



Jury Instructions: Work in Progress

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THE INSTRUCTIVE PHRASE, “*begin with your destination in mind,*” provides the essential principle and starting point for the creation of jury instructions. (Covey, 1989). Jury instructions are the final legal education and procedural guidance jurors receive prior to entering deliberations. Based on when they are given and the content they cover, jury instructions play an influential role in how jurors ultimately arrive at a verdict. While drafters of juror instructions always have good intentions, the research indicates that “[J]urors don’t understand their instructions as well as they think they do, as well as judges would like to think they do or as well as we in Society might hope they do.” (Devine, 2012, pg. 56)

Jury Instructions Affect Millions of Americans Every Year

Every jury, in every jury trial, in every jurisdiction in America relies on instructions that are congruent with the law and are understandable. Mize, Hannaford-Agor & Waters (2007), in their State of the States research, estimated that there were 148,558 jury trials in U.S. state courts each year, with 1,526,520 adults being impaneled to serve on those juries.

- 47% of the trials were related to felonies
- 31% related to civil issues
- 2% involved misdemeanors and other matters

Clearly, a significant number of trial events involving juries occur each year, despite the increasing frequency of plea bargains, settlements and matters resolved through alternative dispute processes. This means that there are more than a hundred thousand opportunities each year for lawyers, judges and juries to get jury instructions right (or wrong). In many cases, understanding the instructions given by a judge to a jury is truly a matter of life and death (Dumas, 2014).



Why Are Jurors Confused?

- Legal language is complex
- Jurors are legal novices
- Relatively low average literacy levels
- Jurors often rely on schemas, stereotypes and shortcuts
- The timing of instructions also may be part of the problem

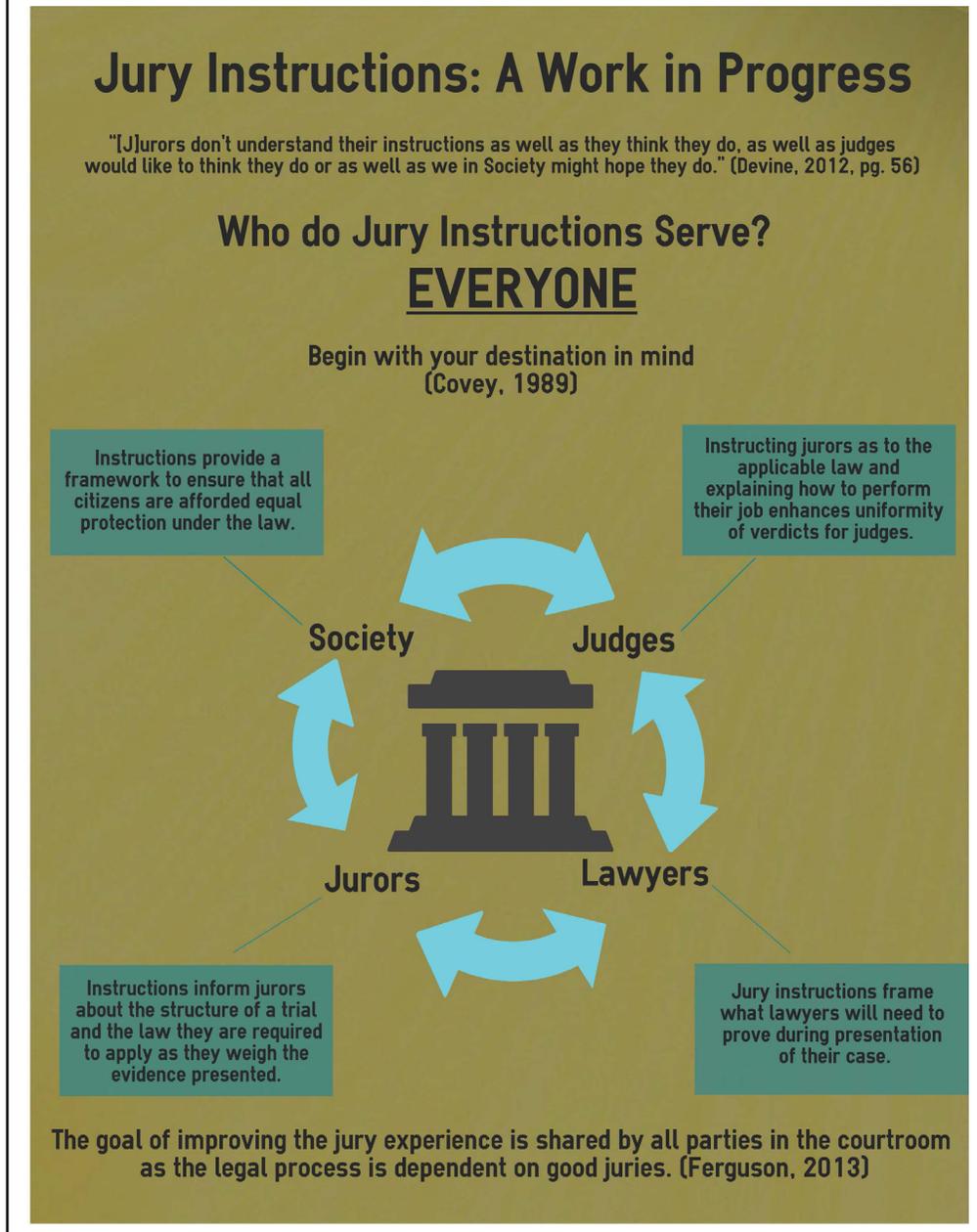
Legal Language is Complex

Jury instructions are drafted by practicing lawyers and judges based on statutes and case law. Unlike most jurors, lawyers and judges have successfully completed law school and have spent years honing their legal reading, writing and analytical skills. “Studies have almost universally found that jurors are confused by jury instructions and often disregard them.” (Gordon, 2013, pg. 644).

In 1979, Charrow and Charrow completed the first empirical psycholinguistic study of standard jury instructions. They sought to identify problematic grammar, semantics, vocabulary and the structure of jury instructions that made compre-

Jury Instructions Serve Everyone

The legal process is dependent on juries that function well and the goal of all stakeholders ought to be improving the quality of jury performance – specifically through better, understandable instructions. The stakeholders include:



hension difficult. The study revealed that **linguistic complexity was a greater contributor to poor understanding than legal complexity.**

When language was simplified comprehension improved. We suggest a fair take away from the Charrows' research is that comprehension is not necessarily made more difficult by the legal concepts embedded in jury instructions; rather, the complex linguistic structure, which is akin to a dialect or foreign language (a.k.a., "Legalese"), is the culprit.

Consistent with Charrow and Charrow, other researchers and scholars who study the language of jury instructions have found the following:

- Formal language tends to reduce comprehension, especially for people who have had relatively little education (Tiersma, 2009).
- Plain language studies and reports document difficulty in lawyer-crafted instructions (Ferguson, 2013).
- Instructions often contain words that have different meanings to the lawyers who wrote them and the jurors who are

asked to apply them (Gordon, 2013).

- When a word or phrase has a unique legal definition (e.g. burglary, assault, kidnapping) differing from how it is used in everyday conversation, jurors are required to replace the established ordinary meaning with the novel legal meaning (Tiersma, 2014).

Jurors Are Legal Novices

Even though there are many trials each year in America, jurors are legal novices, and therefore view and interpret both the law and facts differently than lawyers and judges. Additionally, most instructions do not do enough to help jurors compensate for their lack of legal expertise, as they are often not drafted with novices in mind, nor do they utilize plain language principles that would best ensure novices fully comprehend the law (Gordon, 2013).

Therefore, officers of the court must provide jurors with the applicable law in the form of understandable jury instructions. The law must be given and explained to jurors so that they are able to comprehend and apply it as intended, and to use it as an official decision-making framework that ensures uniformity (Tiersma, 2014, Ferguson, 2013, Gordon, 2013).

Low Average Literacy Levels

The U.S. Department of Education, National Institute of Literacy found that 21% to 23% of adult Americans were not "able to locate information in text", could not "make low-level inferences using printed materials", and were unable to "integrate easily identifiable pieces of information (Kirsch, Jungblut, Jenkins, & Kolstad, 2002).

Furthermore, The Plain Language at Work Newsletter reports that 14 percent (30 million) of adults in the U.S. are functioning at Below Basic, defined simply as "not having adequate reading skills for daily life." These are people who cannot read, must struggle to read, or cannot cope with unfamiliar or complex information. It is noteworthy that people with Below Basic reading skills cannot:

- Understand the instructions on a medicine container,
- Read a newspaper article or a map,
- Read correspondence from their bank or any government agency,
- Fill out an application for work, or
- Read the safety instructions for operating machinery (DuBay, 2013).

Communicating is different from merely speaking or reading to someone. You can speak to someone without that person understanding what you said, such as when two people do not share the same language. Accordingly, if the reading level for many Americans is below basic levels, and the reading level required to understand jury instructions has been found to be at or above a 12th grade level, it is not surprising that many jurors have difficulty understanding the instructions given by a judge (Small, Platania & Cutler, 2013).

Reliance on Schemas, Shortcuts and Stereotypes

In the face of ambiguity, jurors turn to schemas, incorporating their everyday knowledge and understanding of concepts into their interpretation of legal rules and application to the facts presented (Gordon, 2013). Communication requires that the audience actually understand what you intended to communicate. If the audience does not understand, the attempt to communicate has failed. Simply reading instructions to jurors cannot, by itself, be considered communication (Tiersma, 2014). When communication fails, jurors are likely to substitute commonsense, prior experiences, easier questions, stereotypes and cognitive shortcuts to facilitate their decision-making (Cialdini, 2001). While these adaptive responses to complexity and poor communication are useful in everyday life, they become a problem for jurors because they may or may not be consistent with the law and facts as they were given to them.

Like social science researchers who value high rates of inter-observer reliability, our legal system values the consistent application of the law from case to case. However, when there is confusion around language, terms of art and the law itself, uniformity may be sacrificed, thereby denying or interfering with equal protection under the law. As members of the legal community, it is our joint obligation to protect the Constitutional rights conferred upon members of our society by continuing efforts to make jury instructions more understandable.

When Do Instructions Appear During a Trial?

In real estate, it is often said that "location, location, location" is king. In jury trials, timing and placement of instructions is also important.

Voir Dire

The jury selection process is explained and potential jurors are educated about why jury selection is such an important aspect of the American legal system.

Preliminary Instructions

Jurors are educated about their duties, the definition of evidence is explained, the burden of proof to be applied is introduced and the trial process is described.

Immediately before beginning deliberations

Legal principles are recited, instructions are given to guide deliberations and the jury's role as the sole finders of fact is reinforced.

During deliberations

The instructions provided are implemented and questions seeking further clarification of issues may be asked.

And they are expected to listen, learn and apply all that they have heard over several days to several months in comparative isolation from what they experience in their pre and post jury

service life.

A Blueprint for Improvement

Although progress to improve jury instructions (and trial practice in general) may be slow, advocates for reform have made progress that shows that modifications to improve the process can take root and grow (Ferguson, 2013). There are several simple steps that can be taken to overcome jurors feeling like strangers in a strange land. We suggest several below:

Use Checklists

The following checklist will help you make sure your jury instructions are understandable:

- Use understandable vocabulary (*e.g.*, use “important” rather than “material”)
- Use conventional grammar and simple sentence structure
- Use concrete phrasing rather than abstract phrasing
- Use the active voice
- Do not use double negatives
- Use examples relevant to everyday life
- Remind jurors of their fact-finding role
- Educate jurors about how to deliberate
- Explain why jurors are asked to do things a certain way
- Provide glossaries for legal terms, particularly when their legal meaning is different from their colloquial meanings (*e.g.*, “burglary” or “negligence”)

Explore resources from Federal and State Judicial Committees

- Guidelines for Preparation of Jury Instructions (available at [http://www.fjc.gov/public/pdf.nsf/lookup/CivLit2D_Form47.pdf/\\$file/CivLit2D_Form47.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/CivLit2D_Form47.pdf/$file/CivLit2D_Form47.pdf))
- Benchbook for U.S. District Court Judges Outline for giving Instructions (available at [http://www.fjc.gov/public/pdf.nsf/lookup/benchbk.pdf/\\$file/benchbk.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/benchbk.pdf/$file/benchbk.pdf))
- Judicial Writing Manual: A Pocket Guide for Judges (available at [http://www.fjc.gov/public/pdf.nsf/lookup/judicial-writing-manual-2d-fjc-2013.pdf/\\$file/judicial-writing-manual-2d-fjc-2013.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/judicial-writing-manual-2d-fjc-2013.pdf/$file/judicial-writing-manual-2d-fjc-2013.pdf))
- Judicial Council of California Plain Language Instructions (available at <http://www.courts.ca.gov/partners/juryinstructions.htm>)
- Florida Supreme Court Standard Jury Instructions Committee “Plain English” modifications (available at http://www.floridasupremecourt.org/civ_jury_instructions/index.shtml)

Tools for Change

- Judges can give instructions on the applicable law they must apply in a case before opening statements.
- Just as attorneys benefit from the “trial notebooks” jurors may do so as well. Juror’s trial notebooks may include the instructions of the court, lists and examples of the evidence that has been admitted, stipulations between the parties, witness lists and in the case of experts their qualifications.
- Since definitions are critical for framing the law and explaining a jury’s duties, glossaries containing definitions of

key terms could be valuable reference guides to help jurors remain focused on the proper definitions during presentation of evidence and during deliberations.

- Judges and counsel could be permitted to, and could agree to, consider and answer jurors’ questions about the instructions guiding deliberation.
- Jury instructions can be written in the active tense, using plain language to enhance jurors’ understanding of the law.
- The timing of when instructions are given can improve their effectiveness. Instructions given before closing arguments can provide a judicial context counsel can reference during closing arguments.
- Giving jurors copies of the written instructions they can refer to so they remain on point can improve understanding. Providing jurors written instructions reduces the need to listen and attempt to retain what the judge is saying while also anticipating what may come next.
- Using an electronic presentation to accompany the instructions given by the judge and allowing jurors to take the presentation with them into deliberations is worthy of consideration. This approach maximizes the impact of sight and sound in the service of enhancing understanding.
- Providing guidelines that facilitate effective and civil discussion during deliberations can reduce ambiguity about how to get started and stay on task. Historically, judges have been reluctant to provide any guidance regarding deliberation for fear that it may result in a verdict being overturned at the appellate level. While this is a legitimate concern, establishing new norms that keep jurors from becoming bogged down is also a worthy goal. Jurors must understand that passionately held feelings are not evidence and that a civil, though passionate, deliberative process serves all parties well.

Mindfulness: A Tool to Improve Jury Service

Mindful people are aware of their thoughts, emotions, physical sensations, pre-existing beliefs, as well as contextually defined obligations. As a self-management tool mindfulness enhances competence, critical thinking and civility. It also reduces the likelihood that impulsivity, reliance on erroneous pre-existing beliefs, stereotypes, bullying and counterfactual assumptions will prevail when jurors deliberate.

Mindfulness benefits all of the stakeholders involved in a trial. A mindful judge is aware that jury instructions written in legalese are hard to understand and thus becomes an advocate for the clarity that plain language provides. A mindful lawyer avoids verbally assaulting an adversary when civility and assertiveness will do. A mindful juror becomes aware of their biases, their obligation to follow the law as given to them and does not rush to conclusions based on pre-existing beliefs, stereotypes or schemas (Langer, 2000, Jacobowitz, 2013).

Focus-Refocus: Helping Jurors Succeed

When we ask jurors to wade through instructions that are hard to understand and reach a verdict based on the facts of the case in the context of the law, we are asking them to employ their reflective capacities. We generally ask them to do this toward the end of a trial when they may be tired, bored, frustrated, confused and ready to go home. To complete their job, jurors may rely on reflexive processing and shortcuts that include in-

complete heuristics such as framing, anchoring, hindsight, and assumptions about extrapolating from a sample to a population or personal experience. Asking jurors to evaluate their assumptions, how they frame and reframe issues, to employ the definitions given by the court in a jury charge and what the law requires will help them remain on task and on point. (Casey, Burke, & Leben, 2013).

Trial Consultants Can Help

Trial consultants possess expertise in written, spoken and visual communication, as well as trial processes. Utilizing this unique combination of competencies, trial consultants can make meaningful contributions to enhance jurors' abilities to understand the law, evaluate evidence, and engage in efficient, productive deliberative processes. Additionally, as the courts and their committees develop and consider implementing changes in jury instructions, trial consultants can utilize their expertise in research design and analysis to help evaluate the effectiveness of proposed changes in language, definitions, procedures and instructional methods.

The Tools for Change discussed in this article illustrate some of the specific ways jury instructions and juror effectiveness may be improved. The design, development, testing and implementation of the innovations noted above require the courage to change traditional but ineffective communication practices. At the same time, we must ensure that any changes made are consistent with the legal system's core values and collective mission of preserving all citizen's constitutional right to equal protection and due process under the law.

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As this article took shape, Sara Gordon, Associate Professor of Law at the William S. Boyd School of Law | UNLV, graciously shared her knowledge and insights- Thanks Professor Gordon.

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