

## The Practitioner Appellate Procedure

# BAJI Blunder

## To Hang Onto a Verdict, Read Instructions First

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**E**xperienced trial and appellate attorneys recognize that instructional error is not only one of the most frequently raised grounds for reversal on appeal, it also is one of the most successful. For one thing, the evidence is viewed most favorably to the complaining party. For another, it is virtually impossible to waive one's objection to an incorrect instruction. Thus, if the appellant can meet the standard of prejudice set forth in *Soule v. General Motors Corp.*, 8 Cal.4th 548 (1994), a reversal and probable retrial will result. Counsel proposing jury instructions must therefore ensure that the instructions accurately convey the controlling law — and not just what the client would like the law to be. Success in the battle over a jury instruction may later cost a hard-won verdict if an appellate court finds that the instruction was in error.

As a recent decision from the 4th District California Court of Appeal illustrates, even a statement of the law so accurate that it is in the California "Book of Approved Jury Instructions" may provide a basis for reversal. *National Medical Transportation Network v. Deloitte & Touche*, 62 Cal.App.4th 412 (1998).

In *National Medical*, an ambulance company, Medtrans, hired the Deloitte accounting firm to issue a financial condition opinion that would help them lure investors. During the audit, Deloitte could not resolve certain disagreements with Medtrans' management and resigned from the engagement without issuing an opinion. Medtrans sued, charging that Deloitte's withdrawal amounted to professional negligence and a breach of contract, which interfered with Medtrans' prospective advantage in a \$10 million investment. Deloitte's principal defense was that Medtrans' uncooperative management and unreliable financial representations gave them good cause to resign.

The trial court instructed the jury using BAJI 6.37.3 ("Duration of Professional Responsibility"). The instruction provides that a professional who begins to serve a client continues to owe duties to the client until the reten-

tion is ended by consent, by client request or by withdrawal, and only if the withdrawal does not unduly prejudice the client and the client has a chance to hire someone else. Lawyers should be familiar with this standard, since it essentially is the one that applies to attorneys. See California Rule of Professional Responsibility 3-700.

But it is not the standard for all professionals, as the "use note" to BAJI 6.37.3 acknowledges when it cautions not to "give this instruction if the rule stated is not within the professional standards of the profession involved."

Here, Deloitte objected to the instruction, arguing that professional auditing guidelines permit (and sometimes require) resignation regardless of prejudice to the client. This resignation rule arises from a public accountant's duty — to the public — not to promulgate erroneous financial information. In response to Deloitte's objection, the trial court invited Deloitte to submit an alternate instruction. Deloitte agreed to do so, but never did. Consequently, when the issue over BAJI 6.37.3 was raised on appeal, Medtrans' first argument was that Deloitte had waived any objection.

The Court of Appeal rejected the waiver argument, finding that where a jury instruction contains an incorrect statement of law, the party harmed by that error need not have objected or proposed a correct instruction to preserve the issue on appeal. *Matco Forge Inc. v. Arthur Young & Co.*, 52 Cal.App.4th 820 (1997); *Suman v. BMW of No. Am. Inc.*, 23 Cal.App.4th 1 (1994).

The court noted that any rule that imposed a duty to object to an erroneous instruction would contravene California Code of Civil Procedure Section 647, which creates an automatic objection to the "giving of an instruction, refusing to give an instruction, or modifying an instruction requested." See *Argawal v. Johnson*, 25 Cal.3d 932 (1979). Having resolved the waiver issue, the court explained (citing *Bily v. Arthur Young & Co.*, 3 Cal.4th 370 (1992)) that

the BAJI instruction was flawed since it did not account for a public accountant's "public responsibility transcending any employment relationship with the client," which requires "complete fidelity to the public trust" and total independence from the client at all times.

Both Medtrans and Deloitte implicitly acknowledged at trial that public accountants can withdraw for good cause — much of the trial focused on whether Deloitte had good cause to resign. But recognition of an auditor's duty to the public and the exonerating effect of resignation for good cause was not provided for in the BAJI instruction. Therefore, the BAJI instruction deprived the jury of the guidance it needed to evaluate the crux of Deloitte's

of the jury's verdict; and the effect of other instructions in remedying the error.

Looking at these factors, the court found that the evidence of alleged malpractice was not overwhelming. Furthermore, the parties presented conflicting expert testimony about whether Deloitte had the right and good cause to resign. And the jury's consideration of the relevant professional standard of care was impaired because the instruction failed to provide for the possibility that Deloitte could resign for good cause consistent with professional standards. Thus, in light of the conflicting evidence and inability of the jury to accept Deloitte's primary defense as instructed, Deloitte was prejudiced.

The prejudicial effect likewise was not mitigated by other instructions, since no other instructions set forth the correct standard. Nor did Medtrans' opening statement or closing argument minimize the error, as had been true in *Soule*. Rather, both focused on how the resignation harmed Medtrans and not whether there was good cause for the withdrawal. Consequently, the instruction was prejudicial because the verdict finding professional negligence and breach of contract was squarely based on that instruction and because a reasonable probability existed that a verdict more favorable to Deloitte could have been reached had the instruction reflected the proper standard.

Deloitte's appeal also alleged another instructional error, which was more understandable but equally prejudicial. Shortly after the jury verdict was entered against Deloitte, the California Supreme Court announced a new and retroactive rule that added an element to the tort of negligent interference with prospective economic advantage: The alleged interference must be wrongful "by some measure beyond the fact of the interference itself." *Della Penna v. Toyota Motor Sales U.S.A. Inc.*, 11 Cal.4th 376 (1995). The trial court's instruction in *National Medical* omitted this material "independent wrongfulness" element.

Medtrans again argued that Deloitte had waived or invited the error, this time because Deloitte had agreed to the instruction. And again, the court rejected the waiver argument, applying the general rule that a party harmed by an erroneous instruction may raise the error on appeal without having objected to the instruction below or proposed a correct instruction. The court also noted that waiver and invited error do not apply to new legal rules. *Arntz Contracting Co. v. St. Paul Fire & Marine Ins. Co.*, 47 Cal.App.4th 464 (1996).

**N**ational Medical teaches several lessons. Foremost, counsel must ensure that jury instructions properly reflect the applicable professional standards. Pattern jury instructions, first invented and published in California 60 years ago, are helpful to practitioners and judges. BAJI instructions, usually praised for their accuracy, fairness and convenience, are rarely disapproved and using approved instructions is a safe and desirable practice. But the benefits of such use are lost if the instructions are not relevant or not tailored to the case. As *National Medical* shows, blind reliance on BAJI instructions — especially in professional liability cases where a given profession may have its own canons of conduct — can be a trap for the unwary.

*National Medical* also demonstrates the pivotal nature of claims of instructional error on appeal. Not only is the standard of review advantageous, but many instructions involve central issues, like the standard of care or the elements of a legal theory or defense. On these issues, it is difficult to minimize the effect of an erroneous instruction on a jury.

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defense: the argument that the resignation was for good cause and in compliance with professional standards.

**T**he court next examined whether that error was prejudicial under the *Soule* standard, which requires an appellant to show a reasonable probability that a more favorable result would have been reached if the error had not occurred. In assessing prejudice, the Court of Appeal examined various factors in light of the trial record, including the degree of conflict in the evidence; whether the prevailing party's jury arguments contributed to the instruction's misleading effect; indications by the jury that it was misled (i.e. whether the jury requested a rereading of the erroneous instruction or related evidence); the closeness

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