

I Object!

– James Eckert, Esq.

Refusal to Charge vs Charge as Given

Formal exceptions are no longer formally required (CPL 470.05[2] purports to dispense with exceptions), but repeating your objection after it has been overruled is not a bad idea. Whatever you do, don't say "Thank you, your Honor", which might be interpreted to accede to a ruling you just spent five minutes trying to prevent.

Formal exceptions are required to a charge to the jury, and there is an interesting rule you should be aware of. Interesting in the sense that the rule against perpetuities is interesting, or an IRS audit is interesting. That is this: objecting to a refusal to charge is not the same as objecting to the charge as given. That's just obvious, right?

Let's say you asked the judge to charge justification, agency, and missing witness. Your defenses are that the Confidential Informant threatened your client, to force him to sell fake drugs; that your client was merely an agent for the CI; and that the failure of the DA to call the CI was proof that the CI's testimony would not have helped their case. The judge, of course, refuses to charge missing witness, saying "you could have called him". The Judge then charges the jury that agency was only valid when real drugs were sold, and that the jury should consider justification as it pertains to an uncharged assault which the DA cross-examined your client on "to complete the narrative". Nevermind substance, **when** do you object?

Well, it never hurts to repeat all your objections after the charge is given. However, the judge refused to charge missing witness, therefore it is preserved by the request to charge, without an exception after the charge. This is a refusal to charge, and a refusal to charge is preserved by a proper request to charge. However, the screwy charges the judge did give are only preserved by a specific exception **after** the charge. The judge did not refuse to charge on the other two, he just got the law wrong.

If you ask for a charge on extreme emotional disturbance, and the judge charges the jury that extreme emotional disturbance is "a bunch of crap nobody in their right mind would buy", he hasn't refused to charge. You need to object to the charge as given.

You - "Your Honor, I ask that you charge Extreme Emotional Disturbance."

Court - "Why won't you leave me alone? I hate you! I hate you! I hate you!"

That's a refusal to charge.

You - "Your Honor, I ask that you charge Extreme Emotional Disturbance."

Court - "Ladies and gentlemen of the jury, Extreme Emotional Disturbance

is established only when the defendant shouts 'why won't you leave me alone? I hate you! I hate you! I hate you!'"

That's a problem with the charge as given.

A refusal-to-charge error is preserved by properly requesting the charge. A charge-as-given error is only preserved by a proper exception after the charge is given, obviously. Better yet, always repeat your objections after the charge.