

PRODUCT LIABILITY

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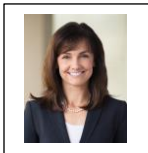
IN THIS ISSUE

Jury instructions are a crucial part of every case, directly affecting the outcome. Yet, while technology has enhanced such essential trial elements as the presentation of evidence, instructions to jurors remain lengthy, lecture-style recitations, which are often boring and confusing to the laypersons who comprise the jury. It is time for a change in this critical trial component.

#UpdateJuryInstructions

Improving Jury Instructions in the Age of Smartphone Communication

ABOUT THE AUTHORS



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The International Association of Defense Counsel serves a distinguished, invitation-only membership of corporate and insurance defense lawyers. The IADC dedicates itself to enhancing the development of skills, professionalism and camaraderie in the practice of law in order to serve and benefit the civil justice system, the legal profession, society and our members.

Trial attorneys spend countless hours refining their cases to be “jury friendly.” Litigants spend thousands of dollars on trial graphics and other attention-grabbing presentations of evidence. Brevity and clarity are necessary ingredients to successful case presentations. But what about instructions on the law? Why have jury instructions remained lengthy, lecture-style recitations, which are often boring and confusing to the laypersons who comprise the jury? This article suggests that it is time for a change in this critical component of every trial.

We can stipulate, perhaps request judicial notice, that technology has significantly impacted the ways in which information is accessed and communicated. The proliferation of smart phones and tablets has resulted in a significant portion of the population eschewing print and other tangible content in favor of abbreviated, digital equivalents, with ebooks, apps, podcasts, and streaming services becoming the standard mechanisms through which content is consumed. Further, communications via e-mail, text messaging, and social network platforms, such as Twitter, Facebook, and Instagram, are now a routine part of everyday life – and not just for millennials. The majority of today’s jury pool are part of a culture that takes and shares (often instantaneously) pictures and videos with their phones, publicly conveys their momentary thoughts and reactions – from the profound to the mundane – without hesitation, and increasingly

consumes information in small, easily digestible portions, which are often presented in a visually arresting and aesthetically pleasing manner.

Jurors’ immersion in technology is likely only to increase in the future. As a result, the legal community appreciates that corresponding innovations need to be made in the courtroom. Seasoned trial attorneys strive to satisfy the expectations of jurors, and they regularly utilize photos, videos, audio recordings, diagrams, and other demonstratives to effectively present evidence at trial. A growing number of courts have upgraded the technology available in the courtroom, including flat-screen monitors, large projection screens, and touchpad devices, which allow for the annotation and highlighting of trial exhibits. Further, several federal courts now utilize the Jury Evidence Recording System, which allows evidence admitted during trial to be viewed electronically in the jury deliberation room.

The efforts undertaken by attorneys to present evidence in a visually compelling and effective manner are important given that jurors are vested with a significant amount of power; indeed, jurors are regularly tasked with resolving multi-million dollar disputes and, sometimes, matters of life or death. Attorneys and litigants, therefore, routinely devote extensive resources and incur substantial expenses in connection with trial preparation, often hiring litigation consultants and holding mock jury trials to

test their case and enhance their presentation of the evidence.

Jury instructions should be no different, but attorneys and litigants – and the courts – generally do not devote nearly as much attention to the wording and presentation of the jury instructions, a crucial part of every case that directly impacts the outcome.

Jurors are presumed to understand and follow the instructions provided to them.¹ The instructions, however, are the product of committees, usually comprised only of judges and lawyers, whose focus is on crafting model instructions that summarize often-verbose and nuanced statutory language and case law in an effort to create uniformity in the instructions provided in similar cases and to decrease the number of appeals based upon improper instructions. Those goals, although important, overlook the importance of providing brief, understandable, and memorable “plain English” instructions to laypersons, most of whom are unfamiliar with the particular writing style frequently employed by the legal community. Concerns over jurors’ ability to comprehend lengthy instructions, which are hardly a model of clarity, have existed for decades and are exacerbated by the fact that jurors are forced to listen as the trial judge recites those instructions in their entirety – a dreary task for all involved,

which can easily exceed one hour in a case involving multiple claims and defenses.

Several courts and committees have taken steps to improve the drafting and communication of jury instructions, but many problems remain. Most courts do not provide copies of the instructions to every juror, with some courts not providing even a single copy to the jury and further disallowing notes to be taken into the deliberation room. Even in courts where jurors are provided with copies of the instructions, listening to a judge read tedious and lengthy instructions following the completion of a likely multi-day trial is not a very innovative way of ensuring that jurors understand those instructions and are capable of properly applying them to the facts.

So how can jury instructions be improved in an age where phones with five-inch displays have supplanted print newspapers and televisions and the President’s preferred method of communication is tweeting in 280 or less characters? First, attorneys should ensure – or at least request – that copies of the written instructions are provided to each juror, ideally in a binder or notebook, containing a meaningful table of contents, clear headings, bullet points, and ample space for notetaking. Second, attorneys should craft, and encourage the courts to

¹ See, e.g., *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 243 (1993) (“[A] reasonable jury is presumed to know and understand the law . . .”); *Omega Environmental,*

Inc. v. Gilbarco, Inc., 127 F.3d 1157, 1161 (9th Cir. 1997) (same).

display, an alternative visual depiction of the instructions, such as a PowerPoint presentation summarizing the key points, while the judge reads aloud the instructions. Third, in an effort to avoid miscomprehension from the outset, attorneys should consider requesting that jurors be permitted to ask questions regarding the instructions immediately after they have been provided and before the commencement of the jury's deliberation. Finally, attorneys should review the model instructions of the states and courts in which they practice and, as appropriate, encourage the committees to revise instructions such that they are easier for laypersons to understand and apply.

A Brief History of the Development of Model Jury Instructions

The role of the jury in American trials has significantly changed over the centuries. In the eighteenth century, juries were responsible both for finding the facts and determining the applicable law.² By the end of the nineteenth century, however, the jury's role had been reduced to its present

form: the trier of fact.³ In addition to the reformulation of the jury's role in trials, courts and the legislatures began requiring judges to instruct the jury on the law and authorizing courts to order new trials where the jury's verdict was inconsistent with the controlling law.⁴ Where trial judges failed to accurately instruct jurors on the law, appellate courts began reversing and remanding jury decisions and ordering that new trials be held.⁵ In an effort to increase the accuracy of jury instructions and lessen the chances of being reversed on appeal, trial judges formed committees to draft model jury instructions for use in all applicable cases.⁶

According to the National Center for State Courts, there are 88 known state pattern jury instruction committees across the nation and nine known federal committees.⁷ Most committees are comprised of judges and attorneys, with few comprised solely of judges.⁸ For example, the Committee on Model Civil Jury Instructions for the Third Circuit is comprised of eight judge-members, two professor-reporters, and one attorney-staff person.⁹ Typically, committee

² Arie M. Rubenstein, *Verdicts of Consciousness: Nullification and the Modern Jury Trial*, 106 COLUM. L. REV. 959, 959-60 (2006).

³ *Id.*

⁴ Renee B. Lettow, *New Trial for Verdict Against Law: Judge-Jury Relations in Early Nineteenth-Century America*, 71 NOTRE DAME L. REV. 505, 521-26 (1996).

⁵ *Bihn v. United States*, 328 U.S. 633, 638 (1946); *Eller v. Koehler*, 67 N.E. 89, 90 (Ohio 1903).

⁶ See Robert G. Nieland, *PATTERN JURY INSTRUCTIONS: A CRITICAL LOOK AT A MODERN MOVEMENT TO IMPROVE THE JURY SYSTEM* 7 (1979).

⁷ Paula L. Hannaford-Agor & Stephanie N. Lassiter, *Contemporary Pattern Jury Instruction Committees: A Snapshot of Current Operations and Possible Future Directions*, at 3, <http://www.ncsc-jurystudies.org/~media/Microsites/Files/CJS/What%20We%20Do/Contemporary%20Pattern.ashx>.

⁸ *Id.* at 5.

⁹ <http://www.ca3.uscourts.gov/model-jury-instructions>.

reporters are tasked with identifying new or modified statutes and recent appellate opinions for which jury instructions might be developed, while the members actually draft and approve the instructions. The committee's model instructions generally will trump any alternatives proposed by the parties.

With this backdrop, some jurisdictions have begun the process of modernizing and improving jury instructions. We suggest that, because quickly changing technology has had such a dramatic impact on the way that information is delivered, updating jury instructions should be fast-tracked.

The Way Forward: Jurors' Understanding of Jury Instructions Should be a Priority

For decades, legal scholars and practitioners have expressed concerns over the ability of jurors to comprehend the instructions that they are presumed to understand. Since at least the 1970s, scholars have conducted studies in which laypersons were found to perform poorly on comprehension tests.¹⁰ Concerns over jurors' comprehension are particularly acute in complex business

litigation and patent disputes.¹¹ In light of these continued concerns, attorneys should encourage and support efforts to make jury instructions easier for laypersons to understand and to present the instructions in more effective manners.

At Minimum: Give the Written Instructions to Each Juror

All jurors must undergo the laborious, often boring, task of listening to the trial judge read every single word of the jury instructions. Understandably, in this age of concise, visually appealing, on-demand information accessibility, it is quite difficult for jurors to retain, absorb, and apply information that is conveyed orally in a lengthy lecture-style setting, particularly after having sat through a multi-day trial. These difficulties are heightened where jurors are not provided with a copy of the instructions and/or are not permitted to take notes into the deliberation room.

The American Bar Association's Principles of Juries and Jury Trials endorses the approach of every juror being provided with a copy of the instructions,¹² but not all courts have

¹⁰ See Robert P. Charrow & Vedra R. Charrow, *Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions*, 79 Colum. L. Rev. 1306, 1316 (1979) (finding that jurors had an accuracy rate of 54% in explaining essential terms at issue); Bradley Saxton, *How Well Do Jurors Understand Jury Instructions? A Field Test Using Real Juries and Real Trials in Wyoming*, 33 Land & Water L. Rev. 59, 88 (1998) (finding that civil jurors had comprehension accuracy rates of only 58%).

¹¹ Debra Cassens Weiss, *Jurors take instructions seriously, but do they understand them?*, ABA Journal (Aug. 11, 2017), http://www.abajournal.com/news/article/jurors_take_instructions_seriously_but_do_they_understand_them.

¹² See Am. Bar Ass'n, Principles of Juries and Jury Trials princ. 14.B (2005), https://www.americanbar.org/content/dam/aba/ad_ministrative/american_jury/principles.authcheckdam.pdf.

adopted this suggestion. The National Center for State Courts' State-of-the-States Survey found that, in nearly one out of every three jury trials in state courts, the jury was not provided with a copy of the instructions.¹³ Further, less-than-half of all courts supplied each juror with a copy of the instructions,¹⁴ and some courts do not permit even a single copy of the written instructions to be taken into the deliberation room.¹⁵

Providing each juror with a copy of the written instructions imposes a minimal burden on counsel and the court and helps guard against jurors' miscomprehension of the instructions and potential misapplication of the law to the facts. One practitioner, a leader of the Civil Jury Project at the New York University School of Law, has advocated for each juror being given an iPad, containing the written jury instructions, along with case information, including a cast of characters, chronology of events, trial exhibits, and real-time trial transcript.¹⁶ Although these proposed measures may be beyond the present capabilities of certain courts, many of them should be feasible in any American court proceeding. At a minimum, there is no reason why each juror cannot be provided with a copy of the written jury instructions

and, ideally, additional information relevant to the case, such as key trial exhibits and the verdict sheet.

Show the Instructions

In addition to providing each juror with a copy of the jury instructions, it may be useful for trial judges to show the instructions to the jury. A trial judge could display a PowerPoint presentation or similar visual depiction, containing a summary of the instructions, while the judge orally instructs the jury. While it may not be as memorable as a meme or an emoji, such a presentation would be an effective supplement to the lengthy and verbose written instructions, particularly if provided in an easy-to-digest, "plain-English" summary style. The use of PowerPoint slides or a similar visual summary of the instructions would surely appeal to technologically savvy jurors who are accustomed to, and prefer, visual representations of information. Of course, the use of PowerPoint slides would require both parties to reach agreement as to their style and content, but such an obligation is hardly an insurmountable obstacle given that nearly all courts require the parties to submit proposed jury instructions and

¹³ Gregory E. Mize, et al., The State-of-the-States Survey of Jury Improvement Efforts: A Compendium Report 32 tbl. 24 (2007), <http://www.ncsc-jurystudies.org/~media/Microsites/Files/CJS/SOS/SOSCompendiumFinal.ashx>.

¹⁴ Mize, at 31-32 & tbl. 24 (state courts: 68.5%; federal courts: 79.4%).

¹⁵ Scott Donaldson, *Improving Jury Service*, 73 ALA. LAW 190, 192-93 (2012).

¹⁶ Debra Cassens Weiss, *Jurors take instructions seriously, but do they understand them?*, ABA Journal (Aug. 11, 2017), http://www.abajournal.com/news/article/jurors_take_instructions_seriously_but_do_they_understand_them.

objections to the proposed instructions prior to instructing the jury.

The use of a visual summary of the jury instructions is a practical measure given that many federal courts now utilize the Jury Evidence Recording System (“JERS”), which allows evidence admitted during trial to be viewed electronically in the deliberation room. JERS provides easy access to evidence during the deliberations through the use of a touch screen monitor in the jury room. JERS is capable of storing all exhibits submitted prior to the trial and segregating those admitted into evidence for the jury’s use during deliberations as well as restricting how the jury views the exhibits, such as allowing a photo to be enlarged. Presumably, any visual summary of the jury instructions (along with a copy of the complete written instructions) also could be stored in JERS, thereby permitting the jurors to peruse the salient points of the instructions at any time during their deliberations.

Allow Juror Questions

Courts are increasingly allowing jurors to submit questions for witnesses during trial, an approach endorsed by the American Bar Association’s American Jury Project.¹⁷ The American Jury Project found that “judges, the lawyers for the winning side, and, tellingly, the lawyers for the losing side, all

concluded (by substantial margins) that when jurors were allowed to ask questions, their attention improved, with benefits for the overall quality of adjudication.”¹⁸ With respect to jury instructions, however, the only point at which a juror may submit a question is following the commencement of deliberations. After receiving a question from the jury, the judge must confer with counsel for the parties to formulate a response, a process that is often time-consuming given that counsel usually departs the courthouse during the jury’s deliberation. The delay in receiving an answer to a question on jury instructions hardly encourages the jury to ask additional questions or helps promote their comprehension of the instructions. Therefore, it would be practical to allow for jurors to ask any questions they may have immediately after the judge finishes orally instructing them. This measure may, from the outset, alleviate misunderstandings about the law, allow for a more accurate application of the law to the facts, and provide for more efficient deliberations.

Include Lay People, Linguists and Psychologists on the Jury Instructions Committees

As discussed, the model jury instructions are drafted, reviewed, and approved by committees, which usually are comprised of only judges and attorneys. The instructions

¹⁷ *Secs. & Exch. Comm’n v. Koenig*, 557 F.3d 736, 741 (7th Cir. 2009).

¹⁸ *Id.*

tend to adhere to the legalese employed in statutes and case law as opposed to translating complex and nuanced legal principles into easy-to-understand guidelines for laypersons. Committees should be encouraged to revise and amend the instructions such that they are set forth “in plain and understandable language,” as endorsed in the American Bar Association’s Principles for Juries and Jury Trials, which found that “jury instructions remain syntactically convoluted, overly formal and abstract, and full of legalese.”¹⁹

California and Arizona have utilized special committees to rewrite their jury instructions in plain language. After a commission on jury system improvement found that jury instructions in California were “on occasion, simply impenetrable to the ordinary juror,” the Judicial Council of the Advisory Committee on California’s Civil Jury Instructions created a task force to rewrite the model instructions.²⁰ A civil subcommittee, including judges, attorneys, laypersons, and academics, including a linguist,²¹ was formed to help revise the instructions. As a result, California now utilizes “Plain Language” instructions, which offer simpler versions of longwinded sentences, featuring multiple clauses and double negatives. For example, the instruction, “Failure of recollection is

common. Innocent misrecollection is not uncommon,” was revised to simply state: “People often forget things or make mistakes in what they remember.”²²

A holistic revamping of model instructions will not alleviate all confusion that jury instructions may cause. Certain areas of the law are more complex and others, and the case law is not always as precise as counsel and litigants would hope. But at present, the manner in which most jury instructions are written and communicated will not meet the average juror’s expectations. By styling the instructions in a more “user-friendly” format, with shorter sentences and bullet points, jurors may avoid misunderstandings and confusion and more quickly grasp the principles of the law that they are required to apply.

Encouraging committees to consider such revisions is a step worth taking, and suggesting that non-attorneys, such as jury consultants, psychologists, linguists, and laypersons, be permitted to join the committees may open a dialogue that engenders a superior version of model jury instructions to the benefit of all involved. #UpdateJuryInstructions

¹⁹ See Am. Bar Ass’n, Principles of Juries and Jury Trials princ. 14.A, cmt. Subdiv. A., 14.B (2005), https://www.americanbar.org/content/dam/aba/administrative/american_jury/principles.authcheckdam.pdf.

²⁰ <http://www.courts.ca.gov/partners/313.htm>

²¹ See Peter Tiersma, *The Rocky Road to Legal Reform: Improving the Language of Jury Instructions*, 66 Brook. L. Rev. 1081 (2001).

²² <http://www.courts.ca.gov/partners/314.htm>.

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