a good outline for the trial of the case. By using the instructions in every phase of the trial, counsel can slowly and effectively win jurors over to his client’s side and ensure that the evidence needed to sustain a verdict in favor of his client is placed before the jury.

The first time defense counsel has an opportunity to use the jury instructions at trial is during the selection of the jury. It is important to convey to the jury from the very beginning that the law is on the side of counsel’s client. It is also critical to know if the prospective jurors agree with the laws that govern the resolution of the case. Frederick W. Schultz, *Effective Use of Jury Instructions in Non-Catastrophic Cases*, ATLA Winter Convention Reference Materials (February 2004). Therefore, to the extent that you are certain that some of the final instructions will be given by the judge at the end of the trial, it may not be too early to ask potential jurors what they think of the final instructions. For example, there is nothing wrong with asking prospective jurors whether they would follow the law and refuse to award the plaintiff any damages if the evidence shows that the defendant is not liable for the plaintiff’s injuries. *Id.*

Obviously, the goal of jury selection is to find out as much information as possible about the individuals who make up the venire. Counsel wants to hear prospective jurors talk about how they think about the law. This provides two benefits to the client. First, the jury begins to think through and become familiar with the legal standards they will be asked to use to reach a

Where there is a defense to a claim, the defendant is entitled to an instruction regarding that defense.

verdict. Additionally, counsel will be able to see which potential jurors will fairly apply the law and which ones will ignore the law and decide the case based on their own biases. *Id.*

Once the jury is selected, careful consideration should be given to working two or three of the most important jury instructions into the opening statement. Counsel should work the language of the final instructions into the theme of the case. By weaving the text of the jury instructions into the opening statement, counsel can place the facts of the case within the legal structure that is defined by the final instructions that the judge will give the jury at the end of the case. *Id.*

Using final instructions with witnesses is a great way to ensure that all the elements of a claim or defenses are covered. Counsel should attempt to incorporate the contents of the important instructions into the questions that are asked of the witnesses. By adding a little bit of the instruction language into the questioning, counsel can elicit responses that cover all of the elements of a particular claim or defense. There are two benefits to this approach. First, counsel is constantly reminded of the legal standard that has to be met while interacting with the witnesses. It is a great way to make sure that the critical questions are not overlooked. Second, counsel

is again putting the contents of the final instructions in front of the jury and surrounding the case with the legitimacy of the legal standards that govern the applicable claim or defense. *Id.*

The last opportunity counsel has to use the jury instructions is in the closing argument. This is where all trial counsel are used to talking with the jury about the final instructions. By this point in the trial, the judge has indicated which instructions will be given and which ones will not be given. Counsel should take advantage of this certainty and talk to the jurors about the rules that govern the claim or defenses at issue. Counsel should go over the important jury instructions with the jury and explain how the instructions apply to the case. Counsel should also remind the jury that it is to take the evidence that was presented, apply the law contained in the instructions, and provide a fair and just verdict. *Id.*

Pay Attention When the Court Reads the Instructions

Counsel’s job is not over once the court has ruled on all the instructions, closing arguments have been given, and the parties and their lawyers settle down to hear the judge instruct the jury regarding the law. Counsel has to keep track of the instructions, with the annotated copies and the court’s order regarding the instructions close at hand, as the judge reads the instructions. It is not unheard of for a judge to read an instruction that was not among those marked “given” or for the judge to either skip a whole instruction or part of an instruction. Fisher, *supra*, p. 32.

Since the jury instruction reading is the longest time that a judge will ever speak to the jury, counsel should feel some reticence in objecting or asking to be heard once the reading of the instructions begins. If a mistake has been made, however, it must be corrected and there are tactful ways to approach the court and ask for a re-reading of the instructions. Asking the court for a prompt sidebar is the most appropriate way to handle errors that occur during the court’s instruction. *Id.*

Don’t Forget to Use Special Interrogatories

Many states, like Illinois, allow the parties to submit special interrogatories to

the jury. Section 2-1108 of the Illinois Code of Civil Procedure provides that special interrogatory findings control a general verdict and that a trial judge must submit a special interrogatory if it is in proper form. *Id.* According to Illinois case law, a special interrogatory is in proper form if: 1) it is single question; 2) it relates to an ultimate issue of material fact, such that a response to the interrogatory would control an inconsistent general verdict returned by the jury; 3) its terms are simple, unambiguous and understandable by the jury, so that the jury knows what it is deciding; and 4) it is not repetitive, confusing or misleading. See *Chicago City Ly. Co. v. Olis*, 192 Ill. 514, 61 N.E.2d 459 (1901); *Illinois Steel Company v. Mann*, 197 Ill. 186, 64 N.E.2d 328 (1902); *Snyder v. Curran Township*, 281 Ill. App. 3d 56, 666 N.E.2d 818 (4th Dist. 1996).

In those cases where a single question that relates to an ultimate issue of material fact can be drafted and submitted to the jury, counsel should do so. For example, if proximate cause is an issue in the case, a special interrogatory to be given to the jury might read as follows: “On the date of the accident and at the time and place of the accident in question, was the driving conduct of the plaintiff, Jane Doe, the sole proximate cause of the accident?” If that special interrogatory was read to the jury and the jury returned a guilty verdict but answered the special interrogatory in the affirmative, the verdict would be inconsistent with the answer to the special interrogatory. In that case, and in any case where the general verdict is inconsistent with the answer to a special interrogatory, counsel should move the court for the entry of judgment in favor of the defendant.

Conclusion

Preparing jury instructions should not be an afterthought. Instead, the review, drafting and use of jury instructions should be an important part of the preparation and trial of the case from the moment it is called into the office to the moment the jury retires to the jury room to deliberate and deliver a verdict. Properly utilized and thought out jury instructions will help counsel achieve what all clients are looking for: a just verdict.

