CREATING THE JURY CHARGE

AND

SELECTING THE JURY:

HOW CAN THE LEGAL ASSITANT HELP?

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CREATING THE CHARGE

Introduction

The purpose of this paper is not to give a CLE for lawyers on how to draft a proposed charge, request Questions and Instructions, and object to any instruction or question that is erroneous. There are plenty of CLE papers available to lawyers and legal assistants for that purpose. The use of the term "creating" is intentional, because if done properly the final product—the charge—should reflect thought put in from the moment your boss takes the case.

Resources

Much of the practice of law is an exercise in plagiarism.[1] We rarely want to reinvent the wheel and doing so when creating a charge is particularly dangerous. Finding what has worked before and adapting it to the facts and legal theories of the case is the safest course. So, where do you look for material?

(1) Texas Pattern Jury Charges, published by the State Bar of Texas. There are several volumes covering most of the types of cases routinely tried in Texas. This should be the first resource you consult. If it is in the PJC, and the questions and instructions are properly adapted to your case, it will probably be accepted by the trial and appellate courts. Depending on your practice area, this may be all you need. Every family lawyer I spoke with on this subject stated that when they do have a jury trial—rare these days—they exclusively use the PJC.

(2) Texas Court's Charge Reporter, published by Lexis Nexus. This is a compilation of actual charges submitted to juries in cases throughout Texas. This is available at the Denton County Law Library. It is a little tricky to use as the charges are compiled by year and the Index is not the best. This resource has lots of charges with multiple parties and legal theories not routinely encountered. If you can find one that fits your case it will probably be accepted by the trial judge because your attorney can point out that it was used in a previous trial.

(3) Dorsaneo, Trial Practice, Lexis Nexus. This multivolume treatise contains the proper format for requesting Questions and Instructions at trial. There are other form books and online sources. I prefer this one because the form is connected to a

[1] Actually plagiarism is the act of fairly using the work of another without properly attributing the work to the author.

section of the treatise that explains the law. Westlaw Document and Form Builder is an online resource and I am sure Lexis has a similar system.

(4) Various CLE articles available from the Texas Bar CLE's online library. If your lawyer is a member of the College of the State Bar you can get them free.

(5) Key cases cited in the above.

(6) The files in your office. If you have had a similar case see what you or your boss did in the past. If you scan and index the files you don't even need to go to the warehouse and pull the closed files. If your office does not already do it, set up a forms file that contains "jury charges," "trial briefs" and similar materials that will come in handy at future trials. I regret that I am not that organized, so my search for a prior charge usually goes something like this:

> Lawyer: "What was the name of the client where we sued the oil company for dumping salt water?" It starts with a G, or it could be a C."
>
> LA: "When was that?"
>
> Lawyer: "I don't remember, maybe 5 or 6 years ago. Could be 10."
>
> LA: "I did not work for you then."
>
> Lawyer: "Well, call Sally. She will know."
>
> LA: "We have not heard from her in a couple of years. I heard she moved to Alaska to live off the grid with her new husband. I forget his name"
>
> Lawyer: "I really need that charge. This case is just like that one."
>
> LA: "Maybe I can call opposing counsel. What is his name?
>
> Lawyer: "That Dallas creep? He is a real jerk, did everything the hard way, filed unnecessary motions at 4:59 on Friday and every other dirty Dallas lawyer trick I know. He wouldn't give me the time of day. Besides I heard he had a stroke and is in a nursing home. Karma is a real Bitch. We could go to the district court website and find all the cases I have been involved in. Wait, that won't work. We tried that case in Scurry County. Besides we would have to know the name for them to even look it up. Never mind, if it doesn't come to my feeble mind by tomorrow I'll just do a new charge.

If your boss is a detail person with a great memory you may not have such things happen. I am a big picture guy. Most lawyers are. I learn the details when the case is going hot and heavy, but if it is a one-time case and a one-time client those details get vague pretty quickly after the case closes.

When I began the practice of law there were IBM typewriters and copy machines that were very slow, one page at a time. J. Harris Morgan of Greenville was the State Bar guru on how to organize and practice law. He recommended the "whiskey box" method of storing and retrieving briefs, jury charges and similar matters that one might want to use again. "Take the brief and throw it in the whiskey box. Give it a number and write, e.g., "Brief regarding admissibility of dead man's statement, Jones case" and note that description and number on a legal pad kept in the top of the box.

Computers give us a big edge today. They are a high-tech whiskey box, if we will only use them. Lawyers are well meaning but do not follow through. If your attorney drafts a brief, motion, order, judgment, or jury charge don't wait for him to tell you to save it, and don't rely on him to do it himself. Just do it! Put it in the form file and index so you, your boss or your successor can find it again. It will be available even if the case file and the client whose name you have forgotten are long gone, and the creepy Dallas lawyer has gone to his just reward.

If you already do the above tell your boss I said you deserve a raise.

How to begin the jury charge:

In law school we are taught to draft the charge before filing the case. If that is done all the elements that will have to be proven at trial are stated in the charge. Then the petition can be drafted. When the case is filed you have the game plan, i.e. that allegations that must be proven for your client to win.

Similarly if your client is sued and it is apparent that affirmative defenses need to be asserted draft the jury question and any instructions that should go with it. Even if your boss decides to file only a general denial and wait until after discovery to assert the affirmative defenses you are ahead of the game. Many of the questions regarding affirmative defenses are in the Pattern Jury charges. Most affirmative defenses are set forth in TRCP 94, and there are sections in the PJC that show how to submit them. Some pleas need to be verified so make sure to look at Rule 93 to see if verification is required. Lawyers sometimes overlook this, and if the plea is not verified the court will sustain an objection to evidence supporting the matter. *Pledger v. Schoelkopf,* 762 SW2d 145, 146 (Tex. 1988).

If your lawyer does not follow his law professor's advice.

Most lawyers to not draft the charge first thing. They want to get the case into court, do discovery and force a settlement or go to trial. Many times the charge becomes an afterthought. You and your boss should read *State Department of Highways and Public Transportation v. Payne*, 838 S.W.2d 235, 240 (Tex. 1992). There the Court described what usually happens:

> The preparation of the jury charge, coming as it ordinarily does at that very difficult point of the trial between the close of the evidence and summation, ought to be simpler. To complicate this process with complex, intricate, sometimes contradictory, unpredictable rules, just when counsel is contemplating the last words he or she will say to the jury, hardly subserves the fair and just presentation of the case. Yet that is our procedure. To preserve a complaint about the charge a party must sometimes request the inclusion of specific, substantially correct language in writing, which frequently requires that even well prepared counsel scribble it out in longhand sitting in the courtroom. The rules of procedure require that the judge endorse each request with specific language, although sometimes this requirement is ignored. Sometimes a request is not sufficient and may not even be appropriate; instead, counsel must object. The objection must be specific enough to call the court's attention to the asserted error in the charge. It is not clear whether a request will serve as an objection or an objection as a request. Rather than attempt to decide under the pressure of the courtroom and in peril of losing appellate rights, whether an objection or a request is called for, cautious counsel might choose to do both in all cases—request and object. But if they are not kept separate, or if an appellate court later decides that the duplication obscured the real complaint, counsel's precaution may still result in a decision that the complaint was waived.

The *Payne* case should be read and reread by any trial lawyer and any legal assistant who is going to assist in drafting the charge or arguing over it at trial. I cite it here because it accurately depicts the chaos that happens at the conclusion of trial, when the judge is cranky, the jurors want to go home, and the lawyers are trying to structure an argument that will lead to glorious victory.

Most cases are now tried with a scheduling order or under a local rule that requires the lawyers to submit their proposed questions and instructions pre-trial and on a thumb drive. Often this is done the night before the deadline, and these are usually about a C Plus quality. There is really no excuse for this since it is like an untimed test where you can use the textbook. I plead guilty to sometimes succumbing to this, and I know other good lawyers do too. We underestimate the time it will take and put it off to the last minute. Push your lawyer to do this earlier and go over the elements that your side must prove or the defenses that you are going to assert. See if these elements are alleged in the pleading, and if not file an amendment.

Do the same with the other side's pleadings to see what to anticipate from them.

Check to ensure that the questions and instructions you intend to request dovetail with the elements or defense you intend to prove. Check the other side and if the elements and allegations do not match up make a note so your lawyer can prepare an objection.

Check with the court coordinator well ahead of trial to see what the judge expects. Some judges want all instructions contained in the main charge and others want the instruction that pertains to the question stated in the questions. I like the second method and I would draft the requests for inclusion in the charge this way.

Some defenses are now stated as inferential rebuttal matters as part of the question rather than having a separate question. Waiver is one such defense that is now presented as part of the question.

If you have planned far enough in advance and drafted the charge that you and your attorney think is correct wait a few days and read it carefully. Does it confuse you? Have a layman read it. Does it confuse her? How? If this is a problem rethink how to clarify the charge.

These are just some of the things a legal assistant can do to help her boss. The most important one is to push him to work on the charge in advance. Mistakes are made under pressure.

One other thing that can help is to draft a list of objections to jury charges that have been sustained, and those that have not. There is a good list in O'Connor's TRCP. Put that list on a page and put it in the trial notebook. It is a handy reference for your boss when it comes time to object to the charge.

I hope this is helpful. I am sure there are items I have not included that you and your boss can come up with.

Selecting the Jury

More has been written about this than any other aspect of trying cases. There are any number of treatises on how to do it. Theories spawn more theories. I have read a lot of it and must confess that I know as much about it as any other honest lawyer. That is, not much.

I am a big fan of using legal assistants, secretaries, clerks, interns, and clients to help me select a jury. When the lawyer is on his feet talking to the jury panel he cannot watch each one at all times. If I am talking to Mr. Jones I need to pay attention to him. I cannot see Mrs. Smith nodding her head in approval. I cannot see Mr. Snodgrass folding his arms and turning away in disgust.

Jury consultants are usually psychologists or come out of a similar discipline. They charge big bucks to analyze the panel, tell you who to pick and who to exclude, what kind or questions to ask and what kind to avoid. They can arrange mock jury trials where you put on one side of the case, your colleague puts on the other and jurors who are paid to listen then deliberate while you watch on closed circuit TV. They can also arrange for the "jurors" to observe the "trial" and register their reactions on electronic devices that produce a green ascending line on a chart when they approve and a red descending line when they do not like what they are hearing. Unless your client has very deep pockets and lots is at stake, or you are trying to hit home run and financing a catastrophic injury case you will not, cannot afford their services.

I am a firm believer in enlisting ordinary people to be my jury consultants. So if your boss wants you to assist in selecting the jury here are some suggestions.

(1) Once you know substantially what the evidence in the case is, talk to other folks about it. [CAUTION: GET YOUR BOSS'S PERMISSION]. Remember you are dealing with some matters that a privileged and some that are confidential under the Rules of Professional Responsibility. I recommend to any lawyer who is going to try to do informally what a jury consultant would do formally tell your client what you are going to do and get her permission.

(2) Summarize the case without using names of the parties. Try not to use pejorative terms to describe your opponent. Disclose the good, the bad, and the ugly about the case. Don't even tell what side of the case you represent. Ask your friends what they think. Try not to put words in their mouth. You

want their opinion, not assurances that your case is fool proof. Ask them what appeals to them about each side of the case, and what they don't like.

(3) Lawyers often do this informally, but we do it with our fellow attorneys. My experience tells me that lay people often see things differently, and these are the folks that are going to be on the jury. Analyze the reactions you get and modify your voir dire questions accordingly.

(4) Before the trial strategize with the lawyers, the client and any others who will be in the courtroom during the voir dire. Come up with some open ended questions to pose to the jury. Asking leading questions about any topic is not likely to get you anywhere. We want to come up with inquiries about subjects and ask the jurors what they think. We want to get them to talk, not make a speech to them. The legal assistant can help prepare the script of questions.

(5) Unless you have a pretty good idea what your lawyer should ask the jury, you might check a book out of the law library or look online for areas of inquiry suggested for particular types of cases. I like the two volume set L. Blue and R. Hirschhorn, Blue's Guide to Jury Selection (West and ATLA 2003). There are many others.

(6) At the court house on day of trial get there early and watch the prospective jurors. You may see or hear something that will not come out during voir dire examination. I know lawyers who will post agents in the parking lot to see what cars particular folks drive and what bumper stickers they have.

(7) All notes need to be taken by others. The lawyer is best off with no notes, only the seating chart with the juror's names. Let the legal assistant, client, co-counsel, clerk or others enlisted make notes not only about what is said, but reactions, facial expressions, body language or other conduct that might give a clue to whether a particular juror might be good or bad for your case.

(8) Do not disregard demographics altogether, but society has changed and attitudes and outlook on life can be surprisingly similar.

(9) Make the same notes and observations when the other side conducts its voir dire.

(10) When the court tells you to make your strikes go to a conference room with the rest of the team and discuss. You generally will not have more than 20 minutes. Discuss why you like or don't like each juror. In district court you get 6 strikes a side in a two party case so there is no reason to consider anyone past no. 24 of the jurors who still remain on the panel (some will disqualify during the voir dire).

(11) Quickly go around to each member of the team and find out who they think should be struck and why. Sometimes it will be apparent to all and sometimes there will be differing opinions. The lead lawyer breaks all ties.

(12) During the trial help your lawyer watch the jury. See how they react to the lawyer's the clients, the witnesses. Sometimes you will notice something that will help your lawyer decide how to modify the examination of future witnesses and what to present on rebuttal.

In most federal courts the judge will not allow the liberal voir dire examination permitted in Texas courts, and conduct the voir dire from the bench. Each side can submit written questions which the judge may, but does not have to, ask. When the judge is finished he will generally give the lawyers 5 or 10 minutes to ask follow up questions. This is little better than pulling names at random out of a hat. The federal judge wants to put 12 butts in the jury box, and the sooner the better. The lawyers want an opportunity to find something about the jurors that will give their client a fighting chance. There is a silver lining: In the Eastern and Northern Districts of Texas most of the judges had a Texas practice, understand and appreciate the voir dire process, and will let the lawyers pick the jury.

Some Texas courts place strict, and in my opinion unreasonable, time limits on voir dire. When there are time limits the presentation must be limited accordingly. Our local judges will generally permit a reasonable time for voir dire. I am grateful for this because I talk slow, but I think fast.