

Practical Guidelines for Jury Instructions, Verdict Forms, the Charge Conference, and Preserving Error

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You have been asked to prepare a set of jury instructions and a verdict form for trial . . . for the first time. What do you do? Where do you start? And what does this have to do with an appellate practice? Here, we offer some basic guidelines for drafting jury instructions or a verdict form, preparing for the charge conference, and preserving any error that may occur during or after the charge conference. The importance of having clear jury instructions, objections and rulings thereon cannot be underestimated, as jury instructions are usually a fertile ground for appeal. Jury instructions are often reviewed *de novo* because they involve questions of law, so it is imperative that you preserve all potential issues related to the instructions and verdict form. **I. Drafting**

Instructions

When beginning the process of drafting jury instructions, consult a number of sources. Start with your jurisdiction's standard or pattern instructions. Many jurisdictions provide model instructions and verdict forms for particular claims or defenses. Trial courts will usually use these instructions unless you can show that they do not accurately describe the current state of the law or are otherwise insufficient. If you determine that additional instructions are necessary, these instructions are referred to as "special instructions." If you think the standard instructions do not adequately state the law on your claims or defenses, or if you would like to argue that a change in the law is appropriate based on some authority, you should submit special instructions. Special instructions should be drafted after you have reviewed the statutes and case law that apply to your claims or defenses. Keep special instructions as short and simple as possible. Additionally, ask your colleagues for instructions they may have used in similar cases, or before the same judge. They may provide insight not only with respect to appropriate special instructions, but also as to the court's charge conference procedures. Be organized. Make sure that the instructions are numbered or otherwise identified so that they are easy to refer to and identify when discussing them with opposing counsel

or when referring to them during the charge conference on the record. Indicate what authority supports each instruction. In this regard, it is helpful to have each instruction on a separate page. Also, consider referring to the parties by their names (or a shortened version of their names) rather than "plaintiff" or "defendant." Parties are seldom referred to as plaintiff or defendant during trial – their names are used instead. As a result, instructions that refer the parties only as plaintiff and defendant, as many pattern instructions do, can be confusing to jurors, especially when there is a counterclaim or cross-claim in the case. Once you have a first draft of your instructions, read them as a whole to ensure that all issues are addressed and there are no internal inconsistencies or conflicts. Also, compare them to the verdict form to ensure they complement each other. Then, ask someone who knows nothing about the case (preferably a non-lawyer) to read them or, better yet, to listen to you read them. **II. Preparing for the Charge Conference**

Bring to the charge conference copies of all pertinent authority that may be the subject of instructions or verdict forms. Consider providing the court a binder that includes the instructions, verdict form and authority you will rely on. But, do not forget that it is not enough to simply hand this to the judge. File the instructions and verdict form with the clerk's office so that you have a proper appellate record. Likewise, make sure all other parties' requested instructions are filed with the court. Be sure to compare your instructions to the opposing party's so that you can bring any differences to the trial court's attention during the charge conference. It is helpful to cross reference the instructions on your copy or to create a chart that reflects your numbered instructions and how they correspond to the other side's instructions. Also, have written notes of your objections to the opposing party's instructions at the charge conference. Every appellate lawyer who has ever reviewed the cold record of a charge conference will tell you it almost always seems confusing, with people interrupting each other, talking in shorthand, and referring to things that are never identified on the record. To avoid such confusion, follow these simple steps:

1. Create a chart that reflects your numbered instructions in one column and the other side's corresponding instruction in the next column.
2. Cross reference your instruction to opposing counsel's instruction (i.e. note on your #3 instruction for legal cause that it is similar to opposing counsel's #7 instruction). That way it is easier to go back and forth between different sets of instructions.
3. Make notes of every objection right on the instruction. That way you will always have your objection handy, even if the judge is jumping around between instructions.
4. Cross reference on opposing counsel's instructions why your instruction is different or better.
5. Make sure you have extra clean sets of unstapled instructions, so that you can merge your instructions with that of opposing counsel according to the court's rulings.
6. File your written objections and the final version of the instructions.
7. Do the same with regard to the verdict forms.

(See S. Walbolt & C. Alonso, "Jury Instructions: A Road Map for Trial Counsel." *Litigation*, The Journal of the ABA Litigation Section, Vol. 30, No.2, Winter 2004).

III. During the Charge Conference

You have your instruction and arguments ready, but what should you expect at a charge conference? Some judges may not schedule charge conferences and you may have to specifically ask for such a conference. If the judge refuses to hold a charge conference, object on the record. Also, always ensure that a court reporter is present whenever the instructions or verdict form are discussed. If discussions occur outside the court reporter's presence, be sure to state for the record what was argued and ruled on when the court reporter is present. At the charge conference, do not be afraid to object and where appropriate, to reject suggestions from the court that instructions have been agreed upon. A specific objection to the failure to give your requested instruction may be required to preserve an issue for appellate review. Likewise, an objection to the other party's requested instruction may not suffice -- you may be required to request a correct instruction. Make sure you know the requirements for preserving these issues in your jurisdiction before you go to the charge conference. At a minimum, the objections must be specific enough to raise the points you would want to assert on appeal. See *Voohries-Larson v. Cessna Aircraft Co.*, 241 F.3d 707, 713 (9th Cir. 2001) ("Objections to a charge must be sufficiently specific to bring into focus the precise nature of the alleged error."). For example, if you believe a requested instruction does not correctly state the law, you need to explain why. (See Walbolt & Alonso, *supra*, for a discussion of possible objections). Also, be sure that you explain to the court on the record how the language of the other side's requested instruction is either legally inaccurate or not supported by the evidence. Object to instructions that are confusing or misleading when considered in light of other instructions, the facts of the case or the verdict form. Also, object to instructions that use words that are too legalistic for a lay person to understand. What do you do when the court has overruled your objection to an instruction and you now want to modify the instruction? First, you must be clear that you are only suggesting such "alternative" instructions or modifications in light of the trial court's rulings, which you object to, and that even the giving of this modified or alternate instruction will not cure the prejudicial harm from that ruling. Sometimes proposing a new instruction or the modification of an instruction reads on the transcript like you are agreeing that this resolves the objection you originally raised. This is because the trial court is trying to get agreement on the instructions. Do not hesitate to advocate for your requested instructions, without compromise. Making it clear that an alternate or modified instruction is not enough to correctly charge the jury on the point should allow you to balance your desire to get the best instruction against your desire to preserve the record for appeal. Be sure the record reflects that the trial court ruled on all of your instructions, what all the rulings are, and any reasons given for granting or denying a requested instruction. You must be sure that the instruction is identified on the record, by page or by number. Sometimes instructions may not be considered in the order they are requested. Do not forget to return to instructions that were left for later consideration. It helps to place a check at the top corner of each instruction when it is ruled upon and tab with a sticky flag those that have not been ruled on. This allows you to flip through each page quickly to ensure you have a ruling on each instruction. It is also helpful to bring a laptop to court so that you can modify instructions in court and provide a copy to the court and parties

immediately. **IV. The Verdict Form**

The verdict form should go hand in hand with your instructions. There are important strategic and legal issues you must consider when drafting the verdict form. First, consider whether the "two-issue rule" applies to your claims or defenses, so that interrogatory questions are requested that will preserve your points for appeal. The two-issue rule generally holds that an appellant cannot show reversible error when an error relates to one claim or defense and the verdict does not reveal whether the appellee prevailed on that basis or another not affected by the error. *See e.g., Colonial Stores, Inc. v. Scarbrough*, 355 So. 2d 1181 (Fla. 1977) (appellate court will not grant a new trial where the jury has rendered a general verdict and the appellate court finds no error as to one of the theories on which the jury is instructed and could have based its verdict). *Cf. Grant v. Preferred Research, Inc.*, 885 F.2d 795 (11th Cir. 1989) (if jury delivers a verdict based upon several possible grounds, one of which is not supported by the evidence or was improperly submitted to the jury, and the appellate court has no means of determining on what basis the jury reached its verdict, the verdict must be reversed); *Yates v. United States*, 354 U.S. 298 (1957) (holding in a criminal case that a general verdict is invalid when it rests on multiple bases, one of which is legally inadequate and stating the "proper rule to be applied is that which requires the verdict to be set aside in cases where the verdict is supportable on one ground, but not on another, and it is impossible to tell which ground the jury selected."). Next, consider the number of questions you want to ask on the verdict form. The more questions the jury is asked, the more opportunities it has to deny liability (frequently, answering "no" to any question on liability will result in a defense verdict). On the other hand, the more questions the jury is asked, the more opportunities it has to make mistakes and reach an inconsistent verdict. Just as you did with the jury instructions, file with the court a copy of your requested verdict form and that of other parties. Lastly, at the conclusion of the charge conference and again before the jury deliberates, be sure to renew your objections to the instructions and verdict form as given to the extent they deviate from what you requested. *Never preface your objection by saying it is merely "for the record."* It is not. It is an effort to provide the jury with correct instructions and a proper verdict form. Ask the court to confirm that your objections are preserved through the end of trial, and need not be repeated after the charges are given to the jury, if that is sufficient in your jurisdiction. Absent such a ruling, ask for a side bar either immediately before or after the charges are given and before the jury deliberates and again state your objections on the record. **V. The Court's Reading of the Instructions to the Jury**

Once the instructions and verdict form are finalized, try, if at all possible, to read them in their entirety before they are read to the jury. When the court reads the instructions to the jury, listen and compare them to the instructions the court agreed to give. Make sure they are the same as any written instructions that will be submitted to the jury; if there is any difference between the two, the oral instructions will likely control on appeal. If there is an error, ask the judge to correct the oral instruction and specifically advise the jury that its initial instruction was given in error. Consider whether a motion for a mistrial is warranted. If you do not move for a mistrial and the jury is told the instruction was incorrectly given and should be disregarded, the issue may be waived. **Conclusion**

Drafting jury instructions and a verdict form can be challenging, but preparing ahead of time and

staying organized will make the process smoother. Start thinking about the jury instructions and verdict form early on and well before the trial starts and continue thinking about them and modifying them in light of the court's rulings and evidence adduced at trial. And, do not forget to ensure that all instructions are filed and the record is complete. **Republished with permission by the American Bar Association**

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