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JURY CHARGES - THE BEGINNING AND END OF ALL TRIALS

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I. INTRODUCTION

Jury charges are an essential ingredient in the successful handling of a civil dispute. Jury charges must be considered as early as possible to serve as an outline for case preparation. Jury charges must be understandable in addition to being correct statements of law. Finally, suspected error by the trial court in giving, or refusing, jury charges must be properly preserved for review.

The sad truth is that lawyers and judges often do a miserable job of providing the jury with the instructions its needs to perform its duty. "None of the studies that have been done show that jurors understand their instructions at an acceptable level."[1] As a result, jurors often have little if any idea as to the law they are to apply and jury trials thus become little more than crap shoots instead of the determination of facts within the framework of law. Not only do these poorly written jury charges prevent the jury from performing its vital function, they also serve as the basis for unnecessary appeals and reversals. Practicing trial lawyer must follow guidelines to insure the preparation of better charges, make appropriate use of charges once drafted, and preserve the record for appeal when these fine charges are not accepted and the opposing counsel's erroneous charges are accepted.

Jury Charges, or jury instructions as they are often called, are unquestionably important to the success of any trial. The reason for this importance is sometimes disputed. One of group

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1 Steele & Thorburg, Jury Instructions: A Persistent Failure to communicate, 67 N.C. Law Rev. 77, 99 (1988)

of trail lawyers argues that the jury listens to and understands the charges and will only return a verdict if the law allows them to. Thus, this group believes that the jury charge is essential to victory. Another group of trial lawyers insists that jurors either do not understand or care about the court's instructions and will bring back a verdict because of compelling facts. This group thus believes that the importance of jury charges only comes into play when their successful jury verdict is challenged on appeal. The truth is certainly somewhere in between these two extremes.

This divergence in philosophies can result in significant differences in the way jury charges are handled at trial. The trial lawyer who believes the charge is essential to a successful verdict will do everything he or she can to have the charge biased in their favor. These lawyers will be more willing to use creative charges and take risks with the charges to insure a verdict. The group which believes the only people who care about the charge are the appellate judges will typically stick to tried and true charges which come right from the pages of form books and appellate opinions. Good lawyering demands more. If Thomas Jefferson's idea that the jury process is the best of all possible safeguards for the person, property and reputation of every citizen is to survive, trail lawyers must strive to insure that the jury is properly charged to perform its function.

II. THE FIRST STEP IS WRITING THE CHARGES.

Jury charges are the legal framework within which the trial theme is placed. A conciencious attorney will be aware of the boundaries of this framework from the very beginning of his handling of the case. To be effective, jury charges must be understood by the jurors. "The purpose of an instruction is to aid and enlighten the jury, and this object is defeated by instructions which confuse the jury." Reid's Branson Instructions to Juries v. 1, p.293 §103 (1960 replacement).

A. PREPARING JURY CHARGES

"A requested charge should be given only where it embraces a correct and complete principle of law which has not been included in the general instructions given and where the request is pertinent and adjusted to the facts of the case." *Gates v. Southern Railway Company*, 118 Ga. App. 201, 204 (1968). This legal principal is not enough to guide the preparation of good jury charges. When preparing jury charges, the words of Senior Judge James B. O'Connor, Oconee Judicial Circuit, (FOOTNOTE -in the Preface to Pattern Jury Instructions of the Council of Superior Court Judges of Georgia) should also be heeded: "This must be done in such a manner that no harmful error is committed in stating or failing to state the issues and the law, but more importantly, should be done in simple, straightforward, and understandable language for the layperson." This goal, easily spoken, is rarely achieved.

"Research indicates that challenging the language and structure of instructions through improved organization, grammar, and vocabulary, can increase juror comprehension as much as two times over the original pattern instructions." The Psychology of the American Jury, Jeffrey T. Frederick, P.271, 1987. In fact, "an analysis of appellate cases confirms the intuition of lawyers and judges that juries often misunderstand instructions. In recent years social scientists have documented that misunderstanding. Social science experiments have shown a significant gap between what judges instruct and what jurors understand. A few empirical studies by psycholinguists have further shown that juror comprehension can be improved dramatically if jury instructions are rewritten to improve their vocabularly, syntax, and organization." Steele & Thorburg, Jury Instructions: A Persistent Failure to communicate, 67 N.C. Law Rev. 77, 83 (1988)

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1. Guidelines for Writing Jury Charges.

Good understandable jury charges are not impossible. By following some simple guidelines trial lawyers and judges can help jurors understand their duty.

"1. Use root or kernel verbs, rather than derivatives (*e.g.*, "assume" rather than "make an assumption")

2. Relocate misplaced phrases (*e.g.*, changing "A proximate cause of an injury is a cause which, in a natural and continuous sequence, produces the injury" to "A proximate cause of an injury is something that triggers a natural chain of events that ultimately produces the injury").

3. Eliminate technical words where possible (*e.g.*, trading "transferred" for "imputed").

4. Eliminate multiple negatives.

5. Eliminate the passive voice.

6. Simplify sentences with subordinate clauses to effect more logical progression.

7. Enumerate parallel ideas in advance, and provide introductory and transitional statements.""

It Matters That Juries Understand the Law, Thomas H. Cook, Jr., v.56, n.6, Texas Bar Journal, p. 598 (June 1993) citing Robert Charrow & Veda Charrow, Making Legal Language Understandable" A Psychological Study of Jury Instructions, 79 Column. L. rev. 1306, 1336-1340 (1979)

"The psycholinguists have developed a number of norms to govern the choice of words in instructions for lay jurors.

To begin with, the draftsman should avoid legalese. . . . . It is preferable to use common words that lay persons are most accustomed to.

It is better to use concrete, case-specific terms. Jurors can apply an instruction more effectively to the facts when the instruction itself integrates the facts.

The use of nominalizations can similarly confuse the jurors. A nominalizations is a noun formed from a verb.

The utilization of synonyms can also mislead the jurors. . . . .When in doubt, repeat the same word.

Synonyms and homonyms have a common denominator: the potential to lead jurors astray.

[C]ertain types of antonyms are more readily understood by jurors than other types. [(This occurs when a word is made its opposite by adding a modifier - regard to disregard or where words have same root such as polite and impolite.)]

Just as it is generally preferable to use concrete terms, it is best if the subject of a sentence is human or animate.

While the draftsman should avoid verbs that can take on either transitive or intransitive form, he should resort to modal verbs. A modal verb can be directive ("must" or "should") or permissive ("may").

Finally, if possible, the draftsman should eliminate negators such as "not" in the sentence. [(This should especially be avoided with several such words in the same sentence.)]

Sometimes jury confusion arises because a subordinate clause is incomplete. [the clause may leave out words such as "which is" which are necessary for the clause to be understood]

There are also sins of commission in the use of phrases and clauses. A case in point is the use of the phrase 'as to.'

Another sin of commission is using an unduly long word list.

The real cause of jury confusion [with respect to sentence length] is not sentence length per se but rather the complexity of the sentence structure.

Overall, when the researchers eliminated the passive voice, jury comprehension improved markedly.

The above quotes are from pages 138-145. bracketed words are those of MJW

Edward J. Imwinkelried & Lloyd R. Schwed, Guidelines for Drafting Understandable Jury Instructions: An Introduction to the Use of Psycholinguistics, v. 23 Criminal law Bulletin 135 (1987)

III. THE SECOND STEP IS USING THE CHARGES.

A. JURY CHARGES ESTABLISH THEORIES OF RECOVERY.

Law school professors define a "tort" as a civil wrong. Some plaintiff's lawyers define this word slightly differently. To these champions of the downtroden, "A '*tort*' is an injured person."(insert footnote re cross stitch on library wall) Unfortunately, successful representation of the plaintiff is not achieved by redefining the words. Instead, the plaintiff's lawyer is required to figure out a way for the injury his client has suffered to be compensable within the framework of the law. This often requires a certain amount of legal research. Research can produce two basic products. One product is a fine memo or brief, suitable for publication and guaranteed to insure its author a place in the halls of great legal writing. The other product is a jury charge, suitable for supporting a verdict which will not be reversed and which will speak the truth.

When researching the law which will govern the case, instead of writing a memo which will be filed away and forgotten, a more efficient practice is to prepare the jury charges for the case. This is especially important with respect to novel issues and issues with which the trial attorney is not particularly familiar. At the early stages of the case, research which results in the preparation of jury charges accomplishes the goal of establishing what theories are available for liability and damages. "Properly prepared, requests for instructions may serve as, in effect, a pre-trial brief" E. Devitt & C. Blackmar, Federal Jury Practice and Instructions, §8.02 at p. 242 (3d Ed. 1977) "Think of instructions as part of your trial preparation. Everything you do during trial should be done with the understanding and realization of the instructions to be given at the conclusion of the proofs. Expert witnesses can use instruction language when testifying, if it is applicable. View the entire trial from opening statement through instructions as a single tapestry. The threads of the instructions should run through the entire work of art." C. Robert Beltz,

Practice Pointers: Effective Use of Civil Jury Instructions, v. 70 Michigan Bar Journal, 1082 (October 1991)p. 1084 Just as importantly, the early preparation of jury charges provides an easily understood framework, emotionally commits the trial lawyer to the trial process, (footnote -good settlements come in cases where the trial lawyer is prepared for trial - drafting the charges is an essential step in this process do not file suits if you are not prepared to prosecute them) and eliminates the problems associated with last minute jury charge preparation.

When preparing the jury charges which will serve as the framework for the plaintiff's case, do not overlook charges to which the other side will be entitled, or which they may tender. In fact, preparing such opposing charges serves two purposes. First, it insures that the trial lawyer anticipates and prepares for the defense. Second, it enables the trial lawyer to have charges which can be tendered as alternatives to the unfair, biased, prejudicial versions of the law the opponent is sure to tender. It is important to have such charges handy because if a party does not like the charge tendered by the opponent, he must present an alternative in writing. The Court of Appeals has held that "[i]f the plaintiff desired more specificity as to the legal theories involved, a written request to charge could have been submitted." *Ralston Purina Co. v. Hagood*, 124 Ga. App. 226, 230 (1971)

B. THE FRAMEWORK FOR DISCOVERY

1. ESTABLISH THE QUESTIONS THAT NEED TO BE ANSWERED.

(a). DRAFTING THE COMPLAINT

Use the charges when drafting the complaint. While it is fairly infrequent that trial judges will read the complaint to the jury, there are still those who do and there are those who use the complaint to describe the plaintiff's contentions. A complaint which follows or quotes a favorable charge will often serve as a reminder to the jury and aid them in finding in your favor.

(B). DRAFTING DISCOVERY

The jury charges provide the framework for what must be proven. Make sure discovery charges follow them Often, entire areas of law can be resolved by the use of jury charges which

track the language of the jury charges. This very commonly occurs in agency issues. Additionally, the use of admissions which track jury charges can get rid of some of the technical aspects of the underlying case in chief. Note the following examples in FELA and products liability cases.

(C). PREPARING THE CLIENT AND WITNESSES

It is imperative that the client know the law which governs whether he will obtain a recovery. This will help the client understand your advice and make intelligent trial and settlement decisions. Additionally, this will help the client understand how his testimony fits into the overall scheme of things. Witnesses also need to know the law. They are curious as to why they have been called and if they understand how their testimony fits into the damages and liability theories they are often better prepared, have less trouble explaining themselves to the jury, and more prepared for cross examination.

(D). USE IN DEPOSITIONS

When deposing the other side ask them question which are quotes from the charges you expect the judge to give. At trial you will know how they will respond and you can use the deposition transcript to impress the jury with the fact that the witnesses for the other side are testifying exactly as the court will instruct them.

(a). Sources of jury charges

There are a miriad of methods to find jury charges. Listed below are some of the best ones.

(i). Pattern Books

This is a pretty good place to find jury charges. There are a variety of books available with varying levels of respect given by the courts. Certainly, in Federal Courts the two sources are Devitt & Blackmare and the various circuits pattern books. In Georgia's courts the Superior Court's pattern book is often considered the best source. Exhibit "B" is a list of books.

(ii). Similar Cases (go to the Courthouse.)

The jury verdict reporters and advance sheets are gold mines in the search for jury charges. One need only look at similar cases to find a complete charge. If the case is on appeal, the transcript will be at the appellate court and it is easy enough to copy the entire charge as given by the trial court. Of course this would not include the citations of authority. A method which has also been used is to contact the trial counsel on your side of the issue and ask if they will provide a copy of the charge to you. Most will be flattered to do so. Of course, one can go to the Court House and get the charges as tendered.

A. DATA BASE

The charges need to be put in the file and stored in some sort of charge data base for future reference. Attached as exhibit "A" is a sample of descriptions of charges stored in our data base. We also maintain a notebook of hard copies of charges but this is much more difficult to manage and use than is our simple computerized charge book.

B. COURTHOUSE

(iii). Original research (still use the pattern books)

A. HORN BOOKS

Quotes from horn books can make effective charges which will be accepted by judges and understood by juries.

B. HEADNOTES

While headnotes are often a great summary of the law, be careful. They are wrong too often to be blindly trusted. Read the case and make sure it supports the propositions. Additionally, when citing support for the charge, put the page number where the proposition is located, not the headnote. (Of course, some official headnotes are considered part of the opinion.

C. OPINIONS

Obviously opinions are a great place to get charges. However, one must ask when reviewing charges which are claimed as error by the appellant: "If the charge is good, and

correct, why was it the basis of an appeal?" Sometimes such charges are indeed great charges which meet all of the requirements. On other occasions, it is necessary to modify the charge to make it understandable and useful. Quotes from opinions are usually accepted by trial judges as its seems to be their feeling that such language reduces the risk of reversal as it is "preapproved".

D. STATUTES

Obviously, a statute is going to be a correct statements of law. However, statutes are made to be interpreted not read. Thus, they are often miserable jury charges when read to the jury. They can be incorporated into a charge and often must in connection with "negligence per se" charges.

C. TRIAL DAY

1. RELAX, THE CHARGES ARE ALL DONE

IV. THE LAST STEP IS PERFECTING THE RECORD.

Every complete set of instructions should have five basic components:

"An ideal set of jury instructions will consist of five basic elements:

1. juror responsibility;
2. definitions of terms;
3. burden of proof and measure of evidence;
4. factual contentions of the parties;
5. statements of law applicable to the factual issues."

p. 21 Michael J. Farrell, Communication in the Courtroom: Jury Instructions, v. 85 West Virginia law Rev. 5. (Fall 1982)

2. TURN THE CHARGES IN FIRST THING - IN WRITING.

(I) LOCAL RULES

(A). UNIFORM SUPERIOR COURT RULES

(B). LOCAL FEDERAL RULES

3. ADDING CHARGES

(I). NO PROBLEM IF YOU TURNED THEM IN TO BEGIN WITH

(II). WHEN TO DO IT - DON'T WORRY ABOUT GIVING AWAY A SECRET.

D. THE CHARGE CONFERENCE

(I). BE POLITE

(II). GIVE UP LOST CAUSES

(III). DON'T INSERT ERROR JUST TO WIN

E. ARGUING THE CHARGE

1. ENLARGEMENTS

2. OVERHEAD PROJECTOR

E. THE BASIS FOR APPEAL - PRESERVING THE RECORD

1. WRITTEN ALTERNATIVES TO BAD CHARGES

2. FORM OF OBJECTION

3. SPECIFICITY OF OBJECTIONS

4. APPELLATE REVIEW

F. RECHARGES