



# The Effective Use of Jury Instructions in Construction Cases

by Kristan B. Burch

Because not all construction cases are the same, each requires its own set of jury instructions. The instructions vary based on the claims at issue, the damages sought, the affirmative defenses raised, and the type of evidence to be presented. Yet despite the variations, there are some common issues for jury instructions in construction cases.

## Start with Model Jury Instructions

Under most scheduling orders in state and federal court, jury instructions are one of the last items filed before trial. Nevertheless, they should be a focus in case preparation from the very start of each construction case. Applicable jury instructions should also be reviewed early and often as a case develops.

Various model jury instructions (outlined below) are available. Knowing them helps to define claims and defenses in pleadings. Plaintiffs should review model jury instructions when drafting complaints to ensure that claims and damage demands are properly pleaded.

Defendants should review them when drafting motions to dismiss, demurrers, special pleas, and answers to ensure proper motions are filed to challenge improperly pleaded claims and to ensure proper affirmative defenses are pleaded.

As discovery begins and parties work to determine how they are going to prove certain aspects of their case, model jury instructions can help determine the scope of discovery requests. The instructions can also help determine certain deposition questioning for witnesses. As evidentiary issues arise, model jury instructions can assist in shaping how the issues are raised with the court through motions in limine and objections. As legal issues emerge, model jury instructions can help shape summary judgment and other dispositive motions.

## Review and Adapt the Model Jury Instructions

The *Virginia Model Jury Instructions – Civil*<sup>1</sup> are a starting point for cases filed in Virginia courts. Virginia trial judges routinely deal with the *Virginia Model Jury Instructions* and may be more willing to adopt them. These instructions range from general to specific on claims and damages.

The general instructions included in the *Virginia Model Jury Instructions* provide guidance

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on topics such as credibility of witnesses, admission of evidence, and burden of proof.<sup>2</sup> General instructions are intended to help the jury better understand its role and responsibilities in a case. As evidentiary issues develop in cases, the general instructions may provide assistance on case-specific issues including adverse witnesses, unexplained failures to produce important witnesses, and jury views.<sup>3</sup>

In addition to general instructions for civil cases, the *Virginia Model Jury Instructions* include more specific instructions tied to various causes of action and damages claims that may be pleaded in construction cases.<sup>4</sup> Those instructions can, and should, be tailored to fit the facts of a specific case.

Other sources of model jury instructions include, but are not limited to:

- *Instructions for Virginia and West Virginia* (4th ed.) contain instructions relevant to various evidentiary, contract, and damages issues.
- *Federal Jury Practice and Instructions*<sup>5</sup> contain general instructions on issues such as the duties of the jury, burden of proof, and credibility. In addition, they address specific claims that may be brought in federal court in a diversity case, including contract actions.
- Pattern Jury Instructions have been assembled for the various federal circuits, which include general instructions and instructions relevant to certain federal causes of action.

Some construction-specific jury instructions also are offered by various providers. One example is those originally assembled by the American Bar Association in 2001.<sup>6</sup> The *ABA Model Jury Instructions* addresses many of the more specific and complicated issues that may arise in a construction case. These instructions address essential contract formation issues, including offer and acceptance, consideration, and intent.<sup>7</sup> In addition, they address breach of contract and breach of warranty claims, defective construction, termination, and damages.<sup>8</sup> The ABA also outlines claim issues, including changes and extra work and delay and disruption.<sup>9</sup>

### **Draft Additional Jury Instructions**

For issues that are not addressed by the model jury instructions, counsel should draft their own instructions. Sources are decisions issued by Virginia courts, along with construction treatises and other treatises that address case-specific issues. The Construction Law and Public Contracts Section of the Virginia State Bar issues regular newsletters and annually updates a hand-

book of construction cases, both of which can serve as resources to consult when crafting jury instructions.<sup>10</sup>

As a case develops, counsel should consider whether specific instructions are needed to define the parties at issue. For example, if one of the parties is a joint venture, the jury may need a better understanding on what that means and which parties make up the joint venture. In addition, counsel may need to draft instructions to address specific contract provisions that are relevant to the issues in the lawsuit. For example, if the contract contains a strong notice provision that may bar a claim, counsel may draft a specific instruction that includes the notice provision.

The bottom line is to keep the instructions simple and straight-forward in order to ensure that the jury can follow them. Using complicated verbiage and legal terms can create confusion and prevent the instructions from serving their ultimate goal of educating the jury on the relevant issues in the case.

Courts require citations of authority to be listed at the bottom of each jury instruction on at least one set of the proposed instructions. This requirement is particularly important when proposed instructions are drafted from scratch. Counsel should bring with them to trial copies of the cases and treatises used to craft instructions as the court may ask to review source materials before determining whether to give the instructions to the jury. In addition, counsel should be prepared to offer alternative language on important issues if the court rejects the original instructions proposed.

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### **Review Relevant Scheduling Order and Procedural Rules**

Deadlines and instructions for submission of jury instructions generally are contained within the court's scheduling order and procedural rules. For many circuit courts in Virginia, the relevant scheduling order is the Uniform Pretrial Scheduling Order described in Rule 1:18(B) and

Appendix 3 of the Rules of the Supreme Court of Virginia. The Uniform Pretrial Scheduling Order states that (1) counsel shall “exchange” proposed jury instructions “two business days before a civil jury trial date”; (2) before the trial starts, the counsel shall “tender to the court the originals of all agreed upon instructions and copies of all contested instructions with appropriate citations”; and (3) counsel can offer additional instructions at the trial.

The Code of Virginia provides additional guidance on civil jury instructions (and closing arguments) for state court proceedings, including:

- “Notwithstanding any other provision of law, any party in any civil action may inform the jury of the amount of damages sought by the plaintiff in the opening statement or closing argument, or both. The plaintiff may request an amount which is less than the *ad damnum* in the motion for judgment.”<sup>11</sup>
- “A proposed jury instruction submitted by a party, which constitutes an accurate statement of the law applicable to the case, shall not be withheld from the jury solely for its nonconformance with the model jury instructions.”<sup>12</sup>

Federal courts in Virginia issue scheduling orders that vary by division and district. Generally, these scheduling orders contain deadlines and requirements for submitting jury instructions. Counsel should consult the local rules issued by the applicable federal court in order to determine if there are any requirements for jury instructions. For example, Local Civil Rule 51 of the Local Rules of the United States District Court of the Eastern District of Virginia dictates that jury instructions shall be submitted in duplicate at least five business days before the scheduled trial date, with each instruction set forth on a separate page and with the citation of authority at the bottom of each instruction.

In addition, Rule 51 of the Federal Rules of Civil Procedure provides as follows regarding jury instructions: (1) after the close of the evidence, parties may file requests for jury instructions “on issues that could not reasonably have been anticipated by an earlier time that the court set for requests” and “with the court’s permission” may file “untimely requests for instructions on any issue”; (2) before instructing the jury, the court “must inform the parties of its proposed instructions and proposed action on the requests” and “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) the 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.”

### **Incorporate Jury Instructions into Closing Argument**

Subject to the particular rules of the court in which the case is tried, counsel should work to incorporate important issues from the jury instructions into their closing argument. This is particularly true for plaintiffs who can incorporate relevant instructions into their rebuttal closing argument when they have the last word with the jury.

In courts where the instructions are sent back to the jury room, the jury will have the ability to review the instructions further and note that the words being used by counsel in closing arguments are the same words contained in the jury instructions from the court. Counsel should determine the trial judge’s practices for jury instructions in advance of trial in order to be prepared their closing argument to most effectively use the instructions.

### **Conclusion**

From the beginning of a construction case, counsel should be aware of the relevant jury instructions that may frame the issues. Jury instructions can assist with pleadings, discovery, evidentiary issues, and motions practice. If the model jury instructions do not cover all of the relevant issues, counsel should draft their own instructions and be prepared to defend them at trial. It is never too early to begin reviewing jury instructions and using them to shape case preparation.

#### **Endnotes:**

- 1 Model Jury Instructions Committee, “Virginia Model Jury Instructions – Civil” (1993 & Supp. 2015).
- 2 Examples of such instructions include Instruction No. 2.000 (Preliminary Instructions to Jury), No. 2.020 (Credibility of Witnesses), and No. 9.010 (Reasonable Proof).
- 3 Examples of such instructions include Instruction No. 2.030 (Adverse Witnesses), No. 2.080 (Unexplained Failure to Produce Important Witness), No. 2.090 (Jury View), No. 2.130 (Prior Inconsistent Statement by Witness), No. 2.135 (Prior Inconsistent Statement by Party), and No. 2.170 (Rejected and Stricken Evidence).
- 4 Examples of such instructions include No. 9.020 (Duty to Mitigate Damages), No. 9.080 (General Punitive Damages), No. 45.090 (Meeting of Minds), No. 45.310 (Construction against the



- Drafter), No. 45.400 (Material Breach), and No. 45.540 (Liquidated Damages).
- 5 Kevin F. O'Malley et al., "Federal Jury Practice and Instructions" (6th ed. 1993 & Supp. 2015).
  - 6 "Model Jury Instructions: Construction Litigation" (Melissa A. Beutler and Edward B. Gentilcore eds., 2nd ed. 2015).
  - 7 Examples of such instructions include No. 1.03 (Offer and Acceptance), No. 1.04 (Consideration), and No. 1.05 (Intention and Formation).
  - 8 Examples of such instructions include No. 6.19 (Liquidated Damages), No. 8.12 (Material Breach), No. 9.01 (Breach of Express Warranty), No. 9.02 (Implied Warranty), and No. 18.03 (Compensatory Damages – Breach of Contract).
  - 9 Examples of such instructions include No. 5.02 (Change Orders), No. 5.05 (Disputed Extra Work), No. 6.02 (Critical Path), No. 6.06 (Compensable Delay), and No. 7.02 (Differing Site Conditions Explained (Type I and Type II)).
  - 10 <http://www.vsb.org/site/sections/construction>.
  - 11 Va. Code Ann. § 8.01-379.1.
  - 12 Va. Code Ann. § 8.01-379.2.



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