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Montana Jury Instruction Guides (MJIG)

W. W. Lessley*

A district judge has the duty to instruct the jury as to the law. His task is more than that of a mere arbiter of proposed instructions.¹ Few who work at trial level would deny that the task of careful preparation and proper delivery of jury instructions is a much needed but long neglected aspect of effective jury trials.²

Illinois found that one of the greatest obstacles to prompt and true administration of justice in the trial of jury cases was the matter of instructing juries.³ A study of their jury instruction problem indicated that thirty eight per cent of all cases reversed within a twenty five year period were, in whole or in part, reversed because of errors in instruction.⁴ No such study has been made in Montana. This writer's experience, involving seventeen years on the trial bench, indicates twenty five to thirty per cent of all cases reversed upon appeal from his court were reversed, in whole or in part, by reason of errors in instruction.⁵ A casual check of the *State Reporter* shows twenty to twenty five per cent of the cases reported were reversed, in whole or in part, by reason of errors in instructions.⁶

More than twenty five years ago, the Honorable William J. Palmer led the program for pattern instructions in California. The product of this study is a two-volume work entitled *California Jury Instructions Civil (BAJI)*, containing over 219 instructions. These books have been in general use in Montana since 1956.

The desirability of some measure of standardization, and the need for improvement in jury instructions in civil cases has been recognized by both the bench and the bar in Montana. In 1961, a Montana Bar Association committee was asked to study a uniform method of settlement of instructions.⁷ When the Judges' Committee on Instruction Guides was formed and started its work,⁸ this particular bar association committee

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¹MONT. R. CIV. P. 51, "The Court shall rule upon the proposed instructions and may prepare other written instructions to be given of its own motion. . ."

²MATHES AND DEVITT, FEDERAL JURY PRACTICE AND INSTRUCTIONS 69 (1965).

³SUPREME COURT COMM. ON JURY INSTRUCTION, ILLINOIS PATTERN JURY INSTRUCTION (CIVIL), p. XI (1961).

⁴*Ibid.*

⁵The author checked the cases he tried in all jurisdictions in Montana from 1949 to 1965.

⁶22 State Rptr. (1965).

⁷The committee was chairmanned by Randall Swanberg of Great Falls and composed of the following lawyers: Robert Poore, Butte; Bruce Toole, Billings; Henry Loble, Helena; and A. G. Shone, Butte.

⁸The Hon. Guy C. Derry asked the Hon. W. W. Lessley to head a committee to study and report on pattern instructions to the judges' association. This was a

ceased to exist.⁹ The committee of trial judges began functioning in 1964.¹⁰ It was geographically representative of the state.¹¹ Thus, each judicial member of the Committee on Instruction Guides was, in effect, a sub-chairman of a working committee of all the trial judges in his geographical area. He spoke for the general opinion of his area, bench and bar. At the request of the chairman of the Judges' Committee, a committee of lawyers was appointed to review the Instruction Guides prepared by the Judges' Committee.¹²

The Committee's work was facilitated by similar programs in sister jurisdictions.¹³ Following intensive study of jury instructions of other states, the Committee formulated standards for the drafting of instructions. The guidelines of Illinois seemed most practical and most likely to promote substantial justice.¹⁴ These were the Illinois fundamentals adopted by the Committee:

1. The instruction must be "conversational."
2. The instruction must be "understandable."
3. The instruction must be "unslanted."
4. The instruction must be "accurate."

To achieve fundamentals one and two, the Committee enlisted the services of a layman, Mr. Nicholas Ifft, III.¹⁵ Fundamentals three and four required a scholar's objectivity. This need was met by engaging the services of Professor Gardner Cromwell of the University of Montana School of Law.

The format of each instruction was dictated by the Committee's collective experience as trial lawyers and trial judges. Each instruction should carry its own credentials; that is, it should be in form to be accepted on presentation by the busy trial lawyer. This required specific statements appended to each instruction as to source, comment, authorities, and library reference. The Committee also desired to include an accurate, complete, and current listing of Montana cases for each suggested Montana Jury Instruction Guide.

group diversified as to geographic location and it combined over thirty-four years experience at the trial court level. The members of the Judges' Committee were: Judges Leslie C. Gulbrandson (7th), Victor H. Fall (1st), Jack Green (4th), Thomas Dignan (17th), and W. W. Lessley (18th). Minutes of Montana Judges' Association, December 1963.

⁹Letter from Randall Swanberg dated February 10, 1966. "In any event, our work dwindled off—as is ultimately the fate of most bar association committees—and the work of the Judges' Association appeared to whack with considerable rapidity."

¹⁰*Supra* note 9.

¹¹Northern Montana: The Hon. Thomas Dignan, Glasgow; Eastern Montana: The Hon. L. C. Gulbrandson, Glendive; Western Montana: The Hon. Jack Green, Missoula; Central Montana: The Hon. Victor H. Fall, Helena; and Southern Montana: The Hon. W. W. Lessley, Bozeman.

¹²Russell Smith, Missoula; Cale Crowley, Billings; Krest Cyr, Butte; and Al Shone, Butte.

¹³Illinois, *supra* note 3; MINN. DIST. JUDGES' ASS'N, MINNESOTA JURY INSTRUCTION GUIDES (CIVIL) (1963); JUDGES OF THE SUPERIOR COURT OF LOS ANGELES COUNTY, CALIFORNIA JURY INSTRUCTIONS (CIVIL) (4th ed. 1956); KANSAS DISTRICT JUDGES' ASS'N, PATTERN INSTRUCTIONS FOR KANSAS (CIVIL) (1961); SIMONS AND HECK, SOUTH DAKOTA PATTERN JURY INSTRUCTIONS (1961-62).

¹⁴ILLINOIS PATTERN JURY INSTRUCTIONS (CIVIL) p. XIII, *supra* note 3.

¹⁵He was to serve as a sounding board on the "conversational and understandable"

The next task was to establish a procedure for drafting the instructions. It was agreed that the chairman would assign each member of the Committee a block of instructions to prepare from a list of subjects to be covered by instructions. Once the rough draft of an instruction was ready, it was sent to the chairman who circulated it among the Committee for criticism and evaluation. The additions and corrections made separately by each member of the Committee were compiled and sent to the author of the instruction. After this preliminary procedure, the chairman would again put the instructions in a tentative-final form. Then it would be submitted to Professor Cromwell for suggestions. After Professor Cromwell's suggestions had been acted upon, the instruction was submitted to the lay committee member, Nicholas Ifft, who was asked: "Does this instruction make sense? Do you understand it? Do you think it will help you to arrive at a decision?" No further steps were taken until the instruction was understandable and helpful to him.

Once passed the layman's hurdle, (and it was most interesting and puzzling at times) the instruction was submitted to the Bar Committee for their criticism. When the corrections were finished by the Lawyers' Committee, the chairman again submitted the instruction for final consideration and approval to the Judges' Committee. The final instruction, together with source, comment, authorities, and library reference, was then ready for inclusion in the *MJIG* volume.¹⁶

This is a continuing work. The *Montana Jury Instruction Guides* are in looseleaf form to allow for additions and changes from year to year. The Honorable Nat Allen, current president of the Montana Judges' Association, appointed a working committee for the ensuing year, and the former Committee will serve in an advisory capacity.¹⁷ In addition, the Montana Bar has appointed a committee of lawyers.¹⁸ Judge W. W. Lessley will continue as chairman of the entire project.

Over 350 copies of the *Montana Jury Instruction Guides* are now in the hands of Montana's practicing lawyers and trial judges. The use of these *Guides* brings criticisms which are carefully evaluated, and which will be followed if justified. Some of the more important criticisms to date have concerned *res ipsa loquitur*, negligence of minors, and survival action instructions.

The Committee has been told that some of the instructions are dated, that the supreme court has taken a different position. This is being checked. A yearly annotation of all supreme court decisions that bear upon the *MJIG* is planned. Criticism has been directed at the *Guides* for favoring the plaintiff and, conversely, for favoring the defendant. The same criticisms were made to the California Committee on Instructions.

quality of the instructions. Mr. Ifft is a journalist and has served a full term as a juror.

¹⁶This was prepared by Victor R. Lutes, my assistant in all clerical work.

¹⁷Judges Paul Hatfield, Ronald D. McPhillips, and Arthur Martin were appointed.

¹⁸Urban L. Roth and James A. Robischon of Butte; Floyd C. Small, Helena; James C. Garlington, Missoula; and Edward C. Alexander and L. Morris Ormseth of Great Falls.

Some other objections have dealt with the failure of the Committee to cover more fully negligence in automobile cases, damages in contract cases, and other subjects. Each subject suggested is considered. We have already started on some new *Guides* at the present time, and others will be prepared as time allows.

The Committee expected and wanted to receive constructive criticism. The fact that some complaints are being made indicates that the *Guides* are being used in the state. Each trial judge has been asked to suggest additional areas to be covered by the *MJIG*. The new working committee will prepare these. The advisory committee will consider changes to the already published *Guides*. Supreme court decisions concerned with instruction will be digested and made a part of this revision schedule.

The trial judges know that such a volume of guides is not a panacea for all the problems in the task of instructing a jury on the law. They are not to be swallowed whole; they are aids and guides, and each case must receive individual treatment. The preparation of instructions for a specific case is the joint responsibility of the lawyer and the trial judge. From our work on the committee, and as trial judges, we suggest these guidelines for attorneys:

1. Make a rough draft of your instructions as you prepare your case for trial. It is then that you are concerned with points of law. Well grounded and researched instructions are as important as a trial brief.
2. Duplicative instructions on the same phase of the case serve little purpose. Some counsel bombard their trial judge with many instructions in the hope that he will accept at least one.
3. You are an advocate; however, save that for your argument to the jury. A properly worded instruction that is not argumentative, subjective, slanted, nor directive may well be given by your trial judge; and, coming from the judge, will have great weight with the jury.
4. Don't "lift" the supreme court's language from an opinion for use as an instruction. The purpose behind court opinions differs greatly from that behind jury instructions. Rely on the point of law that the case controls—not on the language used.
5. You cannot avoid certain legal terminology without risking error. Remember, however, that these instructions are for laymen. Use what Judge Alfred Murrah calls the "common speech of man."¹⁹
6. With all the pattern instructions available on all subjects, no lawyer need start from "scratch," nor should he. The pattern should serve as a guide in the preparation of the specific instruction needed.
7. Avoid the temptation to offer formula instructions. These operate on the premise that if the jury finds certain facts, they should find for the plaintiff (or the defendant). These instructions of mixed law and fact are dynamite. Such an instruction may indicate to the jury that the court favors a certain party. Also, if some essentials are omitted, it may constitute prejudicial error.

8. Give the draft of your instruction a trial run. Read it aloud (that is the way it reaches the jury) to members of your firm, your secretary, and to laymen. If they fail to understand, rephrase for clarity.
9. Check and Shepardize your authorities. It is disastrous to be wrong when settling instructions, especially when your adversary has challenged your authority.

The Association, and the Committee, believed that initial responsibility for this project should rest with the trial bench. The preparation and distribution of these *Guides* is the product of the Montana Judges' Association. While the supreme court justices are an important and welcome part of our Association, neither the supreme court nor any of its members took part in this project. Though the Committee and the Association enjoyed excellent cooperation and valuable assistance from the Bar Association Committee and many individual lawyers, this work was not a joint undertaking of bench and bar.

The Committee felt that the *Guides* should not be binding upon the Montana Supreme Court nor should the court feel any hesitation to reverse a trial judge with respect to any of the instructions suggested in the *Guides*. The same freedom should be available to any trial lawyer who may wish to challenge and seek appellate review of any of the *Guides*. It is this feeling that led to the use of the title "Guides."

There is no easy way for either bench or bar to discharge their joint task of preparing concise, impartial, and understandable instructions. But we hope to avoid in Montana the charge that instructions are "grand conglomerations of garbled verbiage and verbal garbage."²⁰ Out of this work should come instruction guides that are clear, concise, accurate, and impartial; guides that are in the tone and language of conversation that will truly guide the jurors. We cannot avoid legal abracadabra in all instances, but wherever possible, we can strive to reach the "common speech of man."²¹

²⁰POLLACK, CIVIL JUSTICE AND THE JURY 139 (1962).

²¹Supra note 19.
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