Jury instructions: It's up to you to make certain they are clear to jurors

Jurors say that one of the greatest stumbling blocks to a fair verdict is understanding the jury instructions

By Noelle Nelson

Jurors polled in focus groups and jury debriefings point out again and again that one of their greatest stumbling blocks in arriving at fair and just decisions is their lack of understanding of jury instructions and how those instructions apply to the case. For attorneys, the message is simple: if you want to prevail, you must help jurors make sense of the often unfamiliar language used in jury instructions, and then help jurors understand how these instructions support your interpretation of the facts.

The lawyer who provides the most clarity and the most logical explanation of a situation is the lawyer who will most likely win. Many words that make perfect sense to attorneys and those who work within the judicial system have a completely different meaning to jurors. For example, you say "Proximate cause." The juror hears "Approximate," – maybe it has something to do with what happened, but not certain. You say, "Preponderance of the evidence." The juror hears, "A lot of heavy-duty evidence."

The examples are endless. Lawyers like to say a graphic will "depict" things. Jurors need to know what the graphic will "show." The lawyer says this event was "prior." Jurors want to know what came "before." And "aforementioned" doesn't even compute.

The use of clear and readily understood language is important throughout the trial, but it is critical when it comes to jury instructions. Improper handling of jury instructions can damage an otherwise wonderfully prepared and presented case.

If you give a clear, easily understandable definition of the jury instructions and tie your definition specifically to your interpretation of the evidence at hand, you win. If, however, opposing counsel is the one to pull off this feat, opposing counsel wins.

Here are just a few words typically found in jury instructions you assume the jury understands to mean the same thing as you. Unfortunately, they do not.

"Reasonable"

"Reasonable" is a word that appears repeatedly in jury instructions. In employment cases, for example, "Conduct is within the scope of employment if: (a) it is reasonably related to the kinds of tasks that the employee was employed to perform or (b) it is reasonably foreseeable in light of the employer's business or the employee's job responsibilities." In (among others) personal injury cases, "Negligence is the failure to use reasonable care to prevent harm to oneself or others."

What is reasonable to you and your colleagues, even to defense counsel, is often light years apart from what any given juror may believe is reasonable. Not only that, but often, what is reasonable is such an individual belief, that every juror on your panel has a different understanding of the word "reasonable."

In the employment case, for example, "reasonably related to the kinds of tasks" to one juror may mean anything that needs doing within a given department on a given day. To another, it may mean only those tasks that are defined in the employee's job description. To other jurors, it means everything in between.

In a personal-injury case, "reasonable care to prevent harm to oneself or others" can run the gamut from "texting is fine as long as you're driving slowly" to "don't ever have your mobile turned on in the car," with again, everything in between.

"Foreseeable"

If you think "reasonable" is problematic, try "foreseeable." Some jurors think foreseeable is much like prophecy or psychic powers with only a select few able to see into the future. Other jurors believe that any physician, scientist, engineer or other professional should be able to "foresee" all eventualities.

When you marry the words "reasonable" and "foreseeable" in the same jury instruction, such as "it is reasonably foreseeable in light of the employer's business or the employee's job responsibilities," the jurors are now saddled with having to determine the real-world consequence of words with definitions they can't agree on. And this is before they ever get to the heart of the matter – the verdict. You can be sure that confusion over word meanings will inevitably be skewed by whatever collective definition of these words jurors grudgingly concede they can live with.

"Negligence"

To most people, "negligence" means that you forgot to do something, or did something sloppily when you knew

perfectly well what you were supposed to do, or how you were supposed to do it. Someone who is negligent, in regular people's parlance (to wit, jurors) is lazy, shiftless, forgetful, irresponsible, or even stupid.

That's a big problem for plaintiff attorneys. In medical malpractice cases, for example, jurors rarely want to believe that a physician is lazy, shiftless, forgetful, irresponsible or stupid, because that means – by inference – that their physician might also be lazy, shiftless, forgetful, irresponsible or stupid. Many jurors will attach the "on purpose" tag to "negligence." They will say "Well, the doctor didn't nick the artery *on purpose*, so it had to be an accident," thereby excusing the doctor, much to defense counsel's delight.

"Standard of care"

"Standard of care" may not be one word, but it is treated as such by attorneys, and certainly heard as such by jurors. Because standard of care contains the word "standard," most jurors want to know what standard should be followed, as in an official regulation, law or ordinance that regulates the behavior or activity.

During debriefings, jurors say "Oh, well, we figured it's whatever OSHA would say," since many of them are familiar with OSHA, or "The cop said X, so that's gotta be what the standard is. He would know," or "The instructions in the manual said to do X, so that's the standard," grabbing onto whatever has some semblance of an official regulation.

Of course, that's not what standard of care means. Standard of care refers variously to the reasonable care one would take to prevent harm to yourself or others or, in medical malpractice cases, how a similarly qualified practitioner would have performed under the same or similar circumstances.

In medical malpractice cases, the standard of care-related question invariably posed by jurors is "How the heck am I supposed to know?!" Since the guidance offered by the experts during the trial will almost always conflict – defense experts maintain that X is the standard, your experts maintain that Y is the standard – jurors tend to be even more confused during deliberations. At some point, too often, standard of care becomes a subjective assessment by a group of people groping in the dark to do the best they can, which may or may not give you the result you want.

Moving toward clarity

Let's use as an example of one of the most common jury instructions that contains "reasonable," "negligent" and "standard of care" all in the same instruction (California Civil Jury Instructions 401).

Basic Standard of Care:

Negligence is the failure to use reasonable care to prevent harm to oneself or to others.

A person can be negligent by acting or by failing to act. A person is negligent if he or she does something that a reasonably careful person would not do in the same situation or fails to do something that a reasonably careful person would do in the same situation.

You must decide how a reasonably careful person would have acted in XYZ's situation.

To help relieve the confusion in the jury box, first work out wording by using a focus group. As with jurors, you should expect blank looks when these instructions are read. In an attempt to be precise, the instructions appear convoluted to the lay person. In the interest of moving the deliberations portion of the focus group along, explain, using examples from everyday common experience, what the terms mean, such as how a reasonably careful person crosses the street, versus one who does not, and what the ramifications are in terms of harm caused to self and/or others.

This process is precisely what you do at trial, only your examples would be drawn from the specific environment of your case; the world of road construction, or biomedical products, vehicle manufacture, whatever it is.

Laying the foundation

Start the language education process early. Depending on the jurisdiction and your judge, you may not have latitude in what you present in your opening statement. Some judges will allow only the "and the evidence will show" format, others are more lenient. If you can begin to familiarize jurors with the jury instructions and how they apply to your case during your opening statement, do so.

If not, do not wait for closing argument. Introduce as many elements of the jury instructions through your witness and expert witness direct examinations as you can. The more the jurors become familiar with your interpretation of the instructions as they relate to your case, the better.

For example, in a medical malpractice case, you want your experts to use the language of the jury instructions. You ask, "How was Dr. Smith not reasonable, specifically?" "Why was this procedure not reasonable?" "What would other physicians have done that would have been reasonable in a similar situation?" By the time the expert opines "negligence," jurors have a basis of understanding what went into that opinion – and will have a better understanding of the jury instructions later in the case.

Your expert's responses, in a hypothetical direct, would be something like the following:

How was Dr. Smith not reasonable, specifically?

Dr. Smith failed to order diagnostic procedure XYZ. This was not what a reasonably careful physician would do in this circumstance.

Dr. Smith says he didn't feel diagnostic procedure XYZ would have revealed anything that he didn't already know. Isn't that a sufficient reason not to order the procedure?

It may be Dr. Smith's reason, but it is not what a reasonably careful physician would have done in a similar situation.

"Why not?" and "How so?" would continue the above interaction, using, as

often as possible, the very words used in the jury instruction, including when you get to the clincher, "And in your opinion, expert Jones, does Dr. Smith's conduct add up to negligence?" "Yes, in my opinion, Dr. Smith was negligent."

This process may seem tedious, especially to experts used to responding a certain way. However, the only people who matter in the courtroom (other than the judge) are the jurors. They are the ones who must be able to connect the dots, so repetition is your friend. Role-play with your experts if necessary until they can comfortably and easily use and repeat the jury instruction words in their responses.

Using visuals

Design a chart that shows all the ways in which the defendant was negligent. Preferably with the use of bullet points, the visual would contain a column header reading "Reasonable?" detailing each action taken/not taken, so that you can write (or electronically fill in) "No" next to each item as you go down your list. This chart can be used at closing, both to summarize and support your points as they relate to the jury instructions. Visuals are imperative to bring home to the jurors exactly what you mean.

Never lose sight that the jury instructions are given by the judge, the only person in the courtroom the jurors are certain is fair, on the side of justice, and the voice of "God." The jurors consider the instructions the final word on what the judge expects of them, and they do their darndest to honor that. Give them the tools they need to comply with the jury instructions in a way that fits your case, and thus, increases your chances of success.


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