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Sedona Conference Publishes Model Jury Instructions on DTSA's 10th Anniversary

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Key takeaways

- The Sedona Conference's Trade Secrets Working Group published the first-ever model jury instructions for federal DTSA cases – the product of a multiyear, consensus-driven drafting effort – filling a long-standing gap in trade secret trial practice.
- The publication is expected to promote greater uniformity in DTSA jury instructions across federal courts, though some issues will continue to be treated differently in different courts.
- Both plaintiffs and defendants stand to benefit from increased certainty, including improved prospects for early resolution of disputes when both sides have a clearer picture of how key issues are likely to play out at trial.

The need for DTSA model jury instructions

The federal Defend Trade Secrets Act of 2016 (DTSA) authorizes civil claims for trade secret misappropriation. DTSA trials are complex, often combining federal claims with state trade secret claims, breach of contract and other causes of action. Given the relatively modest period of the statute's existence, uniform federal common law under the DTSA has been slow to develop.

In the absence of jury instructions specifically tailored to the DTSA, courts and litigants have relied on instructions from state law analogs (primarily statutes modeled on the Uniform Trade Secrets Act (UTSA), Economic Espionage Act precedents and prior DTSA trial court orders) – sources less readily available and formulated for a different purpose. The result has been certain inconsistency across districts, unpredictability for clients and counsel alike, and hard-fought disputes over jury instructions conducted without the benefit of an impartial and authoritative reference.

The effects of this publication go beyond trials themselves. Jury instructions provide the framework for understanding what each party must eventually prove and how they can prove it, which in turn shapes the tenor of prelitigation disputes, pretrial discovery and – critically – settlement analysis. The Sedona Conference's model instructions are likely to have an important impact in these areas.

The Sedona Conference Trade Secrets Working Group

The Sedona Conference is a nonprofit research and educational institute dedicated to the advanced study of law and policy in complex litigation, intellectual property, artificial intelligence, and data security and privacy. Its Working Group Series publications – developed through a consensus-driven process among practitioners, academics and jurists representing all stakeholders – are widely recognized as influential thought leadership and frequently cited by courts and others.

The model instructions were developed over three years in a collaborative process that included a public comment period.

Highlights from the model jury instructions

The instructions address the full life cycle of a DTSA misappropriation claim at trial, organized as follows:

- Trade secret existence: Definition of "trade secret," the reasonable measures and independent economic value requirements, so-called "negative" trade secrets, combination and compilation trade secrets, the "generally known" and "readily ascertainable" standards, ownership, and the interstate commerce requirement.
- Misappropriation: Misappropriation by improper acquisition, unauthorized disclosure and unauthorized use – including a specific instruction that "inevitable disclosure" is insufficient to establish misappropriation.
- Damages: A comprehensive framework covering actual loss (including lost profits, price erosion, increased costs, development costs, lost business value and diminution of trade secret value), unjust enrichment (including defendant profits, avoided development costs and "head start" damages), reasonable royalty, apportionment, avoidance of double recovery, and exemplary damages for willful and malicious misappropriation.

The instructions reflect several notable outcomes on key issues, while also leaving certain unresolved questions and areas of disagreement for courts to address.

Defining trade secrets with particularity

The instructions require the factfinder to determine that the plaintiff has identified alleged trade secrets "with a reasonable degree of precision and specificity." The requirement of defining trade secrets with particularity – and the appropriate timing for such definition by the plaintiff – continues to be a hot topic in trade secret litigation, including in the high-profile Ninth Circuit decision in *Quintara Biosciences Inc. v. Ruifeng Biztech, Inc.* The working group's inclusion of an instruction concerning trade secret particularity reflects that this issue may remain a focus of the litigants up to and including trial.

Rejection of inevitable disclosure doctrine

The publication includes a model instruction requiring "actual" disclosure or use for a finding of misappropriation, rather than merely a finding that such use or disclosure would be "inevitable." As the working group acknowledges, there has long been a debate concerning the degree of overlap between the requisite showing for "threatened misappropriation" sufficient to support preliminary injunctive relief, and "inevitable disclosure" that, in some courts, has been held to qualify as sufficient for a showing of misappropriation. The instructions do not fully resolve the distinction, but clarify that misappropriation by disclosure or use requires genuine, not speculative, disclosure or use.

Reasonable measures

While courts frequently provide nonlimiting examples of factors for juries to consider whether the plaintiff took "reasonable measures" to protect the confidentiality of the trade secret, the working group recognized that any specific example offered out of context could inadvertently favor one party. The Sedona Conference publication cautions that all instructions – and particularly those on reasonable measures – must be carefully tailored to the specific claims and facts in each case. The model instructions summarize two alternative approaches to reasonable measures: listing relevant examples for the factfinder to consider or separately listing each of the plaintiff's and the defendant's contentions.

'Use' of combination trade secrets – A circuit split left unresolved

Courts are divided on whether a defendant must use "all elements" of a so-called combination or compilation trade secret to be liable, or whether use of a "substantial portion" of the alleged trade secret is sufficient. Unable to resolve this split, the working group proposed two alternative instructions – one for each standard – and left the choice to the court. Litigants should be prepared to argue for the instruction beneficial to their position in courts that have not yet addressed the question.

Unjust enrichment damages – Jury or judge?

The instructions flag an unresolved question about whether unjust enrichment damages under the DTSA are legal (entitling the parties to a jury) or equitable (reserved for the court). Consistent with the approach of most courts to date, the instructions include unjust enrichment damages provisions and note that courts often submit the issue to the jury while preserving the option to treat the verdict as advisory to the court's own determination.

Practical implications for DTSA litigants

For parties involved in or contemplating DTSA litigation, the model jury instructions provide a well-regarded resource to frame how key issues will be presented to a jury. Because an influential organization has now reduced these principles to writing, there may be increased certainty on issues, such as defining trade secrets with particularity, ways to establish “use,” reasonable measures and damages methodologies, that previously lacked a widely accepted baseline. That increased certainty benefits both sides: Plaintiffs and defendants can more reliably assess the strength of their positions at the outset of litigation, which may facilitate more informed early settlement discussions and reduce the cost of disputes that would otherwise turn on unpredictable jury instruction battles. For potential plaintiffs, in particular, greater uniformity across federal courts may reduce the need to be selective about the jurisdictions in which to bring cases, while defendants may benefit from reduced uncertainty about how key issues will be framed, regardless of where a plaintiff chooses to file.

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