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## Jury Charge: An Essential Tool Throughout Litigation

by David Bissinger and Kurt Kuhn

There are many pressures that can push preparation of the jury charge to the bottom of the trial lawyer's to-do list. But resisting them pays dividends in the form of more effective discovery; more successful motions; and more discerning case evaluation, mediation and settlement.

Most courts require preparation of the charge late in the scheduling order. The client may resist paying for that task until it is due, and procrastination plays a role, too. Sometimes counsel may not really focus on the charge until the informal charge conference, after the close of evidence. But this can be a chaotic point in the litigation process. As the Texas Supreme Court noted in *State Department of Highways & Public Transportation v. Payne, et ux.* (1992), the hectic nature of the charge conference can frequently lead to "even well prepared counsel scribb[ing] [proposed instructions] out in long-hand sitting in the courtroom."

Waiting until the last minute not only makes mistakes more likely, it also increases the likelihood that trial counsel will lose track of the theory of the case, the law and the evidence needed to prove that theme at trial.

Good trial lawyers know better. Early preparation of the jury charge will make an attorney try a better case, even if the case never reaches the jury. As trial lawyer Robert Belz wrote in a 1991 issue of the Michigan Bar Journal, early preparation of the charge helps the lawyer see the case "as a single tapestry." Indeed, as Belz puts it, the "threads of

the instructions should run through the entire work of art."

Trial lawyers should prepare the charge immediately. For plaintiffs lawyers, that means preparing the applicable charge before filing suit. Likewise, defense counsel should begin to prepare the charge before filing the answer, motion to dismiss or other responsive pleading. As Frank Jones observes in his book "Lessons From the Courtroom," "Without knowing what the jury is going to be asked there is no way you can focus on developing the evidence you will need to prevail successfully at trial."

### Using the Charge

Here are four stages in litigation during which attorneys should be mindful of the charge.

*The charge in discovery.* Pretrial practice tempts lawyers to look at everything relevant everything that is, as Federal Rule of Civil Procedure 26 puts it, "reasonably calculated to lead to the discovery of admissible evidence." But that wastes time, money and the chance to focus the case into a winner.

Instead, the trial lawyer should use the charge to formulate the theory of the case and the evidence the lawyer needs to win. As timeconsuming as this project appears, preparing the case in the context of the charge will give rise to the fact-based themes the lawyer needs to try the case.

That, in turn, allows the trial lawyer to focus written discovery requests, third-party subpoenas and even deposition examinations on the issues

that matter for trial. Using the charge to assemble the chronology allows the lawyer to formulate a discovery strategy that weaves the threads of the instructions the law into the factual tapestry of the case.

*The charge in discovery motions.* The use of the charge in discovery pays another dividend in cases in which the trial lawyer's adversary fails to produce responsive documents. In many cases, parties file motions to compel that simply recite random discovery request items without thematic organization.

But by coupling the charge with the discovery process, the trial lawyer will prepare motions to compel that focus the court on what the parties need to try the case. The trial lawyer can use the charge's language in the motion to show in the context of the facts of the case the thematic categories of documents the court should order produced (or, in opposing the motion, refuse to order).

*The charge in summary judgment.* All lawyers know that a court grants a summary judgment when the movant shows that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. All lawyers also know (or should know) that most trial judges rely on pattern jury charges as the main source for instructing the jury.

Yet few motions for summary judgment use those charges. By using the charge in summary judgment briefs, the lawyer will focus her argument around the genuine issues of material fact. The charge will often help avoid needless string citations or extended discussions of the meaning of the law. Most important, the charge will empower the judge to rule on summary judgment motions in the context of a handy and familiar source of law.

*The charge in evaluation, mediation and settlement.* In the age of the vanishing jury trial, the vast majority of cases settle. But parties in mediation or

settlement discussions negotiate "in the shadow of the law," as legal scholar Robert Mnookin observes in his book, "Bargaining With the Devil: When to Negotiate, When to Fight."

The charge, once again, provides the parties and their counsel with the best tool to evaluate the legal issues critical to the outcome of the case. Many cases involve feelings of betrayal, injustice or overreaching. The charge helps the parties and their counsel see how those emotions will play out in the courtroom.

In short, "If you don't know where you're going, you might not get there," as Yogi Berra warned in "When You Come to a Fork in the Road, Take It!: Inspiration and Wisdom From One of Baseball's Greatest Heroes." Early and frequent use of the jury charge will serve not only as a map, it will also make a lawyer more persuasive. By weaving the charge into every phase of pretrial preparation, trial counsel will find herself with a much more organized, cogent and appealing case.

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