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Young Lawyers

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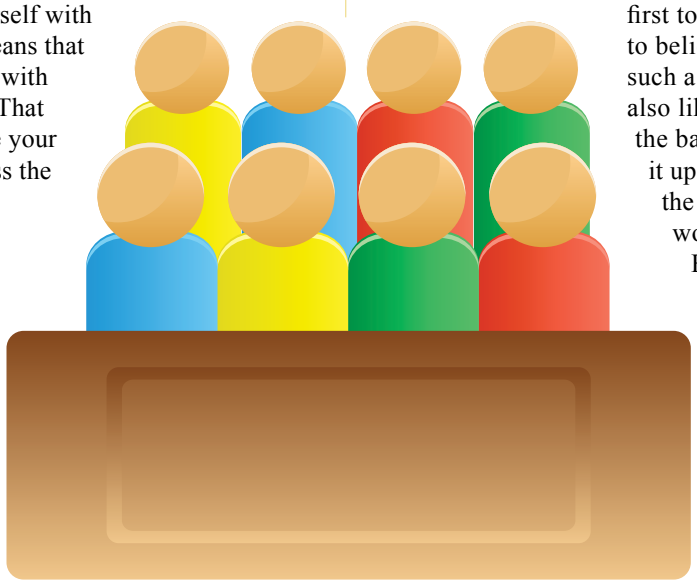
DON'T FORGET ABOUT THE JURY INSTRUCTIONS

That may sound silly, but often lawyers, new and seasoned, forget to really consider jury instructions until the eve of trial, or worse, the eve of closing arguments.[1] On the contrary, jury instructions are something you should be thinking about from the inception of your case. It is vital that you know the law on which the jury is likely to be instructed. Familiarizing yourself with the likely jury instructions means that you will have armed yourself with the law governing your case. That enables you to properly frame your discovery plan and truly assess the merits of your case.



In addition to thinking about the jury instructions you want given based on your theory of the case, it is also key to consider jury instructions that the other side will propose, that may not be so favorable to your position. Weighing the other side's arguments early on in the case may allow you time to gather the facts and evidence you need to avoid unfavorable instructions. At a minimum, you will be better equipped to respond to the arguments on the other side and devise a way to respond before it's too late.

Speaking of responding before it's too late, never try to hide the bad facts! If you know a fact is bad for your case,[2] it's a pretty safe bet that the other side does too, and they are going to bring it out just as soon as they can. Rather than let your opposing counsel be the first to ring that bell in an "aha moment," in front of the jury, make sure you get to it first. By putting the facts out there, including the bad stuff, you steal the other side's thunder. Opposing counsel will probably still try to make a big deal out of it (after all, they've been building a case on those bad facts for months and, in many civil cases, years) but if you are the first to disclose, the jury is likely to believe that you don't think it's such a big deal. They are, in turn, also likely to assume that whatever the bad fact may be, if you brought it up first, it probably isn't quite the smoking gun the other side would like them to believe. Besides, few things are as personally satisfying as seeing your opponents immediately deflate upon realizing that you just robbed them of their grand Perry Mason moment. In other words, shoot the smoking gun yourself.

Finally, remember, whether you are thinking about jury deliberations or the record on appeal, it's almost always about the jury instructions. Our Nevada Supreme Court has reminded us time and time again, that failing to lodge proper objections to jury instructions is one of the easiest ways to tank your odds of success on appeal.[3] Remember that awful jury instruction you have been dreading since the outset of your case (when you first started researching relevant instructions)? Object

to it! It is especially imperative for more inexperienced practitioners to remember that, when settling jury instructions, you cannot allow yourself to be bullied.

Remember that the argument, "this instruction is always given" or, this is "stock," does not mean that it is a proper instruction on the current state of the law or that it ever was, for that matter. Things change, and even courts and judges make mistakes (shocking right?). If you believe a particular instruction is off on the law or does not fit with the particular facts of your case, make a record and be specific about how and why it should not be given, based on the relevant law (or alternatively, why a particular instruction *should* be given). In short, regardless of whether or not you win the trial, you should always be mindful of preserving the record for appeal. ■

1 Many courts have rules governing submission of jury instructions. For example, the Local Rules for the Eighth Judicial District Court require that the parties bring with them to the final calendar call, two sets of instructions – one of them being an agreed upon set and the other the contested set, which must contain the name of the party proposing the instruction and the citations relied upon for authority. EDCR 2.69. You should note, however, that some judges require the submission of instructions to take place earlier on in the process and under more specific parameters. Pay attention to the Scheduling Order, Order Setting Trial and any other particularized directions the judge may give (whether by filed order or vis a vis the court's website).

2 If you know a fact is bad for your case and is not relevant or that there is some other evidentiary basis for keeping it out at the time of trial, file a motion in limine asking the court to rule on whether such evidence comes in before trial even begins. See NRS 47.080; EDCR 2.47; *See generally State ex rel Dept. of Highway v. Aggregates & Asphalt Co.*, 92 Nev. 370, 551 P.2d 1095 (1976).

3 NRCP 51; For criminal matters, refer to *McKenna v. State*, 114 Nev. 1044, 1052 (1998) (citing *Flanagan v. State*, 112 Nev. 409, 423 (1996); For guidance in civil cases, look to *J.A. Jones Constr. Co. v. Lehrer McGovern Bovis, Inc.*, 120 Nev. 277, 287 (2004).