

EFFECTIVELY USING JURY INSTRUCTIONS IN A CIVIL TRIAL

BY JUDGE MARK DENTON

An appropriate focus upon jury instructions is often neglected during law school. Even though I took a course in trial practice, I still wondered what my adversary was talking about during my first jury trial when he asked the judge when we would be meeting to settle jury instructions. To use a term that my father brought from his Lincoln County upbringing, the judge must have thought that I looked at opposing counsel “like a bull looking at a bastard calf.”

Fortunately, my adversary behaved like a professional, helping me come to grips with the concept that I actually did have a part to play, and that the judge did not just *sua sponte* come up with the instructions in the case. Then, in settling the instructions, I learned what part counsel can and should have in this task. That was a criminal case, but the lessons I learned carry over to the civil side.

At their most effective, jury instructions should be utilized, not just during the trial presentation, but also to help identify issues on which the jury should be instructed, and to find and prepare proposed instructions on those issues.

In fact, there are those who maintain that jury instructions should be considered as soon as an attorney takes a case, in order to familiarize counsel with the elements and burdens of proof regarding claims and defenses, and in drafting initial pleadings and preparing discovery requests and questions.

Some courts have rules that require the submission of proposed jury instructions before trial begins. But, even where there is no such requirement, or where such a requirement is not enforced, there are judges who welcome the submission of proposed instructions before trial, as this will give the court a good idea of how submitting counsel intends to prove or defend a case, and this practice will assist the judge in assessing relevancy objections.

A rule in the Eighth Judicial District, EDCR 2.69 (a)(3), provides, in part, that “[u]nless otherwise directed by the court, trial counsel must bring to calendar call ... [j]ury instructions in 2 groups: the agreed upon set and the contested set...” Rule 7 (8) of the Second Judicial District states that: “[P]roposed jury instructions shall be submitted to the court by delivering the original to the judge’s chambers no later than 5:00 p.m. on the Friday before trial ... [although] [a] judge may order jury instructions to be submitted to the court at a pretrial conference.” Similarly, Rule 13 of the First Judicial District states: “Proposed special jury instructions and forms of verdict must be served on all counsel and provided to the Judge at the commencement of any civil or criminal trial...”

¹ Procedurally, then, the first step in effectively using jury instructions is to become aware of the court’s submission and format requirements, by reviewing any applicable local rule and the order scheduling the case for trial. These issues can also be addressed at any pre-trial conference conducted by the trial judge. The general requirements for submission and formatting instructions are set forth in NRS 16.110(1) and NRCP 51; counsel should become familiar with those provisions as well.

Next, it is important to differentiate the so-called “stock instructions” from the special instructions.

Historically, various judicial districts in Nevada had what were called stock instructions that counsel could count on the jury receiving in virtually all cases, with some room for withdrawal upon stipulation of counsel. Thus, when I started my first jury trials, I recall being directed to the Clark County Law Library where such instructions could be purchased, on 8.5 by 14 inch paper, for a nominal sum. These included instructions regarding the basic nature of the proceedings, general classifications of types of evidence, conduct of jurors, etc. The task was then to fill in the blanks with the particularized instructions on the law in the specific case. Then, in 1986, the State Bar of Nevada authored *Nevada Pattern Jury Instructions – Civil*, which could be used for such purpose. It included both general instructions about the process and instructions on some points of law.

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Counsel can still look to their local resources for the stock instructions utilized in the judicial districts where they practice, and the 1986 publication remains useful. But, there is now an item that has built upon those tools and that addresses many more areas of law: *Nevada Jury Instructions – Civil*, first published by the State Bar of Nevada in 2011. It is presently published in loose-leaf format with an accompanying CD. It is a work in progress and, although it does not purport to stand as a pronouncement of the Nevada Supreme Court of instructions that it has approved for use, it contains proposed instructions that have been drafted by accomplished authors and editors, listed therein with reference to Nevada statutes and Nevada Supreme Court published opinions.² Part of the effective use of instructions is definitely having a starting point, such as this recent publication, that recognizes economy of time, and can be used to create a road map describing the procedure of hearing and considering the proffered evidence by the trier of fact and the law that applies to the factual issues presented. Of course, instructions must be accurate statements of the law, but organization and logical presentation assist in their comprehension, as does the use of language that will be easily understood by members of the jury.

Once the proposed jury instructions are prepared and their settlement is at hand, reference is made to NRS 16.110(3), which provides that “[c]onferences with counsel to settle instructions may be held in chambers at the option of the court. In any event, conferences on instructions must be out of the presence of the jury.” On this point, counsel will want to inquire how the particular trial judge handles settlement. My practice has been to initially confer with counsel, in chambers, with the court clerk present after the evidence is closed; there we identify the instructions that will likely be given and those that will be refused, and make a full record of the instructions and verdicts to be used, allowing for objections and formal proffers of instructions that are refused, during a formal conference in the courtroom. But, every judge may have a different way of doing things.

It often happens, especially in complicated cases where more than one counsel appears for a given side, that the second chair counsel will meet with the court and opposing counsel to confer about the proposed instructions and settle them, while lead counsel is preparing for argument. That is fine, but conferences about jury instructions can bring out points of which lead counsel should be aware in preparing for and making argument, and can provide a subtle heads-up about perceptions of the evidence on the part of participants in the conference. Therefore, lead counsel should not look at the settlement of jury instructions as simply a clerical act, and he or she should make sure to coordinate with counsel who did in fact participate in settlement.

Speaking of objections and proposed instructions, I would point out that it is extremely important that the record

be properly made and, again, that counsel should become familiar with NRCP 51 and NRS 16.110(1) in understanding the procedure to be followed. See also *Cook v. Sunrise Hospital & Medical Center*, 124 Nev. 997, 1001-02, 194 P.3d 1214, 1216-17 (2008). Also, if there are instructions on a given issue that are considered to be particularly important, it does not hurt to have more than one to propose as alternatives; a fall-back position is often preferable to having to use opposing counsel’s proposed instruction as the only one available under the time constraints involved. Always keep in mind that a party has the right to have a jury instructed on all theories being advanced that are supported by the evidence, if the instructions proposed are accurate statements of the law. *J.A. Jones Constr. v. Lehrer McGovern Bovis*, 120 Nev. 277, 284-85, 89 P.3d 1009, 1014 (2004)

Until recently, the applicable rule, NRCP 51 (b), and the statute, NRS 16.090 (6), differed on whether the instructions must be read by the judge before or after argument. Prior to 2005, NRCP 51(b) contemplated instructions being read to the jury after argument, if demand for such was made. Now, both the statute and the rule call unequivocally for the instructions to be read before argument of counsel, who can then use the given instructions in their arguments.

The judge reads the instructions to the jury. In my experience, juries listen intently to such readings, but are told during the process that the instructions are long and complicated, and that they will have the instructions available to them when they retire to deliberate.

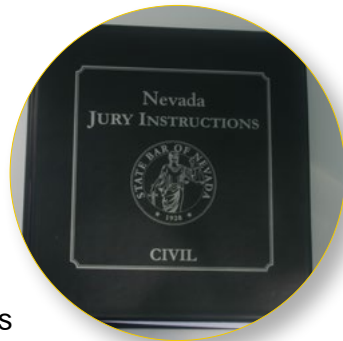
A case may very well turn upon nuances that relate to the application of a few given instructions. Therefore, effective use of jury instructions often requires that counsel focus on those instructions during closing argument. Counsel may thus decide to have reproductions of various instructions printed onto large posters, or to have them shown via a projection system to emphasize them during argument. Before taking such steps, counsel should be sure that the prepared display is identical to the instructions the judge has read. Counsel should also consider the response that such emphasis is likely to elicit from opposing counsel, keeping in mind that the jury is commonly instructed, as part of the stock instructions, that the instructions are to be considered as a whole and that each is to be considered in light of all the others.

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NEVADA JURY INSTRUCTIONS – CIVIL

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We have all read litigation publications and heard presenters at seminars express their opinions about what they consider to be the key stages of trial. Many, probably most, say that the opening statement is it, bar none, and that juries make up their minds at that point. Others maintain that closing argument is it. Still others focus on voir dire. It is not my purpose to question whether or not one can lay out a spectrum of least important to most important aspects of trial preparation. I can say that I have seen trials turn on different things, and that each aspect is a piece of a final assembly that can have an impact. The instructions tell the jury what the law is, substantively and procedurally, but they also guide the jurors in the process they must use to find the facts; so it is vitally important that counsel endeavor to synthesize the presentation of their factual picture with that law. Counsel should never put the opportunity to take part in making that road map in a subservient role in their preparation.

At bottom then, effective use of jury instructions means establishing what they will likely be when taking a case; using them in pleading, discovery and in setting the theme of the case for opening statement and presenting the evidence; identifying the format and settlement requirements of the court; preparing and submitting proposed accurate instructions in accordance with those requirements; making an appropriate record of objections; and using them in closing argument. ■

- 1 See also Rule 8 of the Third Judicial District, Rule 17 of the Fourth Judicial District, Rule 10 of the Seventh Judicial District, Rule 18 of the Ninth Judicial District, and Rule 11 of the Tenth Judicial District. As of this writing, it does not appear that the Fifth and Sixth Judicial Districts have promulgated local rules.
- 2 Significantly, when it was pointed out that some of the instructions had problems, the committee heard from counsel and has sought to correct any errors.



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