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Jurors Are Only Human: Proper Instructions Can Aid Their Good-Faith Deliberations

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Front page.

Above the fold.

“Judge Urges Parties to Settle.”

You always wanted to work on cases that made the front page of the papers, right? Perhaps not when the headlines are the result of a reporter’s eavesdropping on an in-chambers conference a few days into a trial.

That morning, one by one, the jurors are called into the judge’s chambers.

The judge, a hulking former professional football player, imposing even without his robes, puts it to them:

“Did you see the headline?” Yes, they all answer.

“Did you read the article?” Yes, they all answer.

“Didn’t you remember my instructions not to read newspaper articles about the case?”

I’m sorry, Your Honor, they all replied.

It is unlikely any of the jurors had consciously realized when they were reading the article that, in doing so, they violated the judge’s repeated instructions not to read newspaper articles about the

case; they just had a natural reaction to do so when they saw the dramatic headline. After all, the newspaper was where all of us looked for information back in the day.

That is a true story and many, many trial lawyers have their own stories like it. And stories like these tell us a lot about jury instructions and how difficult it is to make them effective.

No one doubts that most jurors want to get their verdict right or that they approach their deliberations with the utmost good-faith desire to do so. But we all know they often struggle with applying the trial court's instructions on the law to the evidence they have heard. We also know that jurors do not always objectively consider the evidence they have heard and engage in the robust discussions with other jurors that will result in the best possible verdict.

Shari Seidman Diamond, a lawyer, social psychologist, and preeminent empirical researcher on the jury process and decision-making, has spoken and written extensively on findings from the Arizona Jury Project, research funded by the American Bar Foundation and the National Science Foundation, which videotaped actual jury deliberations in 50 civil trials. Diamond emphasizes that the research establishes that while jurors have difficulty understanding the law and do make mistakes, they are relatively good decision-makers who try very hard to do what is expected of them when they are given proper instructions and respect for their intelligence. *See* Pat Vaughan Tremmel, *Research Shows How Juries Really Behave*, Northwestern News, Dec. 20, 2005, www.northwestern.edu/newscenter/stories/2005/12/diamond.html.

According to this research, jurors are attentive, work to "get it right," and generally use common sense "to develop the most plausible reconstruction" of the events at issue. *Jurors Are Practical Problem Solvers, But Have Difficulty Understanding Jury Instructions, Experts Say*, A.B.A. News, Aug. 14, 2017, www. americanbar.org/news/abanews/aba-news-archives/2017/08/ jurors_are_practical/.

Roots of the Problem

That said, this research confirms that jurors have substantial problems understanding and applying many jury instructions. After all, they are asked to listen, in a single sitting, to a judge read pages and pages—in a complex case, it may be as many as 30 or more pages—of concepts unfamiliar to the average lay juror. If a juror gets hung up on one instruction, the judge continues to read, moving on to additional ones. And jurors are often given little guidance, if any, on how all of these instructions fit together for purposes of their verdict.

Jurors usually are not students. They are not used to listening to what amounts to a lecture that may last for an hour or more from start to finish. It is no wonder they struggle with the instructions when they start their deliberations.

Quite apart from the sheer volume of new information being given to them, jurors commonly experience problems with unclear or legalistic language in the instructions. They also are bothered by the absence of any mention of issues not presented to the jury in the instructions, such as insurance and attorney fees, but about which they naturally will be curious, particularly when they are told to rely on their common sense.

The Arizona Project demonstrates that failing to address these issues altogether because they are legally irrelevant is ineffective and can lead to inconsistent (and unfair) results. *See* Shari Seidman Diamond, Beth Murphy & Mary R. Rose, *The "Kettleful of Law" in Real Jury Deliberations: Successes, Failures, and Next Steps*, 106 Nw. U. L. Rev. 1537, 1600–1601 (2015). Without any instruction on the matter, jurors often end up considering how insurance might affect their award through pure speculation, which is exactly what they are not supposed to do.

Thus, it appears more effective to give instructions directly explaining to the jurors why they are not to consider such matters, rather than omit any mention of them or merely give a simple admonition not to consider them. *See* Shari Seidman Diamond & Neil Vidmar, *Jury Room Ruminations on Forbidden Topics*, 87 Va. L. Rev. 1857, 1907–11 (2001). Indeed, other research on human decision-making similarly supports such a direct approach. *See* Ralph A. Weber & the Jury Committee of the American College of Trial Lawyers, Improving Jury Deliberations Through Jury Instructions Based on Cognitive Science 10–19 (2019), www.actl.com/docs/default-source/default- document-library/position-statements-and-white-papers/ improving-jury-deliberations-final.pdf?sfvrsn=6.

The Arizona Project showed that another common problem jurors have with instructions involves what have been referred to as "structural errors," which are the failure to understand the relationship between instructions. Diamond and her coauthors suggest providing explicit guidance to the jury to directly explain the connections in the instructions (or lack thereof) and arranging the instructions in the most logical manner. One of their recommendations is to include definitions within the substantive instruction where they are first used instead of having definitions on their own page.

There unquestionably are instances of "nullification" or "resistance errors" in which jurors deliberately disregard the instructions, usually when they suspect there is insurance to cover their verdict. These errors are less common than comprehension problems, however. So figuring out how to better communicate to jurors the issues and the law to be applied in resolving them is an important key to improving deliberations and verdicts.

Doing this is even more important, and yet is even more difficult, because of the technological and societal changes in our country in recent years. In this article, we explore potential ways that lawyers and judges may be able to better help jurors reach their verdict through good-faith deliberations about the issues in the case, based on clear and effective instructions.

Road Map to Effective Instructions

An earlier article published in 2004 provided a basic road map to enable trial lawyers to prepare effective jury instructions and verdict forms, and the tips offered in that article—and briefly summarized below—remain good practice today. *See* Sylvia Walbolt & Cristina Alonso, *Jury Instructions: A Road Map for Trial Counsel*, 30 Litigation 29–35 (Winter 2004). First and foremost, you can't start thinking about jury instructions too early in the case. And you can't make them too simple or too clear for laypeople.

One mock juror was caught on video explaining that "proximate cause" meant the "approximate cause." *Id.* at 31. Lawyers have to look at their requested instructions in the same light that ordinary laypeople will hear or read them. That should be the polestar for preparing effective jury instructions.

Consider asking the trial judge to give the jury preliminary instructions on the substantive law controlling the claim and defenses so the jurors have some legal context as they hear the evidence at trial, rather than hear that evidence in a vacuum, unanchored in the law they will have to apply in their deliberations to the evidence. Then, at the end of the trial, your goal is to have the court give the jury a clear legal framework for its determination of the factual issues. Make it as easy as possible for the jury to understand the controlling law and how it bears on the factual issues the jury ultimately must resolve.

A good trial lawyer can enhance the jury's understanding and proper application of the instructions by carefully crafting them in the first place. As just one example, break a substantive instruction into manageable pieces—each element of the claim—with each element numbered:

To prevail against a defendant on a price-fixing claim, plaintiff must prove as to that particular defendant each of the following elements by a preponderance of the evidence:

> **First**, that an agreement to fix the prices of [product x] existed;
>
> **Second**, that that defendant knowingly—that is, voluntarily and intentionally—became a party to that agreement;
>
> **Third**, that such agreement occurred in or affected interstate [or foreign] commerce; and
>
> **Fourth**, that the agreement caused plaintiff to suffer an injury to its business or property.

Model Jury Instr. in Civ. Antitrust Cases B-19, Horizontal Price Fixing, General Elements.

As this pattern instruction demonstrates, even statutes and legal principles from the case law can be simplified and rewritten in plain English. Eliminate legalese. Eliminate elements that are not at issue from the instruction. If the case is a federal antitrust case and it is undisputed the defendant was engaged in interstate commerce, the jury does not need to be bothered about the requirement that the restraint occurred in interstate commerce, even though the pattern instruction includes that element of the statute. Use as much care in writing the instructions for the jury as you would in writing a motion for the judge. Use short sentences, or at least sentences broken up into recognizable parts. Use short paragraphs. Short bursts of information with a natural pause aid juror comprehension, whether heard or read.

Having worked hard to prepare good instructions, don't ignore them in your closing argument. Help the jury understand them and appreciate their significance to the jury's deliberations. Displaying instructions on a screen and illustrating how they apply to the jury's analysis of the trial evidence can be powerful. At the same time, pay attention to what the other side says (or doesn't say) in closing argument about the court's jury instructions.

You want to prime the jurors to recognize the key substantive instructions so they will focus on them when they hear them from the judge. And you want to help them understand how to apply those instructions to the evidence.

Jurors have enormous respect for the trial judge sitting on the bench in a robe, and they inevitably will be more comfortable with a verdict they believe complies with the instructions given to them by the judge. The simple step of asking that each juror be provided with a written set of the instructions before they retire to their deliberations can ensure better comprehension of, and faithful adherence to, the instructions than just sending one copy back into the jury room (or not doing so at all). Results from the Arizona Project showed that many juror misunderstandings of the instructions were corrected during deliberations when jurors referred to the written instructions. In addition, if your jurisdiction allows jurors to ask questions, make sure the jurors are specifically advised that they can ask the judge about the instructions.

As important as the instructions themselves are, the verdict form is every bit as important. After all, the verdict form is itself a map for the jury to use in conducting its deliberations. Yet, all too often, the verdict form is left to be prepared even later than the instructions, sometimes at the 11th hour when everything else must be done to finish up the trial.

Proper preparation of a verdict form often is easier said than done. Worse yet, it may cause the jury to be curious or worried about how the case will be resolved if the jurors answer certain questions in certain ways. This is a topic for a full article another day. Here, we only flag this important matter as still another thing to address in order to obtain the best possible jury deliberation in your case.

In today's world, the suggestions made in the 2004 article are not enough for trial lawyers seeking to maximize the jury's use of the trial court's instructions to reach the right result. They are only the beginning, not the end, of your work in drafting jury instructions.

Going Further

To begin with, today's jurors are increasingly accustomed to using social media and the internet to obtain instant access to information in their real-life efforts to resolve problems or answer their questions. Just telling them not to do so during a trial may not work, especially as jurors are so used to taking advantage of these resources. Jurors must be helped to understand why it would be so unfair for them to disregard this fundamental instruction by the judge. For example, explaining that a juror's individual investigation "unfairly and improperly prevents the parties" from having the opportunity to challenge the accuracy of the information uncovered by the jurors and to present argument on it, as Florida's standard instruction does, will resonate with most people. *See, e.g.*, Fla. Standard Jury Instr. (Civ.) 201.2, Introduction of Participants and Their Roles.

Lawyers and judges also must recognize that jurors today are part of a society in which people often won't listen openly and objectively to views with which they disagree. Instead, many only hear what is consistent with their own preexisting feelings and beliefs. Others may be unconsciously intimidated by the jurors who have the most strident and confident views, expressed the most vocally. Unfortunately, this can happen with minority jurors, who actually may have a very important and different perspective as a result of their different life experiences.

Changing times require changing trial practices with respect to jury instructions and jury deliberations. Our knowledge about today's jurors makes that clear. Here is some more food for thought about jury instructions in our world today.

As suggested earlier, preliminary instructions to the jurors can help them evaluate the evidence as they hear it. Lawyers' plain-spoken explanations about the instructions during closing arguments can bring clarity to jurors. But there are other, commonsense measures that can be taken during the trial that can lead to better deliberations in the jury room.

One trial lawyer expert on jury trials, Stephen D. Susman, the executive director of the Civil Jury Project at NYU School of Law, an academic center dedicated to studying civil jury trials, believes all jurors should get iPads at the beginning of the trial with written instructions, definitions, and case information, including a cast of characters and chronology of events. *See* Debra Cassens Weiss, *Jurors Take Instructions Seriously, But Do They Understand Them?* A.B.A. J., Aug. 11, 2017, www.abajournal.com/news/article/jurors_take_instructions_seriously_but_do_they_understand_them.

Susman also suggests additional information should be added to the iPads in real time: exhibits as they are introduced into evidence and real-time transcripts of testimony. Jurors should then be allowed to take these iPads into their deliberations.

As another measure to promote clarification of the issues and the law for the jury, some jurisdictions have followed the recommendation of the ABA's Civil Trial Practice Standards to allow interim comments by counsel and instructions by the court. *See* Civil Trial Practice Standards (Am. Bar Ass'n, updated Aug. 2007), *see also* Principles for Juries and Jury Trials 17, 20 (Am. Bar Ass'n Aug. 2005) www.americanbar.org/content/dam/aba/administrative/american_jury/principles.pdf ("Parties and courts should be open to a variety of trial techniques to enhance juror comprehension of the issues including … mini- or interim openings and closings ").

These interim comments and instructions are intended to help the jury place the evidence into proper context as it is adduced at trial. The recommendation is to allow the judge to allocate to each side, at the outset of trial, a total amount of time that may be used, at counsels' discretion, at any reasonable point during the trial (though not in the middle of a witness's testimony). *See* Civil Trial Practice Standards, *supra*, at 19–21. Counsel can preview the key aspects of an expert's testimony, or summarize it and explain how it relates to the issues before the jury and the judge's instructions on those issues.

In turn, the judge can explain the issues and law at pertinent times in the course of the trial. As the Second Circuit has explained,

> We have noted repeatedly that a district court can greatly assist a jury in comprehending complex evidence through the use of intelligent management devices … includ[ing] … interim explanations by the judge on issues of law and fact and on the limited use of evidence, [and] interim addresses to the jury by counsel… .

Consorti v. Armstrong World Indus., Inc., 72 F.3d 1003, 1008 (2d Cir. 1995) (internal citation omitted), *judgment vacated on other grounds*, 518 U.S. 1031 (1996).

Like preliminary instructions, interim instructions on the issues to be resolved by the jury in the end, and the law to be applied by the jury in doing so, undoubtedly increase jurors' likelihood of considering the evidence under the proper legal framework, as opposed to in a vacuum. And such instructions should decrease the chances that jurors will miss the significance of important legal requirements when the jurors only are given the substantive instructions all at once at the end of trial and right before their deliberations.

Diamond's scholarship on the Arizona Project made a striking finding along these same lines. Due to a controversial rule of civil procedure passed in Arizona, jurors are allowed to discuss the case with

one another throughout the trial. While critics of such a rule feared this would lead to premature verdicts, the study showed that in fact jurors used these discussions to correct misunderstandings and to solidify memories and understanding of the evidence, something that is especially important in a long, complex trial.

It also must be remembered that jurors likely will understand their obligations better if they view a screen presentation, rather than merely hear a series of statements by the judge. New York has an excellent video discussing the trial process and the juror's role that the jury venire watches before going into a courtroom for a specific case. *See* NYJuror.Gov, *Petit Juror Orientation: Your Turn*, www.nyjuror.gov/JO_VideoScripts.shtml.

Similarly, showing jurors a PowerPoint reaffirming their obligations (rather than repeating by rote the same initial instructions) may be more effective. A slide as simple as something like this may really resonate with the jurors at the end of each trial day:

YOU PROMISED NOT TO:

1. Make up your mind on your verdict or any of the issues leading to
2. Talk to others about the
3. Do research yourself about issues in the

Instructions About Jury Decision-Making

Can even more instructions aid jurors in their deliberations and improve their chances of getting their verdict right under the evidence and the law? A recent white paper by the American College of Trial Lawyers, suggests that it is in fact the case. The thesis advanced in the white paper is that judges and practitioners must understand the predictable and unconscious flaws in human decision-making in order to ensure good-faith jury deliberations to the extent humanly possible, and it recommends jury instructions specifically designed to counter four known human shortcomings discussed in the white paper. The idea is that jury instructions that openly recognize the four shortcomings, while providing science-based solutions for overcoming them, will encourage jurors to employ more honest thinking and real discussion with one another, and thereby engage in true good-faith deliberations about their verdict.

Four common flaws in decision-making threaten juries' abilities to get it right. These need to be understood by lawyers and judges before jurors can be aided in entering into true good-faith deliberations—that is, to think about the issues and decisions carefully and deliberately, and to truly listen and honestly take into account views expressed by other jurors.

The first is the "affect" heuristic, whereby individuals may avoid the task of answering a difficult question through measured thinking by instead asking, "Do I like this or dislike this?" The second flaw is confirmation bias, the tendency to accept facts that support our beliefs and to reject those that do not. The third is the acute decrease in measured, logical thinking caused by low blood sugar. (As the white paper suggests, the solution to this one seems simple enough: give juries frequent breaks and supply jury rooms with snacks that contain simple carbohydrates like fruit and fruit drinks.)

And the fourth flaw is the effect of juror dominance and submissiveness in deliberations. In theory, a group of jurors should be better able to recognize and make sense of all the evidence than just one juror. But the reality is that only half of jurors usually do most of the talking. Consequently, these dominant jurors are more likely to influence the entire group, even though they are not necessarily right or even better at reasoned thinking and decision-making than the other jurors.

The result of all these human flaws is that an individual's fast, emotional impulses tend to take over deliberate, logical reasoning in jury deliberations. Indeed, the Florida Supreme Court in *Matarranz v. State*, 133 So. 3d 433, 485–86 (Fla. 2013), went so far as to hold that trial judges should not attempt to rehabilitate jurors who express bias based on their actual life experiences—such as the juror in that case who shared during voir dire that her experience as a victim of a burglary when she was a child was likely to make her biased against the defendant. The court so held based on its view that such opinions and biases are "immutable" and stand in contrast to biases based on misconceptions about the law and the judicial process, for which jurors still can be rehabilitated.

The tendency for individuals to abandon deliberate, logical thinking is something lawyers and judges must recognize but discourage in jury deliberations if juries are to have every chance to deliberate in good faith and ultimately get their verdict right. The American College of Trial Lawyers accordingly suggests the use of a discrete type of instructions specifically "aimed at improving jurors' thinking and deliberations." Its white paper provides three potential instructions to consider as a start.

The first is an "accountability" instruction to be given to jurors as soon as they are seated: "[I]n order to do your duty … you will have to explain to your fellow jurors what evidence you believe supports your decision to vote a certain way." This instruction is premised on evidence that people are more likely to engage in thoughtful and careful thinking if they know they will eventually be asked to justify their decision to others.

Next is a "devil's advocate" instruction intended to offset confirmation bias by asking jurors to consider evidence that would support a conclusion contrary to the one they have reached. This recommended instruction is based on research showing that simply telling people not to be biased has just the opposite effect, while telling people to "consider the opposite" of what they believe seems to work.

The third and final recommendation is a "deliberation guide" instruction intended to counteract dominant jurors. The instruction asks that (i) jurors write down reasons for their initial beliefs before discussing them with the group, (ii) the panel discuss the evidence before voting, and (iii) those jurors most reluctant to speak should speak first while the foreperson should speak last.

All of these suggested instructions on the deliberations process itself rest on the scientifically-supported assumption that the key to encouraging truly open and good-faith jury deliberations is alerting jurors to these flaws in human decision-making and providing them with concrete measures to overcome these known, and quite understandable, human tendencies.

To that end, these proposed instructions include a simple explanation of these four known, but unconscious, flaws in decision-making and the risk they pose to a just and true verdict based on good-faith deliberations of the issues. For example, the "devil's advocate" instruction explains that "[r]esearch shows that people tend to look for facts to support their beliefs and to disregard facts that do not fit their beliefs," and that "[t]he problem with this tendency in a jury trial is you may miss important facts and reach the wrong result."

In her scholarship on the Arizona Project, Diamond has examined the problem of juries considering things they are not supposed to, such as insurance or attorney fees. She concludes, as the American College and other studies do, that simply admonishing the jury not to consider commonly known matters such as insurance is not effective; rather, jurors should be given an explanation of why insurance is not relevant and why it is unfair for them to speculate about it when the parties are not allowed to introduce evidence about it.

By the same token, judges (or lawyers) should explain to the jurors, as Florida's standard instruction does, why it is unfair for them to do their own research, when they may have the belief that doing so will only help them get to the truth of the matter. And shouldn't jurors be told why they are not to use emotion as part of their deliberations, when they do so on a daily basis in their own lives—giving money to that homeless woman on the corner and a host of other actions based on sympathy or anger or other emotions? Why should they not do the same at trial?

Nonetheless, adding such instructions to the substantive instructions and to the deliberation process itself raises some important questions that may not have a simple answer.

Can adding even more instructions to what often are already voluminous instructions really help juries reach the right result? The sheer volume of instructions in a typical case makes it difficult for even a trained legal professional to absorb them rather than glaze over them or fall asleep. That is why preliminary and interim instructions can be so helpful to jurors, as can the lawyers' focus on them in closing. This is also why it is critical, if it is allowed, to make sure each juror has a written copy of the instructions.

But even assuming instructing the jury on deliberations can be done without overwhelming jurors with too many instructions, do such instructions improperly invade the province of the jury? As ABA Principle 14D recommends, "the jurors alone should select the foreperson and determine how to conduct jury deliberations." Principles for Juries and Jury Trials, *supra*, at 21.

Years ago, proposed instructions that jurors should not do their own research outside of the trial were initially opposed (at least in Florida) out of a concern this would intrude on the juror's province and would not be a proper function of instructions to the jury. But now such instructions are recognized to be essential to good-faith jury deliberations and not an improper invasion of the jury's province. Indeed, in addition to such an instruction, Florida also now has a standard preliminary instruction on "keeping an open mind," so that all jurors "can easily share ideas about the case," and a standard closing instruction that briefly addresses how jurors should deliberate. Fla. Standard Jury Instr. (Civ.) 202.2, Explanation of the Trial Procedure; Fla. Standard Jury Instr. (Civ.) 700, Closing Instructions.

How Much Is Too Much?

So the question really may be not whether such instructions are proper and wise but, rather, how much is too much? There is a considerable body of scientific research demonstrating how hard it is to get people to alter preexisting views, even when that affects them personally. (*See, e.g.*, Heather Murphy, *How White Nationalists See What They Want to See in DNA Tests*, N.Y. Times, July 12, 2019, www.nytimes.com/2019/07/12/us/white-nationalists-dna-tests.html; Elizabeth Kolbert, *Why Facts Don't Change Our Minds*, New Yorker, Feb. 27, 2017, www.newyorker.com/magazine/2017/02/27/why-facts-dont-change-our-minds.)

Knowing this is a common problem, should the jury be instructed about this human failing? The American College of Trial

Lawyers suggests that it should.

And there is much more, of course, to consider. Should the jury be instructed about hindsight bias, the fact that we all are so wise with the benefit of 20/20 hindsight? Should the jury be instructed about the perils of implicit bias against certain minorities in our society? What about an instruction about the human failings in many eyewitness identifications, something that many jurisdictions have adopted?

One can debate whether these types of issues are handled more appropriately with expert testimony rather than by instructions from the judge. *Compare State v. Clopten*, 223 P.3d 1103, 1113 (Utah 2009) (overruling prior de facto presumption against admissibility of expert testimony on factors affecting the accuracy of eyewitness identification and holding such testimony by a qualified expert to be admissible), *with State v. Long*, 721 P.2d 483, 492 (Utah 1986) (holding that trial judges

must give cautionary instructions on the limitations of eyewitness testimony when such instructions are requested by the defense and eyewitness identification is a "central issue"). But not every litigant can afford to hire the necessary expert witness, and instructions may be better than nothing at all to alert the jury to the deficiencies of eyewitness testimony. After all, these matters are not intuitive to most laypeople.

In the end, these types of concerns may just be an intrinsic part of our country's jury system, one that cannot be overcome by even the strongest instructions from the judge. They may be just too ingrained in us. But, given what we know about these common human obstacles to good-faith deliberations on issues that literally may be matters of life or death in some cases, it seems prudent to use the forceful effect of instructions from the judge to seek to achieve the best possible deliberations by jurors.

Finally, similar to the "accountability" instruction suggested by the American College of Trial Lawyers, perhaps judges should tell jurors at the outset that they will be asked at the end of the trial not only to aver that the verdict is their verdict but also to certify that they all kept the promises they gave when they were sworn in as jurors, including to follow the judge's instructions to the jury. And then jurors could be given a certificate to be completed by each juror at the end of deliberations.

An important additional prophylactic step could be a question by the judge to the panel at the very outset, asking the jurors as part of voir dire if each of them agrees to faithfully follow the court's instructions. If that is done, the jurors should be reminded of their promise to the court before they retire for their deliberations.

A noted trial lawyer once proclaimed, with evident sincerity, that the only real function of jury instructions is to provide the opportunity for reversal of a jury's verdict. But jury research shows otherwise. Jurors—well, most of them—grapple with the instructions the judge gives them and try to follow them. We just need to do a better job with these instructions and thereby help jurors do their jobs as they seek, in good faith, to do.

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