The Necessary Chore of Jury Instructions

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Jury instructions have two purposes, the first of which ought to be obvious: to instruct the jury on the law. The second, equally important, but missed by many unsophisticated advocates, is to create grounds for an appeal should the jury rule against you. That is the reason many experienced trial hands go so far as to say the jury instructions are written as much for appellate courts as they are for jurors.

You surely want to explain to the jury the relevant law using the simplest language possible. So you need to ask the judge to give instructions covering each theory of relief that you assert; failing to do so, you will have waived that theory on appeal.[1]

Giving an incorrect instruction may constitute grounds for reversal; likewise, so will the failure to give an instruction that correctly states the law and was merited under the evidence.[2] With this in mind, instructions must always be drafted and urged on the trial court with the possibility of an appeal in mind, so you really must consider whether you really want that "aggressive" instruction given, even though the judge seems very willing to do so. The unthinking lawyer mindlessly pushes for whatever instructions she can convince an accommodating judge to give, regardless of the risk in error being created for appeal. The mindful lawyer, like a good chess player, learns to think more than one move ahead, and has her

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[1] *Fuller v. Zinik Sporting Goods*, 538 P.2d 1036 (Utah 1975).

[2] Error in instructions by the trial court does not, of course, automatically mean a reversal. You must also prove that the error was not harmless; that is, that the error can be said to have affected the outcome. *Cheves v. Williams,* 1999 UT 86*,* 993 P.2d 19, 196; *Steffensen v. Smith's*, 862 P.2d 1342, 1346 (Utah 1993).

eye on giving no unnecessary grounds for a successful appeal to her opponents.

Procedure for Filing Proposed Jury Instructions

The rules themselves are at the end of this article. Utah Rule of Civil Procedure 51(d) requires you to file requested jury instructions at the final pretrial conference or at any other time directed by the trial judge. The federal rule states proposed instructions must be provided "at the close of the evidence or at any earlier reasonable time that the court orders," but the local federal rule establishes a deadline no later than two business days before the trial starts. Both rules are widely ignored, as judges vary widely in the way they prefer to handle jury instructions. One federal judge is notorious for requesting jury instructions to be filed with proposed draft pretrial orders months before the trial date, yet some judges don't want to bother with them until the first morning of trial.[3] So ask the judge's judicial assistant or clerk about the court's preferences.

The typical procedure is to file an original set of proposed instructions containing case citations to support the instruction. You give that plus a blank set of instructions, containing neither instruction numbers nor case citations. It is these the judge will use to pencil in instruction numbers and give to the jury. Nowadays, most judges want the proposed instructions on a CD in Word or WordPerfect format, which obviously makes it much easier to make changes and add or subtract instructions. Again, don't be ashamed to ask – each judge seems to do this differently, and understand the judge's preference no later than the final pretrial conference.[4]

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[3]This can pose a problem with organizing preliminary instructions, typically given the first day, if not the first morning, of trial.

[4] It's allowable and routine for additional instructions to be proposed after the trial starts based on new evidence or developments.

The Instructions Conference

The instructions conference is a meeting between counsel and the trial judge usually, but not always, in chambers. Typically, the judge will start with the plaintiff's proposed instructions, work through them and deal with objections and changes, and then work through the defense set. Most judges want you to agree on noncontroversial instructions in advance, so they only have to deal with the instructions in dispute. Again, there is great variation as to how this is handled. While not binding, MUJI 2d is considered at least highly persuasive, so use it in preference to others.[5] I've seen judges spend hours and hours with counsel to prepare the instructions, and I've seen judges take what was submitted and simply advise counsel which instructions are going to be given, and which are going to be denied. Some judges (a few) like to get a start on this before the trial begins; most prefer to do so as the trial progresses,[6] and it is the usual case that you are still haggling over instructions the night before closing arguments.

Bases for Objections to Instructions

Objections to instructions are most often based on these grounds:

1. The instruction is not an accurate statement of the law.

2. There are no facts in evidence that support giving the instruction.

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[5]*See* then-Chief Justice's Durham's *Letter From the Chief Justice: "*MUJI 2d is a summary statement of Utah law but is not, of course, the final expression of the law. In the context of any particular case, this Court or the Court of Appeals may review a model instruction. Nevertheless, the Supreme Court urges trial judges to use the MUJI 2d instructions to the exclusion of other instructions, if MUJI 2d contains an instruction applicable to the subject, the MUJI 2d instruction accurately states the law on that subject, and a party requests the MUJI 2d instruction. Obviously, the trial court may edit the MUJI 2d instructions to fit the circumstances of the trial." www.utcourts.gov/resources/muji/letter.html

[6]Which makes a lot of sense: it allows the judge to consider the instructions after being better informed on the facts and circumstances of the case.

3. The instruction is argumentative. (These are often the instructions that go along the lines of "this is what the law is not," such as "just because something bad happened is not any evidence of negligence." *See Green v. Louder*, 2001 UT 62, 29 P.3d 638 (trial courts directed not to instruct juries that the "mere fact" of an accident does not mean that anyone was negligent) and *Randle v. Allen*, 863 P.2d 1329 (Utah 1993) (trial courts directed not to instruct juries on "unavoidable accidents").

4. The instruction is cumulative (perhaps overemphasizing the plaintiff's burden of proof), and the point is made in other instructions.

5. The instruction is in conflict with other instructions.

6. The instruction is confusing or unintelligible.

7. The instruction is unnecessary. Lots of things are accurate statements of the law, but we don't include them in jury instructions. We only need to tell them the minimum amount of law necessary to reach an informed decision, not say essentially the same thing in three different ways.

For example, the MUJI- 2d committee eliminated the former "the doctor is not a guarantor of good results"[7] instruction from the present set based on *Green v. Louder* and *Randle v. Allen*. The latter case pointed out that these types of instructions, while accurate statements of the law, divert the jury from its primary duty of determining negligence and create the impression of "extra hurdles" to be overcome. They also reemphasize a defendant's theory of the case, and may constitute improper judicial commenting on the evidence.[8]

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[7]MUJI- 1st 6.27.

[8]*Id.*, 863 P.2d 1329, 1335-36.

This species of objectionable instruction could as well be used by a clever plaintiff's lawyer, perhaps in a medical negligence case. If a defendant can have an instruction telling the jury that the defendant physician is not liable for "mere"[9] bad results, than why shouldn't a plaintiff get instructions like "the fact that the defendant did his best is not relevant, and would not excuse a breach in the standard of care" or "the doctor is still liable for a breach in the standard of care, even if he used his own best judgment." One can think of many examples of these "accurate-but-unnecessary" instructions and, indeed, the form books on instructions are rife with them. But by pushing for them you may well be buying yourself a reversal on appeal.

Taking Exceptions

This is a critical step. The trial judge will indicate which instructions he's going to give and deny. If you don't make an objection ("take exception") to an instruction given or refused, you've likely waived the point.[10] State your objections to all instructions you requested that were refused, and all instructions offered by your opponent that will be given. It is not enough to state that the instruction is "an incorrect statement of the law" or the like; you must be particular, specific, and propose an alternative in order to preserve the point for appeal.[11]

And please be careful: you must take your exceptions *on the record*. Do not assume simply because you objected during the instructions conference (which might not have been on

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[9]Use of the word "merely" or its equivalents is often a sign of a problem instruction.

[10]Rule 51(f): "Unless a party objects to an instruction or the failure to give an instruction, the instruction may not be assigned as error except to avoid a manifest injustice."

[11]*Nielson v. Cook*, 2002 UT 11, 40 P.3d 1119; *Diversified Holdings v. Turner*, 2002 UT 129, 63 P.3d 686. Stating that "the instruction is not suggested by, and is contrary to law," isn't good enough, *Godesky v. Provo City*, 690 P.2d 541, nor is "the instruction is not a correct statement of the law involving the case nor is it supported by any evidence in the record," *Beehive Med. Elecs. v. Square D. Co.,* 669 P.2d 859 (Utah 1983).

the record) that your point will be preserved. If you have any doubt, ask, and take the opportunity to put on the record your specific exceptions. You must make your objections before the jury retires to deliberate; the Supreme Court has strongly discouraged the former practice of taking exceptions after counsel have argued the case, while the jury is out, and the practice is prohibited by Rule 51.[12]

Once the exceptions are taken, the court will put together a final set of instructions, making copies for counsel, and at least one copy for the jury[13]. As the court is reading the instructions to the jury, follow along to make sure the instructions are being read correctly. After the instructions are read, closing arguments will be heard. (In federal court, arguments go before the instructions.) It is an effective practice in state court to blow up a few key instructions and use them in your arguments to the jury, and I highly recommend it.

Instructions Shouldn't Be Given Only at the End

The MUJI 2d Advisory Committee has strongly recommended that courts consider giving some of the substantive instructions (not just the preliminary ones) at the start of the trial, or as the trial goes along:

> Judges should instruct the jurors at times during the trial when the instruction will most help the jurors. Many instructions historically given at the end of the trial may be given at the beginning or during the trial so that jurors know what to expect. The fact that an instruction is not organized here among the opening instructions does not mean that it

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[12]Rule 51(f): "Objections to written instructions shall be made before the instructions are given to the jury . . . ." *See also Nielson v. Pioneer Valley Hosp.*, 830 P.2d 270 (Utah 1992) (trial judge did not allow counsel the opportunity to do this); *State vs. Cowan*, 490 P.2d 890 (Utah 1971); *Hill v. Cloward*, 377 P.2d 186 (1962).

[13] Rule 51(e) only requires one set to be given to the jury, but some judges give each juror their own copy. Other judges prefer the jurors to "consult together," when referring to instructions, and have each rifling through their own set.

> cannot be given at the beginning of the trial. Instructions relevant to a particular part of the trial should be given just before that part. A judge might repeat an instruction during or at the end of the trial to help protect the integrity of the process or to help the jurors understand the case and their responsibilities.[14]

This is a shocking concept to some and something for which you will find opposition. But doesn't it make far more sense to instruct the jury on what to watch for, or on what basis to decide the issues, *before* they hear the evidence, rather than leaving it until the end? (Oh, is *that* what we were supposed to be looking for?) And don't forget that there's an extensive set of "preliminary" instructions in MUJI that should always be given at the start of the trial.

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[14]MUJI- Civil 2d. www.utcourts.gov/resources/muji/index.asp

RULES ON JURY INSTRUCTIONS

Utah Rule of Civil Procedure 51:

(a) Preliminary instructions. After the jury is sworn and before opening statements, the court may instruct the jury concerning the jurors' duties and conduct, the order of proceedings, the elements and burden of proof for the cause of action, and the definition of terms. The court may instruct the jury concerning any matter stipulated to by the parties and agreed to by the court and any matter the court in its discretion believes will assist the jurors in comprehending the case.

(b) Interim instructions. During the course of the trial, the court may instruct the jury on the law if the instruction will assist the jurors in comprehending the case. A party may request an interim instruction.

(c) Final instructions. The court shall instruct the jury at the conclusion of the evidence as may be needed.

(d) Request for instructions. Parties shall file requested jury instructions at the final pretrial conference or at any other time directed by the court. If a party relies on a statute, rule or case to support or object to a requested instruction, the party shall provide a citation to or a copy of the statute, rule or case. The court shall provide the parties with a copy of the approved instructions, unless the parties waive this requirement.

(e) Written instructions. Whenever practical, jury instructions should be in writing. At least one written copy shall provided to the jury. The court shall provide a written copy to any juror who requests one.

(f) Objections to instructions. Objections to written instructions shall be made before the instructions are given to the jury. Objections to oral instructions may be made after they are given to the jury, but before the jury retires to consider its verdict. The court shall provide an opportunity to make objections outside the hearing of the jury. Unless a party objects to an instruction or the failure to give an instruction, the instruction may not be assigned as error except to avoid a manifest injustice. In objecting to the giving of an instruction, a party shall identify the matter to which the objection is made and the grounds for the objection.

(g) Arguments. Arguments for the respective parties shall be made after the court has given the jury its final instructions. The court shall not comment on the evidence in the case, and if the court states any of the evidence, it must instruct the jurors that they are the exclusive judges of all questions of fact.

Federal Rule of Civil Procedure 51:

(a) Requests.

(1) Before or at the Close of the Evidence. At the close of the evidence or at any earlier reasonable time that the court orders, a party may file and furnish to every other party written requests for the jury instructions it wants the court to give.

(2) After the Close of the Evidence. After the close of the evidence, a party may:

(A) file requests for instructions on issues that could not reasonably have been anticipated by an earlier time that the court set for requests; and

(B) with the court's permission, file untimely requests for instructions on any issue.

(b) Instructions. The court:

(1) must inform the parties of its proposed instructions and proposed action on the requests before instructing the jury and before final jury arguments;

(2) must give the parties an opportunity to object on the record and out of the jury's hearing before the instructions and arguments are delivered; and

(3) may instruct the jury at any time before the jury is discharged.

(c) Objections.

(1) How to Make. A party who objects to an instruction or the failure to give an instruction must do so on the record, stating distinctly the matter objected to and the grounds for the objection.

(2) When to Make. An objection is timely if:

(A) a party objects at the opportunity provided under Rule 51(b)(2); or

(B) a party was not informed of an instruction or action on a request before that opportunity to object, and the party objects promptly after learning that the instruction or request will be, or has been, given or refused.

(d) Assigning Error; Plain Error.

(1) Assigning Error. A party may assign as error:

(A) an error in an instruction actually given, if that party properly objected; or

(B) a failure to give an instruction, if that party properly requested it and—unless the court rejected the request in a definitive ruling on the record—also properly objected.

(2) Plain Error. A court may consider a plain error in the instructions that has not been preserved as required by Rule 51(d)(1) if the error affects substantial rights.

Local Federal Court Rule:

DUCivR 51-1 INSTRUCTIONS TO THE JURY

(a) Proposed Jury Instructions.

(1) Submission: Unless the court otherwise orders, proposed jury instructions must be served and filed with the court a minimum of two (2) full business days prior to the day the case is set for trial. The court in its discretion may receive additional written requests during the course of the trial. Individual instructions must address only one (1) subject, and the principle of law embraced in any instruction may not be repeated in subsequent instructions.

(2) Service: Unless the court otherwise orders, service copies of proposed instructions must be received by the adverse party or parties at least two (2) full business days prior to the day the case is set for trial.

(3) Format: Unless the court permits the submission of proposed jury instructions in electronic format, such instructions must be submitted in paper.

(A) Paper: When submitting proposed instructions on paper, counsel should provide two originals and one copy. In the first original and the copy, each proposed instruction must be numbered, must indicate the identity of the party presenting the same, and must contain citations of authority. In the second original, each proposed instruction must be without number and citation.

(B) Electronic: When submitting proposed instructions electronically, counsel may utilize any means acceptable to the judge to whom the case is assigned. For the court's permanent file, counsel also must submit a paper original in which each proposed instruction must be numbered, must indicate the identity of the party presenting the same, and must contain citations of authority.

(b) Ruling on Requests.

Prior to the argument of counsel, the court, in accordance with Fed. R. Civ. P. 51, will inform counsel of the court's proposed rulings in regard to requests for instructions. If

any counsel believes that there has not been sufficient information from the court under Fed. R. Civ. P. 51, counsel should call the matter specifically to the attention of the court upon the record prior to final arguments before the jury.

(c) Objections or Exceptions to Final Instructions.

The jury will be instructed orally or in writing as the court may determine. As provided in Fed. R. Civ. P. 51, objections to a charge or objections to a refusal to give instructions as requested in writing must be made by stating such to the court before the jury has retired, but out of the hearing of the jury, specifying (i) the objectionable parts of the charge or the refused instructions; and (ii) the nature and the grounds of objection. Before the jury has left the box, but before formal exceptions to the charge are taken, counsel at the bench are invited to indicate to the court informally any corrections or explanations of the instructions that they believe were omitted due to the inadvertence of the court.