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INSTRUCTING THE JURY? WATCH YOUR LANGUAGE!*

HONORABLE GAIL HAGERTY**

I. INTRODUCTION

A common criticism of attorneys and the legal system is that the public does not understand legal language. Members of the public are drawn into a highly specialized system in different capacities, such as parties to lawsuits, crime victims, witnesses, and jurors. They then are faced with legal language.

Of particular concern is the difficulty members of the public face when as jurors they try to fulfill the role of deciding facts and applying the law to those facts. When jurors begin their service, they receive some form of orientation and then are thrown into the thick of a legal controversy. They must depend on jury instructions to explain the law.

The language traditionally used in instructing North Dakota juries often renders the jury instructions meaningless. The language is not concise. It is unclear and the vocabulary is unfamiliar. Sentences are complex and not well organized. Only if judges are willing to adopt a new philosophy and incorporate new skills in the process of drafting jury instructions will they communicate with jurors through instructions.

Journalists communicate with the general public on a daily basis. They are accustomed to writing in language that everyone understands. This article demonstrates that journalists have communication skills which would assist judges and lawyers in drafting meaningful jury instructions understood by jurors. Those skills should be brought into the process of drafting and editing jury instructions. When pattern jury instructions are drafted, the drafters should enlist the skills of journalists to insure that the instructions can be understood by the general public.

It is not novel to suggest that jurors have difficulty understanding jury instructions, or that plain-language instructions would be easier for jurors to comprehend.¹ Writers have suggested that instructions are

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1. See Walter W. Steele, Jr. & Elizabeth G. Thornburg, *Jury Instructions: A Persistent Failure to Communicate*, 74 JUDICATURE 249 (1991) (discussing significantly low comprehension of jury instructions and the need for improvement); A.B.A. PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO TRIAL BY JURY, Standard 4.6(a) (Approved Draft, 1968); A.B.A. JUDICIAL ADMINISTRATION DIVISION COMMITTEE ON JURY STANDARDS, STANDARDS RELATING TO JURY USE

difficult to understand and have speculated about forces that resist change in the language of jury instructions.² Plain language instructions are advocated³ as well as psycholinguistic analyses and changes.⁴ The solution to the very real problem of misunderstood jury instructions by jurors is simple. Journalists should be involved in the drafting and editing of jury instructions along with judges and attorneys.

II. INSTRUCTIONS FAIL

I performed a study to evaluate the effectiveness of the language used in instructing North Dakota juries. The study empirically demonstrates that the instructions are not as effective as those who are giving them would hope.⁵ My study focused on the language used in instructions commonly given in cases involving allegations of driving under the influence of intoxicating liquor.

As a trial judge, my experience has been that most of the jury cases tried in North Dakota county courts involve driving under the influence of intoxicating liquor. To evaluate the effectiveness of jury instructions in that type of case, jurors were given two different jury instructions defining the term "under the influence of intoxicating liquor."

The North Dakota Supreme Court has struggled with the meaning of "under the influence of intoxicating liquor." From the opinions which evidence that struggle, trial courts have distilled a definition commonly given as an instruction to jurors. Until 1992, the instruction read:

UNDER THE INFLUENCE OF INTOXICATING LIQUOR DRIVER OF A MOTOR VEHICLE

The phrase under the influence of intoxicating liquor is a flexible term. The mere fact that the driver of a motor vehicle may have consumed intoxicating liquor does not necessarily render him under the influence of intoxicating liquor. The

AND MANAGEMENT Standard, 16(c)(iii)(1983); REP. OF THE SPECIAL COMMITTEE OF THE A.B.A., JURY COMPREHENSION IN COMPLEX CASES 43 (1990).

2. See STEELE AND THORNBURG, *supra* note 1; see also SAUL M. KASSIN & LAWRENCE S. WRIGHTSMAN, *THE AMERICAN JURY ON TRIAL: PSYCHOLOGICAL PERSPECTIVES*, 151-53 (1988) (discussing judicial opinion that there is a necessary tradeoff between accuracy and clarity that results in difficulty with instructions).

3. Jamison Wilcox, *The Craft of Drafting Plain-Language Jury Instructions: A Study of a Sample Pattern Instruction on Obscenity*, 59 TEMP. L.Q. 1159 (1986).

4. Edward J. Imwinkelried & Lloyd R. Schwed, *Guidelines for Drafting Understandable Jury Instructions: An Introduction to the Use of Psycholinguistics*, 23 CRIM. L. BULLETIN 135 (1987).

5. Nationwide, comparable data is lacking. Researchers rely on subjective comparison of narratives and paraphrasing instructions. Wilcox, *supra* note 3, at 1164-65; Imwinkelried & Schwed, *supra* note 4, at 136; KASSIN & WRIGHTSMAN, *supra* note 2, at 147; STEELE & THORNBURG, *supra* note 1, at 251.

circumstances and the effect must be considered. On the other hand, the driver of a motor vehicle need not be intoxicated or in a state of drunkenness to be under the influence of intoxicating liquor. This expression covers not only all the well-known and easily recognized conditions and degrees of intoxication, but also any abnormal mental or physical condition which is the result of indulging to any degree in intoxicating liquor, and which tends to deprive a driver of that clearness of intellect or control of himself which he would otherwise possess.

*Accordingly, if intoxicating liquor has affected the nervous system, brain, or muscles of a driver so as to impair to an appreciable degree, his normal ability to operate a motor vehicle, he is under the influence of intoxicating liquor. Whether the defendant was "under the influence of intoxicating liquor" is a question of fact for you to determine.*⁶

In June 1992, the North Dakota Pattern Jury Instruction Commission adopted a new pattern jury instruction, which reads:

UNDER THE INFLUENCE OF INTOXICATING LIQUOR

The phrase under the influence of intoxicating liquor is a flexible term. The mere fact that the driver of a motor vehicle may have consumed intoxicating liquor does not necessarily render the driver under the influence of intoxicating liquor. The circumstances and effect must be considered.

On the other hand, the driver need not be intoxicated or in a state of drunkenness to be under the influence of intoxicating liquor. This expression covers not only all the well-known and easily recognized conditions and degrees of intoxication, but also any abnormal mental or physical condition which is the result of drinking intoxicating liquor and which tends to deprive a driver of that clearness of intellect or control which the driver would otherwise possess. Whether the defendant was under the influence of intoxicating liquor is a question of fact for you to determine.⁷

6. N.D. STATE BAR ASS'N, N.D. PATTERN JURY INSTRUCTION No. 2941 (1985) (emphasis added). The italicized language is not included in the instruction as revised in 1992. See *id.* (revised 1992).

7. *Id.*

To determine what prospective jurors and those actually selected to serve on juries believed the phrase "under the influence of intoxicating liquor" meant, a two-part study was conducted. The first part of the study was conducted in five cases tried in 1989 and 1990. That study involved the pattern jury instruction used before adoption of the 1992 instruction. In late 1993 and early 1994, the second part of the study was conducted in four cases to determine whether jurors understood the phrase "under the influence of alcohol" any better than the earlier instruction.

The first step in both parts of the study was to gather information from prospective jurors. A simple questionnaire was used to poll the prospective jurors before they became involved in the trial process.⁸ The questionnaire was distributed by bailiffs as the jurors arrived. It called for a one or two sentence definition of the phrase "under the influence of intoxicating liquor." The questionnaire also asked prospective jurors to provide information about the source of their definition.

Several steps were taken to assure there could be no suggestion that the questionnaire introduced error into the trial process. Attorneys for both the prosecution and defense were contacted and in each case, they permitted the court to use the questionnaire. Jurors were instructed that there was no right or wrong answer and were assured that their responses would be anonymous. The questionnaire did not suggest any response or provide any substantive information.

The second step in both parts of the study was to learn what jurors believed the phrase "under the influence of intoxicating liquor" meant after serving on a jury. After the trial, follow-up questionnaires were

8. See Gail Hagerty (unpublished M.J.S. research, University of Nevada (Reno)) Initial Questionnaire (on file with author).

Judge Hagerty is doing a study of language used in the courtroom, and would appreciate your input. Please answer the questions below. There is no "right" or "wrong" answer. Your response is anonymous, but your juror number is necessary so that responses may be analyzed.

JUROR NUMBER: _____

What do you believe the term "under the influence of intoxicating liquor" means? (Your answer should be one or two sentences.)

What is the source of your understanding of the term "under the influence of intoxicating liquor?"

- News Media
- Information provided by addiction treatment facilities or personnel
- Television programs (entertainment, not news)
- An attorney or attorneys
- Previous experience in the criminal justice system
- Other (Please Specify) _____

sent to those who had actually served as jurors.⁹ Once again, a one or two sentence narrative definition was requested. Jurors were also given a short true or false test to evaluate their objective understanding of the instruction given by the court.¹⁰

The final portion of the second questionnaire asked jurors to identify the source of their understanding of the definition of "under the influence of intoxicating liquor." The second questionnaire, however, differed from the initial questionnaire in that it suggested additional

9. See Gail Hagerty (unpublished M.J.S. research, University of Nevada (Reno)) (on file with author). The follow-up questionnaire read:

This is a follow-up to a study you participated in concerning language used in the courtroom. Judge Hagerty would appreciate your cooperation in completing and returning this questionnaire. Please answer the questions below.

There is no "right" or "wrong" answer. Your response is anonymous, but your juror number is necessary so that responses may be analyzed.

JUROR NUMBER: _____

What do you believe the term "under the influence of intoxication liquor" means? (Your answer should be one or two sentences).

Please indicate whether you believe each of the following statements is True (T) or False (F).

F The phrase "under the influence of intoxicating liquor" has one set meaning.

F If a driver has had one drink, he or she is necessarily under the influence of intoxicating liquor.

T In deciding whether a driver is under the influence of liquor, the circumstances and effect of the liquor must be considered.

F A driver must be intoxicated or drunk to be considered under the influence of intoxicating liquor.

T The phrase "under the influence of intoxicating liquor" includes well-known and easily recognized conditions and degrees of intoxication.

T The phrase "under the influence of intoxicating liquor" includes any abnormal mental or physical condition which is the result of consuming intoxicating liquor and which tends to deprive a driver of that clearness of intellect or control of himself which he would otherwise possess.

F Even if intoxicating liquor has affected the nervous system, brain, or muscles of a driver so as to impair, to an appreciable degree, his normal ability to operate a motor vehicle, he or she may not necessarily be considered to be under the influence of intoxicating liquor.

T The Jury makes the decision whether a defendant is under the influence of intoxicating liquor.

What is the source of your understanding of the term "under the influence of intoxicating liquor"?

___ News media

___ Information provided by addiction treatment facilities or personnel

___ Television programs (entertainment, not news)

___ The prosecutor at the trial for which you were a juror

___ The defense attorney at the trial for which you were a juror

___ The Judge's instruction

___ Witnesses who testified at the trial for which you were a juror

___ Previous experience in the criminal justice system

___ Other (Please Specify) _____

10. See *supra* note 9 (indicating in the follow-up questionnaire what the correct answers are).

possible sources such as the prosecutor, the defense attorney, the judge's instruction, and witnesses.

A. RESULTS OF THE FIRST STUDY

The average size of the jury panels in the first part of the study was twenty-two. One hundred ten prospective jurors were polled before the trial process began. In each of the five cases, a six-person jury was selected.

The first part of the study demonstrated that before any involvement in the trial process, 44% of the prospective jurors had a fairly good understanding of what it means to be "under the influence of intoxicating liquor."¹¹ In other words, 44% of the prospective jurors understood that in order to be "under the influence of intoxicating liquor" a person's mental or physical abilities must be affected by consumption of liquor.

Analysis of the narrative answers indicated another 44% had a limited or erroneous understanding of the phrase "under the influence of intoxicating liquor." Some believed anyone who consumed any alcohol was under the influence, whether or not consumption of alcohol affected mental or physical abilities. Others believed that a test result was necessary in order to prove a person was "under the influence of intoxicating liquor." Still others believed that the prosecution was required to prove a person was drunk in order to prove that the person was under the influence.

Another 11% filled out the questionnaire, but did not provide a narrative. Those individuals who failed to provide a narrative may have been unable to do so because they did not understand the concept.

The responses of those who were chosen to serve on a jury were almost the same after jury service. Those who were selected as jurors had an opportunity to observe the entire trial process, including jury selection, opening statements, testimony, closing arguments, and instruction; yet no significant change was seen in the definitions they provided after jury service.¹²

11. See Gail Hagerty (unpublished M.J.S. research, University of Nevada (Reno)) Tally—Narratives—First Questionnaire (on file with author).

Reactions — judgment	44%
Drunk	10%
Tests	19%
Several Drinks	15%
No definition	11%
Total	99%
Total Number sampled	110

12. JUROR # 718

Response 1: "Having drank one or more drinks and then operating a motorized vehicle."

To determine whether the jurors understood and remembered the court's instruction defining "under the influence of intoxicating liquor," jurors were given a true-false test using language directly from the court's instruction. Significant numbers answered key questions incorrectly.¹³ For example, 36% did not believe that the phrase "under the influence of intoxicating liquor" included well-known and easily recognized conditions and degrees of intoxication. Twenty-four percent believed a driver had to be intoxicated or drunk to be considered under the influence of intoxicating liquor. Twenty-four percent also believed that the phrase "under the influence of intoxicating liquor" had one set meaning. Fifty-six percent did not believe the jury made the decision whether the defendant was "under the influence."

As part of this study, an attempt was made to determine what jurors credited as the source of their knowledge of what it means to be "under the influence of intoxicating liquor." Both prospective jurors and those who served as jurors credited the news media as the major source of the information and knowledge from which they determined the meaning of "under the influence of intoxicating liquor." Those who served on juries

Response 2: "How it affects your reactions to doing things and talking."

JUROR # 908

Response 1: "A person consumed an amount of liquor that would impair their driving abilities."

Response 2: "A person has consumed an amount of alcohol in sufficient quantity to impair judgment and physical control."

13. See Gail Hagerty (unpublished M.J.S. research, University of Nevada (Reno)) Result Compilation (providing percentages of uncorrect answers to key questions) (on file with author).

F The phrase "under the influence of intoxicating liquor" has one set meaning. 24% incorrect.

F If a driver has had one drink, he or she is necessarily under the influence of intoxicating liquor. 12% incorrect.

T In deciding whether a driver is under the influence of liquor, the circumstances and effect of the liquor must be considered. 5% incorrect.

F A driver must be intoxicated or drunk to be considered under the influence of intoxicating liquor. 24% incorrect.

T The phrase "under the influence of intoxicating liquor" includes well-known and easily recognized conditions and degrees of intoxication. 36% incorrect.

T The phrase "under the influence of intoxicating liquor" includes any abnormal mental or physical condition which is the result of consuming intoxicating liquor and which tends to deprive a driver of that clearness of intellect or control of himself which he would otherwise possess. 0% incorrect.

F Even if intoxicating liquor has affected the nervous system, brain, or muscles of a driver so as to impair, to an appreciable degree, his normal ability to operate a motor vehicle, he or she may not necessarily be considered to be under the influence of intoxicating liquor. 12% incorrect.

T The Jury makes the decision whether a defendant is under the influence of intoxicating liquor. 56% incorrect.

also considered courtroom sources important, although there was no showing that their understanding was altered by their jury service.¹⁴

B. RESULTS OF THE SECOND PART OF THE STUDY

The second part of the study, performed in 1993 and 1994, closely tracked the 1989-1990 study, so that results could be accurately compared. The instruction used in that part of the study was the 1992 instruction. Five jury panels were polled.

The average size of the jury panels in the second part of the study was sixteen.¹⁵ Eighty-one prospective jurors completed questionnaires. Follow-up questionnaires were sent to individuals who served as jurors in four of the five cases.¹⁶ Of a possible twenty-four responses, twenty-one were received.

Analysis of the narrative answers provided on the initial questionnaires in the second part of the study indicated that about 36% of those polled had a good understanding of the phrase "under the influence of intoxicating liquor." Fifty percent had a limited or erroneous understanding of the phrase. Fourteen percent of those who filled out the questionnaires did not provide a narrative.¹⁷ After serving on a jury,

14. *See id.* (providing the percentage of jurors crediting each source before and after trial). Before: (Total sample size 120) What is the source of your understanding of the term "under the influence of intoxicating liquor"?

- News media. 56%
- Information provided by addiction treatment facilities or personnel. 18%
- Television programs (entertainment not news). 28%
- An attorney or attorneys. 2%
- Previous experience in the criminal justice system. 3%
- Other (Please specify) 12%

After: (Total sample size 25) What is the source of your understanding of the term "under the influence of intoxicating liquor"?

- News media. 60%
- Information provided by addiction treatment facilities or personnel. 24%
- Television programs (entertainment not news). 28%
- The prosecutor at the trial for which you were a juror. 48%
- The defense attorney at the trial for which you were a juror. 56%
- The Judge's instruction. 56%
- Witnesses who testified at the trial for which you were a juror. 28%
- Previous experience in the criminal justice system. 8%
- Other. (Please specify) 12%

15. The size of jury panels was smaller than in 1989 and 1990 because the number of peremptory challenges allowed to each party was reduced by Rule 24 (b)(1) of the North Dakota Rules of Criminal Procedure in January of 1990 which became effective in March, 1990.

16. One jury panel was not sent questionnaires because of an oversight.

17. *See* Gail Hagerty (unpublished M.J.S. research, University of Nevada (Reno)). Tally—Narratives—First questionnaire (on file with author).

Reactions — judgment	36%
Drunk	6%

four of the jurors had an improved understanding of the phrase.¹⁸ However, the average score on the objective true/false portion of the test in the 1989-1990 study was 77%, while the average score in the 1993-1994 study was only 73%.¹⁹

Although the narrative answers might suggest some improvement in comprehension, the objective scores counter that suggestion. For instance, one juror initially defined "under the influence of intoxicating liquor" as "When a person has too much to drink over the percentage." That response is incorrect because it suggests that a test result or blood alcohol level must be presented in order to prove that an individual is "under the influence of intoxicating liquor." After serving as a juror, the same person wrote, "When a person is out of control." That response is more accurate because it recognizes that in order to prove an individual is under the influence of intoxicating liquor, the prosecution must prove

Tests	27%
Several Drinks	17%
No definition	14%
Total	100%
Total number sampled	81

18. JUROR # 730

Response 1: "When a person has too much to drink over above the %."

Response 2: "When a person is out of control."

JUROR # 1741

Response 1: "Having had too much to drink."

Response 2: "I believe D.U.I. means under the influence; but not necessarily intoxicated as D.W.I. meant."

JUROR # 1515

Response 1: "Not able to walk straight in a line and not able to answer the way they should be—and Breathalyzer higher than it should be."

Response 2: "A condition in which a person does not have full control of the things he does."

JUROR # 1551

Response 2: "Consuming alcohol to a degree in which an individual becomes impaired."

19. See Gail Hagerty (unpublished M.J.S. research, University of Nevada (Reno)) 1993-94 Results Compilation (on file with author).

F The phrase "under the influence of intoxicating liquor" has one set meaning. 33% incorrect.

F If a driver has had one drink, he or she is necessarily under the influence of intoxicating liquor. 19% incorrect.

T In deciding whether a driver is under the influence of liquor, the circumstances and effect of the liquor must be considered. 19% incorrect.

F A driver must be intoxicated or drunk to be considered under the influence of intoxicating liquor. 28% incorrect.

T The phrase "under the influence of intoxicating liquor" includes well-known and easily recognized conditions and degrees of intoxication. 38% incorrect.

T The phrase "under the influence of intoxicating liquor" includes any abnormal mental or physical condition which is the result of consuming intoxicating liquor and which tends to deprive a driver of that clearness of intellect or control of himself which he would otherwise possess. 14% incorrect.

T The Jury makes the decision whether a defendant is under the influence of intoxicating liquor. 33% incorrect.

that the individual was affected by the alcohol consumed. In the words of the instruction which had been given:

This expression covers not only all the well-known and easily recognized conditions and degrees of intoxication, but also any abnormal mental or physical condition which is the result of drinking intoxicating liquor and which tends to deprive a driver of that clearness of intellect or control which the driver would otherwise possess.

That same juror, however, did not believe that the phrase "under the influence of intoxicating liquor" included well-known and easily recognized conditions and degrees of intoxication when tested objectively.

Another juror defined "under the influence of intoxicating liquor" as, "Having an amount of liquor in your system." That response fails to recognize the necessity that the liquor affect a person in order to establish that a person is "under the influence." After serving as a juror, the same individual defined the phrase as, "Consuming alcohol to a degree in which the individual becomes impaired." The second definition recognizes the effect of the liquor. The juror, however, believed that a driver must be intoxicated or drunk to be considered "under the influence of intoxicating liquor" when tested objectively.

In both parts of the study, prospective jurors and those who served as jurors perceived the news media to be the major source of their knowledge of what it means to be "under the influence of intoxicating liquor."²⁰ That result suggests not only that the news media communi-

20. *Id.* Tally—First Questionnaire (providing percentage attributed to each source).

Before: (Total sample size 81) What is the source of your understanding of the term "under the influence of intoxicating liquor"?

- News media. 55%
- Information provided by addiction treatment facilities or personnel. 28%
- Television programs (entertainment not news). 18%
- An attorney or attorneys. 9%
- Previous experience in the criminal justice system. 8%
- Other (please specify). 18%

After: (Total sample size 21) What is the source of your understanding of the term "under the influence of intoxicating liquor"?

- News media. 33%
- Information provided by addiction treatment facilities or personnel. 24%
- Television programs (entertainment not news). 14%
- The prosecutor at the trial for which you were a juror. 48%
- The defense attorney at the trial for which you were a juror. 33%
- The Judge's instruction. 52%
- Witnesses who testified at the trial for which you were a juror. 19%
- Previous experience in the criminal justice system. 4%
- Other (Please specify) 4%

cates with lay persons who are summoned to serve on juries, but also that those people are comfortable relying on information they receive from the news media.

III. WHY DO INSTRUCTIONS FAIL?

Should the criminal justice system be satisfied with juries on which less than half of the jurors have a reasonable understanding of one of the key concepts in controversy? Is a 75% score on an objective test good enough for a juror who decides whether or not a defendant will be convicted of a criminal offense? Our system of justice requires unanimous verdicts—100% agreement that a defendant is either guilty or not guilty. That constitutional protection is diluted when a significant number of jurors lack understanding of a key concept they are to apply to the facts of a case. One hundred percent agreement is not possible if the jurors do not have a common understanding of the law to be applied to the facts.

The question, then, is why jurors do not understand the jury instructions used in my two-part study? The simple answer is jury instructions are drafted by a commission made up of lawyers and judges without input from other professions with specialized communication skills. The North Dakota Pattern Jury Instruction Commission consists of six lawyers and six judges.²¹

The Commission should be guided by the American Bar Association's Standards Relating to Juror Use and Management, which states: "The trial judge should . . . prepare and deliver instructions which are readily understood by individuals unfamiliar with the legal system."²²

One writer suggests: "Pattern instructions need not be incomprehensible. However, drafting committees—composed of legal experts—need to be accurate and technically precise as a means of protecting judges against successful appeals."²³

The desire to avoid successful appeals is probably the reason that both instructions used in this study rely on language taken directly from a 1954 North Dakota Supreme Court case.

The expression "under the influence of intoxicating liquor" simply means having drunk enough to disturb the action of the physical or mental faculties so that they are no longer in their

21. N.D. S. CT. ADMIN. RULES AND ORDERS, A.R. 23, Rule 2.

22. AM. BAR ASS'N, STANDARDS RELATING TO JUROR USE AND MANAGEMENT, Standard 16, 141 (1993). JUD. ADMIN. DIV. ON JURY STANDARDS.

23. KASSIN & WRIGHTSMAN, *supra* note 2, at 151.

natural or normal condition; that therefore, when a person is so affected by intoxicating liquor as not to possess that clearness of intellect and control of himself that he would otherwise have, he is "under the influence of intoxicating liquor". . . . [T]he expression covers not only all of the well-known and easily recognized conditions and degrees of intoxication, but any abnormal mental or physical condition which is the result of indulging in any degree in intoxicating liquors and which tend to deprive an individual of that clearness of intellect and control of himself which he would otherwise possess.²⁴

In 1984 the North Dakota Supreme Court held: "In order to be convicted of driving while under the influence of intoxicating liquor, a defendant need not have been in a totally stuporous condition, nor display an impairment of driving ability."²⁵

The language used by the supreme court in those cases was intended for an audience made up of trial judges and attorneys, not laypersons. Yet when the Pattern Jury Instruction Commission rewrote the instruction in 1991 and 1992, the Commission used language directly from North Dakota case law, considering that to be the safest course.²⁶ Commission members felt that if language taken directly from supreme court decisions was used, reversible error would be unlikely.

The fear of reversal is a major factor which drives drafting of instructions using language not intended for laypersons. Perhaps "preoccupation with legal accuracy"²⁷ will be overcome if lawyers successfully argue on appeal that the jury was not able to understand the jury instructions.

IV. HOW SHOULD INSTRUCTIONS BE WRITTEN?

Scholars who wish to see jury instructions improved have made several suggestions, which I have compiled as follows:

1. Jury instructions should be brief.²⁸
2. Each sentence in jury instructions should be "clear and concise."²⁹

24. *State v. Hanson*, 73 N.W.2d 135, 139-40 (N.D. 1954) (citations omitted).

25. *State v. Kisse*, 351 N.W.2d 97, 101 (N.D. 1984).

26. The author is a member of the Commission and participated in the rewriting of the instruction.

27. LAWRENCE S. WRIGHTSMAN ET AL., *IN THE JURY BOX: CONTROVERSIES IN THE COURTROOM*, Ch. 8, at 176 (1987). AMIRAM ELWORK ET AL., *MAKING JURY INSTRUCTIONS UNDERSTANDABLE*, 176-77 (1982).

28. Wilcox, *supra* note 3, at 1168.

29. *Id.*; Imwinkelried & Schwed, *supra* note 4, at 145.

3. Jury instructions should not contain legalese.³⁰
4. Verbs should not be made into nouns in jury instructions (for example participate becomes participation, nominalize becomes nominalization).³¹
5. Jury instructions should be organized logically.³²

The skills suggested for drafting understandable instructions are the skills taught to and practiced by journalists. Strunk and White's *The Elements of Style* is a key text for every journalism student and sets a timeless standard for professional journalists.³³ Strunk and White advise the aspiring writer to:

1. "Omit needless words . . . Vigorous writing is concise."³⁴
2. "Be clear . . . When you become hopelessly mired in a sentence, it is best to start fresh[.]"³⁵
3. "Avoid fancy words . . . Do not be tempted by a twenty-dollar word when there is a ten-center handy" ³⁶
4. "Write with nouns and verbs."³⁷
5. "Avoid a succession of loose sentences."³⁸

Journalists are trained to write the way scholars advise. A comparison of the two lists demonstrates that journalists are trained to write the way jury instructions should be written. Certainly other professionals could help improve the language of jury instructions. Scholars, linguists, English professors and a host of others could contribute to the improvement of jury instructions.

However, journalists are in the business of communicating with laypersons. They write for people with varied backgrounds and varied levels of education on a daily basis. Most news stories are written at a sixth-grade reading level.³⁹ Jury instructions are often written at a reading level so sophisticated that judges and lawyers debate their meaning.

30. Imwinkelried & Schwed, *supra* note 4, at 138. See also KASSIN & WRIGHTSMAN, *supra* note 2, at 150.

31. Imwinkelried & Schwed, *supra* note 4, at 139; STEELE & THORNBURG, *supra* note 1, at 250.

32. KASSIN & WRIGHTSMAN, *supra* note 2, at 150-51; STEELE & THORNBURG, *supra* note 1, at 250.

33. WILLIAM STRUNK, JR. & E. B. WHITE, *THE ELEMENTS OF STYLE* (3d ed. 1979).

34. *Id.* at 23.

35. *Id.* at 79.

36. *Id.* at 76.

37. *Id.* at 71.

38. STRUNK & WHITE, *supra* note 33, at 25.

39. NEAL COPPLE, *DEPTH REPORTING: AN APPROACH TO JOURNALISM*, 79-80 (1964).

Jurors perceive that they get their information about "driving under the influence" from the news media. Jurors' reliance on information gained from the news media suggests that they are comfortable with the language and manner of presentation used by journalists. It only makes sense, then, to incorporate the writing skills of journalists in the process of drafting jury instructions which are not only technically accurate, but also understandable.

V. JOURNALISTS ARE ABLE TO ASSIST

Is a journalist able to assist in writing an accurate and understandable instruction? To answer this question, I enlisted the help of several journalists in rewriting the pattern jury instruction defining "driving under the influence."⁴⁰

The journalists had a rewriting assignment rather than an original drafting assignment. To some extent, they were captives of the language from which they were working. And yet, they followed the suggestions for drafting understandable instructions listed above to an amazing extent.

The rewritten instructions were shorter and included less complex sentences, as demonstrated below.

Phyllis Mensing of the Associated Press suggested:

Your job is to determine whether the defendant was under the influence of intoxicating liquor. The issue is not whether he/she may have consumed liquor, but whether he/she was physically or mentally impaired as a result of the liquor.

Janell Cole of the *Bismarck Tribune* suggested:

"Under the influence of intoxicating liquor" is a flexible legal term. A driver who's been drinking liquor isn't necessarily "under the influence," without considering the circumstances and effects of the liquor. On the other hand, a driver doesn't have to be intoxicated or drunk to be under the influence.

40. Those who assisted include Kate Sweney, Grand Forks Herald; Dale Wetzel, Associated Press; Pete Selkove, Bismarck Tribune; Deneen Gilmour, Bismarck Tribune; Jeff Olson, Bismarck Tribune; Bob Moen, Associated Press; Janell Cole, Bismarck Tribune; Kevin Giles, Bismarck Tribune; Bob MacLeod, retired KFJR broadcast executive and writer; Phyllis Mensing, Associated Press, and Lori Nitschke, Grand Forks Herald. University of North Dakota Communications Associate Professor Bill Holden also had students in advanced reporting and editing classes edit the instruction. The journalists rewrote the instruction which was used prior to 1992.

The phrase "under the influence" covers the usual symptoms of intoxication we're familiar with. But it also covers the subtle effects liquor has on the driver's physical or mental judgment and self-control.

So, if the intoxicating liquor has affected the driver's nervous system, brain, muscles or normal ability to drive, he or she is "under the influence."

Whether the defendant was under the influence is your decision.

Kate Sweney of the *Grand Forks Herald* suggested:

Whether the defendant was "under the influence of intoxicating liquor" is a question of fact for you to determine. The phrase is flexible and the circumstances and effects must be considered. For example, a person who drinks alcohol is not necessarily "under the influence." On the other hand, a person does not have to be drunk to be "under the influence."

The phrase covers all of the well-known and easily recognized symptoms of intoxication. It also refers to any abnormal mental or physical condition caused by drinking alcohol and that robs a person of normal physical control or intellectual clarity. If a person's normal ability to drive is impaired to an appreciable degree, that person is "under the influence."⁴¹

Dale Wetzel of the Associated Press suggested two versions of the instruction:

1) A driver is considered under the influence of alcohol if it appreciably affects his judgment or ability to react. Alcohol consumption before driving, by itself, does not necessarily mean a person is under the influence. But someone also could be under the influence without showing physical signs of drunkenness, such as slurred speech, bloodshot eyes or smelly breath. It is up to you to decide whether the defendant was under the influence.⁴²

41. This proposal may not be technically accurate in that it requires impairment to an appreciable degree. Current North Dakota law requires only that the State prove impairment, STATE BAR ASS'N, N.D. PATTERN JURY INSTRUCTION No. 2941 (revised 1992).

42. This proposal has the same technical inaccuracy as the Sweney instruction. See *supra* note 41.

2) It is up to you to decide whether the defendant was under the influence.

VI. JOURNALISTS IMPROVE INSTRUCTIONS

The instructions rewritten by the journalists were better than the pattern instructions when judged by the criteria recommended for writing good instructions and the criteria for good newswriting, as listed in this article. I believe a critical reading of the rewritten instructions demonstrates that they are more understandable and more likely to be meaningful to a wide audience than the pattern jury instructions. The pattern instruction was improved when rewritten by journalists.

This assertion can be tested by comparing the pattern instruction to the instructions rewritten by the journalists using the criteria for writing good instructions.

A. JURY INSTRUCTIONS SHOULD BE BRIEF

1. *Pattern Instruction*: The mere fact that the driver of a motor vehicle may have consumed intoxicating liquor does not necessarily render him "under the influence of intoxicating liquor."

a. Sweney Instruction: For example, a person who drinks alcohol is not necessarily "under the influence."

2. *Pattern Instruction*: On the other hand, the driver of a motor vehicle need not be intoxicated or in a state of drunkenness to be "under the influence of intoxicating liquor."

a. Selkove Instruction: A driver doesn't have to be visibly drunk to be "under the influence of intoxicating liquor."

3. *Pattern Instruction*: This expression covers not only all the well-known and easily recognized conditions and degrees of intoxication, but also any abnormal mental or physical condition which is the result of drinking intoxicating liquor and which tends to deprive a driver of that clearness of intellect or control which the driver would otherwise possess.

a. Moen Instruction: The phrase covers all the known and recognized conditions and degrees of intoxication as well as any abnormal mental or physical condition resulting from drinking the liquor.

b. Cole Instruction: The phrase "under the influence" covers the usual symptoms of intoxication we're familiar with. But it also

covers the subtle effects liquor has on the driver's physical or mental judgment and self control.

**B. EACH SENTENCE IN A JURY INSTRUCTION SHOULD BE
"CLEAR AND CONCISE"**

1. *Pattern Instruction:* Accordingly, if intoxicating liquor has affected the nervous system, brain, or muscles of a driver so as to impair to an appreciable degree, his normal ability to operate a motor vehicle, he is "under the influence of intoxicating liquor."

a. *Sweney Instruction:* It also refers to any abnormal mental or physical condition caused by drinking alcohol that robs a person of normal physical control or intellectual clarity. If a person's normal ability to drive is impaired to an appreciable degree, that person is "under the influence."

b. *Gilmour Instruction:* After drinking, did the person on trial have the same mental and physical abilities as he had before drinking. You will decide if he drank liquor to the point it hindered his ability to think or control himself.

C. JURY INSTRUCTIONS SHOULD AVOID LEGALESE

1. *Pattern Instruction:* The mere fact that the driver of a motor vehicle may have consumed intoxicating liquor does not necessarily render him "under the influence of intoxicating liquor."

a. *Olson Instruction:* A driver of a motor vehicle may have consumed liquor and not be "under the influence."

b. *Moen Instruction:* The fact that the driver may have consumed liquor does not necessarily mean he or she is under its influence.

D. VERBS SHOULD NOT BE MADE INTO NOUNS IN JURY INSTRUCTIONS. WRITE WITH NOUNS AND VERBS.

These examples demonstrate improved use of nouns and verbs:

1. *Pattern Instruction*: The circumstances and effect must be considered.

a. Gilmour Instruction: If you conclude he drank enough liquor to affect . . .

b. Wetzel Instruction: A driver is considered under the influence of alcohol if it appreciably affects his judgment or ability to react.

2. *Pattern Instruction*: Whether the defendant was "under the influence of intoxicating liquor" is a question of fact for you to determine.

a. Selkove Instruction: A jury must decide whether the alcohol affected the person's ability to drive.

b. Wetzel Instruction: It is up to you to decide whether the defendant was under the influence.

E. JURY INSTRUCTIONS SHOULD BE ORGANIZED LOGICALLY

1. *Pattern Instruction concludes*: Whether the defendant was "under the influence of intoxicating liquor" is a question of fact for you to determine.

a. Sweny Instruction begins: Whether the defendant was "under the influence of intoxicating liquor" is a question of fact for you to determine.

b. Gilmour Instruction begins: After drinking, did the person on trial have the same mental and physical abilities as he had before drinking?

c. Wetzel Instruction begins: A driver is considered under the influence of alcohol if it appreciably affects his judgment or ability to react.

The journalists' suggestions are particularly important since the 1989 part of the study indicated that 56% of those who served on juries marked the following statement false: "[T]he jury makes the decision

whether a defendant is under the influence [of intoxicating liquor]."⁴³ Thirty-three percent of those who served on juries in the second study marked the statement false.⁴⁴ Reorganizing the instruction and using more direct language would have improved those results.

There were slight technical errors in several of the journalists' proposed instructions, such as a suggestion that the issue involves "drunk" driving or requiring that there be an appreciable impairment rather than just impairment. Those errors could be easily corrected. Almost all the proposals were shorter and easier to comprehend. The language the journalists used was like the language laypersons use. Based on the criteria for writing good instructions and good newswriting, the instructions rewritten by journalists were better than the pattern instructions.

Several instructions, including those above⁴⁵ were circulated to members of the Pattern Jury Instruction Commission and to a number of county judges in order to determine whether they preferred any of the journalists' instructions.⁴⁶ Almost all participants selected one of the journalists' instructions as preferable to the others and as an instruction they might use.

One judge who selected the Sweney instruction noted: "I'll vote for this one but probably only because it is closest to the one I currently use." In fact, the Sweney instruction was the instruction preferred by many of those who responded, although there was no clear consensus.

The jurors who participated in the 1993-1994 study were asked whether they believed future juries should be instructed using the pattern instruction (which they had been given) or the Sweney instruction. Even though they were familiar with the pattern instruction and it had been read to them by a judge, a majority selected the Sweney instruction.⁴⁷ This confirms that jurors are more comfortable with language used by journalists than language used in traditional jury instructions.

43. See *supra* note 13.

44. See *supra* text accompanying note 19.

45. The Mensing proposal was received too late to be circulated.

46. Those who participated included: Judges Robert Holte, Tom Metelmann, Jim Bekken, O.A. Schulz, Richard Geiger, Ron Goodman, Allan Schmalenberger, Ron Hilden, Donovan Foughty, Mikal Simonson, Hal Stutsman, Burt Riskedahl and William McLees, and attorneys Todd Haggart and Steven Lian.

47. Of the 17 who responded, 59% chose the Sweney instruction.

VII. CONCLUSION

Although there will be resistance to incorporating the skills of journalists in the process of drafting pattern jury instructions, this study demonstrates there is a problem with juror comprehension of jury instructions in North Dakota. Jurors identify the news media as the source of whatever knowledge they bring into the courtroom. The news media communicates more effectively with jurors and prospective jurors than judges or attorneys. People are used to reading what journalists write. Journalists' language meshes with popular language and better matches the level of reading and understanding of a large part of society. However, journalists do not have the legal background or technical knowledge necessary to draft jury instructions on their own.

The legal knowledge of judges and lawyers is essential to the drafting of jury instructions. If those instructions are truly meant to communicate with jurors, the skills of journalists should be incorporated in the drafting process. That could be accomplished in one of several ways. Journalists could be members of the Pattern Jury Commission. Journalists could serve as consultants or resource people to the Commission, or the Commission staff could be expanded to include journalists who would assist in rewriting the instructions while the Commission monitors for technical accuracy.

If we concede that jurors find it difficult to understand jury instructions and that journalists have the skills necessary to assist in rewriting those instructions, jury instructions will be improved.