Avoid The Top 10 Pitfalls In A Jury Charge Conference

Law360, New York (March 20, 2013, 12:08 PM ET) -- Seasoned trial lawyers know that the jury charge conference is high-stakes and fraught with peril. The charge conference requires a delicate balance between two goals: persuading the court to give the jury a charge that will help you win your case, and preserving all appellate issues in the event that the jury returns the wrong verdict. There is often limited time to prepare for the conference, which comes toward the end of trial while you are also preparing for final witnesses and closing arguments. You may also face an impatient judge who is focused primarily on getting the case to the jury, and does not share your interest in preserving arguments for appeal. Being aware of the major pitfalls of the charge conference, and how to avoid them, can help you make the most of the conference.

1. Don't Start with Bad Instructions

Make sure that the written, proposed jury instructions that you file with the court are a clear, practical model for what the charge should look like. Use straightforward language that jurors can easily understand. For example, refer to the parties by name rather than by "plaintiff" or "defendant," which are unfamiliar terms to most jurors. Frame the jury instructions in terms of your own case and facts, rather than in generic legal terms. Also, keep in mind that your proposed instructions are your own roadmap for your arguments at the charge conference. Include parentheticals with your citations to case law, so that you can remember the holding of each case when you are arguing at the conference. Also consider filing a written objection to opposing counsel's instructions. Those objections will become part of the record for appeal, and can serve as a written outline for your argument against opposing counsel's proposed instructions at the conference.

2. Don't Get Trapped into Submitting Instructions You Don't Really Want

Here is a common trap for the unwary: The judge makes clear that she is going to give a certain instruction over your objection. Since you want to at least influence the instruction's wording, to try to minimize the damage, you submit your own proposed language. The problem is that you have now proposed an instruction that you do not actually want to go to the jury, and the opposing party can claim that your client, having proposed such an instruction, has waived any objection to it. There is a simple fix: make clear within your written proposed instruction, and verbally on the record at the conference, that you object to the instruction being given at all, and that without waiving that objection, you are asking that, at a minimum, the court use your proposed language.

3. Don't Go In Unprepared

There is no substitute for serious preparation for the charge conference. If the judge has given you a written draft charge to review, sit down in advance of the conference with the judge's proposed charge, your own proposed charge, and that of opposing counsel, and painstakingly compare them. Mark up the judge's proposed instruction as if you are editing it, noting exactly what you would cut and what you would add. This process will enable you to be clear and efficient in your argument at the conference. Having specific proposed language ready to offer the court increases the likelihood that the judge will grant your request, and helps build a clear record for appeal. Know the relevant pattern jury instructions for your issue and jurisdiction, and have them with you at the conference. Have copies of key cases and pattern instructions so you can hand them up to the bench as needed. If the judge does not allow you to see his draft

charge in writing (as some do not), it is even more critical to know your own proposed charge cold, so that you can react quickly when hearing the verbal charge and make a record of your objections.

4. Don't Lose Sight of Your Most Important Issues

Time is scarce at the charge conference, and there is invariably a lot of ground to cover. You will not have time to argue every little point at length. Therefore, it is critical that you know what your most important issues are, both for persuading the jury, and for preserving your appellate record. At the conference, give those key issues the focus they deserve. If one objection is of preeminent importance, tell the judge that, on the record. For less-important objections, state them clearly and succinctly, and move on.

5. Don't Be Pressured Into Not Making Your Record

The charge conference is very pressured. The judge's interest in getting through the conference, with as much agreement between the parties as possible, is in direct conflict with your interest in making your record. But do not let that environment force you to give ground where you will regret it later. For example, do not say, in response to a proposed instruction by the court, "It's not what I wanted, but it looks fair to me." Such a statement effectively waives any post-trial or appellate argument on the point. If the instruction is not want you want, say so, and say why. Further, insist on making your appellate record. This is where preparation is key; you have to know exactly what you want, and be ready to make your points quickly and effectively. Be polite but assertive. If the judge is making it difficult to state your position, ask, "Your honor, may I briefly make a record of my objection to Instruction 10?" The answer will usually be yes, and asking the question refocuses the judge on the fact that you are simply doing your job.

6. Don't Give Opposing Counsel Unnecessary Appellate Hooks

It is important to know when not to push too hard at the charge conference, so that if you win the trial, you have not given the other side an effective appellate hook. Let's say you represent the defendant, and you know that there is a split of authority in your circuit as to whether the plaintiff's standard of proof is a "preponderance of the evidence" or "clear and convincing" standard. Of course, as the defendant, you would rather have the instruction include the higher "clear and convincing" standard. But you might decide that the standard is unlikely to change the jury's verdict, and that if you win, you do not want the opposing party to have a potentially promising appellate issue. In that case, you might decide the best strategy is simply to note briefly for the record your request for the higher standard of proof, with little argument. This strategy effectively denies the opposing party a strong appellate issue in the event you win, but preserves the issue for you on appeal if you should lose.

7. Don't Assume that General Objections are Sufficient

It can be tempting in a long charge conference, where the judge's patience is wearing thin, to rely too heavily on general objections in lieu of specific objections to the charge. But beware of general, catchall objections. If you say, "We object to all of the instructions on malice," it may later be ambiguous which instructions precisely were included in that objection. Instead, offer the general and the specific. For example, say, "We object to all of the instructions on malice, including but not limited to Instructions 2 and 3," and then clearly state the specific grounds for your objection. Carefully laying this groundwork will provide you a much better record on appeal.

8. Don't Speak in Generalities about Prejudice and Confusion

At the charge conference, a general objection that a proposed instruction is prejudicial, or that it will confuse the jury, will not get you very far. The objection sounds like boilerplate, and the judge is likely to ignore it as such. Instead, paint a picture. Explain to the judge precisely how the jury will be confused, or why the instruction will hurt your client. Not only will the judge be more likely to change the instruction, but if the verdict comes out the wrong way, you will have a far stronger appellate argument about prejudice or confusion if the record shows that you warned the trial judge of precisely this problem at the conference.

9. Don't Let Your Objection Fade Away

Repeat and reincorporate your objections to eliminate any danger of waiver. For example, even if you have made detailed objections at the charge conference, after the judge gives the actual charge, ask to be heard briefly at sidebar (on the record) to reincorporate your objections from the conference, and repeat the most salient objections. Be sure to make all objections on the record. If a colloquy occurs about the jury charge when the court reporter is not present, repeat it when you are on the record. If there is no court reporter at sidebar during argument on an instruction, insist on going on the record.

10. Don't Let Your Record Get Muddy

Charge conferences can be long, and they happen at the end of trial, when everyone is tired. Don't let this make you lazy about making your record. Avoid statements like, "On the next instruction, we have the same objection we discussed earlier, your honor, on the definition of a hostile work environment." This may make sense to the judge and the parties at the moment, but it looks like a mess in the record later. Which instruction is "next," and what exactly is the "same objection," and precisely which issue were you discussing earlier? Instead, be crisp and specific: "On Instruction 11, we object to the proposed definition of hostile environment, and instead request that the term be defined as an environment 'sufficiently severe and pervasive as to alter the conditions of employment.'" Eliminate from the record any doubt as to what your position is.

It can be a challenge even for experienced trial lawyers to keep one eye on the present trial, and one eye on the future appellate record, as the charge conference requires. If you have more than one attorney on your trial team, consider designating one person to handle the charge conference, while the other attends to the closing argument and other end-of-trial matters. Taking the time to prepare well for the conference will pay big dividends, both in persuading your judge to adopt your instructions here and now, and building an appellate record you will be thankful for later.

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