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## Orthodoxy v. Reformation in the Jury System: Pattern Instructions: A Resolution?

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# Orthodoxy v. Reformation in the Jury System

## PATTERN INSTRUCTIONS—A RESOLUTION

George P. Smith II

Assuming arguendo that Holmes had a point when he observed the jury was not "specially inspired for the discovery of truth,"<sup>1</sup> and at the same time cognizant of Alexander Hamilton's equally conservative position on the same matter,<sup>2</sup> the purpose of this article, then, will be to present an approach which—it is thought—may remedy the situation and thereby allow the jury to operate in a full and effective manner consistent with sound, judicial administrative policy.<sup>3</sup>

Rule 51 of the Federal Rules of Civil Procedure<sup>4</sup> empowers a judge to consider and to review instructions prepared by an attorney for current cases before the court. That part of the rule which states counsel is to be informed by the judge of his proposed action on requests to charge prior to argument to the jury provides but a means of guidance for counsel in shaping their own arguments. When summation is therefore begun, without counsel requesting such information, the judge may—and usually does—assume no need for the information to be given and, accordingly, treats the requirement as waived.<sup>5</sup> Thus, the

sole purpose of the Federal Rules—namely to promote effective trial practice—is achieved.<sup>6</sup>

Pattern instructions are defined as formulated or specimen copies of instructions which are uniquely suited for repeated use and application in typical cases.<sup>7</sup>

If standards were to be uniformly framed in simple and precise terminology, the jury could not help being assisted in its efforts to comprehend and analyze the charge.<sup>8</sup>

Both the academician and the practitioner are agreed that the present concern and confusion surrounding the basic inefficiencies of the jury system are tied in very large part to

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See generally, Mathes & Devitt, *Federal Jury Practice and Instructions*, Ch. 5, §502 at pp. 55, 56 (1965). The courts usually construe Rule 46 together with Rule 51. *Montgomery v. Virginia Stage Lines*, 191 F. 2d 770 (D.C. Cir. 1951); *Wright v. Farm Journal Inc.*, 158 F. 2d 976 (2nd Cir. 1947).

Fed. R. Civ. P. 46, states:  
Formal exceptions to rulings or orders of the court are unnecessary; but for all purposes for which an exception has heretofore been necessary it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which he desires the court to take on his objection to the actions of the court and his grounds therefore; and, if a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection does not thereafter prejudice him.

The general proposition is that no judicial review of instructions will be undertaken where neither objection nor exception is taken at the trial. *United States v. Glascott* 216 F. 2d 487 (7th Cir. 1954), cert. denied, 348 U.S. 937 (1954); *Maupin v. Erie R. Co.*, 245 F. 2d 461 (2nd Cir. 1957), cert. denied, 354 U.S. 925 (1957). The Court of Appeals, in taking a review, will always look at the complete charge, rather than at isolated segments, in an attempt to discover whether certain instructions were in fact erroneous. *Forester v. Texas Pac. Ry. Co.*, 338 F. 2d 970 (5th Cir. 1964), cert. denied, 381 U.S. 944 (1965).

6. *Downie et al. v. Powers et al.*, 193 F. 2d 760 (10th Cir. 1951).

7. Personal interview with Hon. Chief Judge William E. Stecker, United States District Court, Southern District, Indianapolis, Indiana, September 8, 1966.

8. At the federal level, Mathes & Devitt, *Federal Jury Practice and Instructions* (1965) is the most comprehensive source available and most widely used one. The best known books concerning pattern instructions at the state level are, *California Jury Instructions* (4th ed. 1959); *Illinois Pattern Jury Instructions* (1961); *New York Pattern Jury Instructions* (1965); *Raymond's Missouri Instructions* (1942) and *California Jury Instructions—Civil and Criminal* (1956, 1958).

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1. Holmes, *Collected Legal Papers* 237 (1921).

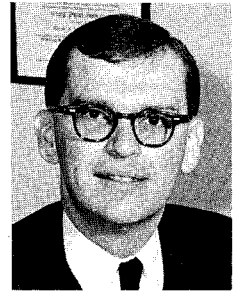
2. "... I must acknowledge that I cannot readily discern the inseparable connection between the existence of liberty and the trial by jury in civil cases." Hamilton, *The Federalist*, No. 83 at p. 426 (Rhys ed. 1911).

3. See generally, Smith, "Effective Instructions to the Federal Jury in Civil Cases—A Consideration in Microcosm," 18 *Syracuse Law Review* 559 (1967).

4. Rule 51 states:  
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, but the court shall instruct the jury after the arguments are completed. No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider the verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.

5. *Casper v. Southern Pac. Co.*, 298 F. 2d 102 (9th Cir. 1961); *Finkle v. New York, N. H. & H. R. Co.*, 26 *Federal Rules Decisions* 9 (D.C. Conn. 1960).

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the inability of the jury to follow and to comprehend the instructions given it by the court. And, indeed, this position is fully supported by surveying common complaints of jurors themselves. The jurymen suggest that the charge is too long, that it is repetitious and disjointed and that it abounds in hard, technical legal terms as well as Latin expressions.<sup>9</sup> The use of pattern instructions would, it is submitted, completely remedy this problem.

Effective instructions are those which are delivered in a clear and audible—even conversational—tone. To be remembered is the fact that the group of twelve receiving the instructions are untutored, save for stilted television dramatizations, in the law. If there are semantical impediments in the medium of communication, the charge may just as well be delivered in a foreign language!

A constant worry that reversal may result often restricts a judge from saying what he should in fact say in his charge. Many judges will purposely limit their instructions to quotations from decisions of appellate courts—failing, as such, to understand that appellate court opinions are written for a far different purpose from that which actual jury instructions are primarily designed. While the legal points may be controlling often, the language certainly is not.<sup>10</sup>

Here again, use of pattern instructions would be of invaluable assistance to the court in meeting the dilemma of boldness in decision making—with the attendant possibilities of later reversal—versus the accuracy of self-knowing “security” attainable only through repeated practice. When standard or pattern instructions are employed, then, as but definitive *guides* for the drafting of individual case

instructions, they would serve as an effective aid to the court and to the attorney in expediting their tasks of administering justice.<sup>11</sup>

Would not a simple solution to the problem of jury comprehension as concerns instructions be solved by allowing a copy of a pattern or standard charge to be made and given to the jury for their later deliberations? An obvious answer would be yes. It has even been wisely advocated that if copies of the instructions are unavailable, they should be taped on a recorder and allowed into the jury room and then played back when and if necessary.<sup>12</sup> Yet, although the federal trial judge has absolute discretion as to whether he will allow a copy of his instructions to be taken into the jury room, few exercise this discretion favorably.<sup>13</sup>

The logic for the court’s refusal here goes like this: if the jury is given a copy of the charge, they might very well select and weigh passages out of context, and thus fail to consider the instructions as a whole. It is better for the jury to request further oral instructions on confusing points.

It is argued by this writer that the possibility of a juror’s isolating a comment from the judge’s oral charge and misconstruing it is far greater than it would be if either copy of the charge were made or taped for the jury’s later referral.

The final proposition to be submitted is that the basic instructions be given to the jury *be-*

9. Devitt, “Ten Practical Suggestions About Federal Instructions,” 38 *Federal Rules Decisions* 75 (1960).

10. *Id.* at p. 76.

11. See generally, Corby, “Pattern Jury Instructions—Their Function and Effectiveness,” 32 *Ins. Counsel J.* 57, 63 (1965) where the author comments upon the *conversational, understandable, unslanted and accurate* approach of the Illinois Pattern Instructions.

12. Joiner, *Civil Justice and the Jury* 84 (1962).

13. *United States v. Standard Oil Co.*, 316 F. 2d 884, 896 (7th Cir. 1963). Chief Judge Steckler allows not only his instructions to be taken by the jury into the jury room, but the courtroom exhibits as well, and appears to be one of the very few judges to act in this manner.

fore they hear the testimony.<sup>14</sup> What practical result—other than further confusion—does it make to have a juror listen to days of testimony only to be told by the court in its charge at the trial's conclusion, that he and his conferees are the sole judge of all factual matters presented?<sup>15</sup>

It is suggested here that a more satisfactory and, indeed, efficient, use of the jury could be realized if—when sworn—they were told about burdens of proof, the manner in which the indictments or pleadings will be treated in the case, how to assess the credibility of the witnesses, and of their duty to disregard stricken evidence.<sup>16</sup> These points could subsequently

be reiterated at the conclusion of the case.

The jury, as the handmaiden to justice, may only be effectively employed as its mistress so designs. If steady—yet by no means blind—reliance is placed upon the use of pattern instructions, if instructions are in turn given both at the beginning as well as at the close of the trial and, finally, a copy of the instructions is allowed to be photo copied or taped and provided for the jury in its deliberations, not only will the rate of comprehension by the average juror be increased, but the over-all administration of justice will be strengthened considerably.

14. Steckler, "The Civil Jury Trial and Charge to the Jury," *Proceedings of the Seminars for Newly Appointed United States District Judges* (1963), 86, 95.

15. Prettyman, "Jury Instructions—First or Last?" 46 *A.B.A. Journal* 1066 (1960).

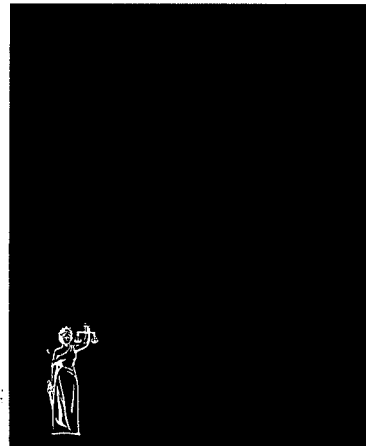
16. Steckler, *op. cit. supra*, n. 28 at p. 95.

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