

[Commentary](#)

6 Ways to Avoid the Most Common Mistakes Trial Lawyers Make on Jury Charges

The jury charge conference is one of the most critical parts of the trial. How can litigators navigate the complex process for making tenders and objections to ensure error preservation.

By **Steven J. Knight** | March 12, 2019 at 03:45 PM

The jury charge conference is one of the most critical parts of the trial. Every word in the definitions, instructions and questions can influence how the jury responds and must be given careful deliberation. Equally important is navigating the complex process for making tenders and objections to ensure error preservation. With that, here's how to avoid the most common mistakes on jury charges.

Prioritize and Prepare Early

Prepare the charge early. As trial approaches, trial attorneys are sometimes overwhelmed with getting the case ready. Preparing a comprehensive and well-reasoned jury charge is often put behind other pressing priorities. The better practice is to have a draft of the jury charge prepared early in the case. This will help identify critical elements of the claim or defense, which not only enables targeted discovery but also streamlines the process of preparing the final jury charge in time for the charge conference.

Lodge Objectives in a Timely Manner

Objections to the jury charge must be timely or they are waived. The trial court is required to allow the parties a reasonable amount of time to inspect the charge and make objection. (See Tex. R. Civ. P. 272.) Thereafter, "objections shall in every instance be presented to the court ... before the charge is read to the jury." *Id.* Objections lodged after the charge is read to the jury are too late. Additionally, objections lodged after the formal charge conference but before the charge is read to the jury may also be too late. Therefore, being fully prepared to make all necessary objections and tenders at the formal charge conference is critical.

Ensure Error Preservation

Objections and tenders must be in the proper form or they are waived. “There should be but one test for determining if a party has preserved error in the jury charge, and that is whether the party made the trial court aware of the complaint, timely and plainly, and obtained a ruling,” the Texas Supreme Court stated in 1992 in *State Dept. of Hwys. & Pub. Transp. v. Payne*. Nevertheless, knowing when to simply object or to object and make a written tender continues to be the most challenging aspect of the charge process. The following guidelines will help ensure that error is preserved:

- If the court includes an erroneous or defective question, instruction, or definition, object regardless of who has the burden of proof. See Tex. R. Civ. P. 274 (“Any complaint as to a question, definition, or instruction, on account of any defect, omission, or fault in pleading, is waived unless specifically included in the objections”).
- If the court omits an instruction or definition, object per Rule 274 and make a written request no matter who has the burden of proof. See Tex. R. Civ. P. 278 (“Failure to submit a definition or instruction shall not be deemed a ground for reversal of the judgment unless a substantially correct definition or instruction has been requested in writing and tendered by the party complaining of the judgment”).
- If the court omits a question on which the party has the burden of proof, object per Rule 274 and submit a proper question. See Tex. R. Civ. P. 278 (“Failure to submit a question shall not be deemed a ground for reversal of the judgment, unless its submission, in substantially correct wording, has been requested in writing and tendered by the party complaining of the judgment; provided, however, that objection to such failure shall suffice in such respect if the question one relied upon by the opposing party”).
- If the court omits a question or an aspect of a question on which the other party has the burden of proof, objecting without tendering a question generally preserves error. See Tex. R. Civ. P. 278; see also *Mangum v. Turner*, 255 S.W.3d 223, 227 (Tex. App.—Waco 2008) (“If a question on a ground of recovery is omitted, or the question omits some essential element of a ground of recovery and is submitted to the jury over the objection of the party without the burden of proof, the party who objected to the partial submission is entitled to judgment, even if the jury returns a finding on the submission in favor of the party with the burden of proof”).

Carefully Scrutinize

Give the court’s final jury charge undivided attention before the formal charge conference. Scrutinize every word, and notate any problems with the charge so a proper record can be made during the formal charge conference. Are the questions supported by legally sufficient evidence? Are the questions supported by the pleadings? Are the legal theories submitted valid? Does the charge omit important definitions, instructions or elements? Does the charge include irrelevant or incorrect definitions, instructions, or elements? Do any of the questions conflict? Does any language unfairly comment on the weight of the evidence? Does the charge commingle valid and invalid theories? Does the charge lump multiple categories of damages under a single award? These are just a few of the many issues attorneys must be prepared to address at the formal charge conference.

Create a Record

During the formal charge conference, when an objection is appropriate, identify the error with a specific reference to the affected portion of the jury charge, explain the problem with precision, inform the court what should be done about it and secure a ruling on the record. When a tender is appropriate, tender a correct version of the definition, instruction or question, and if the court refuses it, ask the court to notate such refusal on the tender, and make sure it is made part of the record for appeal.

Consider Outsourcing

Handling the jury charge and charge conference takes a considerable amount of time and attention. Often, trial lawyers simply do not have time given the demands of a trial. Consider outsourcing this task to an experienced appellate attorney, so you can focus time on trial strategy, knowing that any jury charge error will be preserved for appeal.

Steven J. Knight is a shareholder and appellate practice chairman at Chamberlain, Hrdlicka, White, Williams & Aughtry.