By Robyn Stanton

Jury Instructions — Draft Early and Keep It Simple

Most Civil Jury Trial Orders require proposed written jury instructions to be tendered to the court 10 days before trial. Some courts occasionally request the jury instructions at a Final Pretrial Conference, which typically occurs within 30 days of the trial date. To a new attorney, these deadlines may leave the impression that there is no need to start drafting jury instructions until the case is well underway. But don't wait to draft the document that ultimately guides your jury's verdict. First, researching instructions on the particular issues of the case and the broader issues generally is helpful in drafting the Complaint. Second, you need to know the legal and factual elements you must prove before you start discovery, particularly expert discovery and your own client's deposition. Finally, the issue of jury instructions may arise earlier than you expect, and therefore, it is best to be prepared on the issue.

Researching Instructions— Recent Cases to Review

This suggestion applies to new and experienced attorneys. A frequent resource for Kentucky lawyers is Palmore's Kentucky Instruction to Juries, which is a good place to start, but these form instructions may not apply very well to your particular facts and it is always best to conduct updated case law searches on your legal issues. Knowing how your facts must fit the law to achieve a verdict in your client's favor on your jury instructions helps prepare discovery, expert disclosures and your overall strategy.

Products Liability

Kentucky determined that "bare bones" instructions are best, and this is true even in complex products cases. But "bare bones" doesn't mean that drafting instructions is easy. The very bare bones nature of Kentucky jury instructions can be full of pitfalls. Products liability cases in particular are very tricky in terms of jury instructions. Areas of negligence and strict liability frequently overlap. Recent, unpublished cases on this topic include: *Shea v. Bombardier Recreational Products, Inc.*, 2012 WL 4839527, (Ky. App. 2012) and *Garlock Sealing Technologies, LLC v. Ava Nell Dexter, et al.*, 2014 WL 3795407, (Ky. App. 2014). *Shea* focuses directly on the wording of the jury instructions while *Garlock* focuses on the issue of the "empty chair," which is important and quite common in a products case. Of significance, the court in *Shea* allowed elements of the plaintiff's strict liability claims of defective design and failure to warn into one instruction. This is a long debated issue in products cases. Ultimately, the *Shea* court determined, "Such an instruction adequately informed the jury that Bombardier was strictly liable if the ATV was defective, or if the ATV was unreasonably dangerous without adequate warnings, and either the condition or lack of warning caused Shea's injuries. This particular instruction has been approved by the Kentucky Supreme Court." *Shea* 2012 WL 4839527, at *3.

While some may argue three separate instructions are best, if you take this approach, make sure you avoid conflicting instructions. *See Cardinal Indus. Insulation Co. v. Norris*, No., 2009 WL 562614, at *10 (Ky. App. Mar. 6, 2009), which highlights how a simple use of the word "and" instead of "or" in the instructions can improperly state the burden of proof.

Medical Negligence

Again, Kentucky courts want simplicity and most medical negligence attorneys could recite the most frequently used jury instruction or some variation thereof. For example, "Do you believe that the failure of the defendant hospital/physician to exercise the degree of care and skill expected of a reasonably competent and prudent hospital/physician acting under similar circumstances was a substantial factor in causing plaintiff's injuries?" But what if informed consent or battery issues are involved? Kentucky courts recognized that a claim for lack of informed consent most often is a negligence claim (requiring expert proof) for failing to

conform to the proper professional standard of care. *Thompson v. Argotte*, No. 2014-CA-000095-MR, 2015 WL 1543538, at *3 (Ky. Ct. App. 2015). A recent case on this topic is *Horsley v. Smith*, 2015 WL 602813, at *1 (Ky. Ct. App.), *reh'g denied*. This case is not final but further stresses that courts typically don't allow an instruction specific to the identified medical responsibility to supplement the general legal duty instruction. While you may want to argue otherwise in certain cases, keep this in mind, because even though you hope to get what you consider to be the best instruction under the law, be prepared to present a case under any set of instructions that may result.

In the battery/negligence example, it would be disastrous to allow discovery to close without knowing you needed to retain an expert on the standard of care for informed consent. *Compare Hoofnel v. Segal*, 199 S.W.3d 147, 150 (Ky. 2006); *Vitale v. Henchey*, 24 S.W.3d 651 (Ky. 2003) (Medical battery is an intentional tort; it does not depend on professional judgment or skill; therefore, the elements of a common law claim of battery are relevant.)

Legal Malpractice

One of the most frequent legal malpractice cases occurs when an attorney misses the statute of limitations. Kentucky adopted an instruction requiring the jury be instructed on the underlying action and then asked to find whether the attorney was negligent—commonly referred to as "a suit within a suit." *See Osborne v. Keeney*, 399 S.W.3d 1, 10 (Ky. 2012); and *Daugherty v. Runner*, 581 S.W.2d 12 (Ky. App. 1978).

While misjudgment of the law generally does not render a lawyer liable, errors in judgment can be a basis for legal malpractice because there are circumstances in which lawyers can commit errors of judgment that deviate from the standard of care. The Kentucky Supreme Court has identified an instruction that would be acceptable in an "error of judgment" case in *Equitantia Ins. Co. v. Slone & Garrett, P.S.C.*, 191 S.W.3d 552 (Ky. 2006).

A plaintiff cannot seek a punitive damage instruction in a legal malpractice based on the original wrongdoer's conduct; *however*, a plaintiff may seek punitive damages from his or her attorney for the attorney's conduct if there is evidence the attorney "was grossly negligent in handling the case and acted with oppression, fraud or malice." *Vill. Campground, Inc. v. Middleton & Reutlinger, P.S.C.*, No., 2013 WL 3480376, at *3 (Ky. App. July 12, 2013), *review denied* (June 11, 2014) (citing in part *Osborne* 399 S.W.3d at 13).

Premises Liability

One of the most common premises liability cases are slip and fall cases. Over the past five years, the courts revisited the issue of "open and obvious" and how that applies to summary judgments. Interestingly, there have not been many cases on this issue with regard to jury instructions. A recent case, *Holbrook v. Dollar Gen. Store Corp.*, No. 2012-CA-001794-MR, 2014 WL 4049891, at *9 (Ky. Ct. App., 2014), does a decent job of outlining the cases on this topic for the last five years. The court determined that the wording

Have you moved, changed phone numbers or e-mail address? Let us know.

Call (502) 339-8890 or go online to your My KJA page
www.KentuckyJusticeAssociation.org

of the instruction with regard to the open and obvious doctrine is not a correct statement of law. However, that was irrelevant because ultimately, the jury determined the premises owner breached its duty of care to the invitee for failing to maintain and keep its premises in a reasonably safe condition for its customers. Although not specifically stated, you can infer from the holding that even if the open and obvious doctrine were properly stated, there was no need for it.

Be Prepared For Your Own Client's Deposition

Your opponent likely drafted jury instructions before the plaintiff's deposition, which is usually the first deposition in the case. As a former defense attorney, our firm used the draft jury instructions throughout the case and use the instructions to check off the information required for defenses or information to rebut specific elements of each claim by the plaintiff. Frequently, attorneys asked questions that are directly from case law on the topic. Accordingly, researching the instructions before your client's deposition helps you prepare for the deposition and defend your client during the deposition.

Equally important—you never know when the issue of jury instructions might pop up. At a recent mediation, defense counsel pulled out his draft jury instructions and read portions aloud to my client as part of his presentation. This case involved a spoliation of evidence issue we had extensively researched, and thankfully, we were prepared to provide an immediate response to questions from the client and present counter arguments to our mediator. This impressed the client and informed the other side we were well prepared for trial.

In sum, jury instructions are important and are the jury's guide to rendering a verdict. Even though one might not always agree with the "bare bones" approach, knowing the law is essential and keeping it simple is usually best.

— Robyn Bell Stanton is an associate with Morris & Player PLLC. Robyn joined Morris & Player in 2012 after working for a defense firm that primarily focused in the areas of products liability and mass torts. She currently focuses her practice on plaintiff's personal injury, legal malpractice, products liability and medical negligence.