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The Civil Jury in America: Improving the Jury’s Understanding of a Case

Jay E. Grenig†

Abstract

In this Article, the author reminds the reader of the importance and role of the civil jury, and discusses ways that courts and litigants can improve the effectiveness of civil jury trials. The author suggests the implementation of strategies that increase a juror’s understanding of the facts and law of the case.

I. Introduction

The jury will continue to be an essential part of the American system of justice for the foreseeable future. Thus, courts must continually explore ways to increase the effectiveness of trial by jury. This Article examines several steps that courts can take to increase juror understanding and enhance the effectiveness of the jury system.¹

II. Improving Effectiveness

A. Juror Notebooks

In appropriate cases, judges should distribute or permit the parties to distribute a notebook to each juror that contains the following: the court’s preliminary instructions, selected exhibits that the court has ruled admissible, stipulations, and other materials not subject to dispute such

† B.A. (1966), Willamette University; J.D. (1971), Hastings College of the Law, University of California. The author is a Professor of Law at Marquette University Law School. Professor Grenig is the co-author with Kevin O’Malley and the Honorable William Lee of West’s FEDERAL JURY PRACTICE AND INSTRUCTIONS (5th ed. 2000). This Article is adapted from that book.

¹ See generally 4 KEVIN O’MALLEY, JAY GRENIG & WILLIAM LEE, FEDERAL JURY PRACTICE AND INSTRUCTIONS § 100.01 (5th ed. 2000).
as photographs, curricula vitae of experts, glossaries, and chronologies. To ensure the sanctity of the jury, the court should require jurors to sign their notebooks and the court should collect them at the end of each day of trial until the jurors retire to deliberate.

B. Preliminary and Interim Instructions

Preliminary instructions should be given to the jury at the beginning of the trial. These instructions should describe the jury’s role, explain the trial procedures, set forth the issues in dispute, and include the relevant basic legal principles. In addition, courts should consider giving interim instructions in complex or lengthy cases to improve juror understanding of the evidence during the trial.

C. Special Verdict Forms

Judges should consider using special verdict forms tailored to the issues in cases of appropriate complexity and provide each juror with a copy of the form for use during deliberations. Also, in circumstances

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2 1998 A.B.A. Civil Trial Prac. Stand. 3 [hereinafter ABA]; FEDERAL JUDICIAL CENTER, MANUAL FOR COMPLEX LITIGATION §§ 22.32, 22.42 (3d ed. 1995) [hereinafter MANUAL].

3 ABA, supra note 2.

4 ABA, supra note 2, Stand. 15; SAUL M. KASSIN & LAWRENCE S. WRIGHTSMAN, THE AMERICAN JURY ON TRIAL: PSYCHOLOGICAL PERSPECTIVES 144 (1988) (urging the use of preliminary instructions in order to provide jurors with a legal framework before they hear the evidence and arguments); William W. Schwarzer, Reforming Jury Trials, 132 F.R.D. 575, 583-84 (1990).


6 Walker v. New Mexico & S. Pac. R.R., 165 U.S. 593, 598, 17 S. Ct. 421, 423, 41 L. Ed. 837, 842 (1897) (approving use of special verdicts); see also ABA, supra note 2, Stand. 20; WILLIAM FORSYTH, HISTORY OF TRIAL BY JURY 248 (1852) (indicating that when trial by jury in civil cases was introduced into Scotland in 1815 it became necessary to frame distinct issues in the shape of questions to be submitted to the jury); Smith, supra note 5, at 485.

7 ABA, supra note 2, Stand. 20.
where it will assist the jurors, the court should give a copy of the verdict form to each juror during closing arguments and final instructions.8

D. Juror Questions

Jurors should be allowed to submit written questions for witnesses, but only when the practice will assist the jury in understanding the evidence and in determining a fact in issue.9 However, the court should reserve jurors’ questions for important points only.10 Jurors should be told the sole purpose of their questions is to clarify testimony and jurors’ questions should not be argumentative.11 The court should also inform the jurors that some of their questions will not be asked and they are to draw no inference from the court’s decision not to ask a question.12 Sometimes it may be proper to allow jurors to question the judge concerning the law and legal instructions that they are to apply to the facts.13

E. Juror Note Taking

The court should allow jurors to take notes for use in their deliberations.14 Note taking may aid in juror recollection of the evidence and

8 Id.

9 United States v. Callahan, 588 F.2d 1078, 1086 (5th Cir. 1979) (stating that there is nothing improper about allowing jurors to ask questions to be answered by witnesses); ABA, supra note 2, Stand. 9; JOHN GUINTHER, THE JURY IN AMERICA 68 (1988) (questioning the accuracy of the phrase jury nullification); 1 O’MALLEY, GRENIG & LEE, supra note 1, § 5.18; 3 O’MALLEY, GRENIG & LEE, supra note 1, § 101.15; Akhil Reed Amar, Reinventing Juries: Ten Suggested Reforms, 28 U.C. DAVIS L. REV. 1169, 1185 (1995); Larry Heuer & Steven D. Penrod, Increasing Juror Participation Through Note Taking and Question Asking, 79 JUDICATURE 256, 259-61 (1996); Steven D. Penrod & Larry Heuer, Tweaking Commonsense: Assessing Aids to Jury Decision Making, 3 PSYCHOL. PUB. POL’Y & L. 259, 271-80 (1997); Smith, supra note 5, at 496-97.

10 ABA, supra note 2, Stand. 9.

11 Id.

12 Id.

13 Smith, supra note 5, at 497.

14 ABA, supra note 2, Stand. 6; MANUAL, supra note 2, §§ 22.42, 41.63; Heuer & Penrod, supra note 9, at 258-59; Penrod & Heuer, supra note 9, at 263-71; Smith, supra note 5, at 500; see also GUINTHER, supra note 9, at 68-69; 1 O’MALLEY, GRENIG & LEE,
focus the jurors’ attention on the trial proceedings. Prior to permitting jurors to take notes, the court should give an appropriate cautionary instruction to the jury. The court should collect all juror notes at the end of each trial day until the jury retires to deliberate. The court should then collect and destroy all juror notes at the end of the trial to ensure the deliberation’s privacy.

F. Use of Masters

Court-appointed masters may make the jurors’ task easier by providing the jury with simple language interpretations of the facts. The master’s findings are admissible as evidence of the matters found and may be read to the jury, subject to the ruling of the court upon any objections. When the master’s report provides the jury with additional or conflicting information, however, the master’s report may confuse rather than ease the jurors’ job.

G. Courtroom Technology

Jurors are accustomed to technology in their lives, including videotape and computers. All too often, courtroom technology is limited to microphones and, in some cases, videotape. The courts should be receptive to the use of technology in the presentation of evidence. Litigants can

supra note 1, §§ 5.11, 10.03, 10.04; 3 O’MALLEY, GRENIG & LEE, supra note 1, §§ 101.13, 101.14.

15 ABA, supra note 2, Stand. 6.

16 Id.

17 Id.

18 Id.

19 GUINThER, supra note 9, at 215. See generally FED. R. CIV. P. 53 (allowing the court to appoint a special master); 4 MARY B. COOK & JAY B. GRENIG, WEST’S FEDERAL FORMS: DISTRICT COURTS (CIVIL) §§ 4361, 4381 (2d ed. 1992) (discussing the role of court appointed masters).

20 FED. R. CIV. P. 53(e)(3); COOK & GRENIG, supra note 19, § 4441.

21 GUINThER, supra note 9, at 215.

22 MANUAL, supra note 2, § 34.1, at 394.

23 ABA, supra note 2, at 54; MANUAL supra note 2, §§ 34.1-34.4.
present many exhibits, including photographs and documents such as medical records and x-rays, with computer technology far more effectively than with old-fashioned methods. Computer animation aids perception, while CD-ROMs can store and retrieve audio and video information. Technology can aid the analysis and interpretation of facts and foster visual perception.  

H. Jury Selection

Attention should be given to increasing the efficiency and effectiveness of jury voir dire. In the trial of the British soldiers accused of murder following the so-called "Boston Massacre," the twelve jurors were picked in one morning, even though Boston was then a center of anti-British sentiment. Today, voir dire can take far longer.

The trial judge should conduct an initial voir dire examination, followed by questions from counsel for a reasonable period of time. No matter how the voir dire examination is conducted, the purpose of the examination is not to make a favorable portrayal of the case of one side or the other but rather to ensure that the parties have a trial by an impartial jury.

The search for impartial jurors should not result in the "elimination of all persons who are normally attentive to and hence knowledgeable

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24 Manual, supra note 2, § 34.1.

25 See generally 1 O'Malley, Grenig & Lee, supra note 1, § 4.07.

26 Joseph W. Cotchett, Commencement Address to the Hastings Class of 1999 (May 23, 1999). That jury acquitted six of the soldiers of murder and convicted two with a sentence to have their hands branded and then be set free.

27 Cf. Hicks v. Mickelson, 835 F.2d 721, 726 (8th Cir. 1987) (stating that "participation by counsel in voir dire process frequently results in undue expenditure of time in the jury selection process").

28 Hicks, 835 F.2d 721, 722 (allowing each party only fifteen minutes for voir dire examination of the jury panel upheld, declaring that voir dire examination by the court is the most efficient and effective way to assure an impartial jury); ABA, supra note 2, at 1.

29 1 O'Malley, Grenig & Lee, supra note 1, § 4.07, at 129; see also Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure: Civil 2D § 2482 at 113 (1995) (stating that, unfortunately, counsel too often regard voir dire as an opportunity to obtain a jury sympathetic to their position).
about the happenings around them.” Impartiality should not be confused with ignorance. A predisposition against considering the facts, not pretrial information, undermines impartiality.

I. Jury Instructions

1. The Role of Civil Jury Instructions

Civil jury instructions are intended to inform jurors of the legal principles they must apply when deciding a case. Instructions inform jurors of their role in the trial process. In addition, the instructions help jurors focus on their duties and responsibilities, the parties’ factual contentions, and the parties’ theories of the case. Instructions may be given before and during the evidence, as well as at the close of evidence.

Jurors cannot be expected to render a proper verdict if the jury instructions are unintelligible. The trial judge must instruct the jurors fully and correctly on the applicable law of the case. A party is entitled to a specific instruction on its theory of the case if there is evidence to support it, and if a proper request for the instruction has been made under Rule 51.

—Jeffrey Abramson, We, the Jury: The Jury System and the Ideal of Democracy 21 (1994). Abramson goes on to discuss a number of prominent cases in which the parties went to great effort to excluded jurors who had heard of the dispute. Id. at 21-22.

—Id. at 43.


—Id. (citing Michael J. Farrell, Communications in the Courtroom: Jury Instructions, 85 W. Va. L. Rev. 5, 21-27 (1982)).


—E.g., Gray v. Bicknell, 86 F.3d 1472, 1485 (8th Cir. 1996). Compare Wright & Miller, supra note 29, § 2556 (providing that the trial judge must instruct the jury properly on controlling issues in the case, even though there has been no request for an
The jury instructions must be written and organized so that the jurors will understand them. The instructions must guide, direct, and assist the jurors toward an intelligent understanding of the legal and factual issues involved in their search for truth. Although the judge must instruct the jury on the controlling issues, federal courts do not generally favor abstract charges.

Despite the importance of providing jurors with understandable jury instructions, numerous studies have discussed the extent to which jurors still misunderstand the applicable law. The importance of understandable jury instructions has been stressed by Judge William Schwarzer:

Prevailing practices of instructing juries are often so archaic and unrealistic that even in relatively simple cases what the jurors hear is little more than legal mumbo jumbo to them. Responsibility for the shortcomings of present practices must be shared by lawyers, trial courts, and appellate courts—lawyers for submitting self-serving, excessively long and argumentative instructions, trial judges for adhering to archaic practices out of fear of being reversed, and appellate courts for elevating legal abstractions over juror understanding.

instruction or the requested instruction is defective), with Rivera v. Todo Bayamon, 174 F.R.D. 247, 249-50 (D.P.R. 1997) (finding that the defendants' failure to request instructions cautioning the jury against making a prejudiced decision as result of the plaintiff's panic attack at end of closing arguments did not make it inappropriate to grant a new trial based on the panic attack).

Tyler v. Dowell, Inc., 274 F.2d 890, 897 (10th Cir.), cert. denied, 363 U.S. 812 (1960) (instructions ought to be stated in logical sequence and in the common speech . . . if they are to serve their traditional and constitutional purpose); ABA, supra note 2, Stand. 15 (stating that "instructions should be readily understood by lay persons of average education and sophistication"); see also Michael Higgins, Not So Plain English, 84 A.B.A. J. 40 (June 1998).

WRIGHT & MILLER, supra note 29, § 2556.

Hope V. Samborn, Changing the Jury Tool Box, 83 A.B.A. J. 22 (Dec. 1997) (citing studies); Peter M. Tietsma, Reforming the Language of Jury Instructions, 22 HOFSTRA L. REV. 37, 46-52 (1993); Jamison Wilcox, The Craft of Drafting Plain-Language Jury Instructions: A Study of a Sample Pattern Instruction on Obscenity, 59 TEMPLE L.Q. 1159, 1160-61 (1986); May, supra note 34, at 872 n.14; see also Skidmore v. Baltimore & Ohio R.R., 167 F.2d 54, 64 (2d Cir.), cert. denied, 335 U.S. 816 (1948) (Frank, J., affirming) (finding often the judge must state rules to the jury with such niceties that many lawyers do not comprehend them, and it is impossible that the jury can).

Difficulties with jury instructions can be mitigated in a number of ways:

1. Jurors can be given pretrial instructions on the substantive law.\(^{40}\)
2. Jurors can be given notebooks containing court's preliminary instructions, selected admitted exhibits, parties' stipulations, photographs of parties, witnesses, or exhibits, curricula vitae of experts, lists or seating charts identifying attorneys and clients, a short statement of the parties' claims, lists or indices of admitted exhibits, glossaries, chronologies and timeliness, and the court's final instructions.\(^{41}\)
3. Jury instructions can be repeated.
4. Jurors can be allowed to take notes on the judge's instructions.\(^{42}\)
5. Jurors can be given written copies of the jury instructions.\(^{43}\)

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\(^{40}\) John C. Lowe, *Making Complex Litigation Clear*, TRIAL, Apr. 1997, at 46, 48 (instructing jurors after the parties finish presenting evidence is too late to help the jurors know what to look for as the evidence is presented).

\(^{41}\) ABA, *supra* note 2, Stand. 3; e.g., Consorti v. Armstrong World Indus., 72 F.3d 1003, 1008 (2d Cir. 1995); United States v. Rana, 944 F.2d 123, 126 (3d Cir. 1991), *cert. denied*, 502 U.S. 1077 (1992); United States v. Plitt S. Theaters, Inc., 671 F. Supp. 1095, 1096 (W.D.N.C. 1987); *see also* MANUAL *supra* note 2, §§ 22.32, 22.42.


\(^{43}\) United States v. Calabrese, 645 F.2d 1379, 1388 (10th Cir.), *cert. denied*, 451 U.S. 1018, & *cert. denied*, 454 U.S. 831 (1981) (giving the jury a copy of instructions is desirable in complex cases, but the practice is within the sound discretion of the trial judge); United States v. Standard Oil Co., 316 F.2d 884, 896 (7th Cir. 1963) (stating that, as litigation grows increasingly complex, a jury often may be helped in deliberations by having a copy of the instructions before it); Doane v. Jacobson, 244 F.2d 710, 711 (1st Cir. 1957) (stating that nothing in the Federal Rules of Civil Procedure forbids submitting a written copy of the instructions to the jury); Copeland v. United States, 152 F.2d 769, 770 (D.C. Cir. 1945) (stating that it is frequently desirable for instructions that have been reduced to writing to be read and handed over to the jury); Eleventh Circuit Pattern Jury Instructions: Civil Cases, Preface (1990) (stating that the experience of an increasing number of district judges in the submission of written instructions to jury has been good and the practice is recommended); Lowe, *supra* note 40, at 49 (stating that jurors need instructions in writing to facilitate their deliberations); MANUAL, *supra* note 2, § 22.434 (stating that "[m]ost judges provide jurors with copies of the instructions for use during deliberations"); *see also* ABA, *supra* note 2, Stand. 15. *But see* How to Use These Instructions, in MANUAL OF MODEL CIVIL JURY INSTRUCTIONS FOR THE DISTRICT COURTS OF THE EIGHTH CIRCUIT (1998) (general instructions given at the outset of the trial should not be sent in writing to jury room). *See generally* Propriety and Prejudicial Effect of Sending Written Instructions with
6. Judges can be permitted to answer jurors' questions about the instructions.
7. Jury instructions can be written to simplify the language and increase jurors' understanding of the law.\textsuperscript{44}
8. The instructions should inform the jury of how the law applies to the particular case, rather than merely reciting the applicable statute.
9. Instructions can be given before closing arguments, while the judge has the jurors' attention and counsel can use the instructions in their closing arguments.\textsuperscript{45}

2. Written Copies of Instructions for Jurors

Jurors can be given written copies of their instructions, as long as the judge instructs the jury that they must consider the written instructions in their entirety.\textsuperscript{46}


\textsuperscript{44}ABA, supra note 2, Stand. 15; Carolyn G. Robbins, \textit{Jury Instructions: Plainer Is Better}, TRIAL, Apr. 1996, at 32; Tiersma, supra note 38, at 72-73; Wilcox, supra note 38, at 1161 n.1 (1986). Cf. United States v. Russo, 110 F.3d 948, 953-54 (2d Cir. 1997) (holding, in a criminal case, that the decision whether to submit written instructions to the jury properly lies within the discretion of the district court).


\textsuperscript{46}ABA, supra note 2, Stand. 9; Smith, supra note 2, at 476-77; see Haupt v. United States, 330 U.S. 631, 643, 67 S. Ct. 874, 880, 91 L. Ed. 1145, 1155 (1947) (holding that submitting a copy of the charge to the jury did not constitute "unfairness or irregularity"); Hopt v. People, 104 U.S. 631, 26 L. Ed. 873 (1881) (suggesting the approval of a Utah statute requiring the charge to be reduced to writing); see also KASSIN & WRIGHTSMAN, supra note 4, at 146-47 (describing studies showing that jurors who had access to written material understood the legal terms and substantive law better than those not provided with that material); Schwarzer, supra note 4, at 585-87 (availability of charge in the jury room is almost always certain to assist jury in arriving at an informed verdict while reducing need to send questions to the judge and have parts of the charge reread). \textit{Compare} United States v. McCall, 592 F.2d 1066, 1068 (9th Cir.) (approving the practice of providing written copies of instructions), \textit{cert. denied}, 441 U.S. 936 (1979), \textit{with} United States v. Perez, 648 F.2d 219, 222 (5th Cir.) (condemning the practice of providing written copies of instructions while finding no error absent prejudice in providing the jurors with written copies of instructions), \textit{cert. denied}, 454 U.S. 970 (1981).
 Judges follow different practices with respect to jury instructions. Some judges send a full set of written instructions into the jury room after they have been read in open court. Other judges also provide jurors with written copies of the instructions to follow as they listen to the judge give the instructions. Some courts have experimented with providing jurors with a tape recording of their instructions for use during deliberations.

The Ninth Circuit has approved the practice of providing written copies of instructions. Alternatively, the Fifth Circuit has condemned the practice but found no error in providing jurors with written copies of the instructions absent prejudice. The Eleventh Circuit has approved sending a tape-recorded copy of the charge into the jury room.


Rule 51 of the Federal Rules of Civil Procedure describes the procedures for requesting, giving, and objecting to jury instructions in civil actions. The trial judge must instruct the jury properly on the controlling issues in the case, even though there has been no request for an instruction or the requested instruction is defective. Rule 51 provides as follows:

At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury. The court, at its election, may instruct the jury before or after argument or both. No party may assign as error the giving or the

48 MANUAL, supra note 2, § 22.434, at 153 n.427.
52 See generally WRIGHT & MILLER, supra note 29, §§ 2551-2558; COOK & GREIG, supra note 19, §§ 4221-4260.
failure to give an instruction unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection. Opportunity shall be given to make the objection out of the hearing of the jury. 53

The particular form of a jury instruction is generally within the trial court’s discretion. 54 No specific form is needed so long as the charge as a whole conveys a clear and correct understanding of the applicable law 55 without confusing or misleading the jury. 56

The court should direct counsel to submit proposed instructions at the final pretrial conference. 57 Before delivering any instructions to the jury, the judge should inform counsel of the content of the instructions the judge intends to deliver, allow argument by counsel concerning the proposed instructions, allow counsel to make a record of any objections, and provide counsel with copies of the instructions. 58 Where counsel cannot agree on instructions, the court should require each party to submit proposed instructions and objections to the opponent’s instructions. 59

4. Crafting Jury Instructions

The court should instruct the jury on every material issue. 60 Although the instructions need not be phrased in terms of the specific facts of the

53 FED. R. CIV. P. 51.


55 E.g., Image Tech. Servs., Inc. v. Eastman Kodak Co., 125 F.3d 1195, 1213 (9th Cir. 1997); Bateman v. Mnemonics, Inc., 79 F.3d 1532, 1543 (11th Cir. 1996).

56 Image Tech. Servs., 125 F.2d at 1213; Toroise v. Community Bank of Homestead, 116 F.3d 860, 868 (11th Cir. 1997); U.S. District Court for the Northern District of California, Guidelines for Preparation of Jury Instructions (instructions must be written and organized so that they will be understood by the jurors).

57 MANUAL, supra note 2, § 22.431.

58 ABA, supra note 2, Stand. 15.

59 Id.

60 Gillentine v. McKeand, 426 F.2d 717, 724 n.24 (1st Cir. 1970).
particular case, federal courts have shown a preference for instructions that relate the law to the evidence presented by the parties.61

When a judge gives substantive instructions, the judge should tailor the instructions to the particular case rather than give the jury generalized pattern instructions.62 Instructions phrased in the language of appellate opinions should be explained with reference to the facts and parties in the case.63 Also, it may be helpful to use illustrations familiar to the jurors.64

In drafting jury instructions, the court and the litigants should consider the following:

1. Instructions should be accurate statements of the law.
2. Instructions should be as brief and concise as possible.
3. The average layman should be able to understand the instructions.65
4. Each instruction should be objective and free of argument.
5. Whenever possible, instructions should use the parties' names rather than legal terms such as plaintiff, defendant, bailee, licensor, assignee, or franchisee.
6. The use of technical or obscure legal phrases should be avoided.66
7. The instructions should be arranged and delivered in a logical and coherent fashion.67
8. Jurors should not receive instructions on issues they do not need to decide.

It is insufficient for an instruction merely to repeat statutory language unless the meaning and application of the statutory language to the facts are clear without any explanation.68 Additionally, taking quotations from appellate court opinions that were never intended to be used as jury

61 E.g., Turlington v. Phillips Petroleum Co., 795 F.2d 434, 443 (5th Cir. 1986).
62 MANUAL, supra note 2, § 22.431.
63 Id.
64 Id.
65 ABA, supra note 2, Stand. 15(e)(i).
68 WRIGHT & MILLER, supra note 29, § 2556; e.g., Structural Rubber Prods. Co. v. Park Rubber Co., 749 F.2d 707, 723 (Fed. Cir. 1984).
instructions, and making these quotations a part of the instructions, is generally not helpful.\(^6^9\) One court has explained:

It has always been the law governing jury trials in federal courts that "no court is bound to give instructions in the form and language in which they are asked. If those given sufficiently cover the case and are correct, the judgment will not be disturbed, whatever those may have been which were refused." Indeed, we know as a practical matter that most requested instructions are colored with the advocate's view of his client's cause, and cannot fairly be given in the requested language. . . . "Once the judge has made an accurate and correct charge, the extent of its amplifications must rest largely in his discretion."

But even so, jury trials in federal courts are conducted as at common law when the Constitution was adopted, under which the judge is the governor of the trial with the inescapable duty to fully and correctly instruct the jury on the applicable law of the case, and to guide, direct and assist them toward an intelligent understanding of the legal and factual issues involved in their search for the truth. . . . This duty is not fulfilled by mere abstract statements or legal definitions, but rather by a fair and impartial statement of the factual issues and the law applicable thereto. The instructions ought to be stated in logical sequence and in the common speech of man if they are to serve their traditional and constitutional purpose in our system of jurisprudence.\(^7^0\)

Local rules should be consulted with respect to the required format for instructions. For example, Local Rule 245-3 for the Northern District of California provides the following requirements for proposed jury instructions:

a. They must be in plain language, concise, and free of argument.
b. Each should:
   (1) cover only one subject which shall be indicated on a caption;
   (2) disclose the identity of the submitting party;
   (3) be on a separate page;
   (4) set forth citations to authorities supporting it.
c. Pages must be consecutively numbered.\(^7^1\)

\(^6^9\) Mitchell v. Mobil Oil Corp., 896 F.2d 463, 468 n.1 (10th Cir. 1990), cert. denied, 498 U.S. 898 (1992); Turlington v. Phillips Petroleum Co., 795 F.2d 434, 443 (5th Cir. 1986); Kent v. Smith, 404 F.2d 241, 244 (2d Cir. 1968).

\(^7^0\) Tyler v. Dowell, Inc., 274 F.2d 890, 897 (10th Cir.), cert. denied, 363 U.S. 812 (1960) (citations omitted).

\(^7^1\) N.D. Cal. R. 245-3.
5. Using Model Instructions

Model jury instructions can be helpful in preparing the charge. Though they are not a substitute for the individual research and drafting that may be required in a particular case. Adaptation or modification may be necessary to fit a particular case or a change in the law.

Very few pattern instructions are intended to be copied verbatim in every case. They are intended principally as an aid to the preparation of an appropriate instruction in the particular case. What is sauce for the goose is not always sauce for the gander. Each case has its own peculiar facts and formalized instructions must be tailored to the facts and issues.

Every attempt has been made to use simple, commonplace words while accurately stating the law. The instructions generally use short sentences and try to avoid negative forms. Where appropriate, definitions of terms used in the instruction.

Because language that is meaningful to those with a legal education is often lost upon others, verbatim adoption of language from appellate opinions to formulate instructions should generally be avoided. Every attempt should be made to craft the instructions in language laymen will readily comprehend. Short sentences and the active voice should be used wherever possible; unnecessary words or phrases should be omitted.

6. Instructions at the Beginning, During, and at the Conclusion of Trial

Developments during the trial may create the need for additional instructions. A judge should consider giving instructions at any point in the trial where instructions might be helpful to the jury and provide further understanding or clarity. These instructions may include an

72 But see U.S. District Court for the Northern District of California, Guidelines for Preparation of Jury Instructions (verbatim copies of pattern instructions ordinarily will not be accepted).

73 Bancroft, supra note 32, at 625-26.


75 MANUAL, supra note 2, § 22.433, at 152.
explanation of applicable legal principles that may be helpful when given at the time the issue arises and instructions limiting the purpose for which evidence is admitted.\textsuperscript{76}

Final instructions are generally submitted to the court in connection with the final pretrial conference. The court may give the final instructions before or after closing arguments, or on both occasions.\textsuperscript{77} Most judges provide jurors with copies of the instructions for use during deliberations.\textsuperscript{78} Some judges record the oral charge and send the tape into the jury room for reference.\textsuperscript{79}

III. Conclusion

During the 1970s, attacks on the civil jury became commonplace.\textsuperscript{80} Even former Chief Justice Warren Burger "long entertained doubts about the capabilities of juries."\textsuperscript{81} He urged that there be more stringent limitations in the access to our courts and to juries.\textsuperscript{82} More recently, arbitration clauses imposed by lenders and health maintenance organizations have also limited the access to trial by jury.\textsuperscript{83}

While the jury system may not be the essence of efficiency, there does not appear to be a more satisfactory alternative. The jury system is a

\textsuperscript{76}Id.
\textsuperscript{77}FED. R. CIV. P. 51.
\textsuperscript{78}MANUAL, supra note 2, § 22.434, at 153.
\textsuperscript{79}Id. at 154.
\textsuperscript{80}GUINTHER, supra note 9, at xiv.
\textsuperscript{81}Id.; Duncan v. Louisiana, 391 U.S. 145, 156-57, 88 S. Ct. 1444, 1451-52, 20 L. Ed. 2d 491, 499-500 (1968). For an earlier attack on the jury system, see JEROME FRANK, COURTS ON TRIAL (1949) (describing juries as the premier example of irrationality in the law).
\textsuperscript{82}GUINTHER, supra note 9, at xiv.
\textsuperscript{83}JAY E. GRENIG, ALTERNATIVE DISPUTE RESOLUTION §§ 10.41, 15.50, 15.72, 16.10-16.15 (2d ed. 1997). Compare Badie v. Bank of Am., 67 Cal. App. 4th 779, 79 Cal. Rptr. 2d 273 (Ct. App. 1998), review denied (failure of bank customers to close or stop using their credit accounts immediately after receiving a "bill stuffer" containing an arbitration provision did not waive the customers' right to a jury trial), with Hill v. Gateway 2000, Inc., 105 F.3d 1147 (7th Cir.) (stating that contract terms shipped with a computer in a box are binding on a customer if not returned within the allowed time), cert. denied, 522 U.S. 808 (1997).
cornerstone of American freedom and an important safeguard to a free society. The system is a direct consequence of the sovereignty of the people and a bulwark of protection for the individual. The jury is an essential part of Abraham Lincoln’s "government of the people, by the people, for the people." Not only is a trial before a jury of one’s peers one of our democracy’s primary techniques for finding the truth, the jury also serves to communicate the spirit of the law to the minds of all the citizens and the spirit of the people to the governors.

The importance of the jury system has been aptly summarized by G.K. Chesterton:

Our civilisation has decided, and very justly decided, that determining the guilt or innocence of men is a thing too important to be trusted to trained men. It wishes for light upon that awful matter, it asks men who know no more law than I know, but who can feel the things that I felt in the jury box. When it wants a library catalogued, or the solar system discovered, or any trifle of that kind, it uses up its specialists. But when it wishes anything done which is really serious, it collects twelve of the ordinary men standing round. The same thing was done, if I remember right, by the Founder of Christianity.

Juries may not always get it “right,” but the right to a jury trial is a central part of our system of self-government. Maintenance of the jury is of such importance and occupies so firm a place in our history and jurisprudence, that any curtailment of the right to a jury trial should be scrutinized with extreme care. Moreover, litigants and judges can do much to maintain and improve the effectiveness of the civil jury. Courts

84 National Health to Usurp No-Fault?, 7 TRIAL, Mar.-Apr. 1971, at 53 (quoting retired Justice Tom C. Clark) [hereinafter Clark].
85 DONALD K. ROSS, THE CIVIL JURY SYSTEM 18 (1971); Clark, supra note 84, at 53.
86 Abraham Lincoln, Address at Gettysburg (Nov. 19, 1863).
88 ROSS, supra note 85, at 18.
89 GILBERT K. CHESTERTON, The Twelve Men, DAILY NEWS (London) (date unknown), reprinted in TREMENDOUS TRIFLES 86-87 (Dodd, Mead & Co. 1909).
can adopt strategies such as juror notebooks, special verdict forms, juror note taking, and the use of masters and technology in the courtroom. In addition, courts can improve the quality and user friendliness of the jury instructions that the court provides for the jury. Courts will find that jurors accurately and thoughtfully apply the law when the courts make their instructions to the jury understandable, and when courts tailor the instructions to the facts of the particular case that the jury is hearing.