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Reverse Engineering of Jury Instructions

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ESSAY

REVERSE ENGINEERING OF JURY INSTRUCTIONS[1]

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Reverse engineering of jury instructions requires (1) creating a *decision structure* or *decision tree* for a case, based on a *theory of the case*, (2) identifying crucial points in the *decision structure* or *decision tree*, and (3) incorporating crucial points into the jury instructions. This paper suggests that reverse engineering of jury instructions can be used to instruct jurors about legal concepts and technical terms before they hear jury instructions or closing arguments. The goal is to improve the clarity of instructions to achieve litigation goals.

It is a truism in the legal community that successful advocacy in the courtroom requires a lawyer to proceed based on an appropriate *theory of the case*.[2] Through a theory of the case, the lawyer organizes and correlates facts to support the most effective legal argument for the client.[3] Further, evidence presented to jurors in a jury trial must fully support that theory of the case or explain why a competing theory is inadequate to explain the facts of the case. Thus "[t]he modern litigator's arsenal should include . . . techniques . . . for selecting appropriate case theories, for testing those theories, and then for making the theories

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[1] This is a draft of Chapter 4 of a book manuscript in progress, *Writing and Using Effective Jury Instructions*. Earlier chapters are: 1. Jury Instructions: History and Rationale, 2. Lay Perceptions of Jury Service, and 3. Recent Criticism and Reform Efforts.

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[2] *See* JAMES W. MCELHANEY, EFFECTIVE LITIGATION: TRIALS, PROBLEMS AND MATERIALS 123 (1974).

[3] *See Id.*; BLACK'S LAW DICTIONARY 1517 (8th ed. 2004).

understood at both an intellectual level and a psychological level through the use of illustrative exhibits or computer technology."[4]

In jury trials, the litigator's arsenal must also include techniques for insuring that jurors are adequately instructed with respect to their decision-making responsibilities. In most jurisdictions, it is still assumed that adequate instruction includes instruction in law, though two states, Kentucky and perhaps Georgia, seem to be moving away from that assumption.[5]

Let me pause to explain what is being called the "Kentucky Approach" to jury instructions, as it has implications for the material below. Attorney Charles M. Cork, III, of Macon, Georgia, contrasts it with current practice thus:

> Much of current practice conceives jury instruction as a miniature, accelerated education process in which the judge lectures on one or more fields of law and the jurors are expected to assimilate the lecture into a coherent and correct understanding of the law. This will be called the "Lecture Approach." The goal of this process is that the jurors will understand all of the contours of legal doctrine reflecting on the legal dispute before them. The lawyers for each party will supply to the judge a series of proposed jury instructions comprised of excerpts from reported decisions or statutory text, selected in a partisan manner, emphasizing language that is most favorable to the client's case, and often repeating

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[4] Anthony J. Bocchino & Samuel H. Solomon, *What Juries Want to Hear: Methods for Developing Persuasive Case Theory*, 67 TENN. L. REV. 543, 543 (2000).

[5] Charles M. Cork, III, *A Better Orientation for Jury Instructions*, 54 MERCER L. REV. 1, 2-3 (2002).

> such language in different ways. The current rules for presenting instructions and obtaining review of the judge's decisions give no incentive to lawyers to submit balanced and simple, but complete, jury instructions. After receiving opposing, unbalanced sets of proposed instructions from the lawyers, the judge will then attempt to assemble the excerpts into a cohesive, neutral body of text that will educate the jury about all relevant aspects of the law applicable to any issue raised by the evidence and the contentions of the parties. Unfortunately, the instructions proposed by counsel will hamper, not assist, the judge's efforts to instruct the jury. Unless the judge can accomplish a creative synthesis of the proposed instructions, or ignores them, the jury will hear a number of excerpts that apparently conflict with each other. Further, the excerpts often contain misleading legal usage of common terms, legal jargon, and other confusing and misleading instructions. The result is that the jury instructions will fail to enable jurors to understand the contours of the applicable law simply because those contours cannot be learned by ordinary citizens through cramming; the law can only be learned by legal study that systematizes and harmonizes the body of relevant legal texts into a coherent whole. What is sensible to judges and lawyers, who have had years to learn the contours of the law, will remain opaque to jurors without similar training and experience.[6]

The process whereby judges attempt to assemble lawyers' suggestions into a cohesive document sometimes

[6] *Id.* at 2 (internal citation omitted).

includes a *charge* or *charging conference*, a meeting during which the parties' attorneys present their suggestions for jury instructions.[7] The goal of the charge or charging conference is for decisions to be made so that shortly after the meeting the parties' attorneys receive copies of the jury instructions that will be use. The judge makes all final decisions. Now let us contrast current practice with what is being done in Kentucky and which Georgia appears to be moving towards; Cork continues thus:

> Instead of treating jury instruction as a compulsory mini-law school, it is far superior to orient jury instruction practice so that it helps the jury do its job, which is to resolve questions of fact. The method . . . already practiced in Kentucky and toward which the Georgia Supreme Court may be moving, is to limit instructions to the core factual issues that control the ultimate verdict. This method will be called the "Kentucky Approach." The judge gives instructions in order to call for the jury to do something, rather than to contribute to the jurors' knowledge of somewhat random information about the law. Instructions are framed around the parties' respective burdens of proof and their contentions. Typically, a complete instruction on liability in a simple tort case would take the form of, "D had a duty to do x, y, and z; if you believe from the evidence that D failed to comply with any of these duties and that the failure to comply was a substantial factor in causing P's injuries, you should find for P; otherwise, you should find for D." Instructions in cases with legal issues of greater complexity will still be framed in terms of the factual issues that the jury must resolve in order to determine

[7] BLACK'S LAW DICTIONARY 249 (8th ed. 2004).

> whether a party with the burden of proof has sustained that burden. . . . The point of these instructions is to call upon the jury to perform its fact-finding function, rather than the essentially legal function of harmonizing disparate legal texts.[8]

More generally, perhaps, such an issue as *burden of proof* is crucial in all cases, and such issues as *contributory responsibility* are important in some cases. In any event, jurors must be persuaded by factual evidence, and that is most effectively accomplished in terms of a *theory of the case*—defined very comprehensively in Black's Law Dictionary:

> A comprehensive and orderly mental arrangement of principles and facts, conceived and constructed for the purpose of securing a judgment or decree of a court in favor of a litigant; the particular line of reasoning of either party to a suit, the purpose being to bring together certain facts of the case in a logical sequence and to correlate them in a way that produces in the decision-maker's mind a definite result or conclusion favored by the advocate.[9]

The remainder of this article will identify briefly some contemporary commentary on the ways in which case theories are developed and implemented in *decision structures* or *decision trees* (hereafter "*decision structures*"), then address the issue of how litigators can insure that jury instructions are adequate to allow jurors to consider a given case theory fairly.

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[8] *Id.* at 2-3 (internal citations omitted).

[9] BLACK'S LAW DICTIONARY 1487 (8th ed. 2004).

The technique discussed in this paper is known as *reverse engineering of jury instructions*. The term was initially used by engineers to mean the disassembling of a product or device in order to understand the underlying concepts and perhaps produce something similar.[10] As used with respect to jury instructions, the term means deconstructing the desired verdict with respect to what decisions the jury will have to make in order to reach that desired verdict. In order to carry our reverse engineering of jury instructions, a litigator must complete three steps beyond establishing a theory of the case. The litigator must (1) create a decision structure for the case, (2) identify crucial points in that decision structure, and then (3) incorporate the crucial points of that decision structure into the jury instructions.[11] The technique at its best makes use of insights from discourse theory as well as knowledge of the ways in which syntactic and semantic structure operate to assist or impede communication.[12]

Recent case theory research has focused on case theory as being grounded in story or narrative.[13] This approach has moved away from case theory as legal doctrine and towards case theory as persuasive storytelling. Overall, however, it has been suggested that "[c]ase theory operates at three levels: legal, factual, and persuasive[:]"

> [1.] Legal theory defines the case in terms that describe why, as a matter of law, your client should prevail. . . . Because legal theory is

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[10] *See generally* ELDAD EILAM, REVERSING: SECRETS OF REVERSE ENGINEERING (Wiley 2005).

[11] *See* Bocchino, Anthony J, and Samuel H. Solomon. *What Juries Want to Hear: Methods for Developing Persuasive Case Theory*, 67 Tenn. L. Rev. 543 (2000).

[12] *See id.*

[13] *See generally* Binny Miller, *Teaching Case Theory*, 9 CLINICAL L. REV. 293, 295 (2002) (discussing techniques for treating the case theory development as building a story line.

> primarily for judicial consumption, it is possible to have two or more—perhaps even wholly inconsistent—legal theories of the case at the same time. . . . All that must occur at trial is that the lawyers prove facts sufficient to sustain a favorable verdict on appeal."
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> [2.] Factual theory defines what the facts of the case really are. . . . [I]n developing effective factual theory, it is vital to remember that not only are the facts themselves important, but so is the perception of facts that will drive factual theory. Often the reality of the facts and the common perception of them will be at odds, and it is for the lawyer to reconcile reality and the perception of reality for effective factual persuasion. . . .
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> [3.] Persuasive theory . . . explains why it is that the jury should feel right about its decision. Persuasive theory is grounded in common human experience and is usually presented in common sense terms that come from some authoritative source [for instance, the Bible or great literature]. . . . Persuasive theory will usually strike at the core psychological values that most jurors share and that motivate much of their decision-making. As such, an effective persuasive theory will resonate with themes of fairness, redressing a wrong, doing the right thing, and, in circumstances suggesting egregious behavior, the need for punishment.[14]

It is important to treat a factual theory as a working hypothesis, one that must be modified or discarded if necessary supporting facts do not emerge during discovery. Ideally, "the legal, factual, and persuasive theories of the

[14] Bocchino & Solomon, *supra* note 5, at 544-46.

case will be unitary."[15] Perhaps some specific case examples will be helpful. In *United States v. Hill*, defendants in Union County were accused of conspiring to import cocaine based upon four and one-half hours of audio-recorded conversation among defendants and undercover agents.[16] Most of the facts were not at issue, and the law was not in dispute. There was clearly a plan to import cocaine into the county via air, which is a criminal act. What was at issue was whose plan it was and whether a conspiracy had occurred. That is, at issue was the proper interpretation of agreed facts.[17]

The prosecution's theory was that the defendants had conspired to import cocaine in violation of criminal law.[18] The defense's theory was that defendants, one of whom was a county sheriff running for re-election (the other was a mayor of a town within the same county), were cooperating with initiating undercover agents in order to confiscate the airplane when it landed with the cocaine. Tennessee law permits local jurisdictions to keep such equipment if it is confiscated during a drug seizure. The defendants claimed that they needed the money that they would raise by selling the airplane for county expenses.[19] Conversational analysis of the tape-recorded conversation revealed a striking similarity of conversational patterns between defendants and agents with respect to topic initiation and topic elaboration.[20] Based on my analysis, I concluded that the linguistic evidence supported the defendants' theory at least as well as a criminal conspiracy theory.

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[15] *Id.* at 548.
[16] United States v. Hill, 738 F.2d 152 (6th Cir. 1984).
[17] Expert Report of Bethany K. Dumas, United States v. Hill, No. 83-5587/83-5588 (E.D. Tenn. argued May 20, 1985).
[18] *Id.*
[19] *Id.*
[20] *Id.*

This case was a re-trial of a case in which an original conviction had been overturned by the Sixth Circuit on the ground that the defendants' constitutional rights had been violated when the original judge refused to allow defense attorneys to question prospective jurors about some of their beliefs.[21] A plea bargain was reached in the second trial, but only after the jury was unable to agree on a verdict.[22] Jurors did not appear to be confused about the law and few facts were in dispute; however, jurors were unable to agree on an interpretation of the undisputed facts.[23]

In a number of capital cases, jurors have requested clarifying instructions on the meaning of the term *reasonable doubt*, used in the pattern instructions on murder in most jurisdictions.[24] As recently as 2000, in *Weeks v. Angelone*,[25] the Supreme Court held:

> [I]t is adequate for a trial judge to answer a jury's question about the meaning of instructions by reiterating the language of the original instructions. The specific issue in *Weeks* was whether a trial judge is obligated by the Constitution to do more than refer the jury to a specific portion of jury instructions when the jury has a question about the meaning of an instruction. Typically, trial judges respond to such questions by simply re-reading the relevant portion of the instructions. During the penalty phase of *Weeks*, the jury questioned the trial judge concerning

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[21] Hill, 738 F.2d at 153.

[22] Expert Opinion of Bethany K. Dumas, *supra* note 17.

[23] *Id.*

[24] Bethany K. Dumas, *Reasonable Doubt about Reasonable Doubt: Assessing Jury Instruction Adequacy in a Capital Case, in* LANGUAGE IN THE LEGAL PROCESS 246-49 (Janet Cotterill ed., Palgrave Macmillan Press 2002).

[25] 528 U.S. 225 (2000).

> sentencing alternatives. The judge conferred with Weeks's counsel, but concluded that he could not answer their question more clearly, so he merely referred the jury to the appropriate section of the original jury instructions. The U.S. Court of Appeals for the Fourth Circuit affirmed, and that decision was affirmed by the Supreme Court. The final opinion thus declares it to be the law of the land that "jurors are presumed to understand instructions."[26]

For our purposes, the opinion from *Weeks* is important because it makes clear that juries are sometimes uncertain about the law. Additionally, it underscores that jury understanding matters; it is sometimes a matter of life and death.

Now that we have established the role and importance of jury interpretation and jury comprehension, let us explore the additional steps we are looking at today. We will begin with a very brief look at how one transforms a theory of the case into a decision structure.

The concept of reverse engineering of litigation procedures was, to the best of my knowledge, first introduced by Anthony Bocchino, James Dobson, and Samuel Solomon in 2001. They introduced "reverse engineering the verdict" as:

> [A] method for taking what has been learned in discovery and molding and shaping that information into a trial theory or strategy that will ultimately persuade the jury of the correctness of the position of our clients. . . . Some graphic designers work well with large display boards,

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[26] Bethany K. Dumas, *Jury Trials: Lay Jurors, Pattern Jury Instructions, and Comprehension Issues*, 67 TENN. L. REV. 701, 714 (2000) (internal citations omitted).

> while others are better suited to using computer-generated slide shows. . . . In this way the social scientist can determine the effect certain arguments have on the flow of juror opinion. . . . Usually, regarding the use of graphic displays, less is better, and the graphic display professionals are more likely to come to a similar conclusion as they are part and parcel of the entire trial theory development, not just their own special piece of that preparation. . . . It is for the trial team to determine not only the form, but also the content of the graphic displays to be used to best explain and demonstrate the trial theory.[27]

The strategy of "reverse engineering the verdict" involves developing a detailed case theory and calling the attention of jurors to discrete issues in the case theory.[28] Bocchino et al. acknowledge that "[i]n many cases, there is little dispute as to what happened and who did what to whom, but a great deal of dispute as to why the parties did what they did. . . . At issue then, will be the motive of the people who caused the thing to occur."[29] The authors then suggest that:

> [a] decision tree, which shows the options for decisions and the choices made by the party in charge, leading to the ultimate conclusion in the case [can] be very helpful in advancing either the plaintiff's or defendant's case. If the jury can be made to understand the options available at each juncture in critical decision making, the choices

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[27] Anthony J. Bocchino et al., *What Juries ?Want to Hear II: Reverse Engineering the Verdict*, 67 TEMP. L. REV. 177, 177, 179, 182, 186, 189 (2001).
[28] *Id.*
[29] *See id.* at 187.

> made, and the reasons why the choices were made, jurors will be a long way towards understanding whether the defendant's motives were legitimate or not.30

In their 2001 article, Bocchino, Dobson, and Solomon describe a detailed plan for using social scientists, graphic designers, and lawyers to improve litigation strategies.[31] The social scientists include those who conduct various kinds of surveys, jury consultants, focus groups, jury simulations, and witness evaluations. Missing from the list are linguists who might pay attention to ways in which the words of jury instructions might be introduced during trial process in order to habituate jurors to thinking in terms of key concepts that are crucial to legal theory as well as factual analysis.

For example, suppose that in a products liability case it is required that a product is shown to be "defective and unreasonably dangerous." Pattern jury instructions do not generally give narrative examples of what constitutes a "defective and unreasonably dangerous" product (though some judges do). However, a line of questioning of witnesses could be developed and utilized that would provide examples during trial so that when jury instructions and closing arguments are given, jurors would already be familiar with the terminology.

In other words, I am proposing that reverse engineering of jury instructions be conducted as an exercise in the explicit teaching vocabulary and definitions during trial process. Reverse engineering of jury instructions would need to be done within the context of legal, factual, and persuasive theory, of course. There is no reason to believe that this strategy would not work and every reason to believe that it would. It has been demonstrated in the

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[30] *Id.*

[31] *See id.* at 178-80.

context of custodial interrogation that individuals being interrogated can be "taught" to use specialized terms (often with legal meanings that they do not understand). If one has an explicit agenda and a clear sense of what one is trying to teach, it should be relatively easy to teach terms and definitions in the context of trial questioning.

Earlier, I mentioned the charge conference, where the attorneys present their suggestions for jury instructions and judges attempt to assemble those suggestions into a cohesive document. At its best, a charge conference concludes with judges presenting printed copies of the jury instructions that will be used. Lawyers seeking reverse engineering of jury instruction will have clear ideas about what to present well before the charge conference is actually held. How much of the legal definition that is included will vary, depending upon the extent to which a jurisdiction favors the lecture approach of jury instructions or the Kentucky approach.

This article has proposed that techniques of reverse engineering can be used to advantage in composing jury instructions; partly by identifying how best to instruct jurors about legal concepts and technical terms well before they hear jury instructions or closing arguments. Future publications will illustrate how appropriate questioning during voir dire can serve to educate potential jurors about terms and definitions. They will also explain how such litigation techniques can make it easier for jurisdictions to adopt the Kentucky approach or something similar, dropping most legal definitions from jury instructions and leaving it to the trial lawyers to educate jurors about relevant concepts during trial. The overall goal of the approach is to improve the clarity of instructions to achieve litigation goals.