

Multi-Track Federal Criminal Defense Seminar

Creative Motion Practice: Motions in Limine, Jury Instructions, and Rule 29 Motions

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- I. **Introduction** – All too often defense lawyers leave jury instructions to the eve of trial. Early consideration of jury instructions provides a foundation for identifying and determining the validity of the theory of defense, for advancing that theory of defense to the jury, and creating potential appellate issues. Reliance solely on pattern jury instructions hinders effective advocacy. Ideally, in every case counsel should develop instructions tailored to the facts that advance the defense case. Submitting well-crafted jury instructions supported by authority before trial also educates the judge about the important legal issues in the case and sets up arguments regarding the admissibility of evidence, and if necessary, the Rule 29 motion.

- II. **Jury Instructions.**
 - A. **Fed. R. Crim. P. 30 – Jury Instructions**
 1. Any party may request in writing that the court instruct the jury on the law as specified in the request.
 - a. Request must be made at the close of evidence or at any earlier time the court reasonably sets.
 2. The court must inform parties *before the closing argument* how it intends to rule on requested instructions.
 3. The court may instruct the jury before or after arguments, or both.
 4. When objecting to an instruction, the party must inform the court of the specific objection and the grounds for the objection *before the jury deliberates*.

- a. Opportunity must be given to object outside the jury's hearing.
- b. Failure to object as required precludes appellate review, except for plain error.

B. Defendant's Right to Have Jury Instructed on the Law

1. "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).
2. *Mathews* also holds that the defendant may pursue, and have the jury instructed on, inconsistent defenses (entrapment instruction required despite defendant's denial of crime).
3. A criminal defendant's constitutional right to present witnesses in support of his defense "would be empty" if it did not also entail the right to an instruction allowing the jury to consider the defense. *Tyson v. Trigy*, 50 F.3d 436, 448 (7th Cir. 1995).
4. Informant instruction – See *United States v. Luck*, 611 F.3d 183 (4th Cir. 2010) (reversing conviction on IAC grounds because counsel failed to request instruction cautioning jury that an informant's testimony must be weighed with greater care than that of ordinary witness; the general credibility instruction is an inadequate substitute).
5. The trial court must instruct the jury that no adverse inference may be drawn from a defendant's failure to testify, *Carter v. Kentucky*, 450 U.S. 288 (1981).
6. Defendant has the right to have jury instructed on every element of the offense. E.g., *United States v. Gaudin*, 515 U.S. 506 (1995).

C. Purposes of Defense Jury Instructions

1. Inform the jury of the applicable law.
2. Address possible misconceptions of the jury.
3. Correct any unfairness that has taken place during the case.
4. Create or preserve appellate error.
5. Validate the defense theory of the case/provide a foundation for summation to the jury.

D. Identifying/crafting jury instructions

1. Review existing instructions.
 - a. Start with own Circuit's Pattern Jury Instruction. These instructions are not binding, but most courts are deferential to them;
 - b. Review Patterns from other circuits for instructions more favorable than own circuit (also helps identify circuit splits in the law);
 - c. Review model jury instructions, *e.g.*, Federal Judicial Center, Pattern Criminal Jury Instructions;
 - d. Review jury instruction treatises.
 - i. L. Sand, et al. MODERN FEDERAL JURY INSTRUCTIONS.
 - ii. O'Malley, Grenig, and Lee, FEDERAL JURY PRACTICE AND INSTRUCTIONS.

2. Crafting Instructions.
 - a. Tailor pattern instructions to fit the facts of your case. *See United States v. Duff*, 76 F.3d 122, 127 (7th Cir. 1996) (“Pattern books often fail to supply useful information because the circumstances with which they must deal are so diverse”).
 - b. Meld the best portions of two or more pattern instructions.
 - c. Quote from favorable caselaw.
 - d. Define terms through dictionary or other source.
 - e. Look for instructions that other defendants have used in similar cases through Pacer.
 - f. Make it up.
3. Brainstorming defenses/instructions; other resources
 - a. Samuel, FAVORABLE AND NOTEWORTHY DECISIONS IN THE SUPREME COURT AND THE FEDERAL APPELLATE COURTS, available at <http://www.gslaw.com> – Invaluable resource in identifying issues for the defense.
 - b. The Champion magazine – Thomas Lundy’s numerous articles regarding jury instructions.
 - c. Federal Defenders of San Diego, DEFENDING A FEDERAL CASE, Chapter 11, Jury Instructions.

E. Persuading the Judge to Give Your Instructions

1. Submit numbered proposed defense instruction on separate sheets of paper.

2. When crafting your own instruction, identify the authority for the instruction and be prepared to provide copies of that authority to the court during the instructions conference.
3. Keep track of cases where the court has given a requested instruction of yours and cite those cases as authority in the future.
4. Use plain, concrete language and be concise. Avoid legal jargon.
5. One risk of proposing a longer instruction that addresses multiple issues is that on appeal a court's refusal to instruct may be affirmed if any legal proposition included in the proffered instruction is in error.
6. Know your local rules and comply with them.

F. Types of Instructions

1. It would be impossible to identify every type of instruction that a defendant might request, as the possibilities truly are unlimited. Each case requires counsel to consider what instructions would assist in establishing the theory of the defense, explaining to the jury the significance or trustworthiness of the evidence, and in correcting possible jury misconceptions. Suffice to say, pattern jury instructions can't possibly anticipate all situations that might require an instruction. If you believe that a particular issue needs greater emphasis or explanation for the jury, submit an instruction.
2. Attached to this outline as Exhibit A is a list of one lawyer's compiled jury instructions over a more than fifty-year career. The list attests to Jim Shellow's creativity and tenacity in drafting jury instructions. I've included it to illustrate the point above – that pattern instructions alone won't cut it.

3. Theory of defense instructions.
 - a. Defendant entitled to a theory of defense instruction so long as the theory is legally sound and supported by evidence in the record. *E.g.*, *United States v. Baird*, 712 F.3d 623, 627 (1st Cir. 2013).
 - b. In deciding whether to give a requested instruction, the district court must take the evidence in the light most favorable to the defendant, without making credibility determinations or weighing conflicting evidence. *Id.*

G. Importance of Raising and Preserving Instructions for Appellate Review

1. Even a cursory look at recent Supreme Court cases reveals the importance of requesting theory or defense instructions based on legal theories that may not previously have been universally recognized.
 - a. *Burrage v. United States*, 134 S. Ct. 881 (2014) – In this heroin causing death case, Burrage requested jury instructions and moved for judgment of acquittal on the grounds that the government had to prove that the heroin was a “but-for cause of death.” The district court rejected Burrage’s proposed instruction and his Rule 29 motion, but the Supreme Court ultimately agreed that the government had to prove that the victim would not have died but for the use of heroin distributed by Burrage.
 - b. *McDonnell v. United States*, 136 S. Ct. 2355 (2016) – Former Virginia governor Robert McDonnell was charged with extortion for accepting \$175,000 in loans, gifts, and other benefits from a businessman. To convict McDonnell, the government had to show he agreed to commit an “official act” in exchange for the loans and gifts. McDonnell requested an instruction that “merely arranging a meeting, attending an event, hosting a reception, or

making a speech, are not, standing alone, ‘official acts.’” The district court declined to give the defense instruction. The Supreme Court agreed with McDonnell and reversed his conviction.

- c. *Elonis v. United States*, 135 S. Ct. 2001 (2015) – Elonis was indicted for transmitting in interstate commerce a threat to injure. At trial Elonis requested an instruction requiring the government to prove that he intended to communicate a “true threat.” Instead the district court instructed the jury that Elonis could be found guilty if a reasonable person would foresee that his statements would be interpreted as a threat – a negligence standard. The Supreme Court reversed Elonis’s conviction based on the erroneous jury instruction.

H. Preserving the Record

1. See Fed. R. Crim. P. 30
2. Must put specific objection on the record. *E.g. United States v. Linnwood*, 142 F.3d 418, 422-24 (7th Cir. 1998) (defense counsel failed to specifically state on the record the basis for objecting to the Court’s refusal to give a “mere presence” instruction); *United States v. Crowley*, 318 F.3d 401 (2d Cir. 2003) (holding that Rule 30 requires the objecting party to state distinctly the matter objected to and the grounds for the objection; a mere request for an instruction is insufficient).
3. If judge plans to give an instruction, but fails to do so, counsel must bring it to the court’s attention or the issue may be waived. *E.g., United States v. Clavey*, 565 F.2d 111, 117-18 (7th Cir. 1977).
4. Must insist (and persist) in making sure jury instructions conferences are recorded or that there is sufficient time for putting objections on the record before instructions are given to the jury to avoid waiver.

5. If counsel agrees to an alternate, but less favorable, instruction, counsel must make clear that he is continuing to object to the court's failure to give the original instruction.

I. Opposing Government Instructions

1. *See United States v. McKnight*, 671 F.3d 664, 665 (7th Cir. 2012) (Posner, J., dissenting from denial of petition for rehearing *en banc*).
 - a. The court instructed the jury to the effect that the government must sometimes use informants and deceptive investigative practices, but that such practices were not improper and should not affect deliberations. The Seventh Circuit rejected the challenge to this instruction.
 - b. Judge Posner expressed concern about the use of unnecessary, gratuitous instructions and said they should not be given. He noted that the defendant had not made an issue of the deceptive practices, so no reason for the instruction.
 - c. He added that a gratuitous instruction is likely to worry the jury by making them think they missed something and that the instruction must relate to something that happened in the trial. In this case, the instruction might have caused them to infer the message was that the informant testimony was true.
2. Requested flight instructions should be challenged. *See, e.g., United States v. Williams*, 33 F.3d 876, 879 (7th Cir. 1994) (indicating that the Seventh Circuit generally does not approve of flight instructions).
3. Ostrich (deliberate ignorance) instruction should be challenged. *See United States v. Macias*, 786 F.3d 1060, 1062 (7th Cir. 2015) (reversing conviction based on giving of ostrich instruction).

4. Commentary regarding defendant's intent/credibility.
 - a. *United States v. Waller*, 654 F.3d 430 (3d Cir. 2011) (error to instruct jury that it could consider any statements made or omitted by the defendant; improper invitation to consider post-Miranda silence).
 - b. *United States v. Gaines*, 456 F.3d 238 (2d Cir. 2006) (courts should not instruct the jury that defendant's testimony should be considered with care of his interest in the outcome because it undermines presumption of innocence).

III. Motions in Limine

A. Must be consistent with the theory of the case

1. As with jury instructions, motions in limine may provide opportunity to educate judge about legal issues in the case.

B. Reasons to file

1. Preserve issues
2. Make strongest argument in writing
3. Know before trial what evidence is admissible
4. Avoid exposing the jury to prejudicial evidence
5. Allow judge to fully consider the issue

C. Reasons not to file

1. With notice, the prosecution may be able to fix the evidentiary problem

2. Allowing time for government and court to notice weaknesses in your argument
3. Lose the element of surprise

D. Timing for Motions in Limine

1. Absent court order setting an earlier deadline, motions in limine theoretically may be filed at any time. Since issues raised in a motion in limine typically relate to the admissibility of trial evidence, the motion could be made orally during the trial itself. *See United States v. Agosto-Vega*, 731 F.3d 62, 65 (1st Cir. 2013).
2. Counsel must use good judgment in terms of when to file, particularly if the defense desires a pretrial ruling. *See id.* at 64-65. *See also* Fed. R. Crim. P. 12(b)(1) and 47(c)(requiring that motions be filed at least seven days before any hearing date).

E. Preserving the record

1. Litigating a pretrial motion in limine, without renewal at trial, does not necessarily preserve the objection. *See* Fed. R. Evid. 103(b) (stating that a definitive ruling on the record before or at trial need not be renewed in order to preserve a claim of error). *See United States v. Mahone*, 453 F.3d 68, 70 (1st Cir. 2006)(objection was preserved because court’s pre-trial ruling was “definitive”)
2. However, rulings on motions in limine often are tentative and require renewal at trial. The best practice is to renew issues raised by motions in limine at trial to ensure that they are preserved. *See United States v. Jobe*, 101 F.3d 1046, 1068 (5th Cir. 1996), and *United States v. Turner*, 474 F.3d 1265, 1276 (11th Cir. 2007) (both holding that a pretrial severance motion did not sufficiently preserve a *Bruton* challenge where no contemporaneous objections were made to testimony); *but see United States v. Nash*, 482 F.3d 1209, 1218 n.7 (10th Cir. 2007)(motion for severance preserved *Bruton* issue).

3. When the government concedes the merits of your motion in limine, still get an order from the judge so that you may complain about any violations of the court's order.
4. *Caution*: most motion in limine rulings are tentative and the judge is allowed to change her mind about whether to admit or exclude evidence. If the judge changes her mind mid trial, identify how the tentative ruling prejudiced the defense.
5. If the government violates a pretrial order granting a motion in limine, the defense must timely object or the issue may be waived. *United States v. Fonseca*, 744 F.3d 674, 683 (10th Cir. 2014).

IV. Rule 29

- A. **Legal Standard** “[W]hether after viewing the evidence in the light most favorable to the government, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)(emphasis in original).
- B. **Motion must be timely**
 1. Counsel should move for a judgment of acquittal after the government rests *and* at the close of all evidence. *See* Fed. R. Crim. P. 29(a) (the failure to move for judgment of acquittal at the close of the case may severely curtail the scope of review.) *See, e.g. United States v. Rucker*, 766 F.3d 638, 644 (7th Cir. 2014)(holding that the defendant's failure to move for judgment of acquittal at the close of the evidence restricted the court to plain error review, that is for a manifest miscarriage of justice); *United States v. Fries*, 725 F.3d 1286 (11th Cir. 2013) (same).
 2. However, a timely motion for acquittal under Rule 29(c), which must be made within 14 days after trial, likely preserves a sufficiency-of-the-evidence claim for review, even where the defendant failed to raise it at trial. *United States v. Miller*, 527 F.3d 54, 62 (3d Cir. 2008) (holding that Rule 29(c) motion

preserved sufficiency claim even though no motion for acquittal made at trial).

2. Defendant must renew motion for judgment of acquittal within fourteen days after the guilty verdict or discharge of the jury, which ever is later. Fed. R. Crim. P. 29(c).
3. The defendant may move for an extension of time to file Rule 29(c) motion within fourteen days after the verdict or discharge of the jury, but not outside that time frame absent a finding of excusable neglect. *See* Fed. R. Crim. P. 45(b).

C. Risk of Waiver—Challenging the sufficiency of the evidence by raising a specific claim while not raising other potential claims may waive those claims not specifically raised in the motion. *See, e.g. United States v. Moore*, 363 F.3d 631, 637 (7th Cir. 2004); *United States v. Herrera*, 313 F.3d 884 (5th Cir. 2002). (Issue is preserved by simply stating that you move for judgment of acquittal because the evidence is insufficient to sustain each count).

D. The court may consider defendant’s credibility or even demeanor in assessing sufficiency of the evidence on Rule 29 motion.

1. If your client takes the stand, there is a risk that the court will consider the jury’s rejection of his testimony as evidence of his guilt. *See, e.g., United States v. Bennett*, 848 F.2d 1134, 1139 (11th Cir. 1988) (“By choosing to present a defense the Bennetts incurred the risk that they might bolster the government’s case. Indeed, this court has held that a defendant’s implausible explanation may constitute positive evidence in support of a jury verdict.”); *United States v. Zafiro*, 945 F.2d 881, 888 (7th Cir. 1991), *aff’d. on other grounds*, 506 U.S. 534 (1993) (defendant’s demeanor on the stand might have supplied evidence of guilt); *United States v. Zeigler*, 994 F.2d 845, 848-50 (D.C. Cir. 1993) (rejecting *Zafiro*).
2. If the court reserves ruling to a motion for acquittal at the close of the government’s case, however, the court may not rely on

evidence presented in the defense case in later ruling on that motion. Fed. R. Crim. P. 29(b); *United States v. Moore*, 504 F.3d 1345 (11th Cir. 2007).

- E. **Rule 33**—When making a post-trial Rule 29 motion, counsel also should file a motion for new trial under Rule 33, which allows the court to grant a new trial if the interest of justice so requires. Unlike the Rule 29 motion, Rule 33 permits the court to consider the credibility of witnesses, procedural errors, and other factors that might in the interest of justice require a new trial. Also, if the district court grants the Rule 29 motion, it may also conditionally grant the motion for new trial in the event the judgment of acquittal is reversed on appeal. Rule 29(d).

THE SHELLAW COLLECTION
Jury Instructions By James M. Shellow of Wisconsin

Introduction

Accomplices

Accomplice Liability: Crime Must Have Been Committed By Someone
Accomplice Liability: Negligent Or Mistaken Assistance Insufficient
Accomplice Liability: Defendant Must Know What Specific Offense Was Being Committed
Accomplice Liability: Acts Must Be Committed Before Or During The Offense
Accomplice Liability: Accomplice Must Have A Stake In The Venture
Accomplice Liability: Perpetrator Must Know Of And Accept The Assistance
Accomplice: Cautionary Instruction
No Conviction Based On Unsupported Testimony Of Accomplice Unless Jury Believes
Testimony Beyond A Reasonable Doubt
Informers And Accomplices: Cautionary Instruction Regarding Secret Motives To Give False
Testimony

Attempts

Attempt: Mere Preparation Insufficient
Attempt: Jury May Not Consider Actions Of Government Agents Or Informers As To
Substantial Step Issue
Attempted Possession Of Drugs With Intent To Distribute Requires Proof Of What Defendant's
Intent Would Have Been After Receipt Of Drugs
Attempted Possession Of Controlled Substance/Illegal Drug: Mere Negotiation Of Purchase
Insufficient

Conspiracy

Conspiracy: Defendant Must Have A Stake In The Venture
Conspiracy: Dual Intent Requirement
Conspiracy: Mere Association Insufficient
Conspiracy: Mere Presence And Knowledge Insufficient
Conspiracy: Aiding And Abetting Of Acts By Conspirators Insufficient
Pinkerton: Not Applicable To Attempts
Conspiracy To Possess Marijuana: Use Or Cultivation Insufficient
Conspiracy: Wrongful Intent May Not Be Presumed From Commission Of An Act
Conspiracy: Prosecution Must Prove That Defendant Conspired With At Least One Other Person
Conspiracy: Dual Intent Requirement
Conspiracy: Mere Presence And Knowledge Insufficient
Conspiracy: Liability For Acts And Statements Of Coconspirators
Conspirator Not Liable For Acts Or Statements Of Coconspirator Before Formation Of
Conspiracy Or After Termination Of Conspiracy

Hearsay Of Coconspirator Made In Furtherance Of Uncharged Conspiracy Is Not Evidence Of Defendant's Membership In Charged Conspiracy
Casual Admission Of Culpability Is Not Statement In Furtherance Of Conspiracy
Conspiracy: Mere Assistance In Purchasing Drugs Is Insufficient

Defendants

Defendant's Out Of Court Statements: Cautionary Instruction

Defense Theory

Defense Theory: Sample Instruction
Defense Theory Instruction: Prosecution's Burden Of Proof
Defense Theory Instruction: Good Faith Misunderstanding As To Consent
Defense Theory: Reasonable Possibility Requires Verdict Of Not Guilty
Defense Theory: If Defendant Reasonably Might Be Right Jury Must Acquit

Definitions

Facilitate Defined

Drugs, Controlled Substances

Drugs, Controlled Substances: Payment For Drug Does Not Establish Possession
Illegal Drugs: No Crime Of Aiding And Abetting Attempted Possession
Importing Controlled Substances: Continuous Course Of Conduct Required
Controlled Substances: Chain Of Custody

Duty Of Jury

Duty Of Jury: Importance Of Criminal Case
Duty Of Jury: Jury Not To Consider Extrinsic Evidence

Entrapment

Vicarious Entrapment By Informer

Evidence

Evidence: Chain Of Custody
Evidence: Admission – Hearsay Statements Of Government Agents Or Informers May Not Be Considered
What Is Not Evidence: Jury Not To Consider Extrinsic Evidence
Indictment Is Not Evidence
Jury Must Adopt Reasonable Interpretation Of The Evidence Consistent With Innocence

Jury Must Only Consider Testimony Based On Knowledge Of Witness
Charging Document Is Not Evidence: Information
Documentary Evidence: Signature Not Proof Of Identity

Expert Witnesses

Expert Witness: Cautionary Instruction
Opinion Evidence: No Better Than Underlying Assumption

Hearsay

Incriminating Hearsay: Cautionary Instruction

Income Tax Prosecutions

Income Tax Prosecutions: Taxpayer Not Obligated To Cooperate With IRS

Informants

Testimony Of Informer: Cautionary Instruction
Hearsay Statement By Government Informer: Jury Not To Consider For Their Truth
Government Informer Is Not Conspirator: Definition Of Government Informer

Mail Fraud

Mail Fraud: Elements
Mail Fraud: Good Faith As Defense Theory
Intent To Defraud Defined
Mail Fraud: Requirement That Mails Were Used
Mail Fraud: Scheme Must Be Set Up

Multiple Defendants

Multiple Defendants: Separate Consideration

Perjury

Perjury: Literally True But Intentionally Misleading Statements Insufficient
Perjury: Unanimity Required As To The Basis For The Falsity
Perjury: Defendant Must Know That Statement Was False; Mistaken Or Inadvertent Falsity Insufficient

Possession

Momentary Possession

Possession Defined: Power And Authority

Possession Defined: Ownership Is Not Possession

Possession Defined: Requirement Of Appreciable Ability To Guide The Destiny Of The Drug

Pre-Arrest Silence (Doyle)

No Consideration Of Codefendant's Pre-Arrest Silence (Doyle)

Prior Convictions

Prior Conviction To Impeach Defendant's Credibility: Limiting Instruction

Prosecution Misconduct

Prosecution Misconduct: Question Assuming As True A Fact Known To Be False

Reasonable Doubt

Reasonable Doubt May Be Based On Circumstantial Evidence Alone

Summaries

Jury May Consider Prior Summation To Jury By Prosecutor As Statement Against Interest

Summaries Of Evidence

Summary Charts: Cautionary Instruction

Summary Witness: Cautionary Instruction

Uncharged Acts

Uncharged Acts: Limiting Instruction

Uncharged Acts: Limited To Showing Source Of Funds

Witnesses

Witness Receiving Benefit From Prosecution: Downward Sentencing Departure Must Be Requested By Prosecutor

Witness Receiving Benefit For Truthful Testimony: Prosecutor Decides Whether Testimony Is Truthful

Witness Credibility: Nonresponsive Answers May Demonstrate Bias Of Witness

Jury May Disbelieve Uncontradicted Witness

Inference That Prosecution Witness Has Been Given Promises By The Government

Immunized Witness: Greater Caution

Mental Condition May Impair Witness Credibility

Witness Credibility: Use Of Drugs By Witness At Time Of Observation

Witness Credibility: Economic Interest In Charges

Partial Immunity: Cautionary Instruction

Missing Witness/Negative Evidence

Testimony Of Police Officers: Credibility To Be Judged As Any Other Witness