Jury Instructions: A Road Map for Trial Counsel

by Sylvia Walbolt and Cristina Alonso

Jury instructions provide the opportunity to tell the jurors about the law they must apply to find in your favor. What could be more important? Yet jury instructions are all too often an afterthought, prepared at the last minute when trial counsel is preoccupied with other, "more important" matters. Beware. Simply put, those other matters are *not* more important.

Not only are jury instructions the compass to guide the jury's ultimate deliberations, they also are an indispensable road map for trial counsel before and during the trial. They provide a checklist for the facts that must be established, as well as a framework for the legal arguments to be made on directed verdict and in closing argument. Careful trial lawyers know this and prepare instructions at the beginning of the case as a "living" document, revising and supplementing it as the case moves toward trial.

When properly crafted, jury instructions are a classic example of the point that "preserving the record" should be viewed as an offensive tool to use at trial, not as a defensive, appellate technicality. The jury cannot get a verdict right unless it is clearly, correctly, and completely instructed on the law it is to apply. By the same token, a set of instructions that is slapped together at the last minute prevents cogent argument and may create a fertile field for error on appeal. And such errors are seldom harmless. The moral of all this? Prepare your jury instructions early in the case, not during the trial itself when other matters make difficult, if not impossible, the careful crafting that the importance of jury instructions demands.

Sylvia Walbolt is a shareholder at Carlton Fields, P.A., and chair of its appellate practice group. Cristina Alonso is an associate at Carlton Fields in its appellate practice group. *The authors thank Gary Sasso for his invaluable suggestions and for the ideas discussed in his article "Preserving the Record: An Exercise in Trial Advocacy," published in* The Appellate Advocate*, Issue 2 (2003).*

Drafting Instructions

How do you draft a set of instructions that will lead the jury in the right direction? First, keep each requested instruction short and simple. As Judge Easterbrook noted in *Gehring v. Case Corp.*, "When the legal issue is complex, simplicity of language is vital." 43 F.3d 340, 344 (7th Cir. 1994). Simple instructions are not only more understandable, they also are less likely to contain errors.

Jurors want to follow the instructions but often get overwhelmed by their needless complexity or formality. We have watched mock juries struggle with instructions on so simple a matter as who is the plaintiff and who is the defendant. The parties are seldom referred to in this way during trial—their names are used instead. As a result, instructions that refer to the parties only as plaintiff and defendant, as many pattern instructions do, can be very confusing to jurors, especially if there is a counterclaim.

Other basic legal concepts that lawyers take for granted can be incomprehensible to the jury without meaningful explanation. One mock jury voted for the party who brought the most boxes into the courtroom because that party had the "weight of the evidence." Another mock jury began deliberations by having the forewoman explain "proximate cause" to the other jurors, but she described its opposite, a remote cause, not a proximate cause. Yet another mock jury believed that "proximate" cause meant "approximate" cause. The presiding judge said he had been giving the standard proximate cause instruction for more than 25 years and it had never occurred to him that jurors would view it that way. These are true stories. The lesson to be learned is simple: Spend time preparing your instructions and explaining them to the jury. That will help the jury get it right.

At the same time, be sure to look at your instructions as a whole to ensure that they provide sufficient guidelines to properly apply the law to the particular issues in the case, framed from the view of the evidence supporting your theory of the case. *See McNello v. John B. Kelly, Inc.*, 283 F.2d 96,

101-02 (3d Cir. 1960) (telling jury that negligence is "want of due and proper care" without particularizing the legal standard to relevant circumstances of the case is fundamental error). Do not, however, make the mistake of having jury instructions that are too argumentative or, even worse, might effectively amount to a directed verdict in your favor. *See Ashland Oil, Inc. v. Pickard*, 269 So. 2d 714, 722 (Fla. App. 1972). If the court has not granted a directed verdict, it cannot do so through its instructions to the jury.

Do not assume that your jurisdiction's pattern instructions correctly reflect current law. Make sure that a standard instruction has not been judicially or statutorily disapproved. Sometimes the committee that works on such instructions has a lag time between such cases and the actual removal or rewriting of an instruction. Further, the committee may not have had time to prepare new instructions to conform to general changes in the law and have them approved. For example, standard punitive damages instructions may no longer be sufficient in light of *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408 (2003). But it is likely to be a long while before necessary changes identified in the opinion are reflected in the standard instructions. Even aside from changes or developments in the law, the instructions may simply be wrong and no one has caught the problem.

That being said, objections to standard instructions face an uphill battle. If possible, have case law from other jurisdictions, treatises, or other authority that supports your theory. Obviously, you need to disclose that your proposed instruction varies from the standard instruction.

If you or your opposing counsel are asking for a standard instruction in your jurisdiction, be sure to review the notes, which may raise red flags about the instruction or alert you to other instructions that need to be given to ensure proper and complete context. For example, Florida's standard instruction on tortious interference with contracts does not itself instruct the jury how to determine whether a contract in fact exists. (Civ.) MI 7.1. Yet the note to that instruction makes clear that such an instruction should be given if there is a disputed issue of fact as to whether a contract exists.

There are, of course, myriad special instructions you may want, depending upon the facts and issues in your case. Gather authorities from your jurisdiction for the general proposition that you are entitled to have instructions consistent with your theory of the case, so long as they correctly reflect the law and are supported by the facts. *See, e.g., United States v. Heller*, 830 F.2d 150, 155 (11th Cir. 1987). Then gather the most compelling authorities supporting the specific legal principle that your requested instruction incorporates. Generally, a trial court does not commit error when it correctly instructs on a legal principle that is supported by the evidence at trial. *United States v. Walsh*, 194 F.3d 37, 52 (2d Cir. 1999).

Do not necessarily limit your requested instructions to the current state of law. Consider whether there are cutting-edge issues you may want to raise to change the law. Is there a conflict among different jurisdictions on the proper legal principle to be applied to your facts? What does the Restatement say about the law? A requested instruction in accordance with the law as you believe it should be is necessary to preserve the issue on appeal.

Indeed, if you do not ask for the instruction, any change in the law may be held to be prospective only. *See Maiz v. Virani*, 253 F.3d 641, 677 (11th Cir. 2001) (refusing to reverse where instruction given was requested at trial by defendants but subsequently rendered incorrect when appellate court changed the law at defendants' request; court held that in light of split in circuits, defendants should not have requested instruction but should have let plaintiffs request it and then objected). Avoid any such Pyrrhic victory. Although you must always disclose any contrary controlling law, ask for the most favorable instruction warranted by a good faith argument for a change in the law.

When you have drafted a complete set of proposed instructions, review them to select the basic, substantive instructions you would like the court to give the jury as "preliminary" instructions at the outset of the case. As Justice O'Connor recently observed:

> [J]urors should be given general instructions on the applicable law before the case begins. How are they to make sense of the evidence and the mass of information that the parties will put before them, unless they know in advance what they are looking for? Jurors are not mere receptacles in which information can be stored, to be retrieved intact when the jurors finally are told what to do with it. Jurors are people, and people organize information as they receive it, according to their existing frames of reference. Unless they are given proper frames of reference at the beginning of a case, jurors are likely either to be overwhelmed by a mass of information they are incapable of organizing, or to devise their own frames of reference, which may well be inconsistent with those that the law requires.

Justice Sandra Day O'Connor, *The Majesty of the Law* 221 (2003).

Recognizing this truth, more and more courts are following this jury-friendly practice—they tell the jury the basic legal framework for the claims and defenses before, not after, the evidence is heard. *See* Hon. William W. Schwarzer, *Reforming Jury Trials*, 132 F.R.D. 575, 583-84 (1991); Federal Judicial Center, Manual for Complex Litigation § 22.432 (3rd ed. 1995). *See also* Final Report, Jury Innovations Committee, Supreme Court of Florida (May 2001), at 58, www.flcourts.org/pubinfo/documents/JuryInnovationsFinalReport.pdf. Of course, you cannot ask the judge to give any preliminary instructions unless you have prepared a good set of instructions before the trial begins.

But beware—there may be drawbacks for parties when a jury is "pre-instructed." If an issue later drops out of the case, the jury will have to be told and instructed to disregard the preliminary instruction on the issue. This is a particular concern for defendants, who are reacting to the case presented by the plaintiff. Informing the jury of the defense at the outset of the case also locks the defendant into that defense, thereby eliminating the flexibility of changing the defense strategy

after the plaintiff has presented its case or even during the defense's own presentation of the evidence.

After your requested instructions are in final form, have someone who knows nothing about the case (preferably a non-lawyer) read them (or, better yet, listen to them). Almost invariably you will find points that are unclear. Luckily, you have time to fix them. Also compare them to the pleadings and to the pretrial stipulation, to ensure that you have proposed instructions on all the issues in the case, be it a claim or an affirmative defense. If you have not done so, you may be deemed to have abandoned the point.

Finally, make sure that the instructions are numbered or otherwise identified so that they are easy to refer to and identify when discussing them with opposing counsel or when referring to them during the charge conference on the record.

Before the Charge Conference

Once you're armed with a good set of requested instructions, do not simply serve opposing counsel with your requested instructions and hand a set to the trial judge at the charge conference. File them in the court record itself. Sounds basic, but appellate lawyers commonly see court records without their side's requested instructions. Make sure you have a copy of the other side's requested instructions for your pleadings file, and that they too are filed in the record. Charge conferences are often chaotic, and sometimes you cannot tell from the transcript alone whose requested instruction is being granted or what it says. You may need to review the instructions post-verdict to prepare or respond to post-trial motions, and you must have a complete set available in order to do so.

Remember when preparing for the charge conference that it is not enough to rely solely on your original requested instructions. Think of the trial court's rulings at the charge conference as an up-to-the-minute traffic report. An unfavorable ruling can create a roadblock to your carefully drafted jury instructions. Prepare to steer the jury away from roadblocks with "alternative" instructions in case the court rules that certain issues will be submitted to the jury, or certain requested instructions of the other party will be given, over your objection. Obviously, do not style them "alternative" instructions—that is just a way to think of them because you do not want to request them in the first instance.

Carefully review the other party's requested instructions *before* the charge conference. Always read the authorities cited as support for the other side's instructions and be prepared to explain to the court why they do not support giving the instruction. Do not assume that an instruction that purports to be a standard instruction actually is the standard instruction, or that one purporting to set forth a statute does so correctly. Compare the requested instruction word for word with the standard or the statute. Once again, make sure the requested verdict form on an issue conforms to the instruction on that issue.

We recently had a case in which the jury was correctly instructed on Florida's emergency room statute providing immunity from damages if the hospital provided "medical care" to a patient requiring "immediate medical attention." § 768.13, Fla. Stats. The verdict form, however, asked the jury to determine whether the hospital had provided "immediate medical care" to the patient. This one-word change in the statutory language as it went on the verdict form was highly material. Yet it was not immediately apparent from a quick skimming of the verdict form, which plaintiff's counsel handed over to defense counsel just before the charge conference, without any disclosure of the deviation. On appeal, the plaintiff argued that any error had been waived by defense counsel's failure to object to the change from the statutory language. *See Exxon Corp. v. Exxene Corp.*, 696 F.2d 544, 550 (7th Cir. 1982) (although special verdict form allowed the jury to find a statutory violation based upon language that had no basis in the statute, there was no reversible error because verdict form was not objected to and the instructions were acquiesced to).

Including in your trial notebook a copy of all pertinent statutes, orders, and other writings that may be the subject of instructions or verdict forms allows for a timely comparison so that you can bring any differences to the court's attention during the charge conference. Make sure you explain on the record how the language of the other side's requested instruction deviates from whatever it purports to reflect and why that is material. By the same token, if you make any such change, affirmatively disclose that you have done so, and why.

Think of the trial court's rulings at the charge conference as an up-to-the-minute traffic report.

When possible, prepare and file written objections to the other side's requested instructions and verdict form before or at the charge conference. This will help you do a better job than if you simply address the objections orally at the charge conference. At a minimum, try to have written notes of your objections. Every appellate lawyer who has ever reviewed the cold record of a charge conference will tell you it almost always seems unintelligible, with people interrupting each other, talking in shorthand, and referring to things that are never identified on the record. To avoid such chaos, follow these simple steps:

1. Cross-reference your instruction to opposing counsel's instruction (i.e., note that your item three instruction for legal cause is similar to opposing counsel's item seven instruction). This makes it easier to go back and forth between different sets of instructions.
2. Make notes of every objection right on the instruction so you will always have your objection handy, even if the judge jumps between instructions.

3. Cross-reference on opposing counsel's instructions why your instruction is different or better.
4. Bring clean sets of instructions, unstapled, so you can merge your instructions with those of opposing counsel according to the court's rulings.
5. File your written objections and the final version of the instructions.

Following these pointers will keep you on track and reduce the amount of paper you must fumble through. Having filed written objections may save you on appeal.

At the Charge Conference

So far you've been preparing for the charge conference. Beware that some judges do not usually schedule charge conferences and you may have to specifically ask for such a conference. If the judge refuses to hold the conference, object on the record. In addition, if you want preliminary instructions given to the jury, you must ask for a preliminary conference before trial. If the court insists on holding the "final" charge conference before trial, ask for an opportunity to have another conference after the close of evidence because the evidence may give rise to the need for different or additional instructions. At a minimum, you should file your specific requests in that regard, in the record, before the judge instructs the jury.

Before requesting the conference, consider with opposing counsel how much time realistically should be set aside for the conference. The charge conference is the only way you can fully discuss the instructions with the court and possibly modify them to address concerns expressed by the judge or opposing counsel. Therefore, it's important that the parties and court prepare for a lengthy conference if this will be necessary.

In a recent case, the judge was under the mistaken impression that the conference would take only 30 minutes. Argument on the first contested instruction alone lasted that long. Unfortunately, the jury had already been informed that closing arguments would begin the following morning. As a result, counsel were forced to give closing arguments before the jury instructions were finalized. Had the judge been given a realistic estimate of the complexity of the issues to be discussed, this would not have occurred.

Always ensure that a court reporter will be present at the conference. It is impossible to recall all of the give-and-take that resulted in the charges given. In the event a court reporter is not present—a truly perilous situation—at least go on the record at the end of the conference. Make all your requests for instructions *on the record*, make all objections to instructions *on the record*, and get all the rulings of the court *on the record*. If possible, have another person attend the charge conference with you to provide a second set of eyes and ears to help you catch issues and remind you to make the necessary objections and get clear rulings from the judge *on the record*.

One trial judge recently noted in a judicial roundtable that when arguing for a jury instruction in a conference that takes place after or near the close of the evidence, you should identify the evidence that supports giving the instruction. This is important for purposes of convincing the trial judge that the instruction is necessary. It also helps to lay a record for appeal that demonstrates that the failure to give the instruction was not "harmless error."

Your jurisdiction may make a distinction between the specificity necessary to preserve the court's refusal to give your requested instructions and preserving your objection to an instruction that the trial court decided to give. A specific objection to the failure to give your requested instruction may be required in order to preserve an issue for appellate review. Likewise, an objection to the other party's requested instruction may not suffice—you may be required to request a corrected instruction. Make sure you know the requirements for preserving these issues in your jurisdiction before you go to the charge conference.

To properly preserve for appellate review a trial court's decision to give an instruction requested by the opposing party, it is usually necessary to make a distinct and specific objection. The objection must be specific enough to raise the points you would want to assert on appeal. *See Voohries-Larson v. Cessna Aircraft Co*., 241 F.3d 707, 713 (9th Cir. 2001). If you believe the requested instruction does not correctly state the law, you need to explain why. Otherwise, you may be met on appeal with an argument that the erroneous instruction was acquiesed to and any issue with regard to error was not preserved.

Potential grounds for objection to a requested instruction of the other party include the following:

- It fails to provide relevant criteria for the jury's determination of the issue. *Bollenbach v. United States*, 326 U.S. 607, 612 (1946).
- It assumes the answer to an issue of fact and thereby takes that issue away from the jury. *United States v. Adamson*, 665 F.2d 649, 652 (5th Cir. 1982).
- It is contradictory to another instruction or is internally contradictory. *Penry v. Johnson*, 532 U.S. 782, 789 (2001).
- It effectively grants a directed verdict for the other party on a claim or defense. *Cf. Hardin v. Ski Venture*, 50 F.3d 1291, 1294 (4th Cir. 1995) ("A set of legally accurate instructions that does not effectively direct verdict for one side or the other is generally adequate").
- It tends to endorse the other party's theory of the case or argument. *W.T. Rogers Co., Inc. v. Keene*, 778 F.2d 334, 346 (7th Cir. 1985) ("A jury should so far as possible not be instructed in a way that makes it much easier to decide in favor of one party than in favor of the other").
- It is ambiguous as to the parties' burden of proof. *Wheeling Pittsburgh Steel Corp. v. Beelman River Terminals, Inc*., 254 F.3d 706, 713 (8th Cir. 2001).
- It fails to instruct the jury on your theory of the case. *See United States v. Heller*, 830 F.2d 150, 155 (11th Cir. 1987).
- It is confusing or misleading. *Japan Airlines Co. v. Port Authority of New York & New Jersey*, 178 F.3d 103, 110 (2d Cir. 1999).
- It incorrectly states the law or is not supported by the evi-

dence. *Jaffee v. Redmond*, 51 F.3d 1346, 1353 (7th Cir. 1995).

- It improperly varies from the standard instruction. *State v. Sheahan*, 2003 WL 21782664, at *4 (Idaho 2003); *Reyes v. State*, 783 So.2d 1129, 1136-37 (Fla. Dist. Ct. App. 2001).
- It addresses an issue not pleaded, not included in the pretrial stipulation, or not proved at trial. *Thrift v. Estate of Hubbard*, 44 F.3d 348, 355 (5th Cir. 1995).
- It "indulges and even encourages speculations." *United States v. Branch*, 91 F.3d 699, 712 (5th Cir. 1996).
- It incorrectly includes a non-party. *Barnes v. Owens-Corning Fiberglas Corp*., 201 F.3d 815, 825 (6th Cir. 2000).

Keep a similar list of potential general objections in your trial notebook, annotated to your jurisdiction. This may help you keep out erroneous and harmful instructions and thereby enhance your chances of prevailing at trial.

Be particularly careful to object to instructions that might be correct in a vacuum but are confusing or misleading when considered in light of other instructions or the facts of the case. Object to negative or preemptive instructions or to instructions that use words that are too legalistic or fail to use plain language. This is an increasingly popular ground for appeal, particularly in conjunction with a companion argument such as improper closing argument on the same issue. Even apart from appellate issues, it is good practice from a trial standpoint to speak plainly. Remember, you want instructions that will help you win, and the clearer the instructions are to the jury on your points, the better your chances of prevailing on them.

The most dangerous pitfalls in a charge conference occur when you try to work with the court to modify an instruction you believe should not be given or when you suggest an alternative instruction. With regard to a modified instruction, make it clear that you do not acquiesce in the giving of the instruction, even as modified. With regard to an alternative instruction, be sure to make it clear on the record that you are suggesting such "alternative" instructions only in light of the trial court's rulings, which you object to, and that even the giving of this instruction will not cure the prejudicial harm from those rulings.

All too often, proposing new instructions or changes in instructions may read on a cold transcript as agreement to resolve the objection you originally raised. This occurs because the trial court is trying to get a consensus on the instructions. Do not hesitate to stand on the need for your requested instructions, without compromising. Once again, of course, you must balance your desire to get the best possible instruction that may result in a victory at trial against your desire to preserve the record for appeal. Careful statements on the record should allow you to do both. But saying OK to a modified instruction or to the giving of your alternative instruction may cost you the point for appeal.

In fact, excise the word "OK" from your vocabulary at charge conferences. It is very easy to slip into dialogue that may later appear to be acquiescence in the instruction. A simple response such as "that's fine" after the court stated its intention to instruct the jury has been construed as waiving error. *See Kossman v. Northeast Illinois Regional Commuter Railroad Corp*., 211 F.3d 1031, 1038-1039 (7th Cir. 2000). Even silence may be argued to be acquiescence, as could the words "thank you."

At the end of every such discussion, renew your objection to the instruction, even as modified, and state why it should not be given. If you, yourself, changed the language, state that you continue to request the instruction you submitted on the point but because the court refused to give that instruction, it should at a minimum instruct the jury on the points you raised. In short, make it clear that this change is not enough to correctly charge the jury on the point.

Listen carefully to what opposing counsel says in objecting to your requested instructions. You may be able to make a change that resolves the objection. Never let the other side say simply that your instruction incorrectly states the law. Make the other side specify what is supposedly wrong with the instruction. Then you can decide whether to stand on it or instead seek an alternative instruction addressing and curing the objection.

The question is how good you feel about the correctness of your requested instruction and its wording. If the other side's proposed instruction changes only the words and maintains the substance of your instruction, you may want to agree to the changed language to eliminate any claim on appeal that the instruction should not have been given. If, however, the change is substantive and you agree to it, the point will be waived on appeal.

Opposing counsel's objection also may remind you of a ground you should, and can still, raise as part of a motion for a directed verdict. *See Harrison v. Edison Bros. Apparel Stores, Inc.,* 151 F.3d 176, 179 (4th Cir. 1998) (defendant complied with Rule 50(b) prerequisite of making a motion for judgment as a matter of law at the close of evidence, even though the motion was made at the charge conference held a week after the close of the evidence). Or it may provide you with an additional basis to move again for a directed verdict on a point already raised. For instance, perhaps the plaintiff opposed your motion for directed verdict on a certain issue, such as an element of damages, by arguing that the evidence on the issue was in conflict, but then opposed your requested instruction on the issue by saying there was no evidence adduced on the subject. You then have a great opportunity to renew your directed verdict motion and argue that the plaintiff cannot have it both ways.

Keep a careful record of changes in requested instructions. This is a good job for the second person at the charge conference. Be particularly careful in considering how a later given instruction—especially a modified one—may impact or even negate an earlier instruction. Be sure the record reflects all of the trial court's rulings and any reasons given for them. You must be sure that the instruction is identified on the record, by page or by number. If you have any doubt whether the court's rulings are clear, state your understanding of them on the record.

Review the set exactly as it will be submitted to the jury. Computer word processing programs make it easy to copy an instruction that was not meant to be included and may have nothing to do with the issues in your case, or to use a previous draft that doesn't have the changes incorporated from the charge conference.

The Verdict Form

Do not forget the verdict form. It is a guide to the jury's decision, it may be outcome-determinative, and it should be carefully crafted. Once again, be sure to preserve your objections and your request for certain interrogatories to the jury. For example, if the jury's verdict could implicate insurance coverage, be prepared to address such concerns at the charge conference. It is becoming increasingly common for insurers to show up at the charge conference with their own proposed verdict forms, even though they are not a party to the action. Whatever party you represent, you need to think through how the jury's findings on the proposed verdict forms may impact insurance coverage.

At the risk of stating the obvious: The verdict form should conform to the instructions or it may be deemed a waiver of an issue. In one recent case, the plaintiff alleged claims for both intentional fraud and negligent misrepresentation. At the plaintiff's request, however, the verdict form given to the jury presented only the issue of a knowing, intentional fraud, although the plaintiff's requested instructions covered both claims. The plaintiff's abandonment of the negligent misrepresentation claim became dispositive of the insurance coverage issue in the defendant's later case against its insurer. *See Birmingham Fire Insurance Co. of Pennsylvania v. Politis & Perlman International Realty*, No. 01-15508 D (11th Cir. 2002) (unpublished opinion).

Consider the effect of a possible two-issue rule so that requested interrogatory questions will preserve your points for appeal. *See Colonial Stores, Inc. v. Scarbrough*, 355 So. 2d 1181 (Fla. 1977) (appellate court will not grant a new trial where the jury has rendered a general verdict and the appellate court finds no error as to one of the theories on which the jury is instructed). *Cf. Grant v. Preferred Research*, 885 F.2d 795 (11th Cir. 1989) (if jury delivers a verdict based upon several possible grounds, one of which is not supported by the evidence or was improperly submitted to the jury, and the appellate court has no means of determining on what basis the jury reached its verdict, the defendant is entitled to a new trial); *but cf. Maiz v. Virani*, 253 F.3d 641 (11th Cir. 2001) (defendant is entitled to j.n.o.v. only if he rebuts each possible ground for general verdict).

The verdict form can present difficult tactical issues. The more questions the jury is asked, the more opportunities it has to find liability—but more opportunities to make mistakes and reach inconsistent verdicts as well. And the more opportunity the jury has to state that it does not find liability on specific issues, the more you eliminate issues on appeal. If, for example, you have a sharp dispute over causation in a negligence or malpractice case, you may want to ask for a specific interrogatory on causation rather than have it subsumed in the negligence finding itself. These tensions must be carefully considered and balanced in determining the nature and extent of the verdict form questions you want to ask.

In arguing that a verdict form should be structured a certain way, remember that, with regard to the judge's rulings, sometimes less is more. For example, in a negligence action, the defendant adamantly (and correctly) argued that if the jury answered no to the question of whether the defendant owed the plaintiff a duty, there was no need for the jury to consider breach of duty, causation, or damages. Thus, the defense urged the court to instruct the jury that if the answer to this first question was no, there was no need for them to answer the remaining questions on the verdict form. The court declined and instead instructed the jury to answer all the questions. The jury ultimately determined there was no duty but nevertheless found the defendant 50 percent liable for damages (and found the plaintiff 50 percent liable as well). Although the trial judge declined to vacate the damage award, the appellate court did not and reversed on the basis of the jury's finding of no duty.

The fact that the jury was allowed to answer all the questions may have saved the defendant. The jurors may very well have decided to answer yes to the first question because answering no would have prevented them from splitting the damages. Instead, the fact that the elements of the claims were set out separately on the verdict form made reversal easy.

The Court's Reading of Instructions

Listen to the court's oral instructions while they are being given, compare them to the instructions the court agreed to give, and make sure they are the same as any written instructions that will be submitted to the jury. If there are differences among them, the oral instructions will likely control on appeal. In one personal injury case, the trial judge inadvertently read the standard instruction on concurring cause because he was using his personal set of instructions, which included it. But there was no concurring cause issue in the case. The judge's mistake was caught only because trial counsel was reading the correct, written set of instructions actually granted in the case while listening to the oral instructions.

The jury cannot get it right if the instructions on the law are not right.

If there is an error, ask the judge to correct the oral instruction and specifically advise the jury that this instruction was given by mistake. Consider whether the error was serious

enough to require a motion for a mistrial. If you do not move for a mistrial and the jury is told the instruction was incorrectly given and should be disregarded, the point likely will be waived.

You may want to ask to have a set of written instructions provided to the jury. If you do, consider whether you want headings on them. Although headings can be a helpful guide for the jury, take care that they are clear and accurate.

If you did not get an advance ruling that your objections during the charge conference are preserved, renew your objections on the record before the jury begins its deliberations. *See* 9A Wright and Miller, Federal Practice and Procedure § 2553, at 411-15 (1995) (noting that although some courts will forgive a failure to object after the instruction if the party's position previously had been made clear to the trial judge, this is "risky business," and counsel should renew all objections at the close of the jury charge to properly preserve them).

Make sure that you have a copy of all the instructions you requested, a copy of the instructions actually given, and a copy of the instructions requested by the other party. These will help you prepare your post-trial motions and an appeal on any instruction issues. If written instructions are given to the jury, make sure a copy is filed in the record.

References to Instructions in Closing Argument

Always consider addressing important instructions in closing argument and explaining in plain English how they should be applied to the facts in the case. Also consider walking through the verdict form; demonstrative aids can be very helpful in this regard.

During your opponent's closing argument, watch for misstatements of the law or the court's instructions. Ensure that opposing counsel's visual aids reflecting the instructions or the verdict form are correct. To preserve any error, make sure that the visual aid is made part of the record or that its contents are read into the record.

If a misstatement occurs, do not simply object. Consider whether the point is significant enough to request a mistrial. At a minimum, ask the court itself to instruct the jury correctly on the point. If the court refuses to do so and says this is a matter the lawyers can argue, object that argument is not sufficient to cure the prejudice and that the jury should be instructed on the point *by the court* to eliminate the confusion and prejudice created by counsel's improper argument. The explanation of the law is the responsibility of the court, and counsel's argument cannot cure the absence of correct instructions.

Jury Deliberations and Verdict

Your job is not over even after the jury begins deliberations. If the jury asks a question about a particular instruction, ask the court to give the jury all of the instructions on that point so they can consider the requested instruction in context. *See W.T. Rogers Co. v. Keene*, 778 F.2d 334, 342 (7th Cir. 1985) ("Instructions must be read as a whole with due regard for the artificiality of assuming that isolated passages in a lengthy set of instructions are apt to spell the difference between victory and defeat."). In addition, you must object again to the instruction (or absence of your requested instruction) if the jury indicates some concern about it. You also should request a curative instruction and possibly ask for a mistrial.

If there are defects or inconsistencies in the jury's findings when the verdict is actually rendered (i.e., a particular finding is not made, calculations do not add up or make sense, or findings are legally inconsistent), consider whether to object and raise your concern before the jury is discharged. This is a tough judgment call that you will have to make instantly, and often there is no obvious right answer.

On the one hand, failure to raise an inconsistency in the jury's general verdict waives a challenge on appeal. *Coralluzzo v. Education Management Corp*., 86 F.3d 185, 186 (11th Cir. 1996). But "when the verdicts are special verdicts a party is not required to object to the inconsistency before the jury is discharged in order to preserve that issue for a subsequent motion before the district court." *Heno v. Sprint/United Management Co*., 208 F.3d 847, 851 (10th Cir. 2000).

On the other hand, if you do raise the inconsistency before the jury is discharged, the jury obviously may resolve it against you. Then you will have lost at trial and also lost any inconsistency argument for appeal, unless you can tie the original inconsistency into some defect in the instructions or verdict form and argue that a mistrial was required. You may never know the right answer, and you certainly won't know it when you have to make the decision.

You may want to get on record the length of the jury deliberations. You certainly want to get on the record any questions that the jury asks about jury instructions (or anything else) and be sure that the jury's note is made part of the record.

The jury cannot get it right if the instructions on the law are not right. Take instructions seriously and preserve your record with respect to them. It may help to take a few minutes before the charge conference and review these pointers. If you follow these recommendations, the appellate court will have a proper basis to resolve any issues on appeal with respect to the trial court's instructions and verdict form, and you still may end up a winner at the end of the day. ◻