JURY INSTRUCTIONS: AN UNDERUTILIZED RESOURCE

BY ELLEN PLATT

Ellen Platt is the Director of Public Services of the Heafey Law Library, Santa Clara University, in Santa Clara, California.

Although jury instructions are a crucial part of the litigator's preparation for trial, they are often unappreciated by recent law school graduates and used inappropriately even by experienced attorneys. Jury instructions are rarely mentioned or introduced into the law school curriculum. This lack should be a significant concern to educators and practitioners, given the centrality of instructions to a jury's verdict, and the frequency with which jury instructions constitute the basis for appeals. This article briefly describes the sources and authority of jury instructions, discusses how they are drafted, and suggests how this underutilized legal resource could be introduced into the law school curriculum. It concludes with a brief list of research resources related to jury instructions.

Types of Instructions

"The most important purpose of the jury instruction is to educate the jury in order that it may make a fully informed decision."

In any case tried to a jury, the instructions governing the jury's activities play a crucial role. Preliminary instructions explain duties and proper behavior during the trial. They are generally not controversial, and are supplied by the judge. Additional instructions during the trial may explain the proper treatment of various types of evidence or occurrences, such as side bar conferences or in camera discussions. Final instructions, submitted to the judge by the attorneys and delivered immediately before the jury's deliberations, explain the law applicable to the case and direct the jurors to find the facts in accordance with particular legal definitions and instructions. The outcome of a trial depends in part on which instructions are given the jury prior to its deliberations; for example, a jury can't find first-degree murder if it doesn't receive a jury instruction on that crime. For that reason, selecting from among the submitted jury instructions can lead to heated discussion between attorneys and the judge. The emphasis in this article is on final instructions.

Sources and Authority of Instructions

Model or pattern jury instructions may be written by court and bar association committees; by associations of judges or attorneys; by the publishing arms of bar continuing education units; or by academic committees, institutes, or foundations (generally affiliated with a law school). Some are the product of individual practitioners and commercial publishers (e.g., Texas), while others are produced by one of the above listed groups, but published commercially (e.g., California). In some states the instructions issue from committees acting under the authority of the state supreme court; in these jurisdictions the use of relevant instructions is mandatory. In most states, however, the instructions are "unofficial" and their use is only recommended. As one drafting committee explained: "While our role in providing instructions is well recognized ... and indeed the use of our instructions is recommended by the Judicial Council ..., our instructions do not have the imprimatur of the Supreme Court, the Judicial Council or the Legislature."

Drafting Jury Instructions

"The procedure by which jury instructions are drafted, submitted, modified or rejected, and finally given, is a joint effort among the lawyers and the judge, with the judge having the last word. Each of the litigants wants instructions that frame the issues most favorably to his or her side without, of course, creating reversible error." Although attorneys may draft proposed instructions, the judge—viewed by the jury as an impartial party—ultimately selects and gives the instructions. Attorneys should consider proposed jury instructions as the opportunity to present the law to the trier of law in the case, just as they present evidence to the jury, the trier of fact in the case.

Drafting or modifying jury instructions is crucial. Pattern or model instructions should be tailored to the facts of the particular case and should be appropriate. "All unnecessary concepts and terms should be removed so that the instructions may properly focus the attention of the jurors on the precise issue or

3 California Jury Instructions, Civil at x (8th ed. 1994).
4 California Forms of Jury Instructions § 1.01 (1998).
issues that they are being asked to resolve and nothing else." The instructions must state the law correctly and do so in a manner that is not prejudicial or confusing to the jury. Any of these flaws may lead the judge to modify or reject a proposed instruction. In the event a prejudicial, incorrect, or unclear instruction is given, it can lead to reversal on appeal.

Every complete set of instructions should contain five basic components: 1) juror responsibility, 2) definitions of terms, 3) burden of proof and measure of evidence, 4) factual contentions of the parties, and 5) statements of the law applicable to the factual issues. The last component requires careful research to determine the controlling case or statutory law of the jurisdiction. Inclusion of statutory language is not required, but should be considered so long as it is neither misleading nor confusing. Further, "the use of appellate language within the text of an instruction is hazardous and not recommended..." primarily because the language may confuse laypersons.

**Integrating Instructions into the Curriculum**

Despite their importance in litigation, jury instructions generally receive little or no mention in law school courses, not even those focusing on advocacy training, research and writing, or clinical experience. Further, they generally receive only brief treatment in legal research texts used in law schools.

Practice-oriented materials, more frequently used by attorneys than law students, may include more discussion of, and guidance on, the use of jury instructions, but the level of explanation of strategy, research, and drafting considerations in practice texts varies considerably among titles. As one practitioner observed: "Few law schools offer courses which identify or discuss the component parts of jury instructions, their arrangements, and their purpose. This void in the formal educational process is generally filled by attorneys blindly copying instructions offered in similar cases by other attorneys practicing in the community. ... The inevitable result is a confused set of hastily prepared instructions. If an instruction is confusing and misleading, it is erroneous and should be denied by the trial court." Another commentator suggests that this lack of attention to jury instructions is also true in continuing education courses and practice materials focusing on litigation techniques.

If the jury instruction is a crucial tool of practicing attorneys, but is rarely mentioned in law school, then we must ask where, when, and how might this tool be introduced to law students. I believe that there are a number of places in the law school curriculum where creating, redrafting, or applying jury instructions would be useful to students and could fit logically into course plans.

**Research and Writing Classes**

In research and writing classes, jury instructions would be helpful tools for the student who is structuring a memo or brief because instructions state the elements of actions, the burdens of proof, defenses, and the methods of handling evidence, as well as giving citations to primary resources. In advanced writing courses or moot court competitions with a trial focus, the process of redrafting instructions to achieve clarity would not only be a logical part of the brief production process but would help the student structure the argument.

**Clinical or Trial Practice Courses**

If preparation of jury instructions is an essential component of the trial process that practitioners must master, then their introduction into the clinical setting or trial practice courses is logical. In fact, the future practitioner might view the presentation of elements, tests, and applicable law found in instructions—particularly in final instructions that reiterate burdens of proof and elements of actions or crimes—as a way to structure trial preparation and research in the real world. Regardless of whether the case actually goes to trial or a verdict is reached, the careful attorney prepares for all contingencies.

When I presented this suggestion to Professor Charles Clausen, director of Clinical Education at Marquette University, he commented: "Students may read about instructions in appellate decisions, since an error in the instructions is often the basis

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6 See Farrell, supra note 1, at 21.

7 Id. at 27.


9 Farrell, supra note 1, at 21.

for appeal. But in terms of the nitty-gritty of drafting and arguing instructions, there is little exposure in law school. I'm not sure if this is a curable situation. The battle over instructions occurs after all the evidence is in and all sides have rested. Instruction/verdict conferences can take hours. Evidence is offered to set up favorable rulings in the conference, which in turn sets up the closing arguments. Trying to replicate or simulate the experience in a law school setting is most challenging, not because of the law part, but because of the raw evidence part. In clinical courses involving trial work, you can never know whether there will be a case in which a meaningful verdict/instruction conference will occur."

Substantive Courses

Finally, instructions could also be used in substantive courses, such as torts or criminal law, to focus the attention of students on elements of the cause of action or crime, defenses, burdens of proof, damages and types of verdicts. Careful examination and explanation of the instructions' components could help to clarify concepts and enhance the students' ability to distinguish between similar causes of action or criminal acts. Reacting to this proposal, University of Oregon School of Law professor Dominick Vetri, who teaches torts and copyright among other subjects, commented: "Introducing problems that require students to integrate substantive doctrinal knowledge into the drafting of instructions in order to teach substance and skill could be useful, particularly given the trend in bar examination format."

Conclusion

There is no doubt of the importance to the practitioner of learning proper techniques for drafting and using jury instructions. Nonetheless, the introduction of instructions into the academic setting will not be easy, but educators committed to introducing students to jury instructions as part of the educational process should not let this discourage their efforts. After all, it was not long ago that alternative dispute resolution was thought to be too complicated to teach, but ADR courses are now common offerings at many, if not most, law schools. Jury instructions are certainly less complicated than ADR, and surely innovative educators can find a way to bring them to the attention of law students without restructuring the entire curriculum.

Appendix: Selected Jury Instruction Resources

Background Resources


This book describes a rather involved set of techniques for drafting and testing instructions; the intended audience is attorneys and instruction drafting committees. This method was used in 1978 to redraft Alaska's civil instructions into understandable English.


Details various studies on juror comprehension, and relates experiences of a panel of judges, practitioners, and social scientists. It also includes a presentation on 13 basic guidelines for writing clear instructions and a bibliography of sources on the topic.


This article traces the responses to the studies showing jurors have difficulty with instructions. Includes a substantial list of references to articles on the topic and an appendix that lists, in chart form, the state and federal cases, rules, or statutes that regulate jury instruction procedures for civil and criminal actions in each jurisdiction.

Frederick D. Williams, Jury Instructions: A Primer for Young Lawyers, 38 For the Def. 28 (Jan. 1996).

A short overview of the important but overlooked part instructions play in litigation. This is a good article with which to introduce law students to the role of jury instructions. The author stresses the need for careful research of the law and drafting of instructions, and describes the mechanics of presenting your instructions to the judge.

Sources of Instructions

General Form Sets with Instructions:

- American Jurisprudence Proof of Facts
- American Jurisprudence Trials
- American Jurisprudence Pleading and Practice
- Two other sets that may contain some jury instructions for specific causes of action are Model Trials and Causes of Action

11 Researchers should keep in mind that sources often use the phrase "instructions to juries" rather than "jury instructions" as an indexing term.
Federal, Model, and Pattern Instructions:
- Federal Circuit Court Pattern or Model Jury Instructions:
  Civil instructions are available for the 5th, 8th, 9th, and 11th circuits
  Criminal instructions are available for the 1st, 5th, 6th, 7th, 8th, 9th, and 11th circuits

State and Topical Instructions:
- See the bibliography in either *Model Jury Instructions: Securities Litigation or Model Jury Instructions: Business Torts Litigation* (both titles are published by the Section of Litigation, American Bar Association, 1996), which list state, federal, and topical titles for all states but Rhode Island.
- See also two older compilations of state, federal, and topical titles:
- State jury instruction titles typically organize instructions in related groups and cite relevant cases, statutes, and other secondary sources. Appendices may include tables correlating instructions with statute sections, explanations of complex topics, and case tables.
- Also consult the ABA Web site at <http://www.abanet.org/abapubs/home.html> to find titles published by its various sections. Publications are arranged to allow access by subject area or title.

Computer-Assisted Research:
- Westlaw:
  Federal Jury Practice and Instructions database (FED-JI)—Includes *Federal Jury Practice and Instructions* (Devitt and Blackmar), Pattern Criminal Jury Instructions from the Federal Judicial Center, and the pattern and model instructions from the various federal circuit courts for civil and criminal matters (see the section above for a list of the contributing circuits).
  State instructions—As of March 1999, civil instructions were available for California, Florida, Illinois, Maryland, and Washington; criminal instructions were available for California, Florida, Maryland, and Washington.
- LEXIS-NEXIS:
  Federal instructions file (MOFEJI appears in the 2NDARY, GENFED, LITGAT, and MATBEN libraries)—Includes pattern instructions from *Modern Federal Jury Instructions*, the Federal Judicial Center, and several federal circuit courts for civil and criminal matters. The instructions are accompanied by citations to case or statute authority, comments, and analysis. The database is accessible by full-text searching or using the table of contents.
  Combined instructions file (JURINS appears in the 2NDARY, LITGAT, and STATES libraries)—Includes federal and state instructions and is accessible by full-text search or using the table of contents. The table of contents divides the material alphabetically into broad legal topics (titles), subtopics (chapters), and sub-issues (sections), and then lists the instructions. Instructions include text, case annotations (with links), and citations to secondary sources.
- Internet:
  Jury instructions are difficult to find on the Internet. Legal resource sites do not list them as a separate category and general searches were fairly unproductive. The scarcity of materials on the Internet may also be due to the proprietary nature of most jury instruction titles.