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Special Jury Instructions: When CACI Won't Cut It

By Lisa Perrochet

TRIAL IS IMMINENT, AND IT'S TIME TO PREPARE a set of proposed jury instructions. Just whip out the list of California Civil Jury Instructions (CACI) instructions, check all the ones that conceivably apply, and the job is done, right? Well, not exactly, especially not if the plan is to keep one eye on any potential appellate proceedings down the road.

A recent appellate decision highlights the potential problems. In *Bowman v. Wyatt* (2010) 186 Cal.App.4th 286, the Court of Appeal reversed a verdict of over $15 million in a personal injury action, all because of instructional error. The plaintiff in *Bowman* sued the driver of the dump truck that caused his injury, as well as the city for whom the driver was working at the time of the accident, alleging negligence and vicarious liability.

Plaintiff prevailed and, on appeal, the court affirmed the judgment against the driver. But the court held the judgment against the city could not stand because the standard CACI form jury instruction on employment status was both erroneous and prejudicial. The court explained that "CACI No. 3704, given in the present case, did not correctly instruct the jury that it must weigh [multiple] factors to determine whether [plaintiff] was an employee or an independent contractor. Instead, it told the jury that if it decided that the City had the right to control how [plaintiff] performed his work, then it must conclude that [plaintiff] was a City employee. In other words, it told the jury that the right of control, by itself, gave rise to an employer-employee relationship." This instruction simply didn't capture existing precedent on the issue, which requires a more nuanced analysis.

This is not to say that the CACI committee – an advisory subcommittee formed by the California Judicial Council – isn't doing its job. Many questions of law are highly debatable. And the committee does a commendable job of deliberating over the phrasing of the instructions, monitoring new cases as they come down to determine whether the instructions should be revised and inviting public comment on draft instructions and revisions.

The committee is made up of appellate justices, trial judges, law professors and lawyers from a broad spectrum of civil practice (see Cal. Rules of Court, rule 10.58), and they work very hard to make trial lawyers' and jurors' jobs easier. That said, there may be room for correcting, supplementing or otherwise improving the standard form instructions depending on the circumstances of each case.

So what's a busy trial lawyer to do? Here are some tips for digging a little deeper when preparing proposed jury instructions.

It's never too early to be thinking about the jury instructions. Even when drafting or answering a complaint, it's useful to consider what standard of care, what affirmative defenses and what measure of damages the jury may be asked to apply. And when one thinks about the allegations to be pleaded (and, eventually, the evidence to be offered) in that light, the task of planning out the litigation strategy becomes much more concrete. To aid in the process, the Judicial Council makes the complete, searchable text of the CACI instructions available online for free on the California Courts' website at www.courtinfo.ca.gov.

Starting out by reviewing the CACI instructions is not a bad idea to get the lay of the land, but during the investigation phase of the case, it may become clear that some facts or legal theories just don't fit well into the standard rubric. When that preliminary review identifies a square peg that doesn't fit neatly into the round hole of a CACI instruction, it may signal the need for further factual investigation and refinement of litigation strategy.

In other words, the CACI instructions can be a checklist, of sorts, to make sure the legal requirements for a case going to trial are all taken into consideration. But that nagging feeling that there's a mismatch between the case and the instructions may instead signal the need for some additional research and some real creativity to come up with ideas for persuading the trial judge why the form instructions aren't quite the end of the story – they may be downright wrong, as the *Bowman* case discussed above demonstrates.

Look not only for grounds to *object* to inaccurate CACI instructions, but also for ways to *supplement* CACI with special instructions. Even as to CACI

instructions that are more or less accurate, they're not set in stone. Sure, they're officially approved by the Judicial Council – usually a safe bet for the trial judge who hopes to avoid reversal on appeal. But in some cases they could be clearer or more complete. Rule 2.1050 of the California Rules of Court designates the CACI instructions as the "official instructions for use in the state of California" and use of the new instructions is "strongly encouraged." But the rule further explains that a departure from CACI is appropriate if a judge "finds that a different instruction would more accurately state the law and be understood by jurors."

To the extent the CACI instructions can be framed more favorably, in a way that is supported by legal authority, go ahead and propose something from a wish list based on how the client's case can best be presented to the jury. After all, "[a] party is entitled upon request to correct, nonargumentative instructions on every theory of the case advanced by him which is supported by substantial evidence." (*Soule v. General Motors Corp* (1994) 8 Cal.4th 548.)

Just be sure to offer a fallback alternative instruction (perhaps from CACI itself), making clear that this is secondary to the special instruction. That way, if the trial court refuses the special instruction, the court won't later find any waiver of the right to have at least some guidance, imperfect as it may be, in the instructions given to the jury.

Note that simplicity is a worthy goal – rule 2.1055(e) admonishes that special instructions "should be accurate, brief, understandable, impartial, and free from argument." Understandably, judges often look crosswise at instructions that seem very detailed and complex. But many cases raise complex issues, and counsel sometimes need to remind the judge that a long, complicated instruction cannot be refused merely because it may take a little effort on the part of the jury to master. (See, e.g., *Nix v. Heald* 90 Cal.App.2d 723, 731 ["Appellants' final assignment is concerning the instructions given. It is first contended that they were too long and confusing. This contention is utterly without merit. Time consumed in instructing a jury is immaterial if the court's charge is clear, the issues are fairly discussed and the law is correctly applied. . . . .While the instructions were somewhat involved they were as simple as the complicated issues would allow"]; *People v. Reliford* (2003) 29 Cal.4th 1007, 1016 [rejecting notion that an instruction was too complicated for jury]; *City of San Diego v. Barratt American Inc.* (2005) 128 Cal.App.4th 917 ["although the above-quoted instructions involve complex concepts, they are not misleading or inaccurate statements of law"]; *O'Mary v. Mitsubishi Electronics America, Inc.* (1997) 59 Cal.App.4th 563, 584 ["As between the competing instructions, the one chosen by the judge, while more complex, was clearly superior in the context of this case"]; *Sommer v. Gabor* (1995) 40 Cal.App.4th 1455, 1475 [rejecting generalized attack on instructions as confusing: "Although complicated, the instructions, including those which appellants have singled out above, have not been shown to be erroneous or misleading in any respect"].)

Useful language to use in proposing alternative special instructions may be found in the BAJI instructions, which some judges frankly admit they prefer. Publisher Thomson Reuters still updates BAJI even though they are no longer California's official instructions, and a comparison table between BAJI and CACI is available for free online at the California Courts website. Other publishers offer pattern instructions as well, and these can be particularly useful in specialized areas of practice, such as product liability. Also consider examining other states' pattern instructions.

An advantage of using these resources is that a court may be less skeptical about instructions that don't appear to have been made up from scratch, and that appear to have been previously approved by someone with a more objective eye than that of counsel standing before the court.

On the other hand, it may not be best to pull an instruction straight from an appellate decision without analyzing whether the principle is suitably framed for a jury instruction. "'The admonition has been frequently stated that it is dangerous to frame an instruction from the opinions of the court.'[Citation.] 'Judicial opinions are not written as jury instructions and are notoriously unreliable as such." [Citation.] 'One of the reasons for care in adopting a court opinion verbatim as a jury instruction is that its abstract or argumentative nature may have a confusing effect upon the jury.'[Citations.]" (*Merritt v. Reserve Ins. Co.* (1973) 34 Cal. App.3d 858, 876, fn. 5; accord *Merlo v. Standard Life & Acc. Ins. Co.* (1976) 59 Cal.App.3d 5.)

Appellate courts use terms of art, or sometimes old fashioned legalese, that just isn't appropriate for helping a jury figure out how to apply the law to the facts before them – which is, after all, the point of jury instructions.

Consider browsing online resources that might prompt new thinking. This new thinking should focus on grounds for objecting to an instruction as erroneous, or grounds for providing a complementary instruction to complete a concept that is only partially covered by CACI. For example, the Judicial Council issues periodic reports that reflect public comment on the evolving CACI instructions, and interesting information may be gleaned from the Judicial Council's archived redline versions of prior changes (See links under "Civil Jury Instructions (CACI)" in the chart posted on the California Courts' website.)

Similarly, check cases pending in the California Supreme Court, and perhaps other pending appeals or pending legislation that's reported to be in the works, to see whether a legal development might be brewing on an issue relevant to the case at hand. If so, try to anticipate any potentially favorable developments by outlining them in a proposed special instructions. That way, if the instruction is refused and an adverse judgment is entered, it may be possible to get a new trial based on instructional error in the court's refusal to give losing counsel's prescient proposal.

Consider writing directly to the CACI committee with suggestions for improvements. If a case is still in its early stages, with any trial date a long way off, there may be time to get a CACI revision in time for trial. As online reports of the committee's work (referenced above) indicate, they can be quite responsive to proposals.

Take care in the *form* of any special instructions to be proposed. Code of Civil Procedure section 609 specifically authorizes counsel to present special instructions; the judge has a duty to rule on such proposals, making clear whose instructions were given or refused, and ruling "in such a manner that it may distinctly appear what instructions were given in whole or in part." But a judge may correctly refuse a

requested special instruction if it does not conform to the *format requirements* of Rule 2.1055, which prescribes how instructions should appear on a page, and how they should be bound. (Rule 2.1058 requires that instructions use "gender-neutral" language.) Note that rule 2.1055 bars "local rules" under which a particular court or judge may attempt to dictate a format different from that outlined in the rule.

Get it all on the record. Counsel's brilliance in proposing creative and legally correct special instructions, and the judge's intransigence in refusing them, won't help the client get a new trial after an adverse verdict if the proposal occurred orally in an unreported conference in chambers, or if the scribbled addendum written on the instruction packet and shown to the judge doesn't make it into the court file. (See, e.g., *In re Marriage of Schultz* (1980) 105 Cal.App.3d 846, 857 [stipulations and rulings in chambers must be placed on the record: "Trial judges must be alert to insist upon it; counsel for the parties should be equally alert to their respective duties to their clients" to ensure an adequate appellate record].)

For the same reason, it is best to press the judge to allow the court reporter transcribe the judge's reading of the instructions to the jury. And make sure to lodge with the clerk a clear copy of proposed instructions, as well as objections made to the other side's proposals. That way, an appellate court will later be able to see how careful and creative counsel took every step to preserve the client's right to jury that has an accurate and complete description of the law to apply to the facts presented at trial.

Keep in mind that a party is *not* compelled to jointly request instructions offered on the other side's theories. Trial judges may urge counsel to do this, but it's possible to demonstrate professionalism and to show respect for the judge by agreeing readily on most of the instructions while standing on the right to say (politely) that the other side is responsible for the content of the instructions as to issues on which that side bears the burden.

It may not be possible to identify a specific problem with any particular instruction the other side is proposing, but caution in agreeing to all instructions is warranted because a party who proposes an instruction will be deemed to have *waived* any error in the instruction that later comes to light. In contrast, even if trial counsel does not articulate an error in an instruction, counsel is nonetheless deemed to have objected to instructions proposed by the other side (and thus preserved claims of error for appeal), *absent an overt acquiescence in the instruction*. (See Code Civ. Proc., § 647.)

Thus, for example, a defendant need not join in requesting basic negligence instructions, and a plaintiff need not join in requesting a standard instruction on an affirmative defense, because each side's duty is only to make sure the instructions correctly cover the points pertinent to his or her own theory of the case. (See *Agarwal v. Johnson* (1979) 25 Cal.3d 932, 949 ["To hold that it is the duty of a party to correct the errors of his adversary's instructions . . . would be in contravention of [Code of Civil Procedure] section 647"]; *Hensley v. Harris* (1957) 151 Cal.App.2d 821, 825-826 ["[e]ach party has a duty to propose instructions in the law applicable to his own theory of the case. He has no duty to propose instructions which relate only to the opposing theories of his adversary, and having no duty respecting them he has no responsibility for the latter's mistakes" or to "offer corrections of the instructions of his adversary pertinent only to the latter's theory of the case"]; *Valentine v. Kaiser Foundation Hosps.* (1961) 194 Cal.App.2d 282, 290 ["It has repeatedly been held that a defendant has no duty to propose instructions upon the plaintiff's theory of the case"].)

When resisting agreement on certain instructions proposed by the other side, counsel can explain that the evidence may not turn out to support giving the instruction, and counsel does not want the opponent to use any agreement on the instructions as some sort of acknowledgment to the contrary. In addition, counsel might be able to point to indications that the law is somewhat in flux, and counsel feels obligated to preserve arguments based on new authorities that later make the instruction erroneous. Or counsel can simply note that an article published in a legal magazine pointed out that it's not a good idea to waive appellate arguments by proposing instructions, even well established form instructions, that don't help the client's cause!

This is one of the many areas in which wise counsel is advised to "pick your battles." How hard to push for an aggressive special instruction, or how hard to resist the other side's proposed instructions, may turn on such intangibles as the perceived strength of the evidence on particular issues, the client's potential institutional interest in consistently advancing a legal theory, the dynamics of relations with opposing counsel, the trial judge's anticipated attitude toward creative legal thinking, and so forth. The practice pointers above are designed to get trial lawyers to look beyond their CACI form books when preparing to present a case to a jury.

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