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Jury Instructions: We Can Do Better

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From the Bench

Jury Instructions: We Can Do Better

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At the close of the evidence in a civil case, after the attorneys had summed up, the judge carefully read the standard instructions to the jury. When the jurors were tested later on their understanding of the instructions, nearly half thought "preponderance of the evidence" meant "a slow and careful pondering of the evidence" or "looking at the exhibits in the jury room." More than a fourth were unable to select correct definitions for "burden of proof," "impeach," "admissible evidence," and "inference."

Apocryphal? Not at all. These were the results of one of many juror comprehension studies conducted in recent years. Regrettably those studies have confirmed repeatedly that more often than not jurors do not understand the instructions given to them, even brief instructions in simple cases. In one study, for example, in which pattern criminal instructions were read to a group of more than 100 jurors, nearly one half thought they should disregard circumstantial evidence and did not understand that the prosecution had the burden of proving the defendant guilty beyond a reasonable doubt. Two percent actually believed that the defendant had the burden of proving his innocence.

How did this situation come to exist? A number of factors have contributed, and lawyers, trial judges, and appellate courts share responsibility for them. Chief among them is drafting jury instructions to state the law correctly, not to be understood by jurors. Instructions are couched in legal jargon and generalized terms used by appellate courts. Because neither judges nor lawyers are anxious to stray from well-trodden paths, once an instruction has been approved on appeal, it becomes holy writ in later cases, even if a similar but briefer instruction would do for the case.

Lawyers use instructions to further their arguments. They submit numerous and redundant instructions on the strong points of their case, including as much argument as the judge will let them get away with ("If you find that the plaintiff did not signal before turning in the intersection, then you must find for the defendant . . ."). They incorporate into the proposed instructions their contentions at such length that, if approved, judges would end up giving a closing argument.

Trial judges, for their part, tend to give whatever instructions each side requests, so long as they are in approved form. They apprehend the risk of reversal to be much greater from a refusal to give an instruction than from giving an unnecessary instruction. If they have not spent the time and effort to understand and define precisely the issues and the scope of relevance, they instruct on points that may have no proper bearing on the verdict, with little concern for juror comprehension.

Finally, appellate courts are preoccupied with formulating general rules that correctly state the law, not with making the resulting instructions comprehensible. But a sound statement of the law does not necessarily make an instruction understandable to a jury. If the instruction is not presented in comprehensible language relating to the particular case, there is no assurance that the jury will correctly apply the law to the evidence. Judge Learned Hand saw the problem when he said in *United*

Judge Schwarzer is the author of Managing Antitrust and Other Complex Litigation, *to be published shortly by Michie Bobbs-Merrill. This article is adapted from* Communicating with Juries: Problems and Remedies, *69 Calif. L. Rev. 731 (1981), which contains sample plain language instructions. The author wishes to express his thanks to Karen Stevenson, with the firm of Howard, Prim, Rice, Nemerovski, Canady & Pollak, for her thoughtful assistance.*

States v. Cohen, 145 F.2d 82, 93 (2d Cir. 1944):

> It is exceedingly doubtful whether a succession of abstract propositions of law, pronounced staccato, has any effect but to give [the jury] a dazed sense of being called upon to apply some esoteric mental processes, beyond the scope of their daily experience which should be their reliance. . . .[I]n many jurisdictions such requests are taken more seriously...; we can only say in answer, that to do so appears . . . to be part of that attitude towards the institution, which on the one hand affects to suppose that laymen are capable of making effective use of any number of abstract legal propositions, couched in unfamiliar terms, while on the other hand, they are subject to whims, caprices and passions which make the slightest alien intrusion a ground for upsetting all that they may have done. We do not share that attitude.

There is much that lawyers, trial judges, and appellate courts can and should do to improve the present state of affairs. The first move is up to the lawyers: attorneys can submit instructions, written in plain English and free from argument and excess verbiage, and tell the court why they should be given. They can also request improvements in the instructional process. The next moves are up to the courts.

Lawyers find it difficult to write plain English. As Richard Wydick observed, they use eight words when two would do. They use technical words and legal jargon to express commonplace ideas. Seeking to be precise, they become redundant. Seeking to be cautious, they become verbose.

These occupational habits, hallowed by tradition, are not readily shed. The sense of security they provide to the practitioner is reinforced by the fact that it is easier to write ponderous legal prose than it is to write plain and concise English. Poor writing reflects not only bad habits but bad thinking. Clear writing requires clear thinking. To shed unnecessary words, one must know which are unnecessary. To write orderly sentences and paragraphs, one must have organized one's ideas. To avoid cliches and jargon, one must make the effort to recognize and delete them.

Psycholinguistic research confirms what common sense tells us—writing instructions in plain, direct, and well-organized prose enables jurors to understand better even complex ideas. A recent study shows that jurors' comprehension problems are more linguistic than conceptual. When they draft instructions, lawyers and judges should keep within arm's reach a handbook on good writing, such as Strunk and White's *The Elements of Style.* And they should follow rules such as the following:

- Omit unnecessary words; examine each word and each sentence and ask what it adds;
- Use simple, concrete words rather than legal jargon and words not commonly found in the vocabulary of jurors; eliminate circumlocutions and cliches;
- Avoid abstractions; give the jury a familiar context in which to receive and absorb the instructions;
- Use short sentences;
- Use the active voice;
- Avoid negative forms;
- Present the subject matter in orderly, logical sequence; organize the instructions for ease of understanding and application; use introductory and transitional statements to guide the jury;
- Define unfamiliar terms.

Too Abstract

Pattern instructions rarely conform to these rules. In addition to being verbose, cumbersome, dense, and often contradictory, they are abstract. They have the virtue of being universally applicable without having to be adapted to the facts of the case, but it is this virtue that is also their greatest vice.

Psycholinguistic studies tell us that a verbal message is better understood and retained if the listener can fit it into a familiar semantic context. To take a simple example, a negligence instruction is more meaningful and effective if, instead of stating general principles, it tells the jury to decide whether the defendant, when he entered and turned in the intersection at First and Main streets, operated the car as a reasonably prudent person would have done. Instructions should consist as much as possible of concrete statements of the questions to be decided. They should incorporate the context of names, places, things, and events established by the evidence. For example, the jury in a conspiracy case might be instructed as follows:

"In this case, defendant Jones is accused of having been a member of a conspiracy. A conspiracy is a kind of criminal partnership, an agreement or combination of two or more people to do something unlawful. The essence of the crime is the agreement or combination; it does not matter whether it was successful or not.

"For you to decide whether the government has proved its charge against defendant Jones, you must answer these four questions:

"First, did the government prove beyond a reasonable doubt that there was a conspiracy to import cocaine, as charged, starting sometime before September 1, 1981?

"Second, did the government prove beyond a reasonable doubt that defendant Jones became a member of that conspiracy sometime before September 1, 1981?

"Third, did the government prove beyond a reasonable doubt that one of the members of the conspiracy did one of the overt acts described in the indictment?

"Fourth, did the government prove beyond a reasonable doubt that whatever overt act was done by one of the members of the conspiracy was done to accomplish the purpose of the conspiracy, namely, the importation of cocaine?

"I will discuss with you briefly the law relating to each of these four questions:

"Concerning the first question, you must decide whether the evidence shows beyond a reasonable doubt that Smith and Green, alone or with defendant Jones, entered into an agreement or a joint plan to import cocaine. It is not necessary that they made a formal agreement or that they agreed on every detail of the conspiracy. On the other hand, it is not enough if you merely find that they associated together, discussed mat-

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in the lawyers' arena, rather than in his customary scientific arena.

The best expert witnesses frequently are virgins to the witness stand. They may never testify again—a fact for which they are probably grateful. Newcomers approach the task with a freshness and earnestness generally not found in the "professional" witness. But it requires a great deal of work by trial counsel. On the other hand, second to winning, there is no greater joy in trying a patent case than to take a scientist who knows his subject, prepare him for trial, and watch him, on direct and cross-examination, convince the judge or jury of the rightness of the case.

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ters of common interest, acted in similar ways, or perhaps helped one another. You must find beyond a reasonable doubt a joint plan to import cocaine.

"Concerning the second question, if you find that Smith and Green entered into a conspiracy you must then decide whether the evidence shows beyond a reasonable doubt that defendant Jones joined them. To find against defendant Jones here, you must find that he became a member of a conspiracy knowing of the unlawful plan and intending to help accomplish it. . . ."

Bringing the evidence into the instructions thus gives the jury a familiar context in which to apply the rules of law.

Instructions may also properly include a succinct statement of the issues in dispute, or the substance of the controversy. But this does not mean that instructions should necessarily summarize the evidence. Although federal judges are permitted to do so, it is a risky undertaking because the manner in which the evidence is presented, including the selection of what to include and what to exclude, may have a disproportionate impact on the jury. Where the jury is called on to decide policy issues, however, such as questions of reasonableness and good faith, instructions should list the relevant types or categories of evidence that the jury may consider in making its judgment.

Rarely Comment

Closely related is the question whether the judge should comment on the evidence. Federal judges are authorized to do so but rarely do. In approving the practice, the Supreme Court in *Quercia v. United States,* 289 U.S. 466, 469-470 (1933), explained that its purpose is "to assist the jury in arriving at a just conclusion by explaining and commenting upon the evidence [and] by drawing their attention to the parts of it which [the judge] thinks important. . . ." Though the judge "may analyze and dissect the evidence," he is not free to "distort it or add to it."

In cases where juries must pass on issues and evidence foreign to their experience, such as technical or sophisticated business practices, judicial comment as a part of the instructions may be desirable. Such comment might, for example, place conduct unfamiliar to jurors in the proper context, but should always make clear that the ultimate decisions are for the jury to make.

Pattern instructions have other drawbacks. Their ready availability and easy use has produced practices that reduce juror understanding. One of them is the common practice of requesting published instructions by number. The judge then assembles a collection of copies and reads it from beginning to end. The way this mass of material is presented to the jury has little order or logic. Certainly this procedure gives no hint of the interrelationship of the legal concepts and the manner in which the jury should sort them out. A better procedure is for the lawyers to propose an integrated set of instructions in narrative form, complete with headings, explanations, and transitions, which the court may then revise and supplement as necessary.

Another practice bred by pattern instructions is giving excessively lengthy and redundant instructions. Pattern instructions contain numerous general statements that, for the most part, will not apply to the particular case. Often, repetitious instructions are given, sometimes in slightly different phrasing, on a point thought to be important. But psycholinguistic experiments and common sense tell us that the capacity of people to receive, process, and remember information is limited. Thus, to promote understanding by jurors, redundant or inapplicable instructions should be deleted. If instructions are well organized and sent to the jury room so that jurors may refer to them as needed during deliberation, such duplication and elaboration can confidently be eliminated.

Thumbnail Sketch

Three frequently requested types of instructions are often unnecessary and should be scrutinized closely. Instructions concerning the parties' theories are rarely needed, except in criminal cases where they can be stated very briefly. While it can be helpful for the court to give a thumbnail sketch of the key facts of the controversy, theories should be left to counsel to argue.

Similarly, drawing particular inferences from certain facts is a matter for argument and should be left to the attorneys. For the court to instruct on such matters as inferring weakness in a case from the failure to produce evidence injects the judge into partisan argument and is unnecessary except in unusual circumstances. So long as a general explanatory instruction on the drawing of inferences is given, the jury can make its own decisions based on its common sense and experience. The jury might, for example, be given a general instruction such as the following:

> The word "infer"—or the expression "to draw an inference"—means to find that a fact exists based on proof of another fact. For example, if you see water on the street outside your window, you can infer that it has rained. In other words, the fact of rain is an inference that could be drawn from the presence of water on the street. An inference

may be drawn only if it is reasonable and logical, not if it is speculative. Other facts may explain the presence of water without rain. Therefore, in deciding whether to draw an inference, you must look and consider all the facts in the light of reason, common sense, and experience. After you have done that, the question whether to draw a particular inference is for the jury to decide.

Finally, cautionary instructions should be given sparingly. Some cautions to the jury are necessary, such as reminders of the duty to decide on the evidence alone and to follow the law; to disregard personal opinions and matters learned outside the courtroom; to distinguish between intentional falsehood and innocent misrecollection; to refrain from talking with anyone about the case until it is concluded; and to consider the views of fellow jurors during deliberations before reaching a decision.

But the lengthy, redundant, and often argumentative cautions found in standard instructions are unnecessary and sometimes offensive, and can be counterproductive. Studies have shown, for example, that juries returned larger verdicts when they were instructed, after an objection was made to evidence that defendant was insured, to disregard that evidence than when the evidence was received without objection and no cautionary instruction was given.

Pattern instructions can serve a useful purpose as a reference or checklist for drafting custom instructions. But the convenience they offer does not justify the risk of verdicts born of confusion and misunderstanding. It is true that tailoring instructions to the particular case requires additional time and effort. But this is time and effort that the court and the lawyer in any event should expend to define and narrow the relevant issues, particularly as increasingly complex litigation comes before juries. By so doing, the court and the attorneys are in a better position to determine what evidence should properly go to the jury—a matter as important as drafting instructions—because evidence in the record not relevant to the issues to be decided can be as detrimental to an informed verdict as misunderstood instructions.

Communicating Instructions to the Jury

Drafting clear instructions is critical to promoting juror comprehension. But it is only the beginning. Instructing jurors effectively has other aspects.

Traditionally judges have instructed juries after all the evidence has been received and the lawyers have made their arguments. The jurors have listened to days, perhaps weeks or months of testimony and argument without knowing what they were to decide and how to go about it. Who among us would be able to recall the substance of a mass of conflicting testimony, evaluate the demeanor of the witnesses, and with any confidence make decisions on questions given for the first time at the very end of the case? Some instruction, therefore, should be given at the start of the trial. The court should explain the burden of proof, what constitutes proper evidence, and how to evaluate conflicting testimony. It should also summarize the issues to be decided and the governing rules of law. These preinstructions should be briefer than those given at the end of the case, because the latter will control the jury's deliberations.

Conventionally, judges instruct the jury at the close of the summations. Summations are likely to be more meaningful, however, if they follow the court's instructions on the law. Moreover, this saves time because there will be no need for the lawyers to preview the instructions for the jury. Following closing arguments, however, the judge should remind the jurors of their duty to follow the instructions and give them guidance on how to conduct their deliberations.

The judge also should reduce the instructions to writing and, after giving them orally, send a copy to the jury room. Critics argue that jurors may be confused or misled by having the instructions with them, perhaps focusing unduly on some particular phrase or word. Yet the risk of confusion is far greater when jurors must depend solely on the bits and pieces of the instructions they happen to remember after one hearing.

It is important that written instructions be organized so that the jurors can easily find their way through them. They should be written in logical sequence, set off by informative headings and subheadings, with explanatory introductory and transitional statements.

The jury should be provided with a form of verdict appropriate to the particular case. In cases involving numerous issues, some of which may be related to others, a special verdict may be desirable. A form that reflects the sequence of issues to be decided in the case supplements the instructions by providing concrete guidance for the jury's deliberations. Care must be taken to prevent duplicative or inconsistent verdicts.

Good Sense

In conducting jury trials, court and counsel should make the most of the intelligence, good sense, and commitment jurors bring to their service. Instructions are only one part of the process. Other ideas that have proved helpful include the following:

- Avoid designation of alternates, at least until the jury retires for deliberation when they can be drawn by lot, to maximize juror attentiveness.
- Present evidence, particularly exhibits, so that the jury will be able to follow testimony pertaining to it (such as by projecting documents on a screen).
- Permit jurors to take notes for their individual use.
- Treat jurors as equal partners in the judicial process: explain to them what is going on in the trial; avoid bench conferences and other delays and disruptions; and generally treat them considerately.

Trial by jury is a treasured right, but it is not self-executing. When the Seventh Amendment was adopted, jury instructions were of little concern. Many times juries were given no instructions, because jurors were considered "good judges of the common law of the land" who "need[ed] no Explanation [since] your Good Sence &

understanding will Direct ye as to them."

The law is not what it used to be. Unless the jury is instructed so that it is able to render its verdict in accordance with the law, trial by jury is little better than mob rule. Yet this fact seems to have had little influence on instruction ritual. The legal process, while going to great lengths to insure that juries will be representative and free from bias and extraneous influence, has not protected them against confusion and misunderstanding.

This state of affairs depreciates the justice system. It makes juries susceptible to appeals, passion, and prejudice and lessens confidence in the results of jury trials. It is clearly not in the interest of the trial lawyer and the lawyer's client. Advocacy is an appeal to reason, to common sense, and to those instincts that animate man's sense of justice. A jury confused by its task and resentful of its lack of understanding cannot be counted on to respond to advocacy of a high order.

Experts: Fundamentals

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posity. You should tell them that a good expert admits when he is uncertain, acknowledges he has erred in the past and doubtless will in the future, and concedes indisputable facts even when they are adverse. Point out that a good expert cannot be goaded into taking positions he has not considered carefully before assuming the witness stand.

Next, review the expert's testimony with him, finding out what he has to say, how it can best be phrased, and what questions you should ask to elicit that testimony. You should consider whether the expert's testimony can be enlivened or made more comprehensible with demonstrative evidence such as charts, graphs, or slides. If you decide to use such aids, the expert should prepare them or at least assist in their preparation.

The structure of the expert's testimony is very important. At the outset, of course, you must qualify the expert. In most jurisdictions this involves demonstrating that the subject matter of the testimony is an area in which the trier of fact will benefit by some assistance and that the expert has the training, skill, or experience to provide that assistance.

Unless the substance of the testimony will not be disputed or the expert's credentials are unimpressive, the expert's qualifications should be set before the jury or judge in loving (but also lively) detail. In view of the impact that such matters have on those who weigh credibility, do not surrender your opportunity to parade your expert's pedigree nor accept a stipulation as to qualifications unless the expert's credibility definitely will not be challenged.

Qualifications aside, the expert's testimony should be organized like an assault on Mt. Everest: first, climb the mountain; second, plant a flag at the top; and third, climb down. In climbing up, the expert should detail all the preparation, study, experimentation, rejection of alternative conclusions, and analysis that he has undertaken to formulate his conclusions or opinions. The flag at the pinnacle is the expert's statement of his opinion. In climbing down, the expert may explain the basis or reasons that support his conclusion. Taken in this order, the expert's testimony will be understandable and will lend credibility to his conclusion.

Once you have formulated the basic outlines of your expert's testimony, rehearse it with him. Rehearsal is particularly important if you use visual aids with the testimony. If the expert has mannerisms or speech patterns that may detract from his credibility, a videotape practice session is often helpful. You then can review the videotape with the witness to improve the presentation, and repeat the drill to refine the expert's testimony to a simple, persuasive performance. Similarly, you should try to anticipate cross-examination and prepare responses to predictable areas of inquiry.

Having followed all these fundamental guidelines, you and your expert should be well prepared for the rigors of trial. Your expert will be, as he should be, a convincing salesman for your position. And you will be equipped to deal with the opponent's experts as well. After a few trials with expert witnesses, you will be the expert.

Discovery of Experts

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cementing an expert's opinion into a mold that may be inconsistent with the facts. All human beings, including experts, are also liable to use inartful phrases or words upon occasion. Infelicitous phrases in an expert's written report are unnecessary holes below his water line.

The safest course is to ask an expert not to put anything into writing unless absolutely necessary. If you need an affidavit from an expert, ask him to tell you his opinion and the bases for it. Draft the affidavit yourself. Read it to the expert. Get his approval. Give him only the final draft to sign. All other drafts might be protected by the work product doctrine. As the Supreme Court recently stated, "[f]orcing an attorney to disclose notes and memoranda of witnesses' oral statements is particularly disfavored because it tends to reveal the attorney's mental processes." *Upjohn Co. v. United States,* 449 U.S. 383, 399 (1981). The same is true with getting an expert's report. Get it orally.

In principle, if an expert's written statement to you is discoverable, his oral statement should be as well. But as a practical matter, the expert will not remember for any length of time the exact terms of his oral statements.

Despite the addition of Rule 26(b)(4) in 1970, problems with discovery of experts still plague the federal courts. Nevertheless, by withholding from your experts all otherwise privileged material and by avoiding unnecessary written communications from and to an expert, you can sidestep many of the serious pitfalls.