

Tips for Trial Counsel on Planning, Preparation and Preservation: Creating Defensible Jury Instructions and Planning for a Charge Conference

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Jury instructions are the mechanism that provides the jury with the proper legal structure to analyze the evidence that has been presented at trial. Without proper guidance through good instructions on the law, the jury is not as likely to get it right. So, jury instructions should never be an afterthought, prepared at the end of the case. Instead, they should be prepared, at least in draft form, well before trial begins — otherwise, you will not know what evidence must be admitted at trial to prove each of the claims and defenses, or you will not know what grounds to assert for your motion for directed verdict. Thus, jury instructions always should be drafted before trial begins. Ideally, instructions should be prepared at the outset of the case (and updated throughout the litigation), as they will provide a roadmap for discovery and possible pretrial motions. To this end, of course, it is critical to request instructions that are completely correct as a matter of existing law. You do not want to interject invited error into the trial. If you believe the existing law in your forum is wrong on a certain point, request an instruction that reflects what you believe the law should be, while obviously being candid with the trial court that this is not yet the law. Use your case to try to change the law and preserve the issue for appeal by your requested instructions. Jury instructions can provide a fertile field for error, both for your client and against your client on appeal, so take them very seriously and involve your appellate counsel in their preparation, if at all possible. Never assume the standard instructions in your forum correctly state the law. The law may have changed, but the standard instruction may not have been revised yet due to the length of time it takes for a standard jury

instruction committee to address changes in the law. *See, e.g., Bankers Multiple Lines Ins. Co. Farish*, 464 So. 2d 530, 533 (Fla. 1985) (standard instruction conflicts with recent supreme court instructions); *R.J. Reynolds Tobacco Co., Inc. v. Jewett*, No. 1D11-3653, 2012 WL 5373432 (Fla. 1st DCA Nov. 2, 2012) (reversing for failure to give requested non-standard instruction that would have enhanced “jury understanding of the law,” and noting slow pace of revisions of standard instructions that necessarily emphasize accuracy over speed). By the same token, never assume that a jury instruction proposed by opposing counsel correctly states the law just because some case law is cited in support of it. Read the cited authority. Otherwise, you may have invited error if you agree the erroneous instruction can be given. Consider whether you need preemptory instructions on issues that have been resolved before trial. In addition, consider what case-specific instructions you want to be given – such as instructions on statutes, legal doctrines such as the *Slavin* doctrine (*see Slavin v. Kay*, 108 So. 2d 462 (Fla. 1958)), and the like. If there is evidence supporting the instruction under your theory of the case, you are entitled to have it given. *See Febres v. Challenger Caribbean Corp.*, 214 F.3d 57, 62 (1st Cir. 2000) (“A party has a right to an instruction on her theory of the case, provided that her theory is both valid in law and supported by evidence in the record”); *see Hasbrouck v. Texaco, Inc.*, 842 F.2d 1023, 1044 (9th Cir. 1987) (same); *U.S. v. Heller*, 830 F.2d 150, 155 (11th Cir. 1987) (same); *Foreline Security Corp. v. Scott*, 871 So. 2d 906 (Fla. 5th DCA 2004) (security system installer was entitled to a jury instruction in negligence action brought by bank teller on the completed and accepted rule, also known as the *Slavin* doctrine, that a contractor was not liable for injuries to third parties after the owner accepted the work unless the defect at issue was latent and could not have been discovered by the owner or unless the contractor was dealing with inherently dangerous elements). If, on the other hand, you do not request the instruction, you may waive the point. *See McDaniel v. Anheuser-Busch, Inc.*, 987 F.2d 298, 306 (5th Cir. 1993) (“If a party neither requests submission of issue nor objects to the omission of that issue from the special interrogatories given to the jury, such party is deemed to have waived its right to have the jury determination issue.”); *McElroy v. Firestone Tire & Rubber Co.*, 894 F.2d 1504, 1509 n.10 (11th Cir. 1990) (“Each party is responsible for requesting whatever jury instructions it may deem appropriate, and failure to so request, or to object to an instruction deemed inappropriate, precludes ‘assign[ing] as error the giving or the failure to given an instruction”). Having gone to this much trouble with the instructions, make sure the charge conference is reported. If you work with opposing counsel in an informal effort to reach agreement on instructions, go on the record thereafter to make all of the objections and agreements known. Having your appellate counsel with you, both at formal or informal charge conferences, will help assure you do not miss something in the fray. If you have co-counsel, join in her objections/requested instructions just in case. Be as detailed as possible at the change conference in your objection to the other side’s requested instruction. Written objections are a best practice, as objections are hard to make on the fly. But even a general objection – “confusing, incomplete” – is better than nothing. If an objected-to instruction is altered to “cure” the objection, don’t just acquiesce in it – either by silence or affirmative agreement – unless it clearly does cure the problem. Otherwise, expressly stand by your objection. *See Beatty v. Michael Bus. Mach. Corp.*, 172 F.3d 117, 121 (1st Cir. 1999) (“Silence after jury instructions ‘typically constitutes a waiver of any

objections' for purposes of appeal."); *Thompson v. Boggs*, 33 F.3d 847, 856 (7th Cir. 1994) (plaintiff waived claim of error in refusing proposed jury instruction, as plaintiff's counsel remained silent and did not object when judge stated that instruction would not be given). Some potential grounds for objection include:

- the proposed instruction fails to provide the relevant criteria for the jury's determination of the issue; *Bollenbach v. United States*, 326 U.S. 607, 612 (1946) (jury should be given "the required guidance by a lucid statement of the relevant criteria");
- the proposed instruction assumes the answer to an issue of fact and thereby takes the issue away from the jury; *U.S. v. Adamson*, 665 F.2d 649, 652 (5th Cir. 1982) (the instruction reduced the prosecution's burden of proving the requisite state of mind for the offense);
- the proposed instructions are contradictory -- this often happens when trial court is trying to give each party something, and the instructions may not work together; *Penry v. Johnson*, 532 U.S. 782, 789 (2001) (instruction stating that jury could answer "no" to special issue only if it found reasonable doubt to answer "yes," failed to give effect to mitigating circumstances);
- the proposed instruction effectively grants a directed verdict for the other party on a claim or defense; *Cf. Hardin v. Ski Venture*, 50 F.3d 1291, 1294 (4th Cir. 1995) ("A set of legally accurate instructions that does not effectively direct a verdict for one side or the other is generally adequate");
- the proposed instruction tends to endorse the other party's theory of the case or argument; *W.T. Rogers Co., Inc. v. Keene*, 778 F.2d 334, 346 (7th Cir. 1985) ("A jury should so far as possible not be instructed in a way that makes it much easier to decide in favor of one party than in favor of the other."). Stated differently, object that the proposed instruction is not neutral and balanced, but rather is argumentative;
- the proposed instruction will be confusing or misleading to the jury (giving an explanation why); *Japan Airlines Co. v. Port Auth. of New York & New Jersey*, 178 F.3d 103, 110 (2d Cir. 1999) ("A jury instruction is erroneous if it misleads the jury or does not adequately inform the jury on the law.");
- the proposed instruction incorrectly states the law or is not supported by the evidence; *Jaffee v. Redmond*, 51 F.3d 1346, 1353 (7th Cir. 1995) ("Jury instructions `must be correct statements of the law that are supported by the evidence."); *Goldschmidt v. Holman*, 571 So. 2d 422 (Fla. 1990) (same);
- the proposed instruction varies from the standard instruction authorized in the court's jurisdiction; *U.S. v. Hunt*, 794 F.2d 1095, 1099 (5th Cir. 1986) (while trial courts are not mandated to follow Fifth Circuit Pattern Jury Instructions, it is good practice to do so); *Reyes v. State*, 783 So. 2d 1129, 1136-37 (Fla. 3d DCA 2001) (instructions were material departure from standard jury instructions and the statutory elements of the charged offense);

- the proposed instruction addresses an issue not pled or included in the pre-trial stipulation or not proven at trial; *Thrift v. Estate of Hubbard*, 44 F.3d 348, 355 (5th Cir. 1995) ("district court erred in instructing the jury on the issue because the [plaintiff] failed to plead that cause of action"); *E.I. DuPont De Nemours v. Desarrollo Industrial Bioacuatico*, 857 So. 2d 925 (Fla. 4th DCA 2003) (improper for jury to consider a claim that was not in the complaint);
- the proposed instruction puts the case to the jury on a basis that "indulges and even encourages speculations." *United States v. Branch*, 91 F.3d 699, 712 (5th Cir. 1996);
- the instructions as given fail to instruct the jury on your theory of the case. *Ryan v. Atlantic Fertilizer & Chemical Co.*, 515 So. 2d 324, 327 (Fla. 3d DCA 1987) (litigant is entitled to have jury instructed on theories of defense when supported by the evidence); and
- the instruction improperly resolves or affects other issues in the case.

At the conclusion of the charge conference, renew your objections to the instructions as given, for the reasons stated before, and as to the failure to give the instructions you requested. See *Mark Seitman & Assocs. v. R.J. Reynolds Tobacco Co.*, 837 F.2d 1527, 1532 (11th Cir. 1988) (defendant's objection "at the charge conference to the instruction concerning damages...properly preserved [the issue] for appellate review"). Ask the court to confirm that these objections are preserved through the end of trial and need not be repeated after the charges are given to the jury. Absent such a ruling, approach the bench after the charges are given and again state your objections on the record. Finally, make sure you have a copy of your requested jury instructions, make sure you have a copy of every other party's requested instructions, and make sure they are actually in the court file. If written instructions are given to the jury, make sure they are in the court file as well. This is critical for purposes of any appeal. For a more detailed discussion of jury instructions, see the article by Sylvia H. Walbolt and Cristina Alonso, "[Jury Instructions: A Road Map for Trial Counsel](#)," *Litigation*, The Journal of the ABA Litigation Section, Vol. 30, No.2 (2004).

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