ISSUES IMPACTING YOUR STRATEGY FOR THE COURT'S CHARGE TO THE JURY

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This article provides an over view of issues associated with drafting the jury charge, preserving error and the submission of the charge to the jury. The deadlines for submitting proposed jury questions and instructions are set forth in Federal Rule 51.[1] Rule 51 states that "[a]t the close of evidence or at any earlier reasonable time that the court orders, a party may file and furnish to every other party written requests for the jury instruction it wants the court to give."[2] Rule 51 also permits the trial to set forth the deadlines for proposed jury questions and instruction through its Pre-trial Order.[3] The materials required to be submitted with the Pre-trial Order are contained in each district's local rules. For example, the Southern District of Texas provides a form and instructions for the Pre-trial Order in Appendix B to the local rules.[4]

Drafting the Charge

When drafting the proposed jury charge, it is important to take into consideration the type of case being tried in order to determine the type of charge most advantageous to the case. Federal Rule of Civil Procedure 49 sets forth two different types of charges that, depending on the type of case, may be submitted to the jury.[5] Ultimately, the judge is responsible for preparing the charge but usually bases the submitted charge on the proposed questions prepared by counsel.[6] Depending on the complexity of the case and governing laws, the practitioner must determine whether to submit a charge that elicits a general or a special verdict or a combination of the two.[7]

Rule 49(a) provides the requirements for a special verdict.[8] "In theory, special verdicts compel the jury to focus exclusively on its fact finding role. Special verdicts also empower the judge to play a more prominent role by applying the law to the jury's findings."[9] When a special verdict is sought, the charge submitted to the jury requests that the jury answers a series of

factual questions without making a determination of who prevails.[10] The Court then applies the applicable law to the jury's answers to determine the outcome of the case. The special verdict avoids issues associated with the jury knowing the legal implications of their answers and is thought to remove juror bias from the proceedings. In addition, since there are specific factual findings, it streamlines post-trial motions and issues and provides specific findings for the appellate court to review if the case is appealed.[11] Overall, special verdicts are generally favored over general verdicts.[12]

General verdicts permit the jury to determine who will win the case and can take the form of a single sentence specifying the winner.[13] This form is disfavored but when used, the general verdict form usually includes interrogatories addressing specific fact issues necessary for the verdict which are also submitted to the jury for determination.[14] The Ninth Circuit explained:

> Juries rendering general verdicts face a dual task. First, they are responsible for finding facts, which are reflected in their answers to special interrogatories. Second, they must reach a general verdict by applying law to their findings of fact. To help reach a general verdict, the court must often provide a very long and detailed explanation of the law. Needless to say, lay jurors are often left confused and befuddled by the court's instruction.[15]

Due to the nature of the general verdict, it is now common for special interrogatories to be included as part of a general verdict form, which for all practical purposes renders the general and special verdict forms nearly the same.[16] However, how the jury form is classified is important for determining whether there has been a waiver of issues.[17]

It is important to note that although most states have pattern jury charges available for most causes of action arising under state law, federal courts may disregard the forms. In diversity cases, "the substance of jury charges is governed by state law, but the form or manner of giving the instruction is controlled by federal law. . . The charge must accurately describe the

state law, but the court has wide discretion in formulation the charge."[18] As such, the court is not required to use or follow state pattern jury charges.[19] This means that in states like Texas, which requires, whenever feasible, a broad form submission of jury questions, there may be a very different jury charge for the same cause of action, depending on whether one is in federal or state court.[20] For example, a judge in the Western District of Texas determined that the proposed question taken from the Texas Pattern Jury Charge was too broadly worded for the limited issues left in the case and disregarded the instruction based on the pattern jury charge.[21] On appeal, no error was found and the judge was acting within his discretion in crafting the charge.[22]

Objections to the Jury Charge

Although the court has broad discretion in its wording and choice of language incorporated into the charge, a party must specifically object to any perceived incorrect instructions or questions included in the charge as well as object to instructions or questions omitted. Objections are usually made at the charge conference, or as promptly as possible once the party is notified that the instruction or request at issue will be given or refused.[23] Rule 51(c) states that "[a] party who objects to an instruction or the failure to give an instruction must do so on the record, stating distinctly the matter objected to and the grounds for the objection."[24] The objections are usually to be made after the court informs the parties of its proposed charge before the charge is read to the jury.[25] Parties are required to inform the court of any objections to the charge in a manner that provides the court sufficient information to act on the objection.[26] The Fifth Circuit explained, that "[w]ithout more, a pretrial request for instructions or interrogatories is ordinarily insufficient to preserve error. . ."[27] Likewise, general objections to the charge are insufficient to preserve error.[28]

If a special verdict charge is submitted to the jury, a party just object to "any issue of fact raised by the pleadings or evidence but not submitted to the jury" on the charge or the party has waived its right to a jury trial on that issue.[29]

> A party has the burden to request the submission of its issues to the jury and to request instructions on each such issue. If a party neither requests submission of an issue nor objects to the omission of that issue from the special interrogatories given to the jury, such party is deemed to have waived the right to have the jury determine that issue. Likewise, failure to object to the wording of a special issue prevents a party from objecting to such wording on appeal.[30]

Courts strictly construe Rule 51 and require strict adherence to its specifications. Because of the potential of waiver, the best practice is to submit in writing the exact wording of the proposed interrogatories and instructions requested to be presented to the jury and secure a ruling from the judge on the proposed language. If the court does not submit the proposed question or instruction, an objection should be made to its exclusion as well. This should satisfy all the requirements of Rule 51(c).

Many states mirror federal practice with some twists not found in the Federal Rules. For example, Rule 51(b)(2) of the Nevada Rules of Civil Procedure follow the basic language of Federal Rule 51; however, Nevada Rule 51 requires the court to write the words "refused" in the margin of any instruction or request that the court declines to give. Further, the Court is required to write any modifications on the proposed instructions and requests. All of these materials then become part of the Court's trial record.[31] If feasible, it would be beneficial to request the court follow the procedure as outlined in the Nevada rule in order to provide a clear and concise record of the proposed instructions and any modifications thereto.

Although Rule 51 specifically sets forth the process for objecting to the charge, if an error in a jury charge affects a substantial right, the court will review the instruction under the plain

error analysis even though an objection had not been previously lodged.[32] Under a plain error analysis, it must be established that (1) there was an error, (2) the error is plain, and (3) the error affects substantial rights, and (4) "the error seriously affects the fairness, integrity or public reputation of judicial proceedings."[33] The purpose of the plain error examination in cases where a party fails to object to the omission of a proper question or instruction or the inclusion of an improper one, is to "to prevent a miscarriage of justice" when there is clearly error under the applicable law.[34] Despite this exception to requirements of Rule 51(c) and (d)(1), reversal under a plain error analysis is rare and primarily reserved for cases in which the error is blatantly obvious.

Submission of the Charge and Judicial Comments on the Evidence

At the time the charge is read to the jury, federal judges are permitted to comment on the evidence as long as the court explains to the jury that the jury should make its own determinations regarding the evidence and facts in dispute.[35] Although the court is permitted to comment, the court is not obligated to do so. For those who primarily practice in state court, depending on the jurisdiction, allowing a judge to comment on the evidence is inapposite to the state court rules. For example, in Texas, Rule 277 of the Rules of Civil Procedure specifically forbids the court from directly commenting on the weight of the evidence or "advising the jury of the effects of their answers."[36]

Conclusion

Rule 51 sets forth a fairly stringent standard for the preservation of error in jury charges. As discussed above, a party can unwittingly waive its right to have a jury determine a particular factual issue if the issue is omitted from a charge designed to elicit a special verdict. Further, the rules require specific objections be made on the record to any objectionable portion of the jury

charge or to any requested instruction or interrogatory that was omitted from the charge. Otherwise, error is waived unless there is plain error affecting the substantial rights of the party.

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[1] FED. R. CIV. P. 51.
[2] FED. R. CIV. P. 51(a).
[3] *Id.*
[4] http://www.txs.uscourts.gov/district/rulesproc/dclclrl2009.pdf
[5] FED. R. CIV. P. 49.
[6] *Floyd v. Laws*, 929 F.2d 1390, 1395 (9th Cir. 1991).
[7] *Id.* (explaining that a form for general verdicts with accompanying special interrogatories is virtually identical to a charge submitted for a special verdict).
[8] FED. R. CIV. P. 59(a).
[9] *Floyd*, 929 F.2d at 1395 (internal citations omitted).
[10] *Id.*
[11] *Davis v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 906 F.2d 1206, 1220 (8th Cir. 1990).
[12] *Id.*
[13] *Floyd*, 929 F.2d at 1395.
[14] FED. R. CIV. P. 49(b).
[15] *Floyd*, 929 F.2d at 1395.
[16] *Id.*
[17] FED. R. CIV. P. 49.
[18] *Broadcast Satellite Int'l, Inc. v. Versus Nat'l Digital Television Ctr., Inc.*, 323 F.3d 339, 347-48 (5th Cir. 2003).
[19] *Id.* at 348.
[20] TEX. R. CIV. P. 277 ("In all jury cases, the court shall, whenever feasible, submit the cause upon broad-form question. The court shall submit such instructions and definitions as shall be proper to enable the jury to render a verdict.").
[21] *Broadcast Satellite Int'l, Inc.*, 323 F.3d at 348.
[22] *Id.*
[23] FED. R. CIV. P. 51(c)(2).
[24] FED. R. CIV. P. 51(c).
[25] FED. R. CIV. P. 51(b).
[26] *McDaniel v. Anheuser-Busch, Inc.*, 987 F.2d 298, 306 (5th Cir. 1993).
[27] *Id.*
[28] *Russell v. Plano Bank & Trust*, 130 F.3d 715, 720 (5th Cir. 1997).
[29] Fed. R. Civ. P. 49(a)(3).
[30] *McDaniel*, 987 F.2d at 306.
[31] N. R. C. P. 51.
[32] FED. R. CIV. P. 51(d)(2).

[33] *Prod. Specialties Group v. Minsor Sys*., 513 F.3d 695, 700 (7th Cir. 2008).

[34] *Cooley v. CSX Transp., Inc.*, 376 Fed. Appx. 387, 2010 U.S. App. 8619, at *6 (5th Cir. 2010).

[35] *Sandidge v. Salen Offshore Drilling Co*., 764 F.2d 252, 262 (5th Cir. Tex. 1985) ("Although the district court has the right to comment on the evidence, it may not comment on the ultimate factual issues to be decided) (citing *Belton v. Fibreboard Corp*., 724 F.2d 500, 505 (5th Cir. 1984)).

[36] TEX. R. CIV. P. 277.