

## **Form and Function: Clear, Effective Jury Instructions<sup>1</sup>**

by Raymond P. Ward<sup>2</sup>

Jury instructions rank among the most important kinds of legal writing. As Professor Kimble has observed, “Lawyers have to live by them, and some defendants may have to die by them.” Joseph Kimble, *How to Mangle Court Rules and Jury Instructions*, 8 Scribes J. Legal Writing 39, 39 (2001-2002).

Lawyers often pay great attention to the substance of jury instructions, but not nearly enough attention to their form. The result of this neglect: About half the time, the jurors don’t understand the instructions. In one 1989 study, a videotape of jury deliberations showed that half the jurors’ references to the law were inaccurate. In a 1992 study, jurors correctly answered questions about law less than half the time. A 1996 study found that half the jurors who had imposed the death penalty did not understand the instructions about how aggravating or mitigating factors should bear on their decisions. *See* Kimble at 40 note 3 (summarizing several studies). In complicated cases, juries may become so confused that they abandon the instructions and try to reach a verdict based on their common sense. Edie Greene and Brian H. Bornstein, *Determining Damages* 20 (2003).

It doesn’t have to be this way. Research suggests that clarifying jury instructions improves their efficacy. Greene and Bornstein at 203-04. In one study, translating the

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jury instructions into plain language improved juror comprehension from between 51% and 65% to 80%. Kimble at 40 note 3.

How can we make our jury instructions easier for jurors to understand and follow? To answer this question fully would require much more space than we have here. The best we can do is to give you some general advice to point you in the right direction.

**Remember who your audience is.** Most juries include no one who ever attended law school. Instead, they include lay people with varying levels of education: some with college degrees, some who didn't finish high school, and some in between. If you want the entire jury to understand the instructions, then you must write them for the least educated juror.

Avoid legal jargon, and speak to the jurors in the language they understand: plain English. Don't say "preponderance of the evidence" if you can say "more probable than not."

Remember that words meaning one thing to lawyers might mean something entirely different to jurors. For example, in a recent case, a defense lawyer submitted an instruction that said, "The defendant ... is not to be prejudiced by the fact ...." To non-lawyers, *prejudiced* means having an attitude like Archie Bunker's. Most reasonably intelligent jurors hearing the proposed instruction would have missed its message.

(Below, you will see how the instruction was rewritten.)

**Keep it simple.** This means more than simple words. It means simple sentences and simple paragraphs. To keep a sentence simple, keep it short. Keep the subject, the verb, and the object together, and put these elements up front. To keep a paragraph

simple, use it to convey one important thought. Structure each paragraph so that each sentence logically follows the one that precedes it, and structure each sentence so that the jurors can see the connections between them.

**Use specific, concrete language, not vague, abstract language.** Laws often must use vague, abstract language, because they must apply to many situations. But when applied to a specific set of facts—the jury’s job—the law becomes concrete. To illustrate, let’s borrow from Ian Frazier, who imagined a products-liability suit by Wile E. Coyote against Acme Company, for injuries caused by an Acme rocket sled. The law on products liability will likely refer to *the manufacturer, the product, and the plaintiff*. When translated into jury instructions, substitute *Acme* for *the manufacturer*; *the rocket sled* for *the product*, and *Mr. Coyote* for *the plaintiff*. Thus: “To prevail, Mr. Coyote must prove that the rocket sled was defective ....”

That concreteness should carry over to everyone else in the courtroom. The judge, when reading the instructions, should refer to herself as “I,” not “the Court.” She should refer not to “counsel for the parties,” but to “Mr. Mason and Mr. Berger.” And most important, she should refer to the jury as “you.”

**Avoid “be” verbs.** According to Ed Good, one simple trick will help you achieve the concreteness discussed above: avoid using forms of the verb *to be*. The verb *to be* conveys no idea except bare existence—fascinating to philosophers but boring to everyone else. And sentences with *be* verbs tend to be wordier than sentences expressing the same thought with real verbs—another fault that will tend to bore the jurors. If the jurors are bored, their attention will wander. Change those *to be* verbs into real verbs, and you’ll make the instruction shorter and less boring. Just one example:

Before:

Each defendant *is* entitled to a fair consideration of its own defense, and *is* not to *be* prejudiced by the fact, if it should become a fact, that you return a verdict against another defendant. [35 words, 3 *be* verbs.]

After:

Each defendant *deserves* fair consideration of its own defense. If you *decide* against one defendant, that does not mean you must also *decide* against another defendant. [26 words, 3 real verbs, no *be* verbs.]

If you work hard to make jury instructions more understandable and less boring, you will improve the likelihood that the jurors will understand and follow them.