

Appellate Counsel's Tips Regarding Jury Instructions

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Jury instructions are obviously important in winning the case before the jury. They can also provide grounds for appeal if errors are properly preserved. The following points address the most common problems we see regarding jury instructions. 1. Always ask for instructions on the law supporting your theory of the case. If you do not request instructions consistent with your theory, you may be deemed to have abandoned it. 2. Make sure your requested instructions address all claims and defenses in the case. 3. If you seek a change in the law, do not simply request instructions that track the current law. Request instructions under your theory and alternative instructions under the current law. Do not request a standard instruction if it incorrectly states the law as it applies to your case. 4. Make sure to fill in all blanks and remove inapplicable bracketed options in standard instructions. 5. Always file a complete, numbered set of your requested instructions in the court file. Do not expect that a copy provided to the judge will be filed. In our experience, this is the most violated commandment of all, and it can create serious, unsolvable problems for appeal. 6. Amend your proposed instructions based on rulings made at trial and file the amended requests. Do not just hand them to the judge. 7. If you request additional instructions or revised instructions as a result of rulings made over objection, state on the record that you do so in light of such rulings and that you do not waive your objection. 8. Never hold a charge conference off the record. If you must do so, state your objection on the record and, as soon as possible, recite on the record what objections you made, what agreements each side made, and how the court ruled. 9. When discussing proposed instructions at the charge conference, always refer to them by the appropriate number. 10. Make sure any stipulations regarding instructions are confirmed on the record. 11. State on the record if you are adopting a co-defendant's positions, and request to be excused from joining the co-defendant in every instance. Obtain that ruling or join each time. 12. Object to any request that cites a law or standard instruction but does not track it. 13. Make objections as specific and comprehensive as possible, though at least object generally when instructions are confusing or misleading. Offer a solution that fixes the problem. 14. File written objections when possible. In doing so, you will likely be more thorough than if you simply object on the fly at the charge conference. 15. Be careful what you say at the charge conference. Beware saying "ok" or "alright" or otherwise agreeing to modifications to instructions to which you object and thereby waiving your original objection. Always renew your original objection. 16. Ensure the parties' positions and the court's rulings will be clear

when the transcript is later read by someone who was not present. If something is unclear, clarify it. 17. At the conclusion of the charge conference, renew your objections to the instructions to be given and to the refusal to give instructions you requested. Request a ruling that you need not renew those objections again when the instructions are given to the jury, and if that ruling is not made, renew your objections at the bench when the instructions are read. 18. Never tell the judge you are doing something simply “for the record.” 19. Listen when the instructions are read to ensure they are given as the court ruled. 20. If the jury receives a written copy of the instructions, be sure a copy is filed, too. 21. If jurors ask questions that relate to prior objections or requests, use those questions as opportunities to renew your objections or to request previously denied instructions, and request new instructions that address the jurors’ concerns. 22. Do not forget about the verdict form. But that is a whole new set of commandments for a different day!

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