

# *How to* **Research & Draft Effective Jury Instructions**

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## *When to Propose Jury Instructions*

“The request must be made at the close of the evidence or at any earlier time that the court reasonably sets.”

Fed.R.Crim.P. 30(a)

**practice tip:** include footnote in request for instructions that reserves right to propose additional instructions in response to matters arising after request.

# *When to Propose Jury Instructions – Judge Robinson*

“In criminal cases, the deadline for pretrial submission of jury instructions is set by the Court in its General Order of Discovery and Scheduling. In criminal cases, you may access Judge Robinson’s standard or stock instructions at [www.ksd.uscourts.gov](http://www.ksd.uscourts.gov) under the section for Judge Robinson’s chambers. You need not submit proposed instructions that are covered in the stock instructions (for example, instructions concerning the jury’s deliberations, the evaluation of witnesses’ credibility, the burden of proof). The Court’s standard or stock instructions DO NOT include offense-specific instructions; it is the parties’ responsibility to propose such instructions.”

# *When to Propose Jury Instructions – Judge Robinson*

“To be considered timely filed, the parties in civil and criminal cases must do two things by the filing deadlines: (1) electronically file the proposed instructions; and (2) submit the proposed instructions (formatted in WordPerfect or Word) as an attachment to an e-mail sent to [KSD\\_Robinson\\_Chambers@ksd.uscourts.gov](mailto:KSD_Robinson_Chambers@ksd.uscourts.gov).”

# *How to Preserve a Claim of Error re: the Denial of a Proposed Instruction*

“A party who objects ... to a failure to give a requested instruction must inform the court of the specific objection and the grounds for the objection before the jury retires to deliberate.”

Fed.R.Crim.P. 30(d)

“The rule retains the requirement of a contemporaneous and specific objection (before the jury retires to deliberate).”

Adv. Comm. Notes to 2002 Amendments

# *When* Must the Court Rule on a Request for an Instruction?

“The court must inform the parties before closing arguments how it intends to rule on the requested instructions.”

Fed.R.Crim. 30(b)

# *What Happens if I Fail to Lodge a Timely & Specific Objection to the Failure to Give a Requested Instruction?*

“Failure to object in accordance with this rule precludes appellate review, except as permitted under Rule 52(b) [plain error review].”

Fed.R.Crim.P. 30(d).

Failure to request a ruling on instructions before closing argument constitutes “an acquiescence in the trial court's delay.” *United States v. Redmond*, 546 F.2d 1386, 1390 (10<sup>th</sup> Cir.. 1977)

# *What* Happens if I Fail to Lodge a Timely and Specific Objection to the Failure to Give a Requested Instruction?

Merely tendering requested instructions at a “preliminary charge conference,” followed by the failure “clearly to articulate the specific errors the trial judge would commit if he failed to give [the] requested instructions” is a waiver of the issue. *United States v. Hecht*, 705 F.2d 976, 978-79 (8<sup>th</sup> Cir. 1983).

# *What Constitutes an Ineffective Attempt to Preserve a Claim of Error Arising from the Failure to Give a Proposed Instruction?*

“[A]t the final charge conference, defense counsel stated ‘any exception that we would have would be limited to the failure of the trial court to give the instructions heretofore requested, except for this I do not see any basis for objections to the instructions as given or as proposed to be given.’ And, just before the jury retired for deliberations defense counsel lodged an objection to the charge, stating ‘the Defendant takes or renews its exceptions to the charge so far as the charge does not give in words or in substance instructions requested by the Defendant.’ There having been no distinct statement of the grounds of objection at the preliminary charge conference, these generalized objections did not satisfy Rule 30.” *United States v. Hecht*, 705 F.2d 976, 978-79 (8<sup>th</sup> Cir. 1983).

## *Examples* of Instructions to Request: Limiting Instruction

“If the court admits evidence that is admissible against a party or for a purpose—but not against another party or for another purpose—the court, on timely request, must restrict the evidence to its proper scope and instruct the jury accordingly.”

FRE 105

## *Examples* of Instructions to Request: In False Statements Cases Involving Ambiguous Reporting Requirements

“In cases arising under 18 U.S.C. § 1001, which criminalizes making false statements to a government agency, the government bears the burden to negate any reasonable interpretations that would make a defendant's statement factually correct where reporting requirements are ambiguous. ... This reasoning applies equally well to the false statement element of mail fraud. It necessarily follows that, where the evidence supports a defendant's position, the jury must be instructed concerning reasonable interpretations of ambiguous requirements and the government's ensuing burden.”

*United States v. Migliaccio*, 34 F.3d 1517, 1525 (10<sup>th</sup> Cir. 1994).

# *Examples* of Instructions to Request: Aid & Abet

This law makes it a crime to intentionally help someone else commit a crime. To find the defendant guilty of this crime, you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: someone else committed the charged crime, and

Second: the defendant intentionally associated himself in some way with the crime and intentionally participated in it as he would in something he wished to bring about. This means that the government must prove that the defendant consciously shared the other person's knowledge of the underlying criminal act and intended to help him.

The defendant need not perform the underlying criminal act, be present when it is performed, or be aware of the details of its commission to be guilty of aiding and abetting. But a general suspicion that an unlawful act may occur or that something criminal is happening is not enough. Mere presence at the scene of a crime and knowledge that a crime is being committed are also not sufficient to

# *Examples* of Instructions to Request: Aid & Abet

“An intent to advance some different or lesser offense is not, *or at least not usually*, sufficient: Instead, the intent must go to the specific and entire crime charged.”

*Rosemond v. United States*, 134 S.Ct. 1240, 1248 (2014) (italics added).

**Practice Tip:** Argue that unless the Gov’t can show why this case is unusual, the instruction should not include the italicized language, which will only confuse the jury and likely cause the jury to send a question to the court.

# *Examples* of Instructions to Request: Constructive Possession

“A person who, although not in actual possession, knowingly has the power *and the intent* at a given time to exercise dominion or control over an object, either directly or through another person or persons, is then in constructive possession of it.”

Tenth Circuit Criminal Pattern Jury Instruction 1.31 (italics added), as modified by *United States v. Little*, 829 F.3d 1177, 1182 (10<sup>th</sup> Cir. 2016), and *Henderson v. United States*, 135 S.Ct. 1780, 1784 (2015).

# *Examples* of Instructions to Request: Contemporaneous 404(b)

“A contemporaneous instruction on the limited use of 404(b) evidence is preferably given *both at the time such evidence is introduced and in the court's final charge.*”

*United States v. Cuch*, 842 F.2d 1173, 1177 (10<sup>th</sup> Cir. 1988) (emphasis added).

**practice tip:** be prepared to object to prosecution argument that violates the limitations on the purpose for which the evidence is admitted

# *Examples* of Instructions to Request: Conditional Relevancy (Admissibility)

FRE 104(b) allows a court to conditionally admit evidence, subject to the proponent later proving up the foundation (e.g., authenticating an item of physical evidence)

If the proponent fails to do that, “the trial court must instruct the jury to disregard the evidence.” *Huddleston v. United States*, 485 U.S. 681, 690 (1988).

# *Examples* of Instructions to Request: Theory of Defense

“As a general proposition, a defendant is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor.” *Mathews v. United States*, 485 U.S. 58, 63 (1988).

## **practice tips:**

- avoid argumentative instruction
- explain why a specific instruction is needed – not already covered
- avoid evidentiary detail – use abstract statement of law instead

# *Examples* of Instructions to Request: Conspiracy Mens Rea

“in order to sustain a judgment of conviction on a charge of conspiracy to violate a federal statute, the Government must prove at least the degree of criminal intent necessary for the substantive offense itself.”

*United States v. Feola*, 420 U.S. 671, 686 (1975).

But Tenth Circuit Pattern Jury Instruction 2.19 fails to require:

*First*: the defendant agreed with at least one other person to violate the law.

*Third*: the defendant knew the essential objective of the conspiracy.

# *Examples of Instructions to Request: Old Chief*

In an FIP case, it is error for a court to refuse a defendant's request to stipulate to a prior conviction "and admits the full record of a prior judgment, when the name or nature of the prior offense raises the risk of a verdict tainted by improper considerations, and when the purpose of the evidence is solely to prove the element of prior conviction."

*Old Chief v. United States*, 519 U.S. 172, 174 (1997).

**practice tip:** be sure that the prior conviction is actually disqualifying

*Examples* of Instructions to Request: Computer Fraud and Abuse Act (Section 1030)

“[W]e hold that the phrase ‘exceeds authorized access’ in the CFAA does not extend to violations of use restrictions.”

*United States v. Nosal*, 676 F.3d 854, 863 (9<sup>th</sup> Cir. 2012).

*What* to do if the Court introduces new issue  
in response to a jury question.

request additional closing argument – e.g., 5 minutes,  
limited to new issue

*Do jury instructions control the scope of sufficiency review?*

“A reviewing court's limited determination on sufficiency review ... does not rest on how the jury was instructed.”

*Musacchio v. United States*, 136 S.Ct. 709, 715 (2016).