PLRI Public Law Research Institute

Improving The Jury System

Jury Instructions: Helping Jurors Understand the Evidence and the Law

by Ellen Chilton & Patricia Henley

Introduction

Juries have tremendous power over people's lives. Granting them such power directly expresses our faith in an institution that is central to our vision of democratic governance, and our confidence that jury verdicts can be fair, unbiased, and accurate.

In recent years, however, many concerns have been raised about the jury system's viability. One primary concern is that juries have become inefficient and serve as a drain on limited judicial resources. Concerns have also been raised about the quality and integrity of the outcomes reached by juries. Many critics believe that jurors are frequently biased, incompetent, and apathetic, and as such, render verdicts that are unprincipled and often unjust. Jurors frequently misunderstand instructions from the judge on legal issues, fail to recall critical evidence, and suffer from boredom and apathy during trials. Particularly in complex trials, jurors have trouble comprehending the evidence and that as a consequence, jurors reach verdicts that are arbitrary.

Finally, there is a concern over the widespread negative perception that the public has of the jury system. It seems that the public often no longer trusts juries to render fair and principled verdicts. As a result, the legitimacy of the jury system has been questioned by the media, members of the legal profession, and the public itself.

Improving Jury Trials

These concerns have led to proposals intended to improve the jury system. Some of those proposals focus on the way in which jurors are informed about the facts of the case they are deciding, and about the law. This report examines three such proposals.

The first proposal is that jurors be allowed to question witnesses during the trial. Allowing jurors to ask questions radically departs from the traditional practice, which dictates that the jury sit passively and view the evidence as the lawyers present it. Yet, some reformers both in and out of the courtroom feel that a more active role for jurors could improve their ability to decide cases efficiently and accurately.

The second proposal would allow jurors to discuss the evidence as it is presented, rather than requiring them to refrain from discussions until they begin formal deliberations at the end of the trial. The traditional practice is to instruct jurors not to discuss the evidence

until the end of the trial. Discussing the case as it is in progress is thought to create a risk that the jurors will prejudge the case, making up their minds before they hear both sides. Yet, predeliberation discussions might dispel juror confusion, aid later recall of the evidence, and dispel the anxiety and tension a prohibition on discussions can create.

The third proposal focuses on jury instructions. Jurors frequently report that they simply do not understand the law they are expected to apply. Jury instructions, the vehicle by which the jury is informed of the law, traditionally are given only after the evidence is presented, and are frequently phrased in language intended to satisfy appellate courts that might review the verdict, rather than the needs of jurors. Simplifying the language of jury instructions, and instructing jurors about the governing legal principles at the beginning of the trial might give the jurors a framework in which to fit the evidence they are hearing and help them decide the case more quickly and more accurately.

I. Jurors Submitting Questions to Witnesses During Trial

Supporters of jury reform feel that the traditional role of jurors as "passive fact finders" is detrimental to juror comprehension. It is thought that the lack of juror involvement at trial encourages apathy and leads to poor decision-making. There is evidence that allowing jurors to take a more active role during trial will improve juror comprehension and will ultimately result in more accurate and principled verdicts.

One way in which jurors can be encouraged to take a less passive approach to evaluating the evidence presented during a trial would be by allowing jurors to ask witnesses questions when the testimony is unclear or unhelpful. Despite the fact that presenting evidence at trial is considered to be the exclusive domain of lawyers, lawyers sometimes fail to present evidence in a complete and coherent fashion. Jurors may need to ask questions to fill communication gaps in their understanding of a witness's testimony. There is evidence that allowing jurors to question witnesses would improve juror comprehension and attentiveness during trial, resulting in more accurate, fair, and principled verdicts. Thus many scholars and members of the judiciary believe that jurors should be allowed to submit written questions to witnesses during trials.

A. The Traditional Rule

Centuries ago, juries were viewed as inquisitive bodies and jurors were allowed to question witnesses both outside and inside the courtroom. As the modern legal profession developed, the adversarial system of litigation dominated, and jurors gradually took on a less active role in trials. Jurors became "passive fact finders" instead of independent investigators of the facts. Rules of evidence were developed to limit the information the jury received, and, eventually, jurors were not allowed to question witnesses at all.

In a few states, jurors are expressly prohibited from asking questions by judicial decision. The Nebraska Supreme Court, in *State v. Zima*, [1] disallowed juror questioning on the ground that such a practice departs from the traditional adversarial nature of judicial proceedings and may violate the party's due process right to an impartial jury. Georgia's supreme court has also disallowed juror questioning of witnesses in *State v. Williamson*, [2] where it reasoned that jurors may be personally offended if attorneys object to their questions, and that this may be a basis for prejudice. Finally, in *Morrison v. State*, [3] the court concluded that allowing jurors to submit questions to witnesses results in reversible

error per se because it undermines the adversarial system by distorting the jury's fact-finding role and leading jurors to assume the role of advocates.

In most states and in federal court, however, trial court judges can let jurors ask questions if the judge feels it is appropriate. The practice, however, has generally been discouraged. Some courts have discouraged juror questioning because it may be prejudicial to the parties, or interfere with the integrity of the trial process. Such prejudice may result from trial delay, premature deliberation by jurors, reluctance of attorneys to object to juror questions because of the fear of offending jurors, satisfaction of the government's burden of proof by juror-initiated evidence, assignment of disproportionate weight to evidence elicited in response to their own questions, and transformation of the adversary process into an inquisitorial process.

Only in Arizona state courts are juror questions clearly welcomed. In December of 1995, Arizona amended its Rules of Civil and Criminal Procedure to authorize trial judges explicitly to allow juror questions, and to establish a procedural framework for the judges to follow.

B. The Argument Against Juror Questions

Many negative consequences have been predicted from allowing juror questions to be posed to witnesses:

Allowing jurors to ask questions would disrupt trials and burden judges. Juror questions may upset courtroom decorum or the speed of the trial. They may also upset the balance in the adversarial system as it exists today. Studies have found, however, no evidence to support the prediction that juror questions would cause the trial to move slower or upset the lawyer's strategy.

Jurors might ask inappropriate or prejudicial questions because they do not know the rules of evidence and procedure, which could lead to several problems:

-- the lawyers might be reluctant to object for fear of angering the jurors

-- if a lawyer objects, the juror might be embarrassed or angry

-- if a lawyer's objection to a question is sustained, the jury might draw inappropriate inferences.

Despite these fears, studies indicate that when juror questioning is allowed, lawyers are not overly reluctant to object to inappropriate questions from jurors, and jurors report not being embarrassed or angry when attorneys objected to their questions.

Juror questioning may create a bias among jurors that would interfere with the constitutional requirements of due process and a fair trial.

Juror questioning may cause jurors to become overly involved and lose their objectivity and impartiality.

Jurors might place too much emphasis on the answers to their own questions.

An individual juror's question and the answer elicited may take on a stronger significance to the jury than those questions and answers presented and received in the normal

adversarial manner.

Jurors who are the most active in the trial may be the most influential during deliberation.

Juror questions would be an impractical procedure, and would present a nuisance to the judge and courtroom staff. However, studies have failed to show that the question-asking procedure would present a nuisance to courtroom staff.

C. The Argument in Favor of Juror Questions

Despite many of the potential negative consequences of allowing juror questions, both scholars and members of the judiciary have identified several advantages of allowing the practice:

Jurors' doubts and uncertainties about testimony will be alleviated. Studies conducted on groups of jurors who were allowed to ask questions show that practice alleviates juror doubts about the trial testimony.

The accuracy of the decision-making process will be improved.

Jurors' will be more confident in their verdict. Jurors will be satisfied that they possessed all of the information necessary to reach a verdict.

Jurors will be more involved in the trial process, which could heighten jurors' overall satisfaction with the trial.

Allowing the jury to play a more active role will instill in jurors a better understanding of the importance of their responsibility.

The jury's credibility will increase.

The jury's decision will be accorded greater legitimacy in the public eye.

The jury's questions may help inform the attorneys about issues in the case that the jurors do not understand, points that need further clarification, and about juror biases. Studies have indicated that juror questions were effective in providing lawyers with feedback about the jurors' perception of the trial.

Juror questions may reveal important evidence or issues that were left out by the lawyers.

Allowing juries to pose questions to witnesses will serve as a check on the judge's and lawyers' power.

D. Procedural Safeguards Used by Various Jurisdictions

1. General Need for Procedural Safeguards

Many of the concerns surrounding the practice of allowing juror questions can be alleviated with the use of proper procedural safeguards. The most important

safeguard seems to be the requirement that juror questions be presented in *written form.* While at least one judge has endorsed the practice of jurors directly asking oral questions of witnesses, such direct interrogation poses numerous problems. First, inappropriate questions spoken by jurors may create premature bias in the minds of other jurors. Even if the judge attempts to screen the questions as they are spoken, the judge may be slow to respond and inadmissible answers may be given in open court. The practice also places lawyers in the unsavory position of being forced to object to a juror's question immediately after it is stated (which could provoke negative feelings within the juror whose question it is). As such, both courts and scholars have disapproved of the practice of jurors directly posing oral questions to witnesses.

Most state courts that have allowed juror questions have required such questions be in writing. The deliberateness of written questions gives jurors the time to formulate their questions thoughtfully. It also allows judges to rule on the admissibility of evidence before the question is asked in open court. It may also prevent a question from being discussed between the juror and witness.

In requiring that juror questions be in written form, courts could follow one of two approaches. The court could either allow jurors to write down questions while in the jury box, immediately after each witness's testimony. The judge could then screen the question and read it to the witness, after which counsel could object. This, however, still leaves the problem of lawyers being reluctant to object to questions for fear of offending jurors.

The court may also allow jurors to go back to the jury room to write down any questions they may have, and then submit these questions to the judge. The judge would then allow counsel to object, outside the presence of the jury. After ruling on the objections, the judge would call the jury back, the trial would resume, and the judge would ask the witness the questions that were ruled unobjectionable. While this procedure might be more time consuming, it would avoid many of the potential dangers in allowing juror questioning of witnesses.

The following general safeguards have been suggested when allowing juror questioning of witnesses: (1) requiring jurors' questions to be written and unsigned; (2) requiring jurors' questions to be submitted to the judge, who, outside the jury's presence, discusses them with the attorneys and allows the attorneys to make objections to the questions; (3) if questions are proper, allowing the judge to present the questions to the witness; and (4) reminding jurors that they should not attach any significance to the failure of the judge to ask a requested question.

2. Recommendation of the California Judicial Council's Blue Ribbon Commission on Jury System Improvement

The California Judicial Committee's Blue Ribbon Commission on Jury System Improvement has recently determined that "on balance . . . the benefits of juror questioning outweigh the largely speculative concerns that have been raised about the practice." As such, the Commission has recommended that juror questioning be allowed in all cases, subject to the discretion of the judge, the rules of evidence, and the following admonition to the jury:

During the course of this trial you may have some questions that you wish to have asked. If you wish to ask a question, please write out your question and hand it to the bailiff. The court will allow each attorney to examine the question. Whether your question will be asked by one of the lawyers after you have submitted it depends upon many factors. The attorneys have a broad overview of the case and may choose not to ask the question. The question may call for an answer which the court or attorneys may feel is inadmissible because of the Constitution of the United States or of California or the law of the State of California. The question may call for an answer which may be unreliable or untrustworthy. You may not draw any inference when a question is not asked nor may you guess or speculate as to why the question was not asked nor what the answer might have been.

3. Arizona's Statutory Safeguards

In December of 1995, the Arizona Supreme Court amended its Rules of Civil Procedure and Rules of Criminal Procedure to allow jurors to ask questions of witnesses. The amended Rule of Civil Procedure 39(b), which is excerpted below, contains many procedural safeguards for juror questioning of witnesses:

"The court shall instruct the jury concerning . . . the procedure for submitting written questions of witnesses or of the court."
After the plaintiff and the defendant have introduced evidence and had an opportunity for rebuttal, "jurors shall be permitted to submit to the court written questions directed to the witnesses or to the court."
"Opportunity shall be given to counsel to object to such questions out of the presence of the jury. [F]or good cause the court may prohibit or limit the submission of questions to witnesses."
"The court should instruct the jury that any questions directed to witnesses or the court must be in writing, unsigned and given to the bailiff."
"[I]f a juror has a question for the witness or the court, the juror should hand it to the bailiff during a recess, or if a witness is about to leave the witness stand, the juror should signal to the bailiff."
"If the court determines that the juror's question calls for admissible evidence, the question should be asked by the court or counsel in the court's discretion."
"Such question may be answered by stipulation or other appropriate means, including but not limited to additional testimony upon such terms and limitation as the court prescribes."
"If the court determines that the juror's question calls for inadmissible evidence, the question shall not be read or answered."
"If a juror's question is rejected, the jury should be told that trial rules do not permit some questions to be asked and that jurors should not attach any significance to the failure of having their question asked."

Arizona's amended Rule of Criminal Procedure 18.6(e) appears to be the same as its civil counterpart, but with an additional procedural safeguard: "The court should also instruct the jury that they are not to discuss the questions among themselves but, rather, each juror must decide independently any question he or she may have for a witness."

4. Judicially-Created Safeguards

The state courts that have allowed juror questions have established their own procedural safeguards in case law (as there are no code provisions, with the exception of Arizona's new amended rules). Most jurisdictions require juror questions to be in writing. The jurisdictions vary on whether questions should be presented while the witness is on the stand, or at the end of the trial; however, most require that courts follow a procedure similar to the Arizona model.

Some jurisdictions have unique procedural requirements. The South Carolina Supreme Court, in Day v. Kilgore, 444 S.E.2d 515 (1994), held that even if the question is otherwise proper, the trial judge must also examine whether the question would lead the jury out of its normal role of passive fact-finder, and into the role of advocate. The trial judge possesses the power and the responsibility to maintain the adversarial system during trial. The Massachusetts court, in Commonwealth v. Urena, 632 N.E.2d 1200, 1206 (1994), held that when a judge decides that it would be appropriate to allow jurors to ask questions of witnesses, the judge must inform the parties and give them an opportunity to be heard in opposition to the practice or to suggest the procedure to be followed. To avoid unnecessary delay, the trial judge might have all jurors submit their questions at one time, after a witness has been examined but before that witness steps down from the stand. Finally, a New Jersey court in State v. Jumpp, 619 A.2d 602 (N.J. Super Ct. App. Div. 1993), requires that counsel be afforded opportunity to reexamine the witness after the juror's question is asked.

II. Allowing Jurors to Discuss the Evidence During the Trial

Traditionally, jurors are cautioned not to discuss the case until after all the evidence is in, final arguments have been heard, and formal deliberations have begun. To increase the ability of jurors to comprehend, remember, and process the information presented to them at trial, some experts believe that jurors should be allowed to discuss evidence during the trial, subject to an admonition that they not make up their minds before hearing all evidence and legal arguments.

Prohibiting jurors from discussing evidence during trial may impede jurors' natural, decision-making processes. Behavioral researchers have concluded that the jurors' natural tendency is to process the information actively, as it is received. There is evidence that jurors may not be capable of effectively separating the acquisition of information from the process of evaluating such information. It may be unrealistic to ask jurors store all the evidence presented to them and suspend judgment until formal deliberations begin. Studies reveal that 11% to 44% of jurors discuss evidence among themselves before the official deliberation period begins anyway, so explicitly permitting the practice may simply be acknowledging a reality.

A. The Traditional Rule

Both federal and state courts instruct jurors not to discuss evidence presented at trial prior to the start of formal deliberations. In California, the prohibition is statutory. (*See* Cal. Code of Civil Procedure 611 (requiring judges to admonish

jurors, "It is your duty not to converse with or allow yourself to be addressed by any other person on any subject of the trial; and not to form or express an opinion thereon except in the course of your deliberations.") Predeliberation discussions of evidence might, it is feared, cause jurors to decide the case prematurely, or cause them to become attached to a particular position or line of reasoning before other evidence is presented. Additionally, if discussion is permitted during trial, there is the possibility that these discussions could escalate into full-scale deliberations. Such discussions might have a prejudicial effect on the party who presents his or her evidence last (both criminal and civil defendants), because jurors may have already made up their minds after hearing the prosecution/plaintiff's evidence.

B. The Argument Against Predeliberation Discussions

The primary objection to allowing predeliberation discussions is that it would jeopardize the defendant's Fifth and Sixth Amendment right to a fair trial and also diminish a defendant's due process right to have the government bear the burden of proving its case beyond a reasonable doubt. Predeliberation discussions might encourage jurors to become locked into their positions before they hear all of the evidence. If premature discussions occur before the defense presents its evidence, any initial opinion formed by the jury is likely to be unfavorable to the defendant. Defendants in both criminal and civil cases might suffer prejudice when presenting their case if the jury has had extensive discussions based on evidence that the plaintiff or the prosecution has presented. Delaying all discussion until the end of trial is thought to encourage jurors to maintain an open mind regarding the evidence and thus protect the defendant's right to a fair trial. Due to the risks associated with predeliberation discussions, the California Judicial Council's Blue Ribbon Commission on Jury System Improvement has recently recommended that the rule barring such discussions be left in place.

C. The Argument in Favor of Predeliberation Discussions

Despite the above risks, some scholars believe that there are many potential benefits of allowing predeliberation discussions of evidence during trial. These benefits include:

Juror comprehension will be enhanced because jurors would be allowed to have interactive communications with other jurors during trial.
Jurors' questions can be asked and impressions shared on a timely basis rather than held until deliberations. Such questions or impressions may be forgotten by that time.
Jurors' tentative judgments might surface in predeliberation discussions and then be tested (and perhaps debunked) by the group's collective knowledge.
Divisive private conversations and cliques within the jury may be reduced if jurors are given opportunities for expressing their ideas or impressions in the presence of the entire jury.

Scholars who advocate allowing predeliberation discussions have recognized the potential for prejudice to the parties, as mentioned above. As such, they have recommended that judges allow jurors to discuss evidence among themselves *subject to the following admonitions:* (1) Jurors must not make up their minds about any issue in the case until hearing evidence from both sides, all arguments of the

attorneys, and final instructions of law from the judge; (2) Jurors must be careful not to discuss the evidence with another juror while the trial is going on in the courtroom; and (3) Jurors must not discuss the evidence with another juror if any other person who is not a juror is present or with hearing range.

D. Case Law / Legislation from Other Jurisdictions:

Courts in most jurisdictions will not overturn a verdict merely because it is proven that jurors engaged in predeliberation discussions of evidence during a trial. For a verdict to be overturned, it must be shown that the jurors decided the merits of the case prematurely or that prejudicial outside information was introduced into the decision-making process. Cases are split on the question of whether the trial judge commits reversible error when he affirmatively instructs jurors that they may discuss the evidence amongst themselves. Many cases approve of such an instruction as long as the jurors are admonished not to make up their minds until the formal deliberation period begins.

The Ninth Circuit, in U.S. v. Klee, 494 F.2d 394 (1974), *cert. denied* 419 U.S. 835, held that a mistrial will be granted only when the predeliberation discussions result in prejudice to the defendant so that the defendant is denied a fair trial. It is within the trial judge's discretion to rule on whether such prejudice has occurred. Because trial judges are in a better position to determine whether the conduct of the jury is prejudicial to a defendant, the Ninth Circuit has held that appellate courts should not second-guess the trial courts' determination.

Arizona recently amended its code to allow for predeliberation discussions among jurors in civil cases. Allowing such discussions in criminal cases has been postponed until after the resolution of a constitutional challenge to that procedure. Arizona Rule of Civil Procedure 39(f) provides:

[J]urors shall be instructed that they will be permitted to discuss the evidence among themselves in the jury room during recesses from trial when all are present, as long as they reserve judgment about the outcome of the cases until deliberations commence. Notwithstanding the foregoing, the jurors' discussion of the evidence among themselves during recesses may be limited or prohibited by the court for good cause.

The Comment to Rule 39(f) goes on to provide that in deciding whether to limit or prohibit predeliberation discussion of evidence, the trial court should take into account the "length of the trial, the nature and complexity of the issues, the makeup of the jury, and other factors that may be relevant on a case by case basis."

III. Improving the Jury's Ability to Understand and Apply the Law

Until at least the nineteenth century, juries often decided both questions of fact and law. In 1895, however, the United States Supreme Court first declared that "it is the duty of juries . . . to take the law from the court and apply that law to the facts as they find them to be from the evidence." [4] As restrictions were placed on the jury's discretion to decide legal questions, states began mandating that the judge instruct the jurors on what the law required. Today, the trial judge provides the jury with lengthy instructions, the purpose of which is to inform the jury what the issues are,

the principles of the applicable law, and the facts which must be proved to justify their verdict.

Merely instructing the jury as to the applicable law, however, is not enough. The only way a jury can possibly apply the law to the facts of a case is if the judge's instructions are comprehensible. Unfortunately, both case law and social science research reveal that juries often do not understand the instructions given to them.

One study, conducted in the 1970s, found that a significant number of jurors failed to understand or refused to accept certain instructions. The study of 116 people summoned for jury service in Florida, tested the comprehensibility of Florida's pattern criminal jury instructions. Despite instructions to the contrary, 43 percent of the surveyed jurors believed that circumstantial evidence was of no value. Only half of the jurors understood that the defendant did not have to present evidence of his innocence, despite an instruction on the presumption of innocence. [5] In the past few decades many similar studies have been conducted throughout the United States, all resulting in the same conclusion that most jurors do not understand the judge's instructions. [6]

This general lack of comprehension raises several questions about the accuracy and legitimacy of jury verdicts. If jurors do not understand the instructions given them, it is possible that many of their verdicts are reached on the basis of improper law or without regard to the law at all.

Fortunately, he same studies that reveal jury misunderstanding of instructions also reveal ways in which juror comprehension of instructions can be greatly improved. First, the instructions themselves can be rewritten in light of linguistic principles to make them easier for lay jurors to understand. Second, the manner in which instructions are given can be changed to effect greater comprehension on the part of the jury. For example, rather than waiting until the end of the trial to instruct the jury on substantive legal principles, the jury should be instructed at the beginning of the trial. Then, the final instructions should be delivered prior to, rather than after, counsels' closing arguments.

A. Simplifying the Language of Jury Instructions

Social scientists have identified several linguistic factors which may influence the comprehensibility of jury instructions. [7] First, the vocabulary of instructions can be improved. The authors of jury instructions should avoid legal jargon and uncommon words and phrases. Difficult words and phrases should be replaced with more commonly understood synonyms.

Second, the grammar and sentence structure of jury instructions contributes to misunderstanding. Many instructions are difficult even for those in the legal profession to comprehend, due to their complex, confusing sentence structure. To increase comprehension, linguists have suggested, among other things, that drafters avoid long, compound sentences and the use of double or triple negatives.

Finally, the organization of the instructions affects comprehension significantly. Many instructions are difficult to understand, because they are poorly organized. Instructions often contain ideas on several different topics without clearly indicating the relationship between those topics. One organizational suggestion is to begin

each instruction with general contextual information, such as "this instruction is in two parts," or "a person can become negligent in two ways." Also, the instructions should be organized in ways, such as numbered lists, that help the jurors understand and remember the rules that are to govern their decision.

Furthermore, the instructions should be case-specific. Rather than repeating verbatim pattern instructions, the judge should tailor the instructions to fit the individual case. The instructions should contain the names of parties, actual fact issues and examples from the case.

In order to discover which language is more understandable to the average juror, several proposals have been suggested. First, pattern instruction committees, now usually made up of judges, trial lawyers and law professors, should include people outside the legal profession who can better anticipate certain comprehension problems. Psychologists, linguists, English teachers, and former jurors could all contribute ideas about what makes an instruction difficult to comprehend. Unfortunately, very few committees have been willing to hire language experts to assist in the drafting of pattern instructions. [8] The primary concern in drafting instructions is legal accuracy, so committees put little effort toward making instructions understandable to the average juror despite the fact that empirical research has shown that legal accuracy can be achieved without sacrificing comprehensibility.

Second, those responsible for drafting the instructions should seriously consider any comments made by former jurors about the instructions they received and which parts of the instructions they did not understand.

1. The Traditional Approach to Drafting Jury Instructions

In the past, jury instructions were drafted on a case-by-case basis. The attorneys for each side would submit a version of an instruction they wanted read to the jury. The judge would then choose from those instructions or write an instruction of his own. This was a time-consuming process which often resulted in instructions which were argumentative, confusing, or did not accurately state the law.

To deal with these problems and avoid the high percentage of reversals due to legally inaccurate instructions, judges began accumulating instructions, taken verbatim from appellate court decisions, for use in future trials. In 1938, California went one step further, when a committee of the Los Angeles Superior Court drafted a set of pattern jury instructions recommended for use in California courts. Today, every state and the federal courts, has some form of pattern jury instructions, which are either recommended or required in all cases. Responsibility for developing these instructions has been assumed by a variety of groups, including state bar associations, judicial conferences, state supreme courts, judges' associations, administrative offices, law schools, and trial lawyers' associations.

The primary goals of pattern jury instructions are to increase the legal accuracy of instructions and thereby avoid reversals, eliminate argumentative language, save time, and, finally, improve juror comprehension of instructions. Pattern instruction committees have been, for the most part, successful in achieving some of these

goals, particularly a reduction in the number of appeals and reversals based on inaccurate instructions. They have generally failed, however, in their efforts to improve juror comprehension.

There are several reasons for this failure. Pattern instructions are often taken directly from the language of appellate court opinions or statutes, written for legal audiences rather than lay jurors. Even instructions drafted with juror comprehension in mind still contain complicated legal terminology, due to the fact that committees are made up of lawyers and judges who often do not realize that certain language is confusing and unfamiliar to those outside the legal profession. Finally, particularly in states where the use of pattern instructions is mandatory, the judge simply reads the instruction verbatim, rather than tailoring it to the facts of each individual case.

2. Benefits of Reform: Empirical Research

Researchers have conducted many studies to test how jury instructions can be made more understandable to the average juror. One such study, conducted in the 1970s by Robert and Veda Charrow, involved rewriting California's Civil Jury Instructions (BAJI). The instructions were rewritten by eliminating some of the linguistic characteristics which make jury instructions difficult to comprehend such as complex sentence structures and the use of legal terms of art. Both sets of instructions, modified and original, were then read to groups of prospective jurors. The Charrows found that juror comprehension was dramatically better with the revised instructions.

Researchers Amiram Elwork, Bruce Sales, and James Alfini conducted similar work with Michigan's jury instructions. Like in the Charrow study, the Michigan instructions were rewritten in light of linguistic principles. In a simulated civil trial, jurors were given separate sets of instructions. Some received the original Michigan pattern instructions, some received the rewritten instructions, and some received no instructions at all. Those who were given the original Michigan instructions did no better than those who received no instructions at all. Those jurors who received the rewritten instructions performed substantially better.

Some of the obvious benefits which may result from this increase in jury comprehension of instructions include:

Improving the integrity of verdicts. Studies on the deliberations of mock juries reveal that juries frequently reach improper verdicts when a misunderstanding of the judge's instructions misguides the deliberation process. Furthermore, social science research has demonstrated that revision of jury instructions and the increased level of juror comprehension affects trial outcome in simulated trials. In one study by Elwork, Sales and Alfini, identical videotaped trials were shown to mock juries. Half of the juries were given pattern instructions and half were given rewritten instructions, and the researchers found statistically significant differences in the verdicts reached by the two groups.
Increasing Juror Satisfaction. The use of incomprehensible instructions sends a message to jurors that the law is an unexplainable mystery and that juror understanding of the law is not important. By rewriting the instructions to make

them more comprehensible, jurors will realize that their role in the trial process is significant and worthy of their time and effort.

3. Barriers to Reform

(a) Response of appellate courts

The importance of comprehensible instructions is underscored by the refusal of appellate courts to correct verdicts based on a misunderstood charge. For example, in *John B. Gunn Law Corp. v. Maynard*, [9] the California appeals court refused to overturn a verdict, stating , "it has never been held error in California to instruct in terms of [a pattern jury instruction] due to lack of intelligibility." Thus, even where it is acknowledged that there is some misunderstanding about the instruction, many courts have held this irrelevant as long as the instruction is an accurate statement of the law.

There are a couple of reasons for this attitude. First, is the fear that the finality of verdicts will be undermined if every case in which a juror misunderstood the instructions had to be retried. Second, it is difficult to even prove that there was misunderstanding on the part of the jury. Efforts to impeach a verdict are blocked by the general rule that a jury cannot impeach its own verdict once it is discharged, particularly by revealing the mental processes or deliberations that resulted in the verdict.

(b) Responses of lawyers and judges

There is also resistance from lawyers and trial judges. Many simply don't believe that juror confusion is a serious problem. Even those lawyers who do recognize that juries are confused may resist any efforts to correct this confusion if they believe the confusion benefits their clients.

Another cause for resistance results from the adversary system itself. In each case, there are at least three parties advocating different versions of instructions. The adversary system requires that lawyers be primarily concerned with presenting instructions that benefit their clients, and only secondarily concerned with improving the legal system as a whole by drafting clear instructions.

Judges, on the other hand, resist efforts to rewrite instructions because they don't want to risk having the case reversed on appeal. It is much safer to use language already approved by the appellate court, even though the instruction may be difficult for the jury to comprehend. As one commentator wrote, "judges are talking to appellate judges and not to the jury when giving the instruction." [10]

(c) Difficulty in rewriting instructions

Another barrier to reform is the difficulty of rewriting instructions. Although it is important that instructions be comprehensible, it is still of utmost importance that they are accurate statements of the law. It can be very difficult to write a simple instruction explaining complex, and often vague, legal principles. For example, the translation of concepts out of legalese into simple English sometimes requires explanations which are themselves difficult to understand because of their length. Yet while the task is difficult, researchers like the Charrows and Elwork, Sales and Alfini, have demonstrated that it is possible.

B. Provide Jury Instructions Earlier in the Trial

Another way to improve the jury's ability to understand and apply the law might be to instruct the jury about the relevant legal principles at the beginning of the trial. As it is, preliminary jury instructions are usually limited to various procedural matters and some elementary legal principles, such as an explanation of the judge's and jury's respective roles in the trial process. Case-specific instructions about the substantive law governing the case, such as definitions of the crimes allegedly committed and descriptions of the evidence necessary to prove that the crime actually occurred, are generally not given to the jury until all the evidence has been presented and the attorneys have made their closing arguments. One federal judge compares this odd practice of waiting until the end of the trial to instruct the jury with "telling jurors to watch a baseball game and decide who won without telling them what the rules are until the end of the game." [11]

Research has shown that juries function more effectively if they understand from the very start what laws have allegedly been broken, the meaning of key terms, and how witnesses' testimony is intended to relate to the charges. With this information, the jurors are able to listen more closely for relevant evidence and organize the evidence in some meaningful, legal framework. Without the information, jurors often fail to comprehend the significance of various pieces of testimony until the end of the trial. Or, they may never comprehend its significance, because by the time the relevant instruction is read, they may have difficulty remembering what each witness said or how the witness behaved during his or her testimony.

In addition to substantive preliminary instructions, research has also suggested that the judge's final instructions to the jury should be read before, rather than after, closing arguments. This change in sequence allows the jurors to better understand and evaluate the lawyers' arguments, because they are aware, from the instructions, of what each side must legally prove.

1. The Traditional Rule

Traditionally, the judge does not instruct the jury until the end of the trial; however, there are no statutes nor judicial decisions that prohibit a judge from instructing the jury earlier. In fact, the federal rules expressly permit the judge to instruct before

closing arguments, and California court rules provide that the trial judge has discretion to give the jury any instructions the judge feels are necessary at any point in the trial.

The general practice, in California and elsewhere, is to instruct the jury after the closing arguments of counsel. The reason for this practice is that the jurors will most easily remember the instructions if they hear them just before they begin deliberations. Furthermore, there is the traditional belief that the judge's voice should be the last voice the jury hears, rather than one of the attorneys. Some defense attorneys worry that if juries are instructed prior to closing arguments, the prosecution will have the last word. Finally, it is more convenient to instruct the jury at the end of the trial. Waiting until the end of the trial gives the judge more time to hear the evidence and to study the law, in order to decide the best way to word the jury instructions. Later instruction is also convenient for the attorneys, who then have the opportunity to shift legal theories midstream or abandon arguments that the evidence does not support, without the jury noticing.

2. Advantages of giving preliminary instructions on substantive law

Although the use of preliminary legal instructions is rare, those courts that have tried it have done so with favorable results. Judge B. Michael Dann of Phoenix, for example, regularly distributes preliminary instructions to the jury at the start of his trials. These instructions define the alleged crime, and describe the evidence that will have to be presented to prove that the crime actually occurred. As a result of these instructions, Judge Dann has found that the jury is able to concentrate more closely on and remember the witnesses' testimony since they understand the legal context and importance of the evidence presented.

The advantages of providing preliminary legal instructions have been examined by social scientists as well. This research has suggested several positive consequences of providing earlier instruction on the law:

Improve jurors' recall, because the instructions provide a framework for organizing the evidence. Social science research has shown that recall is improved when the information is relevant to some overall organization.
Focus jurors' attention on the relevant issues.
Accommodate jurors' natural tendency to process evidence when they receive it by providing principles that help jurors organize the evidence, assess its significance, and avoid premature judgment.
Help assure that the jurors evaluate the evidence according to the correct legal guidelines, rather than their own personal criteria.
Increase juror satisfaction.

3. Advantages of reading final instructions before closing arguments

Reading final instructions before closing arguments also benefits both jurors and counsel. It may:

Help jurors integrate the evidence and the law.
Enable jurors to better evaluate the closing arguments.
Free lawyers from appearing to "predict" how the judge will instruct the jury.
Allow the lawyers to integrate the actual instructions into their arguments.

4. Disadvantages of reading final instructions before closing arguments

Despite the advantages of providing preliminary legal instructions and reading final instructions prior to closing arguments, critics argue that there are disadvantages. Preliminary instructions, in particular, may:

Delay trials and increase expense.

Critics argue that it is unnecessary and impractical to prepare the instructions before the trial has begun. It is difficult for the judge to predict what instructions should be read when he has not yet heard the evidence. The effort of anticipating the proper instructions may be wasted, because cases often settle before trial. Some instructions are case-specific, and if the judge is not aware of all the evidence and facts, it may be impossible to predict which instructions will be most appropriate. (Of course, jurors will again be instructed after all the evidence has been presented, and the judge can instruct on issues not anticipated at the start of the trial at that time.)

Encourage the jurors to view the trial from too narrow a perspective.

Opponents of pre-trial instruction also argue that if jurors are instructed on the law before they hear the evidence, it will detract from the variety of perspectives each juror brings to the deliberation process. Instead, the jurors would all be looking at the evidence from the same perspective, based on the judge's instructions about what the evidence is supposed to prove. This perspective may result in an oversimplification of the issues, as well.

Also, it is argued that jurors may place too much attention on certain aspects of the lawyer's argument and ignore the rest. This may be particularly dangerous if the juror has misinterpreted the judge's instruction.

Encourage premature decision making.

If jurors are instructed too early, they will develop an immediate hypothesis about what actually happened and spend the trial searching for evidence to confirm that hypothesis.

Defense attorneys in particular are concerned that jurors may develop an early preference for conviction, and be unwilling to give up that preference despite the evidence. Empirical research, however, has shown just the opposite. In various studies, preinstructed jurors were actually more likely to defer their verdict decision until after the trial.

In fact, empirical studies, although often inconclusive about the advantages resulting from early instruction, have found no evidence of the existence of any of these predicted disadvantages.

Sources and Further Information

Jury Trials Generally Steven J. Adler, Disorder in the Court, Double Day, (1994).

Jeffrey Abramson, We, the Jury: the Jury System and the Ideal of Democracy, Basic, (1994).

Valerie P. Hans and Neil Vidmar, Judging the Jury. Plenum Press (1986).

Reid Hastie, Steven Penrod and Nancy Pennington, Inside the Jury. Harvard University Press (1983).

Zeisel, Hans, "The Waning of the American Jury," 58 A.B.A. J. 367 (1972).

Allowing Juror Questions during Trial Ellyn C. Aker, *Standardized Procedures for Juror Interrogation of Witnesses*, 1990 U. Chicago Legal Forum 557 (1990).

Arizona Supreme Court Committee on More Effective Use of Juries, Jurors: The Power of 12 (1994).

Arizona Order 95-23: Amending Arizona Rule of Civil Procedure 39(b) and Criminal Rule 18.6(e) to allow for jurors to submit written questions directed to witnesses.

California Senate Judiciary Hearings,Tape #2 and #3, (July 27, 1995).

Hon. B. Michael Dann, *"Learning Lessons" and "Speaking Rights": Creating Educated and Democratic Juries*, 68 Ind. L.J. 1229 (1993).

Larry Heuer & Steven Penrod, *Increasing Jurors' Participation in Trials: A Field Experiment with Jury Notetaking and Asking Questions*, 12 Law and Human Behavior 3 (1988).

Larry Heuer & Steven Penrod, *Some Suggestions for the Critical Appraisal of a More Active Jury*, 85 N.W.U.L.Rev. 226 (1990).

Robin C. Larner, *Annotation*. *Jurors Questioning Witnesses in Federal Court,* 80 A.L.R. Fed. 892 (1994).

Hedieh Nasheri & Richard J. Rudolph, *An Active Jury: Should Courts Encourage Jurors to Participate in the Questioning Process?*, 16 Am. J. Trial Advoc. 109 (1992).

Leonard Pertnoy, *The Juror's Need to Know vs. The Constitutional Right to a Fair Trial,* 97 Dick.L.Rev. 627 (1993).

Mark C. Roberts, *Jurors may not Pose Written Questions to Witnesses in Criminal Cases: Morrison v. State (Tex).,* 24 St. Mary's L.J. 1421 (1993).

Jonathan M. Purver, Annotation. *Propriety of Jurors Asking Questions in Open Court During Course of Trial*, 31 A.L.R. 3d 872 (1995).

S. Creighton Waters, *Courts Sets Procedures for Juror Questions to a Witness*, 47 S.C. L.Rev. 86 (1995).

Predeliberation Discussions Dale R. Agthe, Annotation, *Propriety and Effect of Juror's Discussion of Evidence Among Themselves Before Final Submission of Criminal Case,* 21 A.L.R.4th 444 (1995).

Arizona Supreme Court Committee on More Effective Use of Juries, Jurors: The Power of 12 (Nov. 1994).

A. Austin, Complex Litigation Confronts the Jury System, 103-104. Greenwod Press, (1984).

A. Austin, *Why Jurors Don't Heed Trials*, Natl Law Journal, Aug. 12, 1985, at 15, 18.

Hon. B. Michael Dann, "*Learning Lessons" and "Speaking Rights:" Creating Educated and Democratic Juries,* 68 Ind. L.J. 1229, 1263-1268 (1993).

Forston, *Sense and Non-Sense: Jury Trial Communication*, 1975 B.Y.U.L.Rev. 601, 612 (1975).

Friedland, *The Competency and Responsibility of Jurors in Deciding Cases*, 85 Nw.L.Rev. 190, 199, 208-09 (1990).

R. Hastie, S. Penrod and N. Pennington, Inside the Jury . HUP, (1983).

Loftus & Leber, *Do Jurors Talk?*, 22 Trial 59, 60 (Jan. 1986).

Note, *Jurors Judge Justice: A Survey of Criminal Jurors*, 3 N. Mex. L. Rev. 352, 358 (1973).

William W Schwarzer, *Reforming Jury Trials*, 1990 U. Chi. L. Forum 119, 142-43.

James P. Thomas, *Constitutional Law -- Sixth Amendment -- Juror Misconduct -- Premature Deliberations*, 32 Duq. L. Rev. 983 (1994).

Jury Instructions Arizona Supreme Court Committee on More Effective Use of Juries, Jurors: the Power of 12 (1994).

The Jury Project: Report to the Chief Judge of New York (1994).

Charrow & Charrow, *Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions*, 79 Colum. L. Rev. 1306 (1979).

B. Michael Dann, *'Learning Lessons' and 'Speaking Rights': Creating Educated and Democratic Juries*, 68 Indiana Law Journal 1229 (Fall 1993).

Elwork, Sales and Alfini, *Judicial Decisions: In Ignorance of Law or in Light of It?* 1

Law & Hum. Behav. 163 (1970).

Larry Heuer and Steve Penrod, *Instructing Jurors: A Field Experiment with Written and Preliminary Instructions*, 13 Law & Hum. Behav. 409 (1989).

William W. Schwarzer, *Communicating with Juries: Problems and Remedies*, 69 California Law Review 731 (1981).

Walter W. Steele, Jr. and Elizabeth G. Thornburg, *Jury Instructions: A Persistent Failure to Communicate*, 67 North Carolina Law Review 77 (1988).

J. Alexander Tanford, *The Law & Psychology of Jury Instructions*, 69 Nebraska Law Review 71 (1990).

Peter Meijes Tiersma, *Reforming the Language of Jury Instructions*, 22 Hofstra Law Review 37 (1993).

Notes

[1] 468 N.W.2d 377, 380 (Neb. 1991). (return to text)

[2] 279 S.E.2d 203 (1981). (return to text)

[3] 845 S.W.2d 882, 888-89 (Tex. 1992). (return to text)

[4] Sparf v. United States, 156 U.S. 52, 102 (1895). (return to text)

[5] Strawn & Buchanan, "Jury Confusion: A Threat to Justice," 59 Judicature 478 (1976). (return to text)

[6] R. Hastoe, S. Penrod, & N. Pennington, Inside the Jury (1983); Forston, "Sense and Non-Sense: Jury Trial Communication," 1975 B.Y.U. L. Rev. 601; Elwork, Sales & Alfini, "Judicial Decisions: In Ignorance of Law or in Light of It," 1 Law & Hum. Behav. 163 (1970); Walter W. Steele, Jr. and Elizabeth G. Thornburg, "Jury Instructions: A Persistent Failure to Communicate," 67 North Carolina L. Rev. 77 (1988). (return to text)

[7] *See* Charrow & Charrow, "Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions," 79 Colum. L. Rev. 1306 (1979); Peter Meijes Tiersma, "Reforming the Language of Jury Instructions," 22 Hofstra L. Rev. 37 (1993). (return to text)

[8] Some exceptions are Arizona, Florida and Pennsylvania. However, even these efforts, have not been systematic nor comprehensive. (return to text)

[9] 235 Cal. Rptr. 180 (Ct. App. 1987). (return to text)

[10] Peter Meijes Tiersma, "Reforming the Language of Jury Instructions," 22 Hofstra L. Rev. 37, 78 n. 76 (1993), *quoting* Ronald M. Price, Comment, "Study of the North Carolina Jury Charge: Present Practice and Future Proposals," 6 Wake Forest Intramural L. Rev. 459, 466 (1970). (return to text)

[11] Stephen J. Adler, The Jury: Disorder in the Court 129 (1994). (return to text)