Closing Argument And Jury Instructions
For Sexual Harassment Cases:
The Plaintiff’s Perspective (With Forms)

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You’ll make your strongest case by making the instructions and closing work together.

**JURY INSTRUCTIONS AND CLOSING ARGUMENT** are what it is all about — literally. The purpose of jury instructions “is to inform the jury of the various permissible ways of resolving the issues in the case, and a party is entitled to an instruction on its theory of the case so long as it is legally correct and there is factual evidence to support it.” Thornton v. First State Bank, 4 F.3d 650, 652 (8th Cir. 1993). Closing argument is an advocate’s chance to explain how the evidence fits the judge’s jury instructions in such a way as to propel the result that the lawyer and her client want.

**JURY INSTRUCTIONS AND THE VERDICT FORM** • In harassment cases, the three thorniest battlegrounds are usually:
• Was the offending conduct serious or pervasive enough to qualify as outlawed harassment? Harris v. Forklift Sys., 510 U.S. 17, 21–23 (1993);
• Whether “the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior.” Faragher v. City of Boca Raton, 524 U.S. 775, 807 (1998); and
• Whether “the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.” Id.

Good jury instructions — and a good verdict form — will state these issues simply and straightforwardly. An example of a set of jury instructions and
a verdict form that did just that is reproduced below.

Start Early

When should you begin working on jury instructions and closing argument in a sexual harassment case? As soon as the client walks in the door for her initial consultation — perhaps even earlier, so that the first client interview can be a useful fact-finding session. Jury instructions provide a roadmap to what you must prove to prevail: closing argument assembles all of the evidentiary puzzle pieces according to the jury instructions, so that the resulting picture leads to the verdict that you seek. You do not refer to jury instructions during opening statement. But a trial lawyer who knows what proof will win the case is well advised to use the anticipated jury instructions to take the jurors step-by-step through what the evidence is going to show. This means that the opening should highlight what the jurors should be listening for as witnesses testify and precondition the members of the jury to be alert to just how each piece of evidence fits into the case. That way, when the judge tells the jurors at the end of the trial what the plaintiff must prove, they can easily look back at the testimony and say to themselves, “Oh, yeah. I remember that!”

Pattern Instructions

Although five federal appellate circuits have no civil pattern jury instructions, the majority do have instructions posted on their various Web sites (the Second, Fourth, Sixth, Tenth, District of Columbia, and Federal Circuits have no published pattern civil instructions). There are specific benefits to using court-approved pattern instructions. For the advocate, they provide an accurate explanation of the law that is as brief and concise as possible, understandable to the average jury, and completely neutral, unslanted, and free of argument. Comm. on Standard Jury Instructions, California Jury Instructions, Criminal vii (Philip H. Richards ed., 4th rev. ed., West 1979). For appellate courts, they provide a measure of uniformity that makes appellate review easier and quicker. United States v. Hunt, 794 F.2d 1095, 1101 (5th Cir. 1986). Even the published pattern instructions, however, are precatory and not mandatory, and the district court has wide discretion, even in criminal cases, to modify them so long as they touch all the necessary bases. United States v. Gomez, 255 F.3d 31, 39 n.7 (1st Cir. 2001), citing United States v. Houlihan, 92 F.3d 1271, 1299 n.31 (1st Cir. 1996). Indeed, it is necessary at times for a trial court to modify pattern jury instructions to fit a case’s unique fact pattern or to stay in step with developing case law; for example, to pencil in a Court of Appeals’ explicit recognition that the Faragher defense is not satisfied by merely an “on paper” policy against sexual harassment. See also, Celeste Bruno v. Monroe County, Case No. 07-10117-Civ-Moore (S.D. Fla. Oct. 6, 2008), Instructions to the Jury, Docket Entry 58, at 9, inserting into 11th Circuit Pattern Jury Instruction §1.2.2 language to reflect the
In determining whether the employer exercised reasonable care, you should also consider the level of the employer’s demonstrated commitment to adhere to its policy. For example, an employer does not exercise reasonable care when its practice indicates tolerance towards harassment or discrimination, despite the fact that the policy itself states otherwise.

In addition to the big questions (such as what constitutes sexual harassment, did the employer do enough to prevent it, or did the plaintiff do too little to avoid it), jury instructions address a number of smaller, but important issues. For example, at the most basic level they tell the lay members of the jury what is evidence (Federal Civil Jury Instructions of the Seventh Circuit, §1.04); what is not evidence (id. at §1.06); and what is the difference between direct and circumstantial evidence (id. at §1.12). How should jurors — literally, people off the street who are not in the business of listening to witnesses testify — gauge credibility? Here are some hints the judge can give them:

“In deciding the facts in this case, you may have to decide which testimony to believe and which testimony not to believe. You may believe everything a witness says, or part of it, or none of it. Proof of a fact does not necessarily depend on the number of witnesses who testify about it. In considering the testimony of any witness, you may take into account:

(1) The opportunity and ability of the witness to see or hear or know the things testified to;
(2) The witness’s memory;
(3) The witness’s manner while testifying;
(4) The witness’s interest in the outcome of the case and any bias or prejudice;
(5) Whether other evidence contradicted the witness’s testimony;
(6) The reasonableness of the witness’s testimony in light of all the evidence; and
(7) Any other factors that bear on believability.”

Ninth Circuit Model Civil Jury Instructions, §1.11 (“Credibility of Witnesses”).

How should jurors regard expert testimony — and especially from someone for whom testifying for hire is a substantial source of income? See, e.g., Pattern Jury Instructions, Civil Cases (5th Cir. 2009), §2.19. Can a juror base a disbelief of a witness’s testimony on the fact that he has been convicted of a crime? Manual of Model Civil Jury Instructions for the District Courts of the Eighth Circuit (2008), §2.09. If the defendant is liable, what kind of damages can the plaintiff recover — and how much? Ninth Circuit Model Civil Jury Instructions, §5.2 (“Measures of Types of Damages”).

**ABA Instructions**

In addition to the court-approved pattern instructions, the American Bar Association’s Labor and Employment Law Committee also publishes a
comprehensive set of jury instructions. For diversity or supplemental-jurisdiction claims involving state-law torts, state court standard jury instructions can be imported for such issues as battery and intentional infliction of emotional distress. 28 U.S.C. §§1332 (diversity jurisdiction); 1367 (supplemental jurisdiction). See, e.g., Bowersox v. P.H. Glatfelter Co., 677 F. Supp. 307, 315 (M.D. Pa. 1988) (declining to dismiss pendent state-law claim and noting that “jury instructions explaining Pennsylvania law on intentional infliction of emotional distress are available”). Likewise, if there is no state standard jury instruction, federal pattern jury instructions can be used to fill the void. See, e.g., Dallas County Sheriff's Dep't v. Gilley, 114 S.W.3d 689, 693 (Tex. App. 2003) (approving use of Fifth Circuit’s pattern instruction for age-discrimination case tried in state court). This is permissible so long as in doing so, a trial court does not run afoul of any idiosyncratic state policy or practice. See, e.g., Lewin Realty III, Inc. v. Brooks, 771 A.2d 446, 477 (Md. Ct. Spec. App. 2001) (rejecting Fourth Circuit instruction that requires trial judge to explain present value of future income stream in absence of expert testimony).

Drafting Your Own Instructions

Trial lawyers who choose to build their own jury instructions, or are forced to do so by either the unavailability of pattern instructions in their state or circuit or counsel opposite’s having convinced the judge that the pattern is somehow flawed, need to keep their instructions in plain English. See Macneill Eng’g Co. v. Trisport, Ltd., 126 F. Supp. 2d 51, 56 (D. Mass. 2001) (patent-infringement case discussing need for instructions to be in plain English and collecting articles stressing that point). They also need to hew closely to the contours of controlling case law or, in its absence, the law as set forth in the various restatements. A judge acts correctly in rejecting an “awkward” instruction — especially one containing errors of law. Byrd v. Ill. Dept of Pub. Health, 423 F.3d 696, 709 (7th Cir. 2005). Jury instructions that misstate the law or fail to convey the relevant legal principles in full can lead to reversal, rendering Pyrrhic any temporary victory in a case that would have to be tried again. See Aliotta v. Amtrak, 315 F.3d 756, 770 (7th Cir. Ill. 2003) (new trial granted to widow in wrongful death case because of “inaccurate and misleading” instructions pressed by defendant railroad). Finally, anyone seeking to borrow an instruction from any particular circuit, must be aware that the instructions are not necessarily fungible and conflict on such critical issues in a sexual harassment case as whether the court or the jury determines whether a “tangible job detriment” has occurred. See Saffa v. Okla. Oncology, Inc., Case No. 03-CV-869-SAJ, 2006 U.S. Dist. LEXIS 1028, *26-27 and n. 8 (N.D. Okla. Jan. 3, 2006) (noting that there was no pattern instruction in the Tenth Circuit, that the Fifth Circuit instruction envisioned leaving the decision to the jury and the Eighth and Eleventh