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Traps in Requests and Exceptions: How to Avoid Them

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TRAPS IN REQUESTS AND EXCEPTIONS: HOW TO AVOID THEM

by

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THIS Article is based on an examination of all federal cases dealing with jury instructions which were decided since October 1968. Each week's advance sheets for the Federal Reporter contain on an average ten important instruction cases. The reported opinions show problems both for trial judges and for counsel. The purpose of this Article is to present suggestions for avoiding such problems, with particular reference to the more recent decisions.

In case after case a lawyer will brief and argue a question concerning jury instructions, only to be told by the appellate court that his arguments will not be considered because they have not been sufficiently preserved. Sometimes the appellate courts confuse writers by quoting the instructions and then saying that they do not demonstrate "plain error." Does this mean that the instructions are good enough to withstand a hasty glance, or does it mean that there is some subtle error which an alert lawyer could have used to his advantage if he had only spoken the proper words at the appropriate time? All that is clear is that the court has not considered the point. This is very difficult to explain to a client who gives the opinion even a casual reading.

In other instances a case must be retried because the trial judge overlooked some detail of the rules relating to instructions and objections. The results are erratic. Sometimes the appellate court will try to judge the overall effect, and will overlook technical details which do not seem to affect the result. In other cases there will be a needless reversal because the reviewing court feels that it must insist on strict compliance with the rules. Sometimes a trial court will err in an effort to save time or extra record pages. There is always a risk if established formulas are not followed.

Cynics frequently claim that jurors pay little attention to the details of instructions, especially when there is a lengthy oral charge. Be that as it may, litigants are entitled to have juries instructed in the correct language, if the claim is properly presented and preserved. Error in instruction is one of the principal reasons for reversal.

By traditional federal practice, the charging of juries is the responsibility of the judge. The court must instruct the jury on the governing law, whether or not counsel request instructions.[1] Perhaps in earlier times jury cases were relatively simple, so that there were not too many problems in the wording of instructions. Under present conditions, however, counsel are very much interested and involved in the instruction process. New theories of liability are regularly proposed and, not infrequently, receive judicial sanction.[2] New criminal offenses are being established and there is often disagreement about the

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[1] United States v. Musgrave, 444 F.2d 755 (5th Cir. 1971); Byrd v. United States, 342 F.2d 939 (D.C. Cir. 1965); United States v. Hutchison, 338 F.2d 991 (4th Cir. 1964).

[2] *See, e.g.*, 2 E. DEVITT & C. BLACKMAR, FEDERAL JURY PRACTICE AND INSTRUCTIONS §§ 75.01-.07 (2d ed. 1970) [hereinafter cited as DEVITT & BLACKMAR], as to new developments in the area of products liability.

essential elements.[3] The wording of instructions is a complicated matter in any case which is not purely routine.

Rule 30 of the Federal Rules of Criminal Procedure codifies the procedure for instructing juries as follows:

> At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to adverse parties. The court shall inform counsel of its proposed action on the requests prior to their arguments to the jury; but the court shall instruct the jury after the arguments are completed. No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury and, on request of any party, out of the presence of the jury.

Rule 51 of the Federal Rules of Civil Procedure is essentially the same. It does not require that copies of requested instructions be furnished to opposing counsel, but it would be unusual to omit this detail. The civil rule refers to assigning as error "the giving or failure to give an instruction" instead of "any portion of the charge or omission therefrom." The requirement of a hearing on objections outside the presence of the jury, on request, is not found in the civil rule. The distinctions are minor and are apparently the result of textual evolution rather than an indication of the establishment of different procedures. A judge would be well advised to use the same procedure in civil and criminal cases and to have the practice comply with the more detailed requirements of the criminal rule.[4]

It is unfortunate if a trial which is otherwise free from error has to be repeated because of technical problems in jury instruction. It is just as bad to have a jury instructed in a way which may be erroneous simply because counsel did not take proper steps to preserve objections for appellate review. Consideration of the effect of recent cases on instruction procedure, then, should be of benefit to both judges and lawyers.

I. THE COURT'S PROBLEMS

A. *Preparation of the Charge*

Basic Responsibility. Under the federal system the trial judge has the responsibility of instructing the jury on the legal issues in the case and on the burden of proof. The responsibility may not be delegated to counsel, although a litigant may lose his right to complain if his lawyer does not make the proper objection at the proper time. But the court has a minimum responsibility. In a criminal case the jury must be instructed as to the essential elements of the offense and certain matters of defense.[5] There is a corresponding responsibility

[3] *See, e.g.*, United States v. Freed, 401 U.S. 601 (1971), as to the principle that *scienter* is not a requirement of offenses regarding possession of firearms, therefore setting at rest a controversy which had been aired in numerous lower court opinions.

[4] It is "better practice" to excuse the jury in a civil action. Apple v. Schweke, 172 F.2d 633, 635-36 (7th Cir. 1949). It is "not improper" to inquire, in the jury's hearing, as to whether there are exceptions. Nolan v. Bailey, 254 F.2d 638, 640 (7th Cir. 1958).

[5] *See* cases cited in note 1 *supra*. *See also* United States v. Leach, 427 F.2d 1107, 1112

in a civil case.[6] If the minimum responsibility is not discharged, the judgment is vulnerable to reversal on appeal.

Use of Language. The charge is the court's charge and the judge is entitled to phrase it in his own language. He is not required to give counsel's requests in the exact language submitted, even though the requested instructions are legally correct.[7] It is sufficient if the substance of proper requests is covered. If a request is relatively simple and is phrased in tolerable language, it may be prudent to give it as requested. As an alternative, the judge may ask the lawyer to consider and to agree to his rephrasing.[8]

Most experienced trial judges assemble forms for the usual explanatory instructions and for substantive matters which come before them regularly. There are also published forms for instructions, with citations and annotations.[9] An instruction which has been expressly approved on appeal necessarily commends itself to trial judges.

Many states make use of pattern instructions.[10] Sometimes these are officially prescribed and approved, or, perhaps more frequently, the pattern instructions are merely suggestions. Federal appellate courts, with some regularity, are prescribing form instructions for use by district courts.[11] The opinion will occasionally set forth a pattern instruction for prospective application only. The range and variety of federal jury cases is so great that it is not practicable to have patterns for all cases, or even for a substantial proportion of the cases.

Federal trial judges are permitted to summarize and to comment on the evidence, as long as the jury is advised that it has the sole authority for determining the facts and that it is not bound by the judge's comments.[12] Judges use this authority in differing degrees. In several recent cases there have been

(D.C. Cir. 1970), holding that the court is not obliged to instruct as to matters of defense, in the absence of a request, unless the defense is "particularly sensitive."

[6] Choy v. Bouchelle, 436 F.2d 319 (3d Cir. 1970).

[7] Among the many recent cases reiterating this proposition are Mann v. Anderson, 447 F.2d 533 (7th Cir. 1971); United States v. Friedman, 445 F.2d 1076 (9th Cir. 1971); James v. Continental Ins. Co., 424 F.2d 1064 (3d Cir. 1970); Nowell v. Dick, 413 F.2d 1204 (5th Cir. 1969).

[8] If the parties agree to instructions, they may not challenge them in further proceedings. Adkins v. Ford Motor Co., 446 F.2d 1105 (6th Cir. 1971); United States v. Greene, 442 F.2d 1285 (10th Cir. 1971).

[9] *See* DEVITT & BLACKMAR; MANUAL OF JURY INSTRUCTIONS IN FEDERAL CRIMINAL CASES (1965); BAR ASSOCIATION OF THE DISTRICT OF COLUMBIA, CRIMINAL JURY INSTRUCTIONS FOR THE DISTRICT OF COLUMBIA (1966, and supplements).

[10] *See* discussion of state pattern instructions in United States v. Barber, 442 F.2d 517, 527-28 (3d Cir. 1971). A federal court is not required to adopt the state "boiler plate" even in a diversity case, and it may be erroneous to do so in a particular case. Wright v. Marzo, 427 F.2d 907 (10th Cir. 1970).

[11] United States v. Barber, 442 F.2d 517, 525 (3d Cir. 1971) (identification instructions); Pendergrast v. United States, 416 F.2d 776 (D.C. Cir. 1969) (inference of guilt from possession in robbery cases); United States v. Brown, 411 F.2d 930 (7th Cir. 1969) (modification of "Allen" or "dynamite" charge); Blake v. United States, 407 F.2d 908 (5th Cir. 1969) (insanity).

[12] *See, e.g.*, United States v. Greenberg, 445 F.2d 1158, 1162 (2d Cir. 1971) (court described bribery as "an offense of grave character"); United States v. Pittman, 441 F.2d 1098, 1099 (9th Cir. 1971) (telling jury it should have no trouble determining that the automobile in question was "stolen"); United States v. Grunberger, 431 F.2d 1062 (2d Cir. 1970) (comment that statement made by defendant was an out of court admission, when the evidence was capable of another interpretation).

reversals because the appellate courts felt that the privilege of commenting on the evidence had been abused.[13]

Deciding on Oral or Written Instructions. The traditional federal charge is delivered orally, after counsel have argued. The court may provide a written copy to the jury but is under no obligation to do so.[14]

There are differences of opinion as to whether it is desirable to give the written charge to the jury after delivering it orally. The practice of submitting written instructions to the jury is used in many states. Its proponents claim that the jury cannot possibly remember the details and precise phrases of an oral charge, and that the instructions have little meaning if the jurors are unable to refer to them while deliberating. Requests for repetition of oral instructions come frequently, and the court must decide whether to respond. Recharging inevitably leads to arguments.

Proponents of the oral charge feel that a jury which has the instructions before it in written form may give undue importance to particular portions while overlooking other important parts of the instructions. The charge of course is a single charge and all parts of it must be considered together.

If the trial judge is accustomed to summarizing or commenting upon the evidence, it is quite inappropriate to give the instructions to the jury in writing. There is no precedent for giving the jury only a part of the charge in writing.[15] However, the effect of presenting the jurors with the court's summary of evidence or expressions of opinion would be very substantial and might very well be prejudicial. If the judge feels that the practice of commenting or summing up is a good one, he should continue the practice of oral instruction. If a particular judge believes that it is better for the jurors to have written instructions, he should confine himself to formal legalistic instructions.

In a civil case the use of a special verdict under rule 49(a) or of special interrogatories as authorized by rule 49(b) may accomplish some of the purposes of written instructions. Special questions are proper in criminal cases only under very limited conditions.[16] In one criminal case the judge submitted verdict forms containing summaries of the essential elements of the several

[13] United States v. Williams, 447 F.2d 894 (5th Cir. 1971) (court's praise of Secret Service in counterfeiting case); United States v. Dunmore, 446 F.2d 1214 (8th Cir. 1971) (possible reversible error if the court summarizes the prosecution's evidence but not that of the defense in a close case); United States v. Musgrave, 444 F.2d 755 (5th Cir. 1971) (aggravated by failure to tell the jury that comments are not binding). *See also* United States v. Grunberger, 431 F.2d 1062 (2d Cir. 1970); Ahrens v. American-Canadian Beaver Co., 428 F.2d 926 (10th Cir. 1970).

[14] United States v. Price, 444 F.2d 248 (10th Cir. 1971); United States v. Gross, 416 F.2d 1205 (8th Cir. 1969).

In United States v. Standard Oil Co., 316 F.2d 884 (7th Cir. 1963), the court strongly endorsed the suggestion that the jury should have the instructions in writing in a complicated case. The instructions must be given orally even if the court also submits them to the jury in writing. United States v. Noble, 155 F.2d 315 (3d Cir. 1946).

[15] The charge is a single and complete charge. First Nat'l Bank v. Small Business Admin., 429 F.2d 280 (5th Cir. 1970).

[16] In United States v. Spock, 416 F.2d 165 (1st Cir. 1969), the First Circuit reversed convictions in a conspiracy case on the ground that the special questions concerning essential elements of the case constituted a "catechizing" of the jury, which might tend to induce a verdict of guilty. However, a special question is essential in a treason case in which several "overt acts" are charged. Cramer v. United States, 325 U.S. 1 (1945). *See also* 1 DEVITT & BLACKMAR § 17.15.

counts of the indictment.[17] The court of appeals did not reverse for this reason, but it spoke with a great lack of enthusiasm for the practice.

Conference with Counsel. The conference to settle instructions is a regular part of most federal trials. The conference, however, is not required.[18] If the judge is so disposed he may simply receive counsel's requests, advise them of his proposed rulings, charge the jury following argument, and then receive exceptions in the manner prescribed by rule.

Charge conferences may be lengthy. If the case is complicated the conference may last all day. Too much delay in a relatively short trial is undesirable, but if the trial has been a long one then it may be better to take extra time to make sure that the instructions are correct.

Time spent in arguing about instructions may be saved through advance planning. The court should not have to listen to legal arguments at the close of the case on points which were necessarily involved from the beginning. These should have been flagged for briefing and argument at an earlier stage—preferably before trial. The court may request that instructions on the essential issues be submitted at the pretrial conference or at the beginning of the trial.

If the court has stock forms of auxiliary instructions it may be desirable to submit these to counsel at an early stage. By efficient management it may be possible to have a complete copy of the court's proposed charge ready at the conclusion of the evidence. The judge may furnish copies to counsel or permit the lawyers to inspect the proposed charge, even though he does not follow the practice of giving the written instructions to the jury.

B. *Action on Counsel's Requests*

Time for Requests. In the absence of a "reasonable" direction for earlier submission, counsel are entitled to submit their requests for instructions after the evidence is closed. The court, however, may ask that the requests be submitted earlier or even that they be submitted before the trial begins.

There is little authority as to when a request for advance submission is "reasonable."[19] The court cannot completely foreclose requests which come at the close of the evidence. The defendant in a criminal case may not know what requests are desirable until the government has rested its case and rebuttal. Any request at the close of the evidence must necessarily be allowed if the facts on which it is based could not be known earlier. A judge invites severe problems if he declines consideration of a request submitted after the evidence is closed.[20]

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[17] United States v. Gallishaw, 428 F.2d 760, 764 (2d Cir. 1970).

[18] United States v. Slaton, 430 F.2d 1109 (7th Cir. 1970), *cert. denied*, 400 U.S. 997 (1971).

[19] *See* McGuire v. Davis, 437 F.2d 570 (5th Cir. 1971), in which the court refused to consider requests presented on the second day of trial, in violation of a pretrial order calling for submission at the beginning of the trial. The decision is not clear-cut in that the appellate court found that the requests which were not considered as such were, nevertheless, covered in substance in the charge. One might wonder whether counsel had been sufficiently advised of the proposed instructions. *See also* note 21 *infra.*

Bruno v. United States, 259 F.2d 8 (9th Cir. 1958), holds that the defendant should always be permitted to present requests at the close of the evidence since he cannot know what theories of defense will be supported by the evidence until then.

[20] *See, e.g.*, United States v. Tourine, 428 F.2d 865 (2d Cir. 1970). The court had re-

Advising Counsel of Rulings. The judge's minimum responsibility is to advise the lawyers of his proposed action on their requests before argument begins, so that they may be appropriately guided for argument. A lawyer must know the essentials of the instructions in order to make an intelligent argument. If the judge misleads counsel, there may be error even though the instructions as ultimately given are legally correct since a lawyer may have been misled as to the proper scope of his argument.[21]

There are some suggestions that the court must advise the lawyers as to the substance of all instructions the court proposes to give.[22] By the weight of authority, however, the judge discharges his duty by confining his advice to the instructions which have been requested. A lawyer who has a serious question about the scope of the charge should present a request or make an inquiry. It is certainly desirable for the judge to give counsel the fullest information possible.

Some judges follow the practice of furnishing copies of the proposed charge to the lawyers and to the court reporter. This may be done even though the judge follows the practice of giving strictly oral instruction to the jury. There is no obligation to furnish a copy of the charge to counsel.[23] When a copy is furnished, the judge may direct the lawyers not to quote from the document in their arguments, but rather to use the conventional form so as to say, essentially, "I am confident that the court will instruct you that . . . ."

There is authority that a lawyer who makes a proper request may assume that it will be granted unless the judge advises him otherwise,[24] but a lawyer who relies on silence about an important instruction is very imprudent. The judge, in any event, should not allow such uncertainties. He should respond to each request, "given," "covered in substance," "given as modified," or "refused." If the judge proposes to modify a request or to cover it in his own language, he should give as much detailed information as he can about the precise form the instruction will take.

It is normally desirable to respond to each request "on the merits." If the requests are clearly unreasonable, verbose, or argumentative, the judge may properly state that they are refused, leaving counsel to the making of exceptions at the conclusion of the charge. An expedient such as this should be used only in an aggravated case.[25]

Allowing Exceptions to Requests. There is a temptation to permit the lawyers to make their objections to the court's rulings on requests or to the court's

quested submission at an earlier time. The specific holding was that the court was not required to rule on a request presented after the close of the evidence.

[21] *See* United States v. Williams, 447 F.2d 894 (5th Cir. 1971). The court granted a request for charge but commented, in the hearing of the jury, "I think that's bad law." *Id.* at 901. The effect was to undermine any argument the defendant might make.

[22] United States v. Bass, 425 F.2d 161 (7th Cir. 1970). *But see* United States v. Littlejohn, 441 F.2d 26 (10th Cir. 1971); Martin v. United States, 404 F.2d 640 (10th Cir. 1968).

[23] United States v. Price, 444 F.2d 248 (10th Cir. 1971).

[24] United States v. Slaton, 430 F.2d 1109 (7th Cir. 1970), *cert. denied*, 400 U.S. 997 (1971).

[25] United States v. American Radiator & Standard Sanitary Corp., 433 F.2d 174, 199 (3d Cir. 1970), holds that the court was not required to rule on 67 proposed requests which were "prolix, imprecise, and . . . highly partisan . . . ."

proposed instructions presented at the charge conference, and then to tell counsel that no additional objections or exceptions will be necessary. The practice of some judges in allowing automatic exceptions in this manner has been severely criticized.[26] Perhaps the appellate court will relieve a lawyer of the consequences of not making exceptions at the close of the charge if the omission has been induced by the action of the trial court,[27] but the safest course is to follow the requirements of the rule literally. Lawyers and judges may feel that requiring the repetition of arguments which have been emphatically made, clearly understood, and advisedly rejected is meaningless ritual. The trial judge may be tempted to allow automatic exceptions to save time, but the practice is dangerous and may be very unfair to counsel. It is better for the court to remind counsel of the requirements of the rule and to tell them in so many words that objections at the conclusion of the charge are required.[28]

C. *Exceptions to the Charge*

Making of Objections. The only safe procedure for court and counsel is to adhere strictly to the provisions of rules 30 and 51, as follows:[29] Excuse the jury at the conclusion of the charge, with the direction that it not begin deliberations; receive counsel's objections and rule on them; recall the jury for further charging, if any, or to instruct them to begin their deliberations. (If there are no further instructions to be given, it might be possible simply to send a note to the jury room to the effect that the jurors may begin their consideration of the case.) Exceptions to the strict rule procedure should be made only if there is very clear recent authority from the appellate court having jurisdiction in the area.

In criminal cases, requiring exceptions in the presence of the jury is manifest error.[30] In civil cases, also, a request for objections outside the presence of the jury should be honored, or the court should excuse the jury without request. It is awkward for counsel to present complicated matters while the jurors are seated in the jury box. If the case is not complicated or if the instructions have been discussed in detail, it is proper for the judge to ask the lawyers whether they wish to present objections.[31]

It is not unusual for the judge to conclude the charge by stating to the court

[26] *See* Shaw v. Lauritzen, 428 F.2d 247, 251 (5th Cir. 1971).

[27] *See, e.g.*, United States v. Meriwether, 440 F.2d 753 (5th Cir. 1971). The defendant represented himself and the trial judge said that he would "undertake to cover all the charges I feel should be given to the jury." *Id.* at 756. One might ask: What purpose lawyers?

[28] In Little v. Green, 428 F.2d 1061 (5th Cir. 1970), the court told counsel that it would be necessary to repeat each objection but not to state the reasons in detail at the conclusion of the charge.

[29] *See* Dunn v. St. Louis-S.F. Ry., 370 F.2d 681 (10th Cir. 1966); *cf.* Washington State Bowling Proprietors Ass'n v. Pacific Lanes, Inc., 356 F.2d 371 (9th Cir. 1966). 2 C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 484, at 289 (1970) commends the practice in the Ninth Circuit and is critical of the technical holding in *Dunn*. *See also* Martin, *Settling the Jury Charge*, 44 F.R.D. 293 (1967).

[30] United States v. Schartner, 426 F.2d 470 (3d Cir. 1970). The appellate court said that reversal was necessary to maintain proper standards of criminal justice and that the defendant was not required to show specific prejudice. The opinion observed that it was not possible to say what claims might have been made or what objections might have been presented if counsel had been able to speak outside the presence of the jury. *But see* note 63 *infra*.

[31] Nolan v. Bailey, 254 F.2d 638 (7th Cir. 1958).

reporter that exceptions and objections previously made will be incorporated as though they had been presented at the conclusion of the charge but, as has been said earlier,[32] this practice is fraught with danger.

The judge should resist the temptation to allow the jury to begin deliberations with the thought that he might call the jurors back for additional instructions if necessary. Such a procedure violates the express provisions of the rules as well as their spirit. The jury is entitled to the complete charge before commencing deliberation.[33] Furthermore, when a judge suggests that the deliberations should begin, he indicates that he will not give very careful consideration to exceptions.

This is not to say that there may not be supplemental instruction after deliberations have begun, but the subject of supplemental instruction is beyond the scope of this Article.[34]

Consideration of Objections. There should seldom be a need for additional charging in response to objections, if careful procedures have been followed prior to the delivery of the charge. It is always possible, however, that corrections will be necessary.

A lawyer will sometimes present an objection which is really a request for instruction and which should have been tendered at the conclusion of the evidence. This produces understandable irritation, but if the request is clearly a proper one (*e.g.*, a request for an alibi, identification, or accomplice instruction), it is best for the trial judge to swallow his irritation and to consider the request on its merits.[35]

Counsel may claim that he has been misled as to the court's advice on his requests in that the judge had told him that a request would be given in substance but the court had actually modified the request beyond recognition. Problems along these lines may be serious. They may be avoided if the court gives detailed advice about the proposed modification. If the claim of variation seems to be substantial and if it may have affected the argument, then it may be possible to provide correction by permitting additional argument.[36] This is

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[32] *See* note 26 *supra*, and accompanying text.

[33] In First Nat'l Bank v. Small Business Admin., 429 F.2d 280, 284 (5th Cir. 1970), the Fifth Circuit was very critical of the local custom of deferring the presentation of exceptions to the charge until after the jury had retired.

The opinion in United States v. Williams, 447 F.2d 894 (5th Cir. 1971), criticized the trial judge for leaving the bench immediately after giving the "Allen" charge and telling counsel to dictate any objections to the court reporter.

[34] *See* 1 DEVITT & BLACKMAR § 17.17. It is not desirable for the judge to engage in discussions with individual jurors. United States v. Raab, 450 F.2d 343 (3d Cir. 1971).

[35] *See, e.g.*, Delancey v. Motichek Towing Serv., Inc., 427 F.2d 897, 900 (5th Cir. 1970), holding that it was sufficient to object to "the court's failure to instruct, or define the term 'willful misconduct,'" even though no definition had been requested. In United States v. Bailey, 451 F.2d 181 (3d Cir. 1971), the appellate court sustained the trial court's action in overruling an exception which should have been the subject of a request for instruction. It was suggested that counsel hoped for a tactical advantage in the late presentation, in that the caution he asked for would have been the last word to the jury.

[36] *See* Loveless v. United States, 260 F.2d 487 (D.C. Cir. 1958), where the court modified its earlier position and decided, following argument, that a manslaughter charge should be submitted to the jury. The appellate court said that, at the very least, defense counsel should have had the opportunity for further argument in order to be able to address the jury as to why a finding of manslaughter was not justified. *See also* Terminal Ry. Ass'n v. Staengel, 122 F.2d 271 (8th Cir. 1941).

an awkward remedy which should seldom be used, but it may be necessary to avoid the danger of reversal. The allowance of additional argument, of course, will not cure legal error properly preserved, but it does forestall a claim that counsel has been misled as to the scope of his argument.

If there are additions to the charge, the court must provide the opportunity for objection just as in the case of the initial charge. It should seldom be necessary to excuse the jury for this purpose unless counsel insists on further hearing outside the presence of the jury.[37]

II. COUNSEL'S PROBLEMS

A. *Requests for Charge*

Purpose of Requests. A lawyer in federal court has no obligation to request instructions. He is entitled to a charge from the court which is legally correct and free from prejudice. The lawyer, in theory at least, may wait until he hears the charge and may then preserve his objections.

In most instances, nevertheless, both sides will have occasion to request instructions. Some judges indicate that they want complete requests, and one who fails to respond under these circumstances invites severe judicial displeasure. In some courts requests are routine for all cases.

A reading of the rule suggests that the purpose of requests is to secure guidance for argument. A lawyer who has made no request may not complain that he is surprised at the law as contained in the charge, or that he has been induced to argue legal theories which the court does not accept. (The lawyer, of course, may preserve a claim of legal error by timely objection.) If counsel has made a request and the court indicates that it will be granted or covered, he is justified in arguing in accordance with the request and may properly complain if the charge departs substantially from it.[38]

There are other reasons for presenting requests for instruction. The lawyer is anxious to have his case submitted to the jury in accordance with the most favorable legal theory available. In a products liability case, for example, there may be sharp disagreements about legal details. The plaintiff may claim that negligence is not an essential element of his legal theory. If he is intent on this position, he should advance it as early and as often as possible, with appropriate citation of authority, and should request a suitable instruction.

Requests on procedural or cautionary matters which counsel deem important or for any unusual submission that is desired should also be made. There have been attempts, unsuccessful up to now, to have juries instructed that they have the absolute power to acquit a defendant even though they find that the prosecution has established the essential elements of the case as set out in the court's instructions.[39] One who wants a novel instruction may not get it, but

[37] See discussion of United States v. Williams, 447 F.2d 894 (5th Cir. 1971), *supra* note 33.

[38] Preservation of this error, as elsewhere, may depend on the making of a timely objection. *See* United States v. Bacher, 430 F.2d 663 (5th Cir. 1970), in which the judge omitted an instruction requested by the defendant after having told counsel that it would be given.

[39] United States v. Boardman, 419 F.2d 110 (1st Cir. 1969); United States v. Moylan, 417 F.2d 1002 (4th Cir. 1969); *cf.* United States v. Garaway, 425 F.2d 185 (9th Cir.

if he wants to be heard on appeal he must present a request and also make a proper objection.

Another reason for making requests is to secure favorable means of expression. It is important to know the particular habits of the trial judge in composing the charge. Some judges insist on using their own language while others look to the lawyers for substantial assistance. A judge may feel, also, that the safest course is to give instructions in the language tendered. If a judge is known to make free use of counsel's language, the lawyer who does not present specific and detailed requests is overlooking a good bet.

Counsel should also ask for any specific form of submission desired, such as a special verdict under rule 49(a) or special questions under rule 49(b). No court of appeals has yet held that a request for a special form of submission must be granted, but some appellate judges have spoken out eloquently in favor of the special verdict procedure.[40] If counsel in a criminal case feels that the jury should be instructed on one or more possible lesser included offenses, he should make a specific request.[41]

The foregoing assumes that the lawyer's purpose is to secure the most favorable instruction possible in the hope of getting a verdict from the jury. There may be situations in which the lawyer has given up on the particular jury and is more intent on having error in the record than in securing a favorable charge. What of the criminal defense lawyer who is up against a strong government case or the counsel for a casualty insurance company who is defending only because of the dollars involved? Might not a lawyer in such a position feel that there would be danger in requesting favorable instructions since the court may grant the request and therefore foreclose claims of possible error? Might it be preferable to wait until the conclusion of the charge and then try to present exceptions in form sufficient to preserve the point, while hoping that the court will stubbornly refuse further instruction? A strategy of throwing deliberate curves might commend itself to counsel in particular situations. Those who want further enlightenment on the point must resort to manuals of trial strategy. The appellate court is obliged to notice claims of legal error properly preserved by objection following the charge. The same requirements do not obtain as to belated requests for instruction.[42] One who feels that he has a reasonable chance before the jury should try to secure the most favorable instructions possible. One who tries to inject error should never underestimate the ingenuity of the appellate court in divining his strategy and in finding reasons for affirmance.

1970). The Ninth Circuit found error because the judge told the jury that it was their duty under the evidence to find the defendant guilty but that they could disregard the instructions and acquit the defendant.

[40] *See* Brown, *Federal Special Verdicts: The Doubt Eliminator*, 44 F.R.D. 245, 338 (1968). For a discussion of the court's discretion to use special verdicts and interrogatories, or to refrain from using them, see Abernathy v. Southern Pac. Co., 426 F.2d 512 (5th Cir. 1970).

[41] A civil case holding that the court does not have to act on an exception which should have been made the subject of a request is Seeraty v. Philadelphia Coca Cola Bottling Co., 198 F.2d 264 (3d Cir. 1952). But a request at the conclusion of the charge was treated as a proper objection in United States v. English, 409 F.2d 200 (3d Cir. 1969).

[42] *See* note 22 *supra*, and accompanying text.

Preserving Claims and Requests. A request for instruction is essentially different from an objection to the charge as given. The theoretical purpose of the request is to obtain guidance for use in argument.[43] It is nearly always necessary to make a specific objection at the conclusion of the charge, even as to matters which have been the subject of definite request. The general objection "to the giving of the plaintiff's requested instruction number five" or "to the failure of the court to give defendant's requested instruction number two," quite proper in the practice of many states, is not a safe expedient in the federal courts.[44] As has been said earlier,[45] it is not always safe to rely on the court's assurance that exceptions will be preserved.

In the presentation of requests, however, the lawyer should have the appellate court in mind. It is said that the failure of the court to give a requested instruction is not error unless the request as tendered is correct.[46] This statement suggests the need for care in the preparation of requests, but it must be accepted with some reservation since it is still possible to object to any of the contents or omissions of the charge. It is good practice to separate one's requests so that each deals with a specific item, and to avoid the use of extravagant language.

In a case in which the law is not well settled the lawyer may want to prepare alternative requests. He may have a primary and a secondary legal theory. In this event he should present a request for his primary theory (*e.g.*, strict liability without negligence) and then, if the court does not accept it, should present an alternate request (a theory of which negligence is an element). When the need is apparent the alternatives should be prepared in advance.[47]

Even when the court has designated a time in advance of the close of the evidence for the presentation of requests, counsel should not hesitate to make a belated request if the occasion presents itself. The risk of judicial displeasure must be undergone, if the occasion is important.[48] The court may indicate, for example, that it will give one of the opposing party's requests, and counsel may feel the need for something to counter the force of the request. Some cases hold that the court is not required to consider oral requests, but if the need arises a request should be presented orally and, if it is not accepted, counsel should ask for time to put the request in writing.[49] If the court declines consideration of a request on the ground that it is late or not in writing, the lawyer should then make his record and should preserve the point at the conclusion of the charge.

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[43] *See* note 29 *supra.*

[44] Delancey v. Motichek Towing Serv., Inc., 427 F.2d 897 (5th Cir. 1970).

[45] *See* note 28 *supra,* and accompanying text.

[46] Mann v. Anderson, 447 F.2d 533 (7th Cir. 1971); United States v. Leach, 427 F.2d 1107 (1st Cir. 1970); *see* 9 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2552, at 634 (1971), in which the authors state that this general proposition must be treated "quite skeptically."

[47] *See* Clark v. Central States Dredging Co., 430 F.2d 63 (8th Cir. 1970), holding that a request for separate instructions on negligence and unseaworthiness should have been made at the close of the evidence and that, in the absence of a request, the plaintiff was in no position to assert error.

[48] Little v. Green, 428 F.2d 1061 (5th Cir. 1970).

[49] United States v. Sanchez-Mata, 429 F.2d 1391 (9th Cir. 1970).

B. *Exceptions and Objections*

Legal Requirements. A lawyer who takes issue with any part of the court's charge must present a specific objection at the conclusion of the charge and before the jury retires. If he does not do this, the appellate court may refuse to consider the claimed error. The appellate court, of course, may reverse for "plain error," but one should never count on its doing so.

The theoretical purpose of the exception is to give the court a chance to correct the error. This claim has only limited validity. If a judge has given careful consideration to the points of his charge, he is not likely to make changes. Some complaints, moreover, are hardly capable of correction. If the court makes unfair or prejudicial comments on the evidence, no caution will eliminate the words from the jurors' consciousness. A statement that the jury is not bound by the comment does not cure prejudice.[50] Even less effective is the statement that the comment is "withdrawn." Cases in which the objection will permit correction of error are relatively rare. The cynic might say that the purpose of requiring exceptions and objections is to cut down on the appellate court's work. There is also some validity in saying that a point is probably not very substantial if counsel familiar with the evidence do not notice it to a degree sufficient to make out a specific objection.

The real purpose of the exception, then, is to protect the record. The lawyer should take exception to anything and everything which might serve as a point for future complaint. He should use as much time as necessary even if the judge shows impatience. He should be very cautious about accepting any assurance that an objection or exception is allowed as to matters previously covered in conference.[51] The requirement that objections be restated also gives the lawyer the chance to polish and particularize his points, in an area in which there is a premium on clear and definite expression. The lawyer should never be deterred by the court's suggestion that he does not desire to hear further exceptions. Appellate relief might be available if counsel shows that the court prevented the presentation of exceptions, but this is very hard to establish and substantiate.[52]

Preceding portions of this Article have referred to appellate criticism of attempts to streamline or simplify the exception process.[53] Court and counsel should take heed. Perhaps it is best to play the game by the rule book. If the court indicates a departure from established procedures, as by suggesting that the jury might begin its deliberations subject to recall for possible additional charging, a lawyer who senses the possibility of error should probably make an objection at that time out of the hearing of the jury.[54]

Form and Detail. Exceptions must be specific. Those which are bound to arise

[50] "A judge's corrective statement will rarely cure the prejudicial damage created when improper information reaches the ears of the jury." United States v. Sememsohn, 421 F.2d 1206, 1208 (2d Cir. 1970).

[51] *See* note 26 *supra*, and accompanying text.

[52] *See* note 28 *supra.*

[53] *See* note 26 *supra.*

[54] *See* note 33 *supra*, and accompanying text. Counsel is not relieved of the duty of presenting exceptions because of the trial judge's informal indication that he did not agree with the party's legal theory. Pogue v. Retail Credit Co., 453 F.2d 336 (4th Cir. 1972).

should be prepared in advance. Among objections which have been held to be insufficient are the following:

(1) The defendant "objects to the use of" an instruction on permissible inferences from the possession of stolen property.[55]

(2) The charge is "sterile and academic."[56]

(3) "In regard to defendant's submitted special charges 5 and 6 we would like to object to the Court having given those charges."[57]

(4) When the only objection to a "flight" instruction was on the basis that the evidence did not support a claim that there had been flight from the scene of the crime, the appellate court declined to consider the claim that other possible motives for flight should have been discussed with the jury.[58]

It is harder to present examples of proper objections. If an objection is discussed in an appellate opinion, this is an indication that it is not all that it should be even though the appellate court concludes that the legal points are preserved. There should be careful attention to precise phrasing. The following examples should be adequate:

(1) The charge improperly requires the jury to find that the defendant was negligent, as an essential element of liability, whereas under the law of _____ the manufacturer is strictly liable for injuries such as are shown by the evidence.

(2) The charge should define "knowingly" as follows: (here set forth definition desired).[59]

(3) The charge is erroneous in failing to instruct the jury that it may not find the defendant guilty unless it finds that he had actual knowledge of the contents of the publication in issue.

(4) The court, after advising counsel that the defendant's requested instruction number five would be given in substance, thereafter in the charge departed substantially from the terms of the request, in the following particulars: (here detail the particular variations).[60]

A lawyer who feels that he has been substantially misled by the court's advice on requested instructions might appropriately ask for additional opportunity to argue to the jury.[61] The court may be reluctant to grant additional time because the procedure is not within the normal order of trial, but, in order to be heard on appeal, it is probably necessary to make the request.

Specific objection to comments by the court which are considered prejudicial should be made.[62] There might also be a motion for a mistrial, if the matter

[55] United States v. Howard, 433 F.2d 505 (D.C. Cir. 1970).
[56] United States v. Greenberg, 445 F.2d 1158 (2d Cir. 1971).
[57] Delancey v. Motichek Towing Serv., Inc., 427 F.2d 897, 900 (5th Cir. 1970).
[58] United States v. Wilson, 435 F.2d 403 (D.C. Cir. 1970).
[59] In Delancey v. Motichek Towing Serv., Inc., 427 F.2d 897, 900 (5th Cir. 1970), an exception "to the court's failure to instruct, or define the term 'willful misconduct'" was held sufficient even without the tender of a definition. The case is a close one and might not always be followed.
[60] Levin v. Joseph E. Seagram & Sons, 158 F.2d 55 (7th Cir. 1946), indicates that counsel must act to protect his record as soon as he realizes that the court may not give his request as tendered. *See also* United States v. Bacher, 430 F.2d 663 (5th Cir. 1970).
[61] *See* Terminal Ry. Ass'n v. Staengel, 122 F.2d 271 (8th Cir. 1941) (the court rejected a request but then covered the subject matter in the charge).
[62] United States v. Bessesen, 433 F.2d 861 (8th Cir. 1970).

is serious enough and the lawyer really wants a mistrial. Unless there is a motion for a mistrial, the only relief may be the statement from the judge that the comments are not binding on the jury.

The obligation to present exceptions and objections applies, likewise, to matters which arise after the jury has retired. Among these are: requests for exhibits or for rereading of testimony;[63] requests by the jury for additional instruction;[64] the court's proposed use of the "Allen" or "dynamite" charge;[65] and the court's proposed action in discharging the jury or allowing it to deliberate further.[66] Unless there is complaint, the appellate court may refuse to consider claims of error.

III. CONCLUSION

The law of instructions, requests and objections is not particularly new. Some may feel that it is meaningless ritual, but modern cases show no great inclination to modify the ritual. There are more cases and more intricate points of law. Proper attention to the details of settling the charge, then, is all the more important.

[63] United States v. Chicarelli, 445 F.2d 1111 (3d Cir. 1971), holds that after a request from the jury there was no error in the court's forcing defense counsel to make his objections to the judge's statements in the presence of the jury, in the absence of an objection to the presence of the jury at the time the event occurred.

[64] United States v. Ragsdale, 438 F.2d 21 (5th Cir. 1971); Gorsalitz v. Olin Mathieson Chem. Corp., 429 F.2d 1033 (5th Cir. 1970).

[65] United States v. Chaplin, 435 F.2d 320 (2d Cir. 1970); Pugliano v. United States, 348 F.2d 902 (1st Cir. 1965).

[66] United States v. Phillips, 431 F.2d 949 (3d Cir. 1970); Morgan v. United States, 380 F.2d 686 (9th Cir. 1967) (the court may return the jury for further deliberation after it reports a verdict on one count but not on another).