Dear Judges,

Earlier this year, the Seventh Circuit Bar Association, under the direction of its President, James R. Figliulo, established the Seventh Circuit Bar Association Jury Project Commission, composed of some of the more experienced trial lawyers in our circuit. You will receive detailed information about the Jury Project from the Commission in the very near future. In essence, the Commission, which Jim Figliulo co-chairs with District Judge Jim Holderman and Circuit Judge Diane Sykes, has proposed that certain procedural concepts be used on a test basis by participating District Judges and Magistrate Judges in civil jury trials conducted between October 1, 2005 and March 31, 2006. The Project's purpose is to test and implement the proposed procedures, which are designed to refine and improve jury trial practice in our circuit.

The Commission has selected seven specific procedural concepts for testing during the Project. They are derived from the American Bar Association's Principles for Juries & Jury Trials report, promulgated in August 2005 by the ABA's American Jury Project, on which District Judge Charles Clevert served. The seven concepts are:

I. Twelve Person Juries - Principle 3; Standard 3 A.
II. Jury Selection Questionnaires - Principle 11; Standard 11 A.
III. Preliminary Substantive Jury Instructions - Principle 6; Standard 6 C 1 & 3.
IV. Trial Time Limits - Principle 12; Standard 12 A.
V. Questions by the Jury During Trial - Principle 13; Standard 13 A.
VI. Interim Statements to the Jury by Counsel - Principle 13; Standard 13 G.
VII. Enhancing Jury Deliberations - Principle 15; Standard 15 C & D.

The Commission anticipates that the trial judges participating in the Project will, in their discretion, use one or more of these concepts as they conduct civil jury trials during the six-month test period. The Commission will survey the judges, lawyers, and jurors about the value of the concepts implemented in these trials. Some of our circuit's trial judges already employ these procedures.

Your participation in the Project is, of course, voluntary, though encouraged. Please give thought to using one or more of these concepts in your civil jury trials during the test period, with the consent of counsel and the parties. I thank you in advance for your consideration of the Project.

Sincerely,

Joel M. Flaum
Chief Judge
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SEVENTH CIRCUIT BAR ASSOCIATION
AMERICAN JURY PROJECT COMMISSION

Introduction

Thank you in advance for your willingness to consider participating in the Seventh Circuit American Jury Project (the “Project”). As Chief Judge Joel Flaum mentioned in his recent email to you, the purpose of the Project is to implement on a test basis seven concepts to improve civil jury trials. This letter describes the genesis of those concepts, outlines the Project, and explains the enclosed materials.

The Project is an outgrowth of the American Bar Association American Jury Project. After a national symposium in October 2004, the American Jury Project produced a single set of modern jury principles that the ABA proposed as a model for courts around the country. The revised principles were approved by the ABA House of Delegates during the midyear meeting in February 2005. The principles and commentary are available on-line at: http://www.abanet.org/juryprojectstandards/principles.pdf.

With the goal of putting these ideas into action, the Seventh Circuit Bar Association has taken a leading role nationwide in implementing and testing the ABA principles. The Seventh Circuit Commission was formed in Summer 2005. Chief Judge Flaum and the Chief Judge of each District Court in the Seventh Circuit have provided support for the Project, and Circuit Judge Diane Sykes, District Judge James Holderman and James Figliulo, President of the Seventh Circuit Bar Association, are serving as co-chairs of the Commission. Prominent, seasoned trial lawyers and law professors from across the Seventh Circuit are members of the Commission. A list of members is enclosed.

Seven of the concepts outlined in the ABA principles that appeared to be both practical and potentially beneficial were selected for testing in the Seventh Circuit. The Commission appointed attorney chairpersons for each concept, who were responsible for preparation of the enclosed materials, which are described below. Seven district court judges, one per concept, have reviewed the materials and provided judicial input.

The seven concepts to be tested during the Project and the ABA Principles and Standards from which they were derived are as follows:

1. Twelve Person Juries B Principle 3; Standard 3 A.
2. Jury Selection Questionnaires B Principle 11; Standard 11 A.
4. Trial Time Limits Principle 12; Standard 12 A.
5. Questions by the Jury During Trial B Principle 13; Standard 13 A.
6. Interim Statements to the Jury by Counsel B Principle 13; Standard 13 G.

7. Enhancing Jury Deliberations B Principle 14; Standard 15 C.

The enclosed materials in this Project Manual represent the culmination of Phase I of the Project. For each of the seven concepts, there are five subsections:

1. The ABA Jury Project Principles and Standards relating to the concept;

2. The rationale for testing the concept;

3. The legal authority supporting the concept’s use;

4. Suggested procedures for the concept’s use;

5. Suggested jury instructions pertaining to the concept’s use.

The questionnaires for the judges, lawyers and jurors to be used in evaluating the concept or concepts in each trial have been prepared by Trial Graphix in consultation with the Commission Chairpersons, Professors Shari Diamond and Stephen Landsman, and the Reviewing Judges, and will be distributed under separate cover by Commission Facilitators.

The Project Manual also will include a CD-ROM, which will contain the same information that is in this Manual, the questionnaires, and the ABA American Jury Project Principles and Commentary. The CD-ROM will also include interactive links to certain authority cited in the Manual. The CD-ROM will be sent shortly under separate cover.

The second phase of the Project will be the actual testing of the concepts. We are requesting each district judge in the circuit to use one or more of these seven concepts and to administer the questionnaires in all civil jury trials during the 6-month time period starting October 1, 2005 and concluding March 31, 2006. Lawyers from each district will be available to facilitate the implementation and testing process, including the questionnaire administration. These Commission Facilitators will be contacting each judge in the circuit during early October to discuss the Project, the schedule of any civil jury trials during the test period and the potential participation in the Project. The ideal would be for each judge to use all seven concepts in every civil trial, but the materials and questionnaires are designed so that you may pick and choose among the concepts. Even if you decide not to try any of the concepts, you can still play an important role in the Project by administering the short, general questionnaires at the conclusion of each trial over which you preside during the six months from October 1, 2005 through March 31, 2005.

Some judges may have reservations about the value of these concepts or some of them. The Commission is not advocating, at this time, that these concepts become part of regular trial practice. The Commission simply believes that these concepts have merit and may be beneficial to our civil justice system. This testing process should shed more light on whether these
concepts have actual value or not. The Commission respectfully encourages all judges in this circuit to participate, but we also sincerely respect your choice to not test one or more of the concepts.

Phase III will be the review, analysis and evaluation of the questionnaires and the results of our testing. We will then determine the best way to communicate and present the results at the Seventh Circuit Judicial Conference and Annual Meeting in Chicago, on May 22-23, 2006.

Judge Holderman, Judge Sykes and Jim Figliulo are available to answer any questions relating to the Project, as are the concept chairpersons. Questions about a particular concept can also be directed to the district judge who reviewed that section of the enclosed materials. The Commission Facilitator assigned to each judge will also be available to answer or obtain answers to any questions.

This Project has already attracted substantial interest from the ABA leadership and from judges and bar leaders across the United States. The ABA is interested in using our materials and experiences as a model for implementation and testing of these concepts in other state and federal courts. Success of the Project here in the Seventh Circuit will be possible only through the cooperation and participation of our circuit’s trial judges. One great strength of the Seventh Circuit is the close relationship between bench and bar. This Project provides another opportunity for judges and trial lawyers to work together with the common goal of improving the civil jury trial experience. All of us and our system of justice will benefit through the process.

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I. TWELVE PERSON JURIES

1. ABA American Jury Project Principles and Standards

   **PRINCIPLE 3 – JURIES SHOULD HAVE 12 MEMBERS**

   **Standard 3**

   A. Juries in civil cases should be constituted of 12 members wherever possible and under no circumstances fewer than six members.

2. The Rationale for Testing the Concept

   This concept was chosen for testing because empirical data encourages a return to a twelve person jury in civil cases whenever feasible. Studies appear to show that twelve member juries are significantly more effective than six person juries. Twelve member juries have a better collective recall of the trial testimony. Twelve member juries are also more likely to be representative of the community at large and return verdicts and damage awards that reflect community standards. Reducing the number of jurors below twelve only minimally decreases the likelihood of a hung jury. According to some sources, smaller juries produce only minimal savings in time and expense compared to twelve person juries.

3. Authority Supporting the Concept's Use

   • The Seventh Amendment guarantees the right to a jury trial in civil cases. “In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.” U.S. Const. amend VII.

   • *Ballew v. Georgia*, 435 U.S. 223, 237-240 (1978) (The United States Supreme Court held that juries of fewer than six persons were unconstitutional and recognized the greater reliability of a twelve person jury over a six person jury).

   • Fed. R. Civ. P. 48 states:

   **NUMBER OF JURORS – PARTICIPATION IN VERDICT**

   The court shall seat a jury of not fewer than six and not more than twelve members and all jurors shall participate in the verdict unless excused from service by the court pursuant to Rule 47(c). Unless the parties otherwise stipulate, (1) the verdict shall be unanimous and (2) no verdict shall be taken from a jury reduced in size to fewer than six members.
Fed. R. Civ. P. 47 states:

SELECTION OF JURORS

(a) Examination of Jurors. The court may permit the parties or their attorneys to conduct the examination of prospective jurors or may itself conduct the examination. In the latter event, the court shall permit the parties or their attorneys to supplement the examination by such further inquiry as it deems proper or shall itself submit to the prospective jurors such additional questions of the parties or their attorney as it deems proper.

(b) Peremptory Challenges. The court shall allow the number of peremptory challenges provided by 28 U.S.C. § 1870.

(c) Excuse. The court may for good cause excuse a juror from service during trial or deliberation.

28 U.S.C. § 1870 entitled “Challenges” states:

In civil cases, each party shall be entitled to three peremptory challenges. Several defendants or several plaintiffs may be considered as a single party for the purposes of making challenges, or the court may allow additional peremptory challenges and permit them to be exercised separately or jointly.

All challenges for cause or favor, whether to the array or panel or to individual jurors, shall be determined by the court.

- Stephan Landsman, In Defense of the Jury of 12 and the Unanimous Decision Rule, 88 Judicature 301 (May-June 2005) (Twelve person juries are more reliable, are more likely to produce accurate results, and are more likely to reflect both the values and make-up of the community. Furthermore, Twelve person juries only slightly increase the likelihood of hung juries and any costs and time saving from using a smaller jury are negligible).

- Michael J. Saks, The Smaller the Jury, the Greater the Unpredictability, 79 Judicature 263 (March-April 1996) (Larger juries deliberate longer and have better recall of trial testimony. Smaller civil juries produce a number of outlier awards that do not reflect community values. Finally, smaller juries are more likely to be less representative of the community).
4. **Suggested Procedures for the Concept's Use**

   - The judge empanels no fewer than twelve persons for a civil jury trial using the jury selection procedures that the judge desires to use consistent with the Federal Rules of Civil Procedure and 28 U.S.C. § 1870.

   - Each side remains entitled to three peremptory challenges when twelve as opposed to six jurors are selected under 28 U.S.C. § 1870 because Fed. R. Civ. P. 48 contemplates no more than twelve and no less than six jurors will be selected to serve as the jury in a civil trial.

5. **Suggested Jury Instructions**

   The judge need not give any additional jury instructions to use this concept, other than providing the standard instruction each judge is requested to give to the jurors after the jury returns the verdict or is discharged without returning a verdict of this section regarding completing the Project’s questionnaires is on the next page.

   The standard instruction each judge is requested to give to the jurors after the jury returns the verdict or is discharged without returning a verdict regarding completing the Project’s questionnaires is on the next page of this section.

   The Commission wishes to acknowledge and thank the following persons who served as part of the subcommittee addressing the concept of Twelve Person Juries In Civil Cases:

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   Judge John W. Darrah
JURY INSTRUCTIONS REGARDING THE QUESTIONNAIRES
THAT ARE A PART OF THE JURY PROJECT TO BE GIVEN
AT THE TIME THE JURY IS DISCHARGED

Members of the jury, thank you again for your service as jurors in this case. Your service in
this case is now over, but I have one additional request of you. Before you say your good-bytes to
one another and leave the jury room today, I would like you to fill out a brief questionnaire regarding
your jury service in this case. The questionnaires I am asking you to complete are a part of a project
in which Federal District Courts in the States of Indiana, Illinois and Wisconsin are participating.
Your answers to the questions in the questionnaires will assist us in finding ways to improve the jury
system.

Your filling out the questionnaires is voluntary. It is not required as part of your jury service
in this case. If you desire to be on your way without filling-out the questionnaires, we fully
understand and thank you again for your service. We appreciate and thank in advance those of you
who do fill out the questionnaires because you will be providing us with valuable information
regarding your jury service.

Thank you again.
II. JURY SELECTION QUESTIONNAIRES

1. ABA American Jury Project Principles and Standards

PRINCIPLE 11 — COURTS SHOULD ENSURE THAT THE PROCESS USED TO EMPANEL JURORS EFFECTIVELY SERVES THE GOAL OF ASSEMBLING A FAIR AND IMPARTIAL JURY

Standard 11

A. Before voir dire begins, the court and parties, through the use of appropriate questionnaires, should be provided with data pertinent to the eligibility of jurors and to matters ordinarily raised in voir dire, including such background information as is provided by prospective jurors in their responses to the questions appended to the notification and summons considered in Standard 10 D. 1.

1. In appropriate cases, the court should consider using a specialized questionnaire addressing particular issues that may arise. Where a specialized questionnaire is appropriate, the parties should be required to confer on the form and content of the questionnaire. If the parties cannot agree, each party should be afforded the opportunity to submit a proposed questionnaire and to comment upon any proposal submitted by another party.

2. Jurors should be advised of the purpose of any questionnaire, how it will be used, and who will have access to the information.

3. All completed questionnaires should be provided to the parties in sufficient time before the start of voir dire to enable the parties to adequately review them before the start of that examination.

2. The Rationale for Testing

The Commission chose this concept for testing because several judges in the Circuit already use written questionnaires before in-court voir dire begins to obtain information pertinent to the jurors’ qualifications. The judges who use questionnaires believe they streamline the jury selection process for several reasons: (1) questionnaires minimize or eliminate repetitive questioning; (2) prospective jurors may be more willing to disclose sensitive information in writing than they would be if asked to do so in open court; (3) the judge and counsel can conduct a more focused voir dire because they have relevant information in advance; and (4) questionnaires reduce waiting time for prospective jurors who are likely to be excused for cause.
3. **Authority Supporting the Concept’s Use**


4. **Suggested Procedures for the Concept’s Use**

- In most cases, a relatively simple questionnaire can be prepared and administered to the jury _venire_ on the day of jury selection. In lengthy, complex, or high-publicity cases, a more detailed questionnaire can be mailed to prospective jurors in advance of trial to permit review prior to the day of jury selection.

- Case-specific questions may be designed to elicit yes/no answers that will permit follow-up questioning during _voir dire_, or may be designed to elicit narrative answers.

- The judge should start with a draft that includes questions seeking basic background information and should solicit the views of the parties’ counsel regarding other questions (general or case-specific) to be included. Counsel should be permitted to review and comment on the draft questionnaire before it is submitted to prospective jurors. (Sample questionnaires are attached to the memorandum for the judge’s consideration.)

- On the day of jury selection, the questionnaires are given to prospective jurors to be completed, along with a short cover letter briefly describing the case being tried and explaining the purpose of the questionnaire. (A sample letter follows this explanation.)

- The completed questionnaires are collected by the judge’s staff, and copies are made and distributed to counsel.

- After the jurors are sworn, the judge questions each prospective juror, inquiring whether each juror’s answers on the questionnaire were true and correct. (Alternatively, the jurors may be sworn in before completing the questionnaires.) The judge also asks follow-up questions prompted by the jurors’ answers. Because the judge and parties already have a written questionnaire, they are able to determine in advance whether particular inquiries of particular jurors should be made privately.

- Depending on the judge’s practice, counsel may be permitted to ask supplemental questions to the prospective jurors, or may be permitted to propose supplemental questions to be asked by the judge.

- District Judge Matthew Kennelly has used jury selection questionnaires in most civil and criminal cases throughout his tenure on the bench. He is available to answer any questions a judge may have regarding the use of written questionnaires or the logistics of the process.
5. **Suggested Jury Instructions**

- Because the questionnaires are administered prior to trial, no additional jury instructions are necessary. As noted above, a cover letter explaining the process may be given to the prospective jurors along with the jury selection questionnaire. The judge also can address the prospective jurors in open court before they fill-out the questionnaires. In doing so the judge should, of course, explain that the goal of the jury selection process is to empanel a jury that will be fair to both sides of the case. The judge also should stress the need that the prospective jurors be totally candid and truthful in filling-out the information requested by the jury selection questionnaires.

- The judge need not give any additional jury instructions to use this concept, other than providing the standard request that the jury complete the Project questionnaire after it returns the verdict or is discharged without returning a verdict. The instructions are provided on the next page of this section.

The Commission wishes to acknowledge and thank the following persons who served as part of the subcommittee addressing the concept of Voir Dire Questionnaires and Procedures:

<table>
<thead>
<tr>
<th>Attorney Chairpersons</th>
<th>Reviewing Judge</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alan Salpeter</td>
<td>Judge Matthew Kennelly</td>
</tr>
<tr>
<td>Dana Douglas</td>
<td></td>
</tr>
<tr>
<td>Mayer, Brown, Rowe &amp; Maw</td>
<td></td>
</tr>
</tbody>
</table>
JURY INSTRUCTIONS REGARDING THE JURY PROJECT QUESTIONNAIRES
THAT ARE TO BE GIVEN AT THE TIME THE JURY IS DISCHARGED

Members of the jury, thank you again for your service as jurors in this case. Your service in this case is now over, but I have one additional request of you. Before you say your good-byes to one another and leave the jury room today, I would like you to fill out brief questionnaires regarding your jury service in this case. The questionnaires I am asking you to complete are a part of a project in which Federal District Courts in the States of Indiana, Illinois and Wisconsin are participating. Your answers to the questions in the questionnaires will assist us in finding ways to improve the jury system.

Your response to the questionnaires is voluntary. It is not required as part of your jury service in this case. If you desire to be on your way without filling-out the questionnaires, we fully understand and thank you again for your service. We appreciate and thank in advance those of you who do fill out the questionnaires because you will be providing us with valuable information regarding your jury service.

Thank you again.
Sample letter and questionnaire 1

_______, 2005

Dear potential juror:

You have been summoned as a potential juror in the case of ________________.

In this case, Mr. _____ contends that Mr. _____, who is a ______ police officer, falsely arrested him and used excessive force against him. Mr. _____ has sued to recover money damages. Mr. ______ denies these contentions and denies that Mr. _____ is entitled to recover damages.

In order to streamline the process of jury selection, I have prepared the attached questionnaire. Please take a few moments to complete it. Although I have not given you a great deal of space for your answers, please do your best to write legibly so that I and the lawyers in the case can read your answers. Because your answers may assist me and the lawyers in the process of jury selection, it is very important that you be truthful and accurate in answering the questions. We may ask you some additional questions in the courtroom.

Thank you for your time and for your service today.

Sincerely,

Matthew F. Kennelly
United States District Judge
QUESTIONNAIRE FOR PROSPECTIVE JURORS

1. Your full name: ____________________________  2. Your age: _______

3. Cities or suburbs where you have lived for the last ten years:

4. Do you own your home or rent it? ____________________________

5. Your level of education / degrees: ____________________________

6. Your current occupation, name of your employer, and number of years employed there (if you are retired, please give this information about your last occupation):

7. What other jobs and employers have you had during your working life?

8. If you are married, describe your spouse's occupation, employer, and number of years worked there (if spouse is retired, please give this information about past employment):

9. Employment information about others who live with you (for example, children, parents, roommates), and any adult children:

10. List any newspapers and magazines that you read regularly:

11. List your hobbies and major interests outside of work:

(See back of page for additional questions.)

II-6
12. Have you, or any relatives or close friends ever been employed by a law enforcement agency or security-related business? ______________________________________

13. Have you ever applied for a job with a law enforcement agency or security-related business? ______________________________________

14. Have you, or any relatives or close friends ever been employed by the city of ________, or by any agency of any local, state, or federal government? ________________

15. Have you ever lived in the city of ________ or had any contact with any member of the ________ Police Department? ____________

16. Have you, or any relatives or close friends, ever been:
   a) questioned or detained by a police officer? ________________________________
   b) arrested or charged with violating any law or ordinance? ___________________
   c) convicted of a crime, jailed or imprisoned? ________________________________

17. Have you, or any relatives or close friends, ever been the victim of a crime? ________

18. Have you had any dealings with the police that left you with strongly negative or strongly positive feelings about police officers generally? ________

19. Do you have any relatives or close friends who are attorneys, judges, or court personnel? ________________________________

20. Have you or a family member ever been sued, or filed a lawsuit? (This includes lawsuits that you were involved in through your employment.) ________

21. Have you ever served on a jury? ______________________________________

22. Are there any facts or circumstances you believe that the court or the parties to the case should know about your ability to serve as a fair and impartial juror in this case?

________________________________________________________________________
Sample letter and questionnaire 2

__________, 200_

Dear potential juror:

You have been summoned as a potential juror in the case of _________. Ms. Roberts claims that while working at _________, she was subjected to sexual harassment and sex discrimination by a supervisor, ________. ________ and ______ deny these claims.

In order to streamline the process of jury selection, the Court has prepared the attached questionnaire. Please take a few moments to complete it. Although we have not given you a great deal of space for your answers, please do your best to write legibly so that I and the lawyers in the case can read your answers. Because your answers may assist me and the lawyers in the process of jury selection, it is very important that you be truthful and accurate in answering the questions. We may ask you some additional questions in the courtroom.

At the conclusion of the jury selection process, all of the questionnaires will be returned to the Court, and they will not be made part of the public record in the case.

Thank you for your time and for your service today.

Sincerely,

Matthew F. Kennelly
United States District Judge

MFK.m
attachment
QUESTIONNAIRE FOR PROSPECTIVE JURORS

1. Your full name: ____________________________  2. Your age: ______

3. Cities or suburbs where you have lived for the last ten years:

__________________________________________________________

4. Do you own your home or rent it? ____________________________

5. Your level of education / degrees: ____________________________

6. Your current occupation, name of your employer, and number of years employed there (if you are retired, please give this information about your last occupation):

__________________________________________________________

7. What other jobs and employers have you had during your working life?

__________________________________________________________

8. If you are married, describe your spouse’s occupation, employer, and number of years worked there (if spouse is retired, please give this information about past employment):

__________________________________________________________

9. Please list the ages of your children (if any): ____________________

10. Employment information about anyone else who lives with you, and any adult children:

__________________________________________________________

11. List any newspapers and magazines that you read regularly:

__________________________________________________________

12. List your hobbies and major interests outside of work:

__________________________________________________________

(See back of page for additional questions.)

II-9
13. Have you, or a relative or close friend, ever worked for a governmental agency or law enforcement agency? ______________________

14. Have you, or a relative or close friend, ever worked for ______? ______________________

15. Have you ever been responsible to supervise other workers, or have you ever been involved in making decisions to discipline, discharge, hire, train, or promote other workers? ______________________

16. Have you, or a relative or close friend, ever been discharged or fired from any job? If so, please identify the person involved and the nature of the job. ______________________

17. Have you, or a relative or close friend, ever felt that you were discriminated against on the job, harassed at work or treated unfairly by an employer? ______________________

18. Have you, or a relative or close friend, ever made a claim of discrimination or harassment involving an employer? ______________________

19. Have you, or a relative or close friend, ever been accused of discrimination or harassment? ______________________

20. Have you or a family member ever been sued, filed a lawsuit, or testified in a deposition or in court? (Include cases you may have been involved in through your employment.) ______________________

21. Have you ever served on a jury? ______________________

22. Are there any facts or circumstances you believe that the court or the parties to the case should know that might affect your ability to serve as a fair and impartial juror in this case? ______________________

II-10
Sample letter and questionnaire 3

__________, 200_  

Dear potential juror:

You have been summoned as a potential juror in the case of ___________. The plaintiff in the case, _________________, contends that the defendant, _________________, breached a contract between the two parties. The defendant, _________________, denies this claim.

The plaintiff also contends that the defendant, _________________, interfered with the contract between _____________ and _____________ . The defendant, _________________, denies this claim.

In order to streamline the process of jury selection, the court has prepared the attached questionnaire. Please take a few moments to complete it. Although we have not given you a great deal of space for your answers, please do your best to write legibly so that I and the lawyers in the case can read your answers. Because your answers may assist me and the lawyers in the process of jury selection, it is very important that you be truthful and accurate in answering the questions. We may ask you some additional questions in the courtroom.

Thank you for your time and for your service today.

Sincerely,

Matthew F. Kennelly
United States District Judge

MFK:m

II-11
QUESTIONNAIRE FOR POTENTIAL JURORS

1. Your full name: ________________________________
   2. Your age: ______

3. Cities or suburbs where you have lived for the last ten years: __________________________

4. Do you own your home or rent it? __________________________

5. If you have children, what are their ages? __________________________

6. Your level of education / degrees: __________________________

7. Your current occupation, name of your employer, and number of years employed there (if you are retired, please give this information about your last occupation):
   __________________________

8. What other jobs and employers have you had during your working life? __________
   __________________________

9. If you are married, describe your spouse’s occupation, name of employer, and number of years worked there (if spouse is retired, please give this information about last employment):
   __________________________

10. Describe the occupation of any adult children and anyone else who lives with you:
    __________________________

11. List your hobbies and interests outside of work: __________________________
    __________________________

12. Identify any organizations to which you belong (labor union, other work-related, social, civic, community, etc.):
    __________________________

13. Describe any volunteer activities that you are involved in: __________________________
    __________________________

   (additional questions on back of page)
14. List any newspapers and magazines that you read regularly: ________________________________

15. List any television and radio programs that you watch or listen to regularly: ____________

16. Have you ever served in the military? ________________________________

17. Have you ever started or owned your own business? ________________________________

18. Have you ever been in a business deal that was not finalized? __________________________

19. Have you ever believed that you, or someone close to you, was taken advantage of unfairly in a business dealing? ________________________________

20. Have you or a family member ever been sued or filed a lawsuit? (Please include cases you may have been involved in through your employment): ____________

21. Have you ever testified in court or in a deposition? ________________________________

22. Have you ever served on a jury? ________________________________

23. Have you ever heard of, or owned stock in, any of the following companies:

   ______ (fill in - plaintiff)
   ______ (fill in - defendant 1)
   ______ (fill in - defendant 2)
   ______ (fill in - related entity)

24. Some of the companies involved in this case are based in states other than Illinois. Are there any of you who might have difficulty giving fair consideration to a company based in another state? ________________________________

25. Have you ever owned or operated a motorcycle? ________________________________
   (this particular case involved motorcycle racing)

26. Have you ever attended a motorcycle event called “motocross” or “supercross” or have you ever seen one on television? ________________________________

27. Is there anything you can think of that might affect your ability to be a fair and impartial juror in this case? If so, please describe. ________________________________
III. PRELIMINARY SUBSTANTIVE JURY INSTRUCTIONS

1. ABA American Jury Project Principles and Standards

PRINCIPLE 6—COURTS SHOULD EDUCATE JURORS REGARDING THE ESSENTIAL ASPECTS OF A JURY TRIAL

Standard 6

C. Throughout the course of the trial, the court should provide instructions to the jury in plain and understandable language.

1. The court should consider giving preliminary instructions directly following empanelment of the jury that explain the jury's role, the trial procedures including note-taking and questioning by jurors, the nature of evidence and its evaluation, the issues to be addressed, and the basic relevant legal principles, including the elements of the charges and claims and definitions of unfamiliar legal terms.

2. The court should advise jurors that once they have been selected to serve as jurors or alternates in a trial, they are under an obligation to refrain from talking about the case outside the jury room, or allowing anyone to talk about the case in their presence until the trial is over and the jury has reached a verdict.

3. The court should give such instructions during the course of the trial as are necessary to assist the jury in understanding the facts and law of the case being tried as described in Standard 13 D.2.

2. The Rationale for Testing the Concept

This Commission chose this concept for testing because the Commission believes it will facilitate better decision-making by jurors as well as their greater understanding of their duty in the decisionmaking process. The Commission recommends that the judge, after conferring with counsel for the parties, provide not merely the standard preliminary instructions recommended for the trial courts in the Seventh Circuit, see FEDERAL CIVIL JURY INSTRUCTIONS OF THE SEVENTH CIRCUIT, General Instructions, (2005) available at http://www.ca7.uscourts.gov/7thcivinstruc2005.pdf, but in advance of opening statements also substantive jury instructions such as instructions on the elements of the plaintiff's claim, burden of proof, and explanatory instructions relating to the plaintiff's claim and any pertinent instructions regarding the defendant's affirmative defenses to the plaintiff's claim. Jurors' ability to recall relevant evidence and apply the law to the facts will improve if they understand in advance the context in which they will be required to evaluate or analyze the
evidence presented during the trial. The judge, of course, will also give the jury final instructions on the applicable law after the evidence in accordance with the judge’s usual practice pursuant to Federal Rule of Civil Procedure 30(c). It is recommended that the preliminary jury instructions include sufficient detail on the legal framework of the case to inform the jurors of the legal issues the jurors will be asked to decide.

The judge may also consider whether effective decision-making by jurors may be improved if certain substantive instructions are also given at appropriate times during the presentation of evidence.

3. Authority Supporting the Concept’s Use

- *United States v. Bynum*, 566 F.2d 914, 924 (5th Cir. 1978) (“Although it is difficult for the courts to give preliminary jury instructions in all cases, it is not only not error to do so, it is a well-reasoned modern trend to give instructions outlining the issues and the law involved prior to the taking of testimony.”); *Id. at 924 n.7 (“[C]ertainly it is the obligation of the court to do all within its power to assist the jury in understanding the issues involved and the application of the law.”). 

- **Fed. R. Crim. P. 30(c) states:**

  **JURY INSTRUCTIONS**

  The court may instruct the jury before or after the arguments are completed, or at both times.

- **Fed. R. Civ. P. 51(b)(3) states:**

  **INSTRUCTIONS**

  The court...may instruct the jury at any time after trial begins and before the jury is discharged.

- **Fed. R. Civ. P. 51(b)(3) advisory notes to the 1987 Amendment state:**

  [Giving instructions before the arguments] has been praised because it gives counsel the opportunity to explain the instructions, argue their application to the facts and thereby give the jury the maximum assistance in determining the issues and arriving at a good verdict on the law and the evidence. As an ancillary benefit, this approach aids counsel by supplying a natural outline so that arguments may be directed to the essential fact issues which the jury must decide. Moreover, if the court instructs before an argument, counsel then know the precise words the court has chosen and need not speculate as to the words the court will later use in its instructions. Finally, by introducing
ahead of argument the court has the attention of the jurors when they are fresh and can give their full attention to the court’s instructions. It is more difficult to hold the attention of jurors after lengthy arguments.

- B. Michael Dann and Valerie P. Hans, Recent Evaluative Research on Jury Trial Innovations, 41 Court Review 12, 15-16 (2004) (summarizing five studies that found substantial benefit in providing preliminary jury instructions on the applicable law).

4. Suggested Procedures for the Concept’s Use

- The attorneys should be requested before trial to submit proposed preliminary substantive jury instructions that will be given after the jury is sworn but prior to opening statements, which will address the key substantive issues the jury must decide including the elements of the claims (or charges) and defenses and any explanatory or definitional instructions necessary for the jury to properly evaluate the claims and defenses.

- The judge should follow “traditional” procedures for the preliminary jury instructions including holding a jury instruction conference with counsel, providing a copy of the finalized instructions to both parties and the jury, reading the instructions to the jury, informing them that the lawyers can refer to and quote the instructions in opening statements as well as closing arguments.

- The judge may refer to the preliminary jury instructions to the jury during the taking of evidence when the Court believes that this would assist the jury.

- The judge may choose to provide additionally supplemental preliminary jury instructions during the trial or may wait until final jury instructions, which under Federal Rule of Civil Procedure 30(c) may be given before or after the closing arguments in the case.

5. Suggested Jury Instructions

The standard instruction each judge is requested to give to the jurors after the jury returns the verdict or is discharged without returning a verdict regarding completing the Project’s questionnaires is on the next page of this section.

The Commission wishes to acknowledge and thank the following persons who served as part of the subcommittee addressing the concept of Preliminary Substantive Jury Instructions:

**Attorney Chairpersons**

William Conlon  
Kathleen Roach  
Sidley, Austin, Brown & Wood

**Reviewing Judge**

Judge Robert Gettleman
JURY INSTRUCTIONS REGARDING THE QUESTIONNAIRES
THAT ARE A PART OF THE JURY PROJECT TO BE GIVEN
AT THE TIME THE JURY IS DISCHARGED

Members of the jury, thank you again for your service as jurors in this case. Your service in this case is now over, but I have one additional request of you. Before you say your good-byes to one another and leave the jury room today, I would like you to fill out a brief questionnaire regarding your jury service in this case. The questionnaires I am asking you to complete are a part of a project in which Federal District Courts in the States of Indiana, Illinois and Wisconsin are participating. Your answers to the questions in the questionnaires will assist us in finding ways to improve the jury system.

Your filling out the questionnaires is voluntary. It is not required as part of your jury service in this case. If you desire to be on your way without filling-out the questionnaires, we fully understand and thank you again for your service. We appreciate and thank in advance those of you who do fill out the questionnaires because you will be providing us with valuable information regarding your jury service.

Thank you again.
IV. TRIAL TIME LIMITS

1. ABA American Jury Project Principles and Standards

   **PRINCIPLE 12 - COURTS SHOULD LIMIT THE LENGTH OF JURY TRIALS IN SO FAR AS JUSTICE ALLOWS AND JURORS SHOULD BE FULLY INFORMED OF THE TRIAL SCHEDULE ESTABLISHED.**

   **Standard 12**

   A. The court, after conferring with the parties, should impose and enforce reasonable time limits on the trial or portions thereof.

2. The Rationale for Testing the Concept

   This Commission chose this concept for testing because a judge’s use of modern trial management techniques can eliminate unnecessary trial delay and disruption. Jurors should be informed of the trial schedule and of any necessary changes to the schedule at the earliest possible time. Time limits, which should only be set after the judge confers with counsel, are a useful tool because they promote attorney efficiency, preserve scarce judicial resources and reduce repetition and redundancy. Time limits also minimize juror dissatisfaction by reducing the amount of time jurors are obligated to serve and giving them a concrete expectation regarding the duration of their service.

3. Authority Supporting the Concept’s Use

   - *M.T. Bonk Co. v. Milton Bradley Co.*, 945 F.2d 1404, 1408 (7th Cir. 1991) (“Trial courts have discretion to place reasonable limits on the presentation of evidence to prevent undue delay, waste of time, or needless presentation of cumulative evidence. The district court’s exclusion of such evidence will not be reversed absent a clear showing of abuse.”).

   - *MCI Communications Corp. v. American Telephone and Telegraph Co.*, 708 F.2d 1081 (7th Cir. 1983) (upholding 26-day time limit for each party to present its case in chief, despite original estimates by the defendant that the time would take eight to nine months).

   - *But see Flaminio v. Honda Motor Co., Ltd.*, 733 F.2d 463, 473 (7th Cir. 1984) (affirming district court’s imposition of a 33 hour time limit on trial, but noting that the Seventh Circuit “disapprove[s] of the practice of placing rigid hour limits on a trial. The effect is to engender an unhealthy preoccupation with the clock, evidenced
in this case by the extended discussion between counsel and the district judge at the outset of the trial over the precise method of time-keeping—a method that made the computation of time almost as complicated as in a professional football game.”).

- **Fed. R. Civ. P. 16(c) states:**

  **SUBJECTS FOR CONSIDERATION AT PRETRIAL CONFERENCES**

  At any conference under this rule consideration may be given, and the judge may take appropriate action, with respect to ...

  (4) the avoidance of unnecessary proof and of cumulative evidence, and limitations or restrictions on the use of testimony under Rule 702 of the Federal Rules of Evidence,
  (15) an order establishing a reasonable limit on the time allowed for presenting evidence,
  (16) such other matters as may facilitate the just, speedy, and inexpensive disposition of the action.

- **Fed. R. Evid. 611(a)**

  **CONTROL BY COURT**

  The judge shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

4. **Suggested Procedures for the Concept’s Use**

- The judge should establish time limits at the pretrial conference based on input from the parties, the number and complexity of issues, the burden of proof on each party, the nature of the proof to be offered, the feasibility of shortening trials through other means such as stipulations and preadmission of exhibits.

- The judge should inform the jury of the time limits in order to establish jury expectations.

- The judge should hold parties to the time limits and only extend for good cause. The jury should be informed of changes at the earliest possible date.
• The judge should use conferences outside the jury’s presence, preferably before
the jury arrives in the morning or after the jury leaves in the evening, to consider
evidence objections that require lengthy argument.

• Each party’s counsel is responsible for keeping their own and opposing counsel’s
time. The judge should confer with counsel and come to an agreement or make a
determination as to the time used at the end of each court day. Counsel are
charged only when presenting their case or responding such as direct or cross
examination. For example, time spent on direct examination of a plaintiff’s
witness is charged to the plaintiff while cross examination is charged to the
defendant.

• Counsel should be encouraged to engage in time saving techniques including (1)
determining which exhibits maybe admitted without objection before trial, (2)
creating a one-page written biography of each witness which the court can read to
the jury instead of direct examination of a witness’ background and qualifications,
(3) agreement by the parties to uncontested facts presented to the jury via
stipulations, (4) Presentation of summaries of complex and voluminous evidence
pursuant to Fed. R. Evid. 1006, (5) Establishing a Firm Trial Date.

5. Suggested Jury Instructions

No additional jury instructions need be given to use this concept.

The standard instruction each judge is requested to give to the jurors after the jury returns
the verdict or is discharged without returning a verdict regarding completing the Project’s
questionnaires is on the next page of this section.

The Commission wishes to acknowledge and thank the following persons who served as
part of the subcommittee addressing the concept of Trial Time Limits:

Attorney Chairperson          Reviewing Judge
Terri Mascherin
Jenner & Block

Subcommittee Members

Rene Torrado
Corboy & Demetrio
Patricia Holmes
Schiff Hardin

Michael W. Coffield
Michael W. Coffield & Associates
Clay Stiffler
Jenner & Block

IV-3
JURY INSTRUCTIONS REGARDING THE QUESTIONNAIRES THAT ARE A PART OF THE JURY PROJECT TO BE GIVEN AT THE TIME THE JURY IS DISCHARGED

Members of the jury, thank you again for your service as jurors in this case. Your service in this case is now over, but I have one additional request of you. Before you say your good-byes to one another and leave the jury room today, I would like you to fill out a brief questionnaire regarding your jury service in this case. The questionnaires I am asking you to complete are a part of a project in which Federal District Courts in the States of Indiana, Illinois and Wisconsin are participating. Your answers to the questions in the questionnaires will assist us in finding ways to improve the jury system.

Your filling out the questionnaires is voluntary. It is not required as part of your jury service in this case. If you desire to be on your way without filling-out the questionnaires, we fully understand and thank you again for your service. We appreciate and thank in advance those of you who do fill out the questionnaires because you will be providing us with valuable information regarding your jury service.

Thank you again.
V. QUESTIONS BY THE JURY DURING TRIAL

1. ABA American Jury Project Principles and Standards

PRINCIPLE 13 – THE COURT AND PARTIES SHOULD VIGOROUSLY PROMOTE JUROR UNDERSTANDING OF THE FACTS AND THE LAW

Standard 13C

A. In civil cases, jurors should, ordinarily, be permitted to submit written questions for witnesses. In deciding whether to permit jurors to submit written questions in criminal cases, the court should take into consideration the historic reasons why courts in a number of jurisdictions have discouraged juror questions and the experience in those jurisdictions that have allowed it.

1. Jurors should be instructed at the beginning of the trial concerning their ability to submit written questions for witnesses.

2. Upon receipt of a written question, the court should make it part of the court record and disclose it to the parties outside the hearing of the jury. The parties should be given the opportunity, outside the hearing of the jury, to interpose objections and suggest modifications to the question.

3. After ruling that a question is appropriate, the court may pose the question to the witness, or permit a party to do so, at that time or later; in so deciding, the court should consider whether the parties prefer to ask, or to have the court ask, the question. The court should modify the question to eliminate any objectionable material.

4. After the question is answered, the parties should be given an opportunity to ask follow-up questions.

2. The Rationale for Testing the Concept

The Commission chose this concept for testing because the Commission believes allowing jurors to submit to the judge clarifying questions after direct and cross-examination would increase the likelihood that the jurors will concentrate on the evidence being presented. Jurors being allowed to submit written clarifying questions is especially appropriate in situations where witness testimony is complex or may be confusing. It is predicated on the notion that, with appropriate safeguards, juror questioning can
materially advance the pursuit of truth.

3. Authority Supporting the Concept’s Use

- *United States v. Sutton*, 970 F.2d 1001, 1005 n.3 (1st Cir. 1992) ("Juror-inspired questions may serve to advance the truth by alleviating uncertainties in the jurors’ minds, clearing up confusion, or alerting the attorneys to points that bear further elaboration. Further, it is at least arguable that a question-asking juror will be a more attentive juror.")

- *United States v. Bush*, 47 F.3d 511, 514-15 (2d Cir. 1995) (questions from jurors is a “matter within the judge’s discretion, like witness-questioning by the jury himself.” Direct questioning by jurors of witnesses “strongly discourage[d].”)

- *State v. Doleszny*, 844 A.2d 773 (Vt. 2004) ("T[he] overwhelming endorsement in other jurisdictions of allowing jurors to question witnesses through the judge, and the lack of persuasiveness of the criticisms of the practice, lead us to hold that trial judges in Vermont have authority to allow jurors to question witnesses, through the judge, in criminal cases. The procedure should follow that employed in this case: (1) the jurors must submit the proposed questions to the judge and be made part of the record; (2) the judge must disclose the proposed questions to the parties and give them the opportunity to object or request the question be narrowed or rephrased; and (3) the judge must rule on each proposed question on the record, allowing, rejecting or modifying the question. The procedures should be explained to the parties and jurors at the commencement of the trial.

- *Carter v. State*, 234 N.E.2d 650 (Ind. 1968) (holding that a preliminary jury instruction that jurors were forbidden to ask questions of witnesses was reversible error).


4. **Suggested Procedures for the Concept's Use**

- At the beginning of the trial, the judge tells the jurors that if witness testimony is confusing or complicated, they may submit clarifying questions, which the judge may or may not address to the witness. A sample jury instruction on this issue is attached.

- Jurors do not have to sign the questions or identify themselves, nor do they have to submit any questions.

- Following direct and cross-examination of a witness, the judge asks the jurors whether there are any questions. If so, written questions should be handed to the judge, who then decides whether the jurors should be sent into the jury room while the attorneys review the questions.

- Outside the presence of the jury, the judge reads each question for the record and permits the attorneys to object to the scope or content of any question.

- The judge rules on the objections at that time; the judge may also instruct the witness to confine any answers to the scope of the question.

- Upon the jury's return, the judge tells jurors that evidentiary rules may prohibit asking certain questions, and they should attach no significance to those questions not asked.

- The judge reads the questions to the witness, and the attorneys may further re-direct and re-cross-examine the witness.

- Judges and attorneys using this technique have reported that most questions are serious, concise, and relevant to the trial proceedings.

- Moreover, the fact that irrelevant or prejudicial questions were disallowed did not appear to affect the juror’s judgment in any significant manner.

5. **Suggested Jury Instructions**

Attached is a proposed preliminary jury instruction and a proposed final jury instruction.

The standard instruction each judge is requested to give to the jurors after the jury returns the verdict or is discharged without returning a verdict regarding completing the Project’s questionnaires is on the next page of this section.
The Commission wishes to acknowledge and thank the following persons who served as part of the subcommittee addressing the concept of Allowing Juror Questions During Trial:

**Attorney Chairperson**

Mike Pope  
McDermott, Will & Emery

**Reviewing Judge**

Judge Joan Gottschall
PRELIMINARY INSTRUCTION REGARDING JUROR’S WRITTEN QUESTIONS TO BE GIVEN WITH THE OTHER PRELIMINARY INSTRUCTIONS BEFORE OPENING STATEMENTS

If you, after listening to a witness's testimony on both direct examination and cross-examination, have a question that you feel may clarify the witness’s testimony, you may, if you desire, write down your question and give it to my clerk.

My clerk will provide it to me and I, as I must, will share your question with the lawyers in the case. If your question is a proper inquiry under the rules of evidence, I will read your question to the witness so the witness may answer it.

Under the rules of evidence questions must be asked in a certain form, and I will attempt to modify the form of any submitted question to conform with the proper form. Also under the rules of evidence if you submit a question, and it is not asked, it is because I as the judge have determined the question should not be asked under the law. You should draw no conclusions or inferences if a question is not asked with regard to the facts in the case, and you should not speculate about the answer to any unanswered question. Likewise, in considering the evidence in the case, you should not give greater weight to the testimony given in answer to any question submitted by a member of the juror.

I emphasize that only written questions can be considered. You cannot ask questions orally of any witness.
FINAL INSTRUCTION ON JUROR'S WRITTEN QUESTIONS

During the trial written questions by some members of the jury have been submitted to be asked of certain witnesses. Testimony answering a question submitted by a juror should be considered in the same manner as any other evidence in the case. If you submitted a question that was not asked, that is because I determined that under the rules of evidence the answer would not be admissible. Just like when I sustained any objection to questions posed by counsel. You should draw no conclusion or inference from my ruling on any question, and you should not speculate about the possible answer to any question that was not asked or to which I sustained an objection.
JURY INSTRUCTIONS REGARDING THE QUESTIONNAIRES
THAT ARE A PART OF THE JURY PROJECT TO BE GIVEN
AT THE TIME THE JURY IS DISCHARGED

Members of the jury, thank you again for your service as jurors in this case. Your service in this case is now over, but I have one additional request of you. Before you say your good-byes to one another and leave the jury room today, I would like you to fill out a brief questionnaire regarding your jury service in this case. The questionnaires I am asking you to complete are a part of a project in which Federal District Courts in the States of Indiana, Illinois and Wisconsin are participating. Your answers to the questions in the questionnaires will assist us in finding ways to improve the jury system.

Your filling out the questionnaires is voluntary. It is not required as part of your jury service in this case. If you desire to be on your way without filling-out the questionnaires, we fully understand and thank you again for your service. We appreciate and thank in advance those of you who do fill out the questionnaires because you will be providing us with valuable information regarding your jury service.

Thank you again.
VI. INTERIM STATEMENTS TO JURY BY COUNSEL

1. ABA American Jury Project Principles and Standards

PRINCIPLE 13 – THE COURT AND PARTIES SHOULD VIGOROUSLY PROMOTE JUROR UNDERSTANDING OF THE FACTS AND THE LAW

Standard 13G

A. Parties and courts should be open to a variety of trial techniques to enhance juror comprehension of the issues including: alteration of the sequencing of expert witness testimony, mini- or interim openings and closings, and the use of computer simulations, deposition summaries and other aids.

2. The Rationale for Testing the Concept

The Commission chose this concept for testing because the Commission believes it will enhance juror comprehension in civil trials. The judge may consider, after conferring with the parties’ attorneys, allowing the attorneys to make explanatory statements to the jury during the course of the trial ("Interim Statements"). Although the value of Interim Statements is particularly compelling in complex matters, the Commission believes that they will be helpful in all civil cases. Interim Statements can be used to explain forthcoming testimony and exhibits or to highlight the significance and context of evidence already elicited. In addition to enhancing a jury’s ability to understand the evidence, Interim Statements by the attorneys can: (a) assist jurors in recalling the evidence; (b) allow counsel to organize, clarify, emphasize, contextualize and explain evidence; (c) aid jurors in remaining focused; (d) break up and make more interesting and informative the parade of evidence; and (e) streamline the presentation of evidence and increase the overall efficiency of the trial. Moreover, judges would retain complete discretion and power to prevent any abuse of Interim Statements or their unduly interfering with the presentation of evidence or the orderly progress of the trial.

If you have questions or wish to discuss the subject—including the procedures suggested below—judges may contact the Honorable Amy J. St. Eve at (312) 435-5686 and judges and lawyers may contact Steve Novack at (312) 419-6900.

3. Authority Supporting the Concept’s Use

- *Westmoreland v. CBS*, Case No. 82 Civ. 7913 (PNL) (In a 62-day trial, attorneys were each given two hours each for interim statements with complete discretion as to how to utilize their time. Each side gave interim summations over 40 times,
with the longest summation running about ten minutes and the shortest slightly over one minute; the average summation lasted about two and a half minutes. Attorneys typically gave their summaries at the start or the conclusion of a witness’s direct or cross-examination.)

• *Energy Trans. Sys., Inc. v. Burlington N., et al.*, Case No. 13-84-979-4. (In a lengthy antitrust trial, attorneys on each side were given six hours of interim summaries. Plaintiff attorneys used summations to outline and preview the purpose of various witnesses’ testimony and to show how the evidence coincided with the court’s preliminary instructions. Defendant attorneys used summations to educate the jury about the points they would cover in cross-examination. Both sides used daily transcripts to remind jurors of significant testimony and highlight discrepancies between the testimony and the documents. Both used summations to identify witnesses in the other side’s case and to explain evidence that was unfavorable to them.)

• *ABA Standards for Crim. Justice Discovery and Trial by Jury*, Standard 15-4.2(c) (3d ed. 1996) (encouraging trial judges to consider, consistent with parties’ rights, mechanisms that might be adopted to improve juror understanding of issues and trial efficiency).


• Honorable B. Michael Dann, “Learning Lessons” and “Speaking Rights”: *Creating Educated and Democratic Juries*, 68 Ind. L.J. 1229, 1255-56 (Fall 1993).

4. **Suggested Procedures for the Concept’s Use**

• Attorneys should be allowed to use Interim Statements before or after a witness’s testimony, on both direct and cross-examination, as previews (if before) or summations (if after). Granting attorneys discretion as to when and how to use their Interim Statements maximizes the benefits and advantages thereof.

• Interim Statements should be given outside the presence of witnesses except for those witnesses not subject to the witness exclusionary rule found in Federal Rule of Evidence 615.
Although attorneys should be allowed to make those objections that are permissible during traditional opening statements and closing arguments, they should not be allowed to respond to Interim Statements. This will prevent the trial from becoming excessively contentious and will prevent an attorney from interjecting argument during the other attorneys’ presentation of evidence.

Attorneys should not be required to give advance notice of their Interim Statements. This recognizes that Interim Statements will often be the product of counsel’s last-minute, spontaneous decisions and strategy and of the unexpected turns that trials often take.

An overall time limit for Interim Statements by each side should be set by the Court in advance of trial. In setting limits, the Court should consider the anticipated length of the trial, the complexity of the case and the nature of the evidence to be submitted.

At the end of the last day of trial each week or the beginning of the first day of trial each week, each side should also be given ten minutes to summarize the evidence that was introduced during the previous week and/or preview the evidence anticipated for the coming week. This will allow the attorneys to: (a) put into context the evidence the jury heard all week; (b) emphasize the key points they want the jury to remember; and (c) let the jury know what they can expect to hear in the coming week.

5. Suggested Jury Instructions

Before the trial starts, the judge should advise the jurors that they will, from time to time, be hearing directly from the attorneys when the attorneys wish to preview, highlight, or summarize the evidence. The judge should also admonish the jurors that nothing the attorneys say to them during the trial constitutes evidence and that Interim Statements by the attorneys are merely their efforts to put the evidence in context and thereby make the case more understandable. At the end of the trial—and as part of the Court’s instructions to the jury—the Court should reiterate these points.

The end of the trial instruction could, in substance, read:

At various times during the trial, the lawyers addressed you. At the beginning of the trial you heard the lawyers’ opening statements, at the end of the trial you heard the lawyers’ closing arguments, in between you heard the lawyers’ interim statements. If at any time you find that the lawyers said something to you that was not shown by the evidence, you should disregard what the lawyers have said. None of the statements or arguments made by the lawyers is evidence.
The standard instruction each judge is requested to give to the jurors after the jury returns the verdict or is discharged without returning a verdict regarding completing the Project's questionnaires is on the next page of this section.

The Commission wishes to acknowledge and thank the following persons who served as part of the subcommittee addressing the concept of Explanatory Statements By Counsel During Trial:

<table>
<thead>
<tr>
<th>Attorney Chairpersons</th>
<th>Reviewing Judge</th>
</tr>
</thead>
<tbody>
<tr>
<td>Stephen Novack</td>
<td>Judge Amy St. Eve.</td>
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<tr>
<td>Kenneth Abell</td>
<td></td>
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<tr>
<td>Novack and Macey</td>
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</table>
JURY INSTRUCTIONS REGARDING THE QUESTIONNAIRES
THAT ARE A PART OF THE JURY PROJECT TO BE GIVEN
AT THE TIME THE JURY IS DISCHARGED

Members of the jury, thank you again for your service as jurors in this case. Your service in this case is now over, but I have one additional request of you. Before you say your good-byes to one another and leave the jury room today, I would like you to fill out a brief questionnaire regarding your jury service in this case. The questionnaires I am asking you to complete are a part of a project in which Federal District Courts in the States of Indiana, Illinois and Wisconsin are participating. Your answers to the questions in the questionnaires will assist us in finding ways to improve the jury system.

Your filling out the questionnaires is voluntary. It is not required as part of your jury service in this case. If you desire to be on your way without filling-out the questionnaires, we fully understand and thank you again for your service. We appreciate and thank in advance those of you who do fill out the questionnaires because you will be providing us with valuable information regarding your jury service.

Thank you again.
VII. ENHANCING JURY DELIBERATIONS

1. ABA American Jury Project Principle and Standards

PRINCIPLE 14 — THE COURT SHOULD INSTRUCT THE JURY IN PLAIN AND UNDERSTANDABLE LANGUAGE REGARDING THE APPLICABLE LAW AND THE CONDUCT OF DELIBERATIONS

Standard 14

A. All instructions to the jury should be in plain and understandable language.

B. Jurors should be instructed with respect to the applicable law before or after the parties' final argument. Each juror should be provided with a written copy of instructions for use while the jury is being instructed and during deliberations.

C. Instructions for reporting the results of deliberations should be given following final argument in all cases. At that time, the court should also provide the jury with appropriate suggestions regarding the process of selecting a presiding juror and the conduct of its deliberations.

D. The jurors alone should select the foreperson and determine how to conduct jury deliberations.

PRINCIPLE 15 — COURTS AND PARTIES HAVE A DUTY TO FACILITATE EFFECTIVE AND IMPARTIAL DELIBERATIONS

Standard 15D

D. When jurors submit a question during deliberations, the court, in consultation with the parties, should supply a prompt, complete and responsive answer or should explain to the jurors why it cannot do so.

2. The Rationale for Testing

The Commission chose this concept because the Commission believes it will encourage efficient and well-informed jury deliberations. Initially, the Commission respectfully suggests that the judge follow the practice of most trial judges in the Seventh Circuit and, after reading the jury instructions to the jury, give each juror a written copy of the jury instructions so each juror may review the exact language of the law the jury is to apply to the facts. Although the jury will determine how it will select its foreperson,
the Commission believes that straightforward suggestions on the role of the foreperson and on effective ways to deliberate, minimize potential confusion and should facilitate open-minded jury deliberations. The judge should consider also providing clear instructions at the outset of deliberations as to how the jury should report its findings and how long the court expects the jury to deliberate each day. Most judges also do this already.

Also by providing responsive and thoughtful answers to questions submitted by the jury during the jury’s deliberations, the judge will make the jury feel more comfortable with its role and allow jurors to focus less on logistical questions of process and more on the factual matters they must decide. When the jury is aware that it may submit written questions to the judge as they arise in the course of the deliberation, jurors potentially will feel more comfortable with the process and make decisions and weigh evidence with greater confidence.

3. Authority Supporting the Concept’s Use

• Federal Civil Jury Instructions of the Seventh Circuit 1.32 (2005) available at http://www.ca7.uscourts.gov/7thcivinstruc2005.pdf (“Upon retiring to the jury room, you must select a presiding juror. The presiding juror will preside over your deliberations and will be your representative here in court. . . . Take these forms to the jury room, and when you have reached unanimous agreement on the verdict, your presiding juror will fill in, date, and sign the appropriate form.”).

• United States v. Sims, 329 F.3d 937, 942-43 (7th Cir. 2003) (reviewing for abuse of discretion judge’s decision to give supplemental instruction on standard of intent, and considering whether instruction as a whole treated issue fairly and adequately, was a correct statement of law, and answered jury’s question specifically).

• United States v. Young, 316 F.3d 649, 661 (7th Cir. 2002) (reviewing both judge’s decision to answer question and language used to respond to it).

• United States v. Warren, 984 F.2d 325, 329-330 (9th Cir. 1983) (holding that the trial court’s failure to issue supplemental instructions to clarify an apparent misunderstanding by the jury concerning the definition of “premeditated” was reversible error).

• United States v. Bay, 820 F.2d 1511, 1514-15 (9th Cir. 1987) (holding that the trial court did not abuse its discretion by limiting the scope of its response to a jury question about the instructions to the definition of “reasonable doubt”).
• *State v. Green*, 121 N.W.2d 89 (Iowa 1963) (reversing conviction where verdict reached after jury deliberated for 27 hours without sleep).


• Shari Seidman Diamond & Jonathan D. Casper, *Blindfolding the Jury to Verdict Consequences: Damages, Experts, and the Civil Jury*, 26 LAW & SOC’Y REV. 513, 548-53 (1992) (“Thus, the foreperson’s apparent influence is more than simply representational. Several pieces of evidence suggest a more active leadership role for the foreperson. . . We have shown that forepersons appear to exert actual influence on other jurors in the course of the deliberation process rather than merely representing the predeliberation preference of the jury.”).

• Alan Reifman, et al., *Real Jurors’ Understanding of the Law in Real Cases*, 16 LAW & HUM. BEHAV. 539, 549 (1992) (“However, all of these jurors had in common the fact that they both requested and received help from the judge. These jurors did not score significantly differently from other jurors on the procedural law. However, for questions about substantive law on which they were instructed, those who requested help were correct 54% of the time, whereas the jurors who were instructed but did not ask for help were correct 35% of the time . . . this difference was highly significant.”).

4. Suggested Procedures for the Concept’s Use

• **Suggestions to the Jury Regarding Deliberations:** In order to alleviate potential concerns of jurors regarding the logistics of choosing a presiding juror, deliberating the case, and reporting its findings, the judge, after giving the Seventh Circuit’s Pattern Civil Jury Instruction 1.32, may consider providing the following instructions:

  A. **Jury Instruction on the Role of the Presiding Juror:**

You are free to deliberate in any way you decide or select whomever you like as a foreperson. However, I am going to provide some general suggestions on the process to help you get started. When thinking about who should be foreperson, you may want to consider the role that the foreperson usually plays. The foreperson serving as the chairperson during the deliberations should ensure a complete discussion by all jurors who desire to speak before any vote. Each juror should have an opportunity to be heard on every issue and should be encouraged to participate. The foreperson should help facilitate the discussion and make sure everyone has a chance to say what they want to say.
B. Jury Instruction as to Suggestions for Conducting the Deliberations:

In order to help you determine the facts, you may want to consider discussing one claim at a time, and use my instructions to the jury as a guide to determine whether there is sufficient evidence to prove all the necessary legal elements for each claim or defense. I also suggest that any public votes on a verdict be delayed until everyone can have a chance to say what they think without worrying what others on the panel might think of their opinion. I also suggest that separate tasks (such as any note taking, time keeping, and recording votes,) be assigned to more than one person to help break up the workload during your deliberations. I encourage you at all times to keep an open mind if you ever disagree or come to different conclusions on facts from any of your fellow jurors. Thinking about the other juror’s point of view may help you understand their position better or give you a better way to explain why you think your position is correct.

• Instructions to the Jury Regarding Reporting Its Findings and Timetable for the Deliberations. Additionally, the court should consider informing the jury on the following issues:

A. Reporting Jury Findings: Although most trial judges in the Seventh Circuit already do this by using the recommended civil jury instructions available on the Seventh Circuit website, judges should given the jury specific instructions on how to report its findings when deliberations have been completed, including how to fill out the verdict forms and whom to contact when they have reached a decision.

B. Schedule for Deliberations: In order to lower juror anxiety about the trial interrupting the jurors’ everyday lives, the court should instruct the jury on its daily deliberation schedule, including whether the jury will be required to stay late (past a specific time of day) or on weekends for deliberation.

• Answering Juror Questions During Deliberations: If during deliberations the jury has a question, the Commission recommends that judge, after conferring with counsel for the parties, and to the extent permitted by the law, directly answer the question in as plain a statement as possible consistent with a neutral explanation of the law.

A. Handling Questions from the Jury: The judge may consider taking a two-step approach, first, giving Seventh Circuit Pattern Civil Jury Instruction 1.33 instructing the jury on how to ask questions, and second, informing the counsel for the parties on how he or she intends to handle
the questions if they are received.

B. **Jury Instructions to the Jury on Asking Questions in Addition to Seventh Circuit Pattern Civil Jury Instruction 1.33:**

You may, if you find it necessary during your deliberation, submit written questions to me about the case, but you should understand that the you, as the jury, must decide the facts. You should make a determined effort to answer any question by referring to the jury instructions before you submit a question to me. If you do submit a question, I must show it to the lawyers for each side and consult with them before responding. I will either answer your question, or explain why I cannot answer your question.

C. **Instructions to the Counsel for the Parties on Questions from the Jury.** The judge may consider taking the following steps to ensure that his or her answer to jury questions are not coercive or prejudicial to either party:

Any questions submitted by the jury should be numbered, designated by time and date, and filed in the court record.

When a question is received counsel should be directed to assemble in the courtroom or be available by telephone to review and discuss the question with the judge on the record.

After the judge reads the question on the record, counsel for the parties should be heard regarding an appropriate response to be given by the judge to the jury.

After listening to the counsel, it is within the judge's discretion whether or not to answer the jury's question and what form the answer should take.

Even if an answer is not given, the judge must still respond to the jury's question, even if only to instruct the jury that, under the law, the judge cannot answer the jury's question and advise the jury to continue deliberating.

5. **Suggested Jury Instructions**

Suggested jury instructions were included in the above section and the Pattern Civil Jury Instructions of the Seventh Circuit are available on the Seventh Circuit’s website.
The standard instruction each judge is requested to give to the jurors after the jury returns
the verdict or is discharged without returning a verdict regarding completing the Project's
questionnaires is on the next page of this section.

The Commission wishes to acknowledge and thank the following persons who served as
part of the subcommittee addressing the concept of Enhancing Deliberation; Procedures and
Instructions:

**Attorney Chairpersons**
- James Munson
- Andrew Langan
- Andrew Dustin
- Kirkland & Ellis

**Reviewing Judge**
- Judge Mark Filip

VII-6
JURY INSTRUCTIONS REGARDING THE QUESTIONNAIRES
THAT ARE A PART OF THE JURY PROJECT TO BE GIVEN
AT THE TIME THE JURY IS DISCHARGED

Members of the jury, thank you again for your service as jurors in this case. Your service in
this case is now over, but I have one additional request of you. Before you say your good-byes to
one another and leave the jury room today, I would like you to fill out a brief questionnaire regarding
your jury service in this case. The questionnaires I am asking you to complete are a part of a project
in which Federal District Courts in the States of Indiana, Illinois and Wisconsin are participating.
Your answers to the questions in the questionnaires will assist us in finding ways to improve the jury
system.

Your filling out the questionnaires is voluntary. It is not required as part of your jury service
in this case. If you desire to be on your way without filling-out the questionnaires, we fully
understand and thank you again for your service. We appreciate and thank in advance those of you
who do fill out the questionnaires because you will be providing us with valuable information
regarding your jury service.

Thank you again.
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1.32 SELECTION OF PRESIDING JUROR; GENERAL VERDICT

Upon retiring to the jury room, you must select a presiding juror. The presiding juror will preside over your deliberations and will be your representative here in court.

Forms of verdict have been prepared for you.

[Forms of verdict read.]

(Take these forms to the jury room, and when you have reached unanimous agreement on the verdict, your presiding juror will fill in, date, and sign the appropriate form.)

OR

(Take these forms to the jury room, and when you have reached unanimous agreement on the verdict, your presiding juror will fill in and date the appropriate form, and all of you will sign it.)
Two defendants were convicted by jury in the United States District Court for the Northern District of Indiana, Robert L. Miller, Jr., Chief Judge, of conspiracy to commit mail fraud, and were sentenced to 55 and 60 months imprisonment, respectively, and ordered to pay restitution. Defendants appealed. The Court of Appeals, Bauer, Circuit Judge, held that: (1) district court did not abuse its discretion in giving supplemental instruction; (2) district court's determination that defendants' victims were "vulnerable," warranting two-level increase in offense level, was not clearly erroneous; (3) determination that defendant committed perjury, warranting two-level increase in offense level at for obstruction of justice, was not clearly erroneous; and (4) determination that defendant abused position of trust, warranting two-level increase in offense level, was not clearly erroneous.

Affirmed.

West Headnotes

[1] Criminal Law §1152(1)
110k1152(1) Most Cited Cases
When defendant objects to issuance of supplemental jury instruction, Court of Appeals reviews district court's decision for abuse of discretion.

[2] Criminal Law §1039
110k1039 Most Cited Cases
When defendant fails to object to issuance of supplemental jury instruction, Court of Appeals's review is limited to plain error.

[3] Criminal Law §1030(1)
110k1030(1) Most Cited Cases
Plain error standard is designed to correct particularly egregious errors that would amount to miscarriage of justice, implying that defendant would not have been convicted but for error.

110k863(1) Most Cited Cases
District court retains broad discretion in deciding how to respond to question propounded from jury, but has obligation to dispel any confusion quickly and with concrete accuracy.

[5] Criminal Law §863(1)
110k863(1) Most Cited Cases
Issuing supplemental instruction to jury is acceptable means of addressing jury confusion.

[6] Criminal Law §1134(3)
110k1134(3) Most Cited Cases
When examining appropriateness of language in supplemental jury instruction, Court of Appeals considers: (1) whether instruction as a whole fairly and adequately treated issue, (2) whether supplemental instruction was correct statement of law, and (3) whether district court answered jury’s question specifically.

[7] Criminal Law §863(2)
110k863(2) Most Cited Cases
District court did not abuse its discretion in giving supplemental instruction in response to jury’s
question concerning proper standard of intent for conspiracy to commit mail fraud; court addressed exact question propounded by jury and carefully reminded jury that each instruction was important and that no single instruction was to be considered in isolation, and supplemental instruction correctly stated legal standard of intent. 18 U.S.C.A. §§ 371, 1341.

[8] Conspiracy 32
91k32 Most Cited Cases
Conspiracy to commit mail fraud requires that government prove: (1) that conspiracy to commit mail fraud existed, (2) that defendant became member of conspiracy to commit mail fraud with intention to further that conspiracy, and (3) that overt act was committed by at least one conspirator in furtherance of conspiracy to commit mail fraud. 18 U.S.C.A. §§ 371, 1341.

[9] Criminal Law 1158(1)
110k1158(1) Most Cited Cases
Court of Appeals reviews district court's factual determination that victims were "vulnerable" within meaning of Sentencing Guidelines for clear error. U.S.S.G. § 3A1.1(b)(1), 18 U.S.C.A.

[10] Sentencing and Punishment 754
350k754 Most Cited Cases
Government need only establish that single victim of defendant's crimes was vulnerable in order for vulnerable victim enhancement to apply under Sentencing Guidelines. U.S.S.G. § 3A1.1(b)(1), 18 U.S.C.A.

350k754 Most Cited Cases
Elderly victims are "vulnerable victims" under Sentencing Guidelines, especially when their financial investments and financial security are at issue. U.S.S.G. § 3A1.1(b)(1), 18 U.S.C.A.

[12] Sentencing and Punishment 754
350k754 Most Cited Cases
District court's determination that victims of defendant's scheme to defraud investors were "vulnerable," warranting two-level increase in defendant's offense level at sentencing for conspiracy to commit mail fraud, was not clearly erroneous; seventy-nine percent of victims were over age seventy, and some resided in assisted-living facilities, and defendant admitted that he and codefendants chose their victims because they had savings accounts, were less sophisticated in financial matters, and "made an easier sale," and victims were often induced to invest money earmarked for retirement purposes. U.S.S.G. § 3A1.1(b)(1), 18 U.S.C.A.

[13] Criminal Law 1158(1)
110k1158(1) Most Cited Cases
Court of Appeals reviews district court's application of obstruction of justice enhancement under Sentencing Guidelines for clear error. U.S.S.G. § 3C1.1, 18 U.S.C.A.

[14] Sentencing and Punishment 761
350k761 Most Cited Cases
Obstruction of justice enhancement can be applied to defendants who commit perjury on witness stand. U.S.S.G. § 3C1.1, 18 U.S.C.A.

[15] Perjury 3
297k3 Most Cited Cases
Defendant perjures himself if he gives false testimony concerning material matter with willful intent to provide false testimony, rather than as result of confusion, mistake, or faulty memory.

[16] Sentencing and Punishment 761
350k761 Most Cited Cases
If defendant objects to application of obstruction of justice sentencing enhancement based on perjury, district court must make specific finding that defendant committed perjury. U.S.S.G. § 3C1.1, 18 U.S.C.A.

[17] Sentencing and Punishment 761
350k761 Most Cited Cases
District court's determination that defendant committed perjury at trial for conspiracy to commit mail fraud, warranting two-level increase in defendant's offense level at sentencing for
obstruction of justice, was not clearly erroneous; defendant testified that he told sales agent that investments involved in defendant's scheme to defraud investors were risky, but sales agent testified to the contrary. U.S.S.G. § 3C1.1, 18 U.S.C.A.

[18] Criminal Law ☑=1158(1)
110k1158(1) Most Cited Cases
Court of Appeals's review of district court's application of sentencing enhancement for abusing position of trust is for clear error. U.S.S.G. § 3B1.3, 18 U.S.C.A.

[19] Sentencing and Punishment ☑=761
350Hk761 Most Cited Cases
District court's determination that defendant abused position of trust, warranting two-level increase in defendant's offense level at sentencing for obstruction of justice, was not clearly erroneous, given defendant's position as president of investment formed as part of scheme to defraud investors, his knowledge of manner in which brokers chose their victim-investors, his creation of and access to corporate bank accounts, his purchase of speculative stock without investors' knowledge, and his issuance of fraudulent promissory notes. U.S.S.G. § 3B1.3, 18 U.S.C.A.

*939* Lovita Morris King (argued), Office of U.S. Attorney, Hammond, IN, for U.S.

*940* David Dana (argued), Northwestern University School, Chicago, IL, for Donald Sims.


Before BAUER, Easterbrook, and Williams, Circuit Judges.

BAUER, Circuit Judge.

A jury convicted Defendants Donald Sims and David Lambertsen of conspiracy to commit mail fraud after acquitting them of the underlying charges of mail fraud. The district court sentenced Sims to fifty-five months' imprisonment and Lambertsen to sixty months' imprisonment and ordered both to pay restitution. Sims appeals only the supplemental jury instruction issued by the district court concerning the proper standard of intent for conspiracy to commit mail fraud. Lambertsen joins Sims in appealing that issue and also appeals the district court's imposition of three sentencing enhancements under the United States Sentencing Guidelines Manual ("USSG")--vulnerable victims (§ 3A1.1(b)(1)); obstruction of justice (§ 3C1.1); and abuse of a position of trust (§ 3B1.3). For the following reasons, we affirm the district court.

BACKGROUND

Sims' and Lambertsen's association began through business ventures they joined in the Northern Indiana area during the late 1990s, none of which ever became successful. The initial venture was launched by Pat Ballinger and two other individuals in 1995 under the names "Genstar" and "Auto Plus." That program offered a Mastercard credit card to individuals who bought a car from a particular dealer. After that venture failed, Ballinger, Sims, and Lambertsen created "Dealer Direct," a program aimed at securing investments primarily from elderly clients through brokers in Ohio. The brokers induced victims, to whom the brokers had often sold medicare or nursing home insurance, to invest in so-called nine-month promissory notes issued by Dealer Direct.

In the course of defrauding these investors, Dealer Direct and its officials made false and materially misleading statements, orally, and in writing that passed through the United States mail. The notes were designed to look impressive and to resemble an insurance document or a stock certificate; in fact, they were nothing of the kind. Sims' and Lambertsen's signatures, along with other Dealer Direct officials' signatures, appeared on the notes. The notes falsely represented that they were insured by specific car titles or loans, a coalition of major insurance companies, and United States Treasury bonds. The notes purported to pay the investor eleven and one-half percent interest at the end of nine months. Investors also had the option of renewing the investment with a new promissory
note at that time.

Dealer Direct raised money from new investors to pay interest to old investors, and corporate officials used investor money for payroll and operating expenses as well as personal gain. Sims brought in the initial investors, and new investors were hand-picked by brokers in Ohio because they had savings accounts, were less sophisticated, and made "an easier sale." In fact, seventy-nine percent of the investors were over the age of seventy, some with health problems and some residing in assisted-living facilities. The brokers told investors that their money was safe and that the investment was a "sure thing." Some victims even fell for the scheme more than once.

Sims joined Genstar in early 1997, after being recruited by Ballinger because Sims represented that he had several insurance clients who might be good candidates for the nine-month promissory notes. Lambertsen joined the business in the fall of 1997, eventually succeeding Ballinger as President of the company in July or August of 1998. Prior to joining Dealer Direct, Lambertsen understood that Ballinger's previous business venture (Genstar) had been shut down because it failed. As the President of Dealer Direct, Lambertsen possessed hiring and firing power and maintained the company's financial records. He established a new bank account for the company, giving Sims and others access to the account.

When he took over as President, Lambertsen was aware of the manner in which brokers in Ohio solicited investments from elderly victims. He and Ballinger met with three brokers, Dixie Grinnell and Alan and Wiley Welton, approximately every two weeks to report on the financial condition of the business. The brokers, of course, earned a commission for each sale of a nine-month note. Lambertsen claimed that he made the brokers aware of the lack of insurance and security for the notes and that he was attempting to obtain financing to pay all of the notes. [FN1] As part of that effort, Lambertsen purchased stock with investor money without disclosing the purchase to investors. When called as a witness for Lambertsen, however, Grinnell testified that Lambertsen never directed her to inform investors of the risk and that had she known the business was floundering, or that the investment brochure contained false representations, she would not have suggested that her clients invest.

FN1. On cross-examination, the following exchange took place between Lambertsen and the prosecution regarding the fraudulent brochures:

Lambertsen: I instructed both Dixie Grinnell and Alan Welton to not distribute that material, that sales material.
Prosecutor: Okay. And did you also tell her, "Oh, and by the way, tell the investors that what we're doing with the money is very risky?"
Lambertsen: Yes, I did tell her that, in so many words.
Prosecutor: You told Dixie Grinnell, "Tell your investors this is risky." Is that your testimony?
Lambertsen: Yes, it is my testimony.
(continuation added).

At trial, Lambertsen acknowledged that Dealer Direct's revenues never exceeded its expenses and that the business was clearly floundering by late 1997. In fact, the business closed its doors in December 1998, shortly after Lambertsen stepped down as President. Lambertsen, however, continued to solicit and receive investors' money by issuing promissory notes as late as April 30, 1999, well after the business was defunct.

In February 2001, a grand jury returned a forty-nine count indictment against Sims, Lambertsen, Ballinger, and Michael Kline, another Dealer Direct employee. Sims and Lambertsen were each charged with multiple counts of mail fraud, and aiding and abetting therein, in violation of 18 U.S.C. §§ 1341 and 1342, while all four were charged with conspiracy to commit mail fraud, and aiding and abetting therein, in violation of 18 U.S.C. §§ 371 and 372. Ballinger and Kline reached plea agreements with the government and testified against Sims and Lambertsen.

The trial in the district court took place in early November 2001, with final jury instructions being issued to the jury on November 13, to which neither Sims nor Lambertsen objected. During deliberations, the jury propounded three questions to the district court. One question raised an issue regarding the proper standard of intent that the government must prove in order to convict Sims and Lambertsen of conspiracy to commit mail fraud. Noting *942 that intent to defraud must be proven to convict on the underlying charges of mail fraud, the jury asked, "[I]s the intent to defraud also a proposition the government must prove in the charge conspiracy to commit mail fraud?"

Sims's counsel urged the district court to reply in the affirmative and objected to the district court's decision to reiterate and expand slightly on the initial instruction. Lambertsen's counsel, however, made no objection to the supplemental instruction. The district court responded to the jury's question by redefining a conspiracy, reiterating the elements of conspiracy to commit mail fraud from the final jury instructions, and heavily emphasizing that the jury should give equal consideration and weight to each instruction and that no single instruction was more important than the others. [FN2]

FN2. Specifically, the district court stated the following:

In an attempt to answer your question, I'm going to focus on one of the instructions. And in doing that, I want to be sure that you understand that all of these instructions are equally important. No one instruction is more important than others, and you may find other instructions bear upon the answer to your question.

* * * * *

A conspiracy is an agreement between two or more persons to accomplish an unlawful purpose. In this indictment, the unlawful purpose alleged is that of mail fraud. To sustain the charge of conspiracy with respect to either defendant, the government must prove the following propositions with respect to that defendant. First, that the conspiracy existed. And that means the conspiracy to commit mail fraud alleged in the indictment. Government must prove that the conspiracy existed. Second, that the defendant knowingly became a member of the conspiracy with an intention to further that conspiracy, that conspiracy being conspiracy to commit mail fraud alleged in the indictment. And third, that an overt act was committed by at least one conspirator in furtherance of that conspiracy.

Again, I repeat that all of the instructions are equally important. None is more important than any other. I have focused on [the conspiracy to commit mail fraud instruction] because I think that's the best--the best I can do to answer your question, to focus on that. But please bear in mind that all of the instructions that you have received are equally important.

The jury finished its deliberations and returned not guilty verdicts for Sims and Lambertsen on the underlying mail fraud charges but convicted them of conspiracy to commit mail fraud. Sims and Lambertsen immediately moved for new trials arguing that the district court's supplemental instruction was erroneous. The district court acknowledged Sims' earlier objection to the supplemental instruction but denied both requests for a new trial. The court later sentenced Sims to fifty-five months' imprisonment, followed by three years of supervised release, and ordered him to pay $2,063,024.15 in restitution and a $100.00 special assessment. The district court then sentenced Lambertsen to sixty months in prison, followed by three years of supervised release, and ordered him to pay $1,521,801.30 in restitution and a $100.00 special assessment. In sentencing Lambertsen, the district court applied three enhancements under the USSG--1) vulnerable victims under § 3A1.1(b)(1), 2) obstruction of justice under § 3C1.1, and 3) abuse of a position of trust under § 3B1.3. This appeal ensued.

ANALYSIS

A. Supplemental Jury Instruction

[1][2][3] The first issue we consider is whether the supplemental instruction was proper. When a defendant objects to the issuance of such an instruction, we review the district court's decision for an abuse of discretion. In the absence of an objection, our review is limited to plain error. United States v. Young, 316 F.3d 649, 661 (7th Cir.2002); United States v. Skidmore, 254 F.3d 635, 639 (7th Cir.2001); see also Fed. R. Civ. P. 51 (2003) ("No party may assign as error the giving or the failure to give an instruction unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection.").

[4][5][6] The plain error standard is designed to correct particularly egregious errors that would amount to a miscarriage of justice, implying that the defendant would not have been convicted but for the error. Skidmore, 254 F.3d at 639. Because Sims objected to the language of the district court's supplemental instruction, we will review his claim for an abuse of discretion and review Lambertsen's claim for plain error.

[7] Here, the jury specifically sought clarification of the proper standard of intent for conspiracy to commit mail fraud. Neither Sims nor Lambertsen objected to the district court's decision to issue a supplemental instruction. Sims objected only to the language of the instruction; Lambertsen made no such objection and agreed to the language of the supplemental instruction.

[8] In framing the language, the district court did not abuse its discretion in choosing not to instruct as Sims urged. Conspiracy to commit mail fraud requires that the government prove these elements: 1) that the conspiracy to commit mail fraud existed; 2) that the defendant became a member of the conspiracy to commit mail fraud with an intention to further that conspiracy; and 3) that an overt act was committed by at least one conspirator in furtherance of the conspiracy to commit mail fraud. See United States v. Shelton, 669 F.2d 446, 450-51 (7th Cir.1982); [FN3] United States v. Craig, 573 F.2d 455, 486 (7th Cir.1977).

FN3. We also note that Shelton demonstrates that it must also be reasonably foreseeable that the mails will be used in furtherance of the conspiracy. Shelton, 669 F.2d at 451. Here, there is no argument that Sims and Lambertsen contemplated using the mails to further this conspiracy.

The supplemental instruction was not an abuse of discretion for two reasons. First, the court addressed the exact question propounded by the jury and carefully reminded the jury that each instruction was important and that no single instruction should be considered in isolation, thereby fairly and adequately treating the issue as a whole. Second, the supplemental instruction correctly stated the legal standard of intent for conspiracy to commit mail fraud. Which, of course means that there was no plain error in giving the instruction. Accordingly, neither Sims nor Lambertsen prevails on this issue.

B. Vulnerable Victims Enhancement

[9] The second issue is whether the district court committed clear error by imposing a sentence enhancement under USSG § 3A1.1(b)(1) because Lambertsen defrauded “vulnerable victims.” We review the district court's factual determination that Lambertsen's victims were vulnerable within the
meaning of § 3A1.1(b)(1) for clear error. United States v. Rumsavich, 313 F.3d 407, 411 (7th Cir. 2002); United States v. Parolin, 239 F.3d 922, 926 (7th Cir. 2001). Section 3A1.1(b)(1) provides for a two-level increase in the defendant's sentence if "the defendant knew or should have known that a victim of the offense was a vulnerable victim." USSG § 3A1.1(b)(1) (2003).

[10][11] Application Note 2 to § 3A1.1 provides that,

[f]or purposes of subsection (b), "vulnerable victim" means a person (A) who is a victim of the offense of conviction and any conduct for which the defendant is accountable ... and (B) who is unusually vulnerable due to age, physical or mental condition, or who is otherwise particularly susceptible to the criminal conduct.

USSG § 3A1.1, cmt. n.2. The government need only establish that a single victim was vulnerable in order for the enhancement to apply. Parolin, 239 F.3d at 926. Further, no other factor need accompany age so long as the victim's vulnerability is related to the victim's age. See United States v. Williams, 258 F.3d 669, 672-73 (7th Cir. 2001). Elderly victims satisfy the requirements of § 3A1.1(b)(1), especially when their financial investments and financial security are at issue. See United States v. Seward, 272 F.3d 831, 841 (7th Cir. 2001); United States v. Stewart, 33 F.3d 764, 770-71 (7th Cir. 1994); United States v. Haines, 32 F.3d 290, 293 (7th Cir. 1994).

[12] There is no doubt that age was central to Lambertsen's scheme to defraud investors in Dealer Direct; as the district court aptly found, many of the victims were in the "twilight of their lives." In fact, seventy-nine percent of the victims were over the age of seventy and some resided in assisted-living facilities. Lambertsen admitted that Dealer Direct's brokers chose their victims, many of whom they had previously sold medicare or nursing home insurance, because they had savings accounts, were less sophisticated in financial matters, and "made an easier sale." These victims were often induced to invest money earmarked for retirement purposes, and this fact was known to Lambertsen. The district court did not commit clear error by applying the § 3A1.1(b)(1) enhancement to Lambertsen's sentence because his criminal conduct targeted vulnerable victims.

C. Obstruction of Justice Enhancement

[13] Next, we consider whether the district court properly applied a sentence enhancement to Lambertsen under USSG § 3C1.1 for obstruction of justice. As before, we review the application of this enhancement for clear error. United States v. Griffin, 310 F.3d 1017, 1022 (7th Cir. 2002). USSG § 3C1.1 authorizes a two-level enhancement if the defendant wilfully obstructs or impedes the administration of justice during the investigation, prosecution, or sentencing of a crime and that obstructive conduct is related to the offense for which the defendant was convicted. USSG § 3C1.1 (2003). Application Note 4 to § 3C1.1 provides that this enhancement is intended to apply, inter alia, to "committing, suborning, or attempting to suborn perjury." USSG § 3C1.1, cmt. n.4.

[14][15][16] This Court has, therefore, held that the obstruction of justice enhancement can be applied to defendants *945 who commit perjury on the witness stand. United States v. Jefferson, 252 F.3d 937, 942-43 (7th Cir. 2001); United States v. Robinson, 30 F.3d 774, 787-88 (7th Cir. 1994). A defendant perjures himself if he " 'gives false testimony concerning a material matter with the willful intent to provide false testimony, rather than as a result of confusion, mistake, or faulty memory.' " Jefferson, 252 F.3d at 942-43 (quoting United States v. Dunnigan, 507 U.S. 87, 94, 113 S.Ct. 1111, 122 L.Ed.2d 445 (1993)). If the defendant objects to the application of this enhancement, the district court must make a specific finding that the defendant committed perjury. Robinson, 30 F.3d at 787-88.

[17] In Lambertsen's case, the district court specifically found that Lambertsen committed perjury by wilfully providing false testimony concerning statements he made to Dixie Grinnell. At trial, Lambertsen testified that he told Grinnell to inform investors that the promissory notes were a risky investment. When called as a witness for
Lambertsen, however, Grinnell denied being told that information by Lambertsen. The district court found Grinnell's testimony more credible given her continued use of the fraudulent brochures and the sheer number of investors. The court noted that on cross-examination Lambertsen initially answered that he had given Grinnell the disclaimer "in so many words," but when pressed further, Lambertsen unequivocally responded that he told her to inform investors of the risk.

The court also determined that Lambertsen's testimony was material and a point on which Lambertsen was not likely to be mistaken or confused. Accordingly, the district court found that Lambertsen wilfully gave false testimony, knowing that he never directed Grinnell to inform investors of the risk. Given those findings and the fact that Lambertsen argues only that the district court should not have believed Grinnell over him, we see no reason to disturb the district court's decision and certainly do not find clear error with the application of the § 3C1.1 enhancement.

D. Abuse of a Position of Trust

[18] Finally, we deal with whether the district court properly applied an enhancement to Lambertsen's sentence under USSG § 3B1.3 for abusing a position of trust. Our review of the district court's application of this enhancement is likewise for clear error. United States v. Mabrook, 301 F.3d 503, 510 (7th Cir.2002). A two-level increase in a defendant's sentence under USSG § 3B1.3 is authorized if he abused a position of public or private trust "in a manner that significantly facilitated the commission or concealment of the [underlying] offense." USSG § 3B1.3 (2003).

Generally, individuals entrusted with professional or managerial discretion constitute persons holding a position of trust because they are subject to significantly less supervision. USSG § 3B1.3, cmt. n.1. We have held that this enhancement applies to defendants who serve as corporate officers, utilize fraudulent documents to induce investors, and employ the corporate form to conduct their criminal activities. Mabrook, 301 F.3d at 510; see also United States v. Boyle, 10 F.3d 485, 489 (7th Cir.1993) (applying § 3B1.3 enhancement to president of company, in part, because he acts as agent of client-victims). In United States v. Mabrook, the defendant used his position as the owner of a company to lure investors and conceal his fraudulent activities. Mabrook, 301 F.3d at 510. The Mabrook court also found that the defendant assumed a fiduciary duty to his investors by virtue of his position as the owner, further occupying a position of trust under § 3B1.3. Id.

*946 [19] Lambertsen does not argue that, as the President of Dealer Direct, he did not occupy a position of trust, but only states that he did not utilize that position to facilitate a crime. Given the nature of his power as the President of Dealer Direct, his knowledge of the manner in which brokers chose their victim-investors, his creation of and access to corporate bank accounts, his purchase of speculative stock without investors' knowledge, and his issuance of fraudulent promissory notes as late as April 1999 (well after the business was defunct), there was no clear error in the application of this enhancement to Lambertsen's sentence. Clearly, he abused a position of trust with respect to Dealer Direct's investors in order to facilitate the conspiracy to commit mail fraud.

Accordingly, the decision of the district court is AFFIRMED.

329 F.3d 937

Briefs and Other Related Documents (Back to top)

• 02-2781 (Docket) (Jul. 10, 2002)
• 02-2092 (Docket) (May. 02, 2002)

END OF DOCUMENT

Defendant was convicted by jury in the United States District Court for the Northern District of Illinois, Rebecca R. Pallmeyer, J., of interstate domestic violence and unlawfully using or carrying firearm during and in relation to crime of violence, and sentenced to consecutive five-year terms of imprisonment. Defendant appealed. The Court of Appeals, Bauer, Circuit Judge, held that: (1) expert testimony was reliable and relevant; (2) district court did not abuse its discretion in admitting victim's grand jury testimony; (3) district court did not abuse its discretion by precluding defendant's proposed impeachment of victim's grand jury testimony; (4) conviction was supported by evidence; (5) district court's erroneous supplemental instruction was harmless; and (6) jury verdict was not inconsistent.

Affirmed.

[1] Criminal Law § 1139
110k1139 Most Cited Cases
Court of Appeals reviews district court's implementation of Daubert framework with respect to admission of expert testimony de novo.

[2] Criminal Law § 1153(1)
110k1153(1) Most Cited Cases
Once Court of Appeals is convinced that district court properly applied Daubert framework with respect to admission of expert testimony, it reviews district court's decision to admit or exclude expert testimony for abuse of discretion.

[3] Criminal Law § 469.2
110k469.2 Most Cited Cases
It is job of district court to ensure that expert's opinion is reliable and relevant to case, and thus, district court is given broad discretion to do so.

110k478(1) Most Cited Cases
Psychiatric mental health nurse's testimony that defendant's former girlfriend exhibited common behavior among victims of domestic violence in recanting accusations that defendant had kidnapped and physically abused her was reliable and relevant, and thus was admissible under Daubert in defendant's trial for interstate domestic violence; nurse had over 40 years of experience specializing in crime victims and had published over 100 scholarly articles, her work was generally accepted in mental health profession, and she based her opinion on thorough and full examination of facts in case, including police and medical reports, communications between defendant and girlfriend, and her interview with girlfriend.

[5] Criminal Law § 388.1
110k388.1 Most Cited Cases
Daubert inquiry with respect to admission of expert testimony must be connected to particular facts of case.

[6] Criminal Law § 478(1)
110k478(1) Most Cited Cases
Expert witness's experience in particular field is often quite relevant in determining reliability of her opinion.
Jury is free to credit whichever witness it sees fit; it is not within province of Court of Appeals to determine which witnesses are persuasive.

District court did not abuse its discretion in admitting victim's grand jury testimony at defendant's trial for interstate domestic violence; victim testified at trial and defendant had right to cross-examine her within rules of evidence, which he fully exercised. Fed.Rules Evid.Rule 801(d)(1)(A), 28 U.S.C.A.

District court did not abuse its discretion by precluding defendant's proposed impeachment of victim's grand jury testimony at defendant's trial for interstate domestic violence by eliciting statements victim made to investigator that her trip with defendant to neighboring state was "no kidnaping"; victim did not actually tell grand jury that she had been "kidnaped," proposed impeachment sought to elicit legal conclusion from victim about defendant's conduct, and defendant was not convicted of kidnaping, so any possible error was harmless.

Confrontation clause is not violated by admitting declarant's out-of-court statements, as long as declarant is testifying as witness and subject to full and effective cross-examination. U.S.C.A. Const.Amend. 6.

Conviction for using or carrying firearm during and in relation to crime of violence was supported by evidence that defendant violently confronted his ex-girlfriend, apparently with something heavy concealed in his pocket, that during four days defendant kept girlfriend confined in hotel room and physically abused her witness saw defendant with gun in his waistband, that defendant asked friend to dispose of gun, and that girlfriend had told others that defendant had gun, that he loaded it in front of her, threatened her with it, and struck her in the face with it. 18 U.S.C.A. § 924(c)(1)(A).

District court did not abuse its discretion in deciding to respond to jury's question seeking clarification of meaning of "during" in charge of using or carrying firearm during and in relation to crime of violence; it was quite clear from language of jury's question that it was having primary difficulty understanding term's meaning. 18 U.S.C.A. § 924(c)(1)(A).

District court's error in including term "in relation to" in supplemental instruction in response to jury's question was harmless; in relation to prong of using or carrying firearm during and in relation to crime of violence may be satisfied by evidence that defendant carried his weapon to further purpose or effect of his crime. 18 U.S.C.A. § 924(c)(1)(A).
question on meaning of "during" in charge of using or carrying firearm during and in relation to crime of violence was harmless; even though terms had separate meanings and "in relation to" should not have been included in response to jury, inclusion of those words did not mislead jury with respect to meaning of "during," and there was sufficient evidence for rational jury to find defendant guilty beyond reasonable doubt. 18 U.S.C.A. § 924(c)(1)(A).

[17] Criminal Law 863(1)
110k863(1) Most Cited Cases
When it is clear that jury is having difficulty with original instructions, supplemental instruction is appropriate.

[18] Criminal Law 1134(3)
110k1134(3) Most Cited Cases
On challenge to district court's supplemental jury instruction, Court of Appeals examines language for: (1) whether instruction as whole fairly and adequately treated issues, (2) whether instruction was correct statement of law, and (3) whether district court answered jury's question specifically.

[19] Criminal Law 878(4)
110k878(4) Most Cited Cases
Jury's finding in special interrogatory that government did not prove beyond reasonable doubt that defendant "used" firearm in connection with interstate domestic violence charge and defendant's conviction for unlawfully using or carrying firearm during and in relation to crime of violence were not inconsistent, since defendant could have carried gun without using it. 18 U.S.C.A. § 924(c)(1)(A).

[20] Criminal Law 878(4)
110k878(4) Most Cited Cases
Inconsistent verdicts do not invalidate verdict, since jury that inconsistently convicts defendant of one offense and acquits him of another is as likely to have erred in acquitting him of the one as in convicting him of the other.

Defendant-Appellant.

Before BAUER, POSNER, and EASTERBROOK, Circuit Judges.

BAUER, Circuit Judge.

On March 19, 2001, the federal government charged the Defendant, Roy Young, under a three-count indictment; count 1 charged Young with kidnapping Beatrice Patrick on or about January 14 to 18, 2001, a violation of 18 U.S.C. § 1201; count 2 charged him with interstate domestic violence against Patrick on or about January 14, 2001, in violation of 18 U.S.C. §§ 2261(a)(1) and (b)(3); and finally, count 3 charged Young with unlawfully using or carrying a firearm during and in relation to the commission of a crime of violence on or about January 14, 2001, in contravention of 18 U.S.C. § 924(c)(1)(A). Young was later charged under a Superseding Indictment, alleging the same three offenses, though altering the wording in count 2 slightly.

A jury found Young not guilty of the kidnaping charge in count 1, but found him guilty of interstate domestic violence and unlawful use of a firearm under counts 2 and 3. The district court sentenced Young to consecutive five-year terms of imprisonment for counts 2 and 3. The district court sentenced Young to consecutive five-year terms of imprisonment for counts 2 and 3. Young raises four issues on appeal: 1) whether the district court abused its discretion by admitting testimony from the government's expert regarding common patterns among domestic abuse victims; 2) whether the district court erred in admitting Patrick's grand jury testimony under Rule 801(d)(1)(A) of the Federal Rules of Evidence; 3) whether the government sustained its burden of proof that Young used or carried a firearm in violation of 18 U.S.C. § 924(c)(1)(A); and finally 4) whether the district court abused its discretion in its response to a question from the jury while it was deliberating.

We affirm the decision of the district court.

BACKGROUND

A. Events Prior to and Surrounding January 14, 2001

Young and Patrick began dating in 1989, when Young was fifteen years old and Patrick was seventeen years old. During their ten to eleven-year relationship, the couple had three children but never married. The relationship was marred by domestic violence, and in April of 2000 Patrick obtained an Order of Protection against Young. Though it appears the relationship was an off-and-on arrangement, the two were at least in touch in January of 2001, when Patrick sent word to Young that she needed money from him. At that time, Patrick lived in the Altgeld Gardens housing development in Chicago, Illinois, while Young resided in Michigan City, Indiana.

On the evening of January 14, 2001, Young drove with a friend, Forknewin Sidney, and two others from his home in Michigan City to the Altgeld Gardens development. After dropping Sidney off at Sidney's mother's home, Young located Patrick at Theresa Miller's home, a neighbor of Patrick's. In addition to Patrick, Young also found George Terry present. Patrick previously had told Terry that if Young caught the two of them together, he would kill them both.

When Young arrived at the apartment, he became visibly agitated at Terry's presence. Young kept one hand in his pocket, which apparently contained a heavier object. Terry fled the apartment, and Young proceeded upstairs and confronted Patrick by grabbing her and asking whether she had been "messing around" with Terry. This argument escalated and Young punched Patrick near her eye and told her to leave with him. The two eventually tumbled down the stairs from the second floor of Miller's home while struggling. Miller and her niece broke the two apart and ordered both of them to leave, for fear of damage to Miller's apartment. Patrick pleaded with Miller to allow her to stay because Patrick said she could not breathe, but Miller insisted that she leave.

The argument continued outside, and Patrick eventually entered Young's car and drove to a nearby wooded area, where Patrick's car was parked. Once there, Young continued to yell at Patrick and used a car jack to smash the front passenger window of her car. Patrick also testified before the grand jury that Young said "Don't play with me" and "I'll kill you" at this time. Young then drove both of them back to Patrick's apartment and proceeded upstairs into her bedroom, where the couple's three children were present. Young told the children to get out of the room and told Patrick that she was coming with him, but Patrick refused. The two continued to argue, with Patrick refusing to go until Young picked up a plastic milk crate and threatened to hit Patrick if she did not go. Patrick eventually left the apartment with Young and got into his van.

Young then drove Patrick, Sidney, and his two other friends to Michigan City, Indiana. Though Patrick testified at trial that she was not "forced" to leave with Young, she testified before the grand jury that she feared for her life if she did not go with him. During the drive to Indiana, Patrick held her head as if in pain and spoke to no one, except to ask for a cigarette on one occasion. When they arrived at Young's apartment, Patrick walked straight into his bedroom with Young close behind. Once inside, Young began beating Patrick with his fists, kicking her, and choking her. This scenario replayed itself off and on over the ensuing two to three hours. On at least one occasion, Patrick called out to Young's friends, who were in the other room, but no one intervened. Patrick did not leave the bedroom that first night.

B. January 15-17, 2001

In fact, Patrick went nowhere over the next four days; Young kept her in the apartment, continued to beat her, and threatened to kill her. Young allowed Patrick to go into the bathroom and living room but not to leave the apartment. Patrick was able to phone her employer at some point by sneaking a call with Young's cellular phone, but she did not call the police. She had never been to the apartment and apparently did not know where she was. Young also kept two pit bulls in the apartment, which got loose at one point and forced Patrick to jump behind a stereo speaker for safety.

During these four days, Young's friends apparently
continued to stay in the apartment. At one point, Sidney witnessed Young walk out of the bedroom (where Sidney had heard Young beating Patrick) with a gun in his waistband. Young asked Sidney to hide the gun for him, but Sidney refused. At trial, Patrick testified that Young never had a gun, but before the grand jury she recounted that he began loading bullets into the gun while in the bedroom and that he struck her in the face with it.

*C. January 18-19, 2001*

After four days of abuse, Patrick convinced Young to drive her back to Chicago so that she could sign some papers at work, pick up her paycheck, and see her children. Just as on the trip to Indiana, Young took Sidney and two other friends with him as he drove Patrick back to her grandmother's apartment in Altgeld Gardens. Once inside, Patrick locked the door and called 911, telling the operator that she had been kidnapped for several days and just released. Young banged on the door to gain entry, which the 911 operator heard over the phone. Patrick also made a second call to 911 and gave a description of Young and his van, told the operator that she had been held against her will, and said that Young had a gun.

After calling 911, Patrick called her aunt, Shirley Fields, and pleaded with Fields to come and get her. Patrick told Fields that Young tried to kill her and that she ran from him. Fields could hear Young banging on the door outside and swearing at Patrick. Fields arrived at the apartment shortly thereafter but did not see Young anywhere. Fields found Patrick in her grandmother's apartment with two black eyes, a cut mouth, swelling on her head, and marks on her neck where Patrick said Young choked her. Fields also saw blood all over Patrick's clothing.

Fields took Patrick to nearby Jackson Park Hospital, where Patrick informed the attending nurse and doctor that she had been kidnapped and beaten by Young, including the fact that Young struck her in the face with a gun. Patrick also told them that she lost consciousness at one point and was forced to have sex. The medical staff noted bruising and tenderness on her head, eyes, forehead, cheek, chin, neck, and back.

That evening FBI agents interviewed Patrick in the hospital and took photos of her injuries. Patrick told them Young forced her to go to Indiana with him, that he beat her, and that she went with him because she thought he had a gun by the way he held his hand in his pocket. She also informed them that he threatened her with the gun while in Indiana on several occasions and hit her in the face with it. Police officers found Sidney that evening and interviewed him as well. Sidney later told Young of the interview, at which time Young instructed Sidney not to tell anyone about the gun.

On January 19, 2001, FBI agents went to Young's apartment, but he was not home. Upon seeing the police, Christine Smith, a friend of Young's, called to warn him, and Young subsequently spent the night at her home. The police searched Young's home and recovered forty-three bullets of various calibers but no gun. The next day, Young agreed to sell Smith's boyfriend a gun, and Young had a friend retrieve it from under the tree where Young had hidden the gun.

FBI agents arrested Young on January 22, 2001, finding him hiding between a mattress and a wall in a friend's apartment. Young helped police locate Sidney and the other individuals present during the kidnapping, who were all arrested as well. The two other individuals were released without being charged, and Sidney testified against Young pursuant to a grant of immunity.

*D. Young's Trial*

During the trial, the government called Patrick as a witness. As is not entirely uncommon with victims of domestic abuse, she denied most of the allegations against Young and recanted her story about the kidnapping and abuse. Patrick testified that she still loved Young and specifically denied that he threatened her before taking her to Indiana, that he forced her to go with him to Indiana, and that he had a *655* gun. The government then treated Patrick as a hostile witness and introduced...
her grand jury testimony, in which she affirmed the details recited above about the trip to Indiana, the abuse, and Young's gun.

Patrick's grand jury testimony tracked a written statement prepared during a lengthy meeting with government prosecutors. Before the grand jury, she testified that she had an opportunity to review and correct the statement, which she utilized. The government questioned her from the statement, and following her testimony she affirmed that all of her answers were correct. Patrick also affirmed that her testimony was entirely consistent with her statements to the police, the FBI agents, the medical personnel, the 911 operators, and her aunt.

The government also called Dr. Ann Wolbert Burgess, a psychiatric mental health nurse specializing in crime victims, as an expert to explain Patrick's recantation. Dr. Burgess has more than forty years of nursing experience and holds a doctorate in nursing science as well as both master and bachelor of science degrees. She is a Professor of Nursing at Boston College and has written, among other things, over 114 articles in various professional journals and publications on topics including forensic nursing, rape, and domestic violence. Dr. Burgess was also the chair of a group from the National Research Council Institute of Medicine that prepared a book at Congress' request entitled *Understanding Violence Against Women*.

Young objected to Dr. Burgess' testimony, but following a full *Daubert* hearing, the court ruled that Dr. Burgess could testify. The doctor stated that victims of domestic violence commonly recant their accusations and that victims of such abuse have a limited ability to perceive means of escape. She also testified that Patrick exhibited this not uncommon behavior pattern. In forming her opinion, Dr. Burgess had reviewed FBI reports, Chicago Police Department reports detailing various confrontations between Patrick and Young, Patrick's grand jury testimony, the Order of Protection Patrick obtained against Young, the criminal history report on Young, letters between Young and Patrick, the defense counsel's notes of an interview with Patrick, and recordings of telephone conversations between Young and Patrick while Young was in pre-trial detention. Dr. Burgess also spent over an hour interviewing Patrick personally.

During deliberations, the jury sent a question to the district judge asking for clarification on the meaning of "during" with respect to count 3's charge of unlawfully using or carrying a firearm during and in relation to the commission of a crime of violence on or about January 14, 2001, in contravention of 18 U.S.C. § 924(c)(1)(A). With respect to this count, the court originally instructed the jury that the government must prove the following beyond a reasonable doubt: 1) that Young committed the crime of kidnapping as charged in count 1 or the crime of interstate domestic violence as charged in count 2; and 2) that on or about January 14, 2001, Young knowingly used or carried a firearm during and in relation to the offense charged in counts 1 or 2.

The jury sent the following question to the district judge during deliberations:

Dear Judge Pallmeyer: We, the jury, would like further clarification of the terms "during" and "in relation to," the second part of Count 3. We, the jury, agree on the first part of Count 3. However, there has been much discussion on when "during" begins and ends.

Question: If a person is convicted of interstate domestic violence, does the "during" begin when the defendant crosses state lines or does that time frame begin when the violence first occurs in Michigan City, Indiana? Thus, when does it end?

Young asked that the jury be referred to the already given instructions, while the government and district judge felt a clarification was necessary. The court, accordingly, sent the following written clarification to the jury: "Dear Jurors: 'During and in relation to the offense charged in Counts 1 or 2' means at any point within the offense conduct charged in Counts 1 or 2."

The jury ultimately acquitted Young of the kidnapping charge in count 1 but convicted him of the charges in counts 2 and 3. In a special interrogatory on count 2, the jury stated that it did
not find beyond a reasonable doubt that Young "used" a dangerous weapon in connection with the interstate domestic violence charge. [FN1] The district court, thus, sentenced Young to consecutive, five-year prison terms, for a total of ten years. Young appeals the district court's decision to admit the expert testimony of Dr. Burgess as well as Patrick's grand jury testimony. Young further appeals the sufficiency of the evidence on his conviction for use of a firearm during and in relation to a crime of violence and the district court's supplemental instruction in response to the question from the jury.

FN1. The court submitted this special interrogatory to the jury pursuant to Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), because an affirmative answer to the special interrogatory could have increased Young's maximum sentence from five to ten years under 18 U.S.C. § 2261(b)(3), (4).

ANALYSIS

A. Expert Testimony on Patterns Among Domestic Abuse Victims

[1][2] We review the district court's implementation of the Daubert framework with respect to the admission of expert testimony de novo. Once we are convinced that the district court properly applied the Daubert framework, however, we review the decision to admit or exclude the expert testimony for an abuse of discretion. United States v. Allen, 269 F.3d 842, 845 (7th Cir.2001).

[3] According to Rule 702 of the Federal Rules of Evidence, "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue," a properly qualified expert may testify as to their opinion on the matter. FED. R. EVID. 702. That testimony must also be based on sufficient facts, be the product of reliable principles and methods, and reflect reliable application of those methods to the facts. Id. It is the job of the district court to ensure that the expert's opinion is reliable and relevant to the case, and thus, the district court is given broad discretion to do so. Allen, 269 F.3d at 846.

[4] Young does not argue that the district court improperly qualified Dr. Burgess as an expert witness. We must determine, therefore, whether the methodology used by Dr. Burgess to arrive at her opinions was reliable and relevant to this case. Young argues that Dr. Burgess' methodology was not reliable because: a) Dr. Burgess formed her opinion before meeting with Patrick; b) Dr. Burgess reached her conclusion about Patrick based upon "anecdotal" evidence of other battered women; and c) Dr. Burgess did not interview Patrick's friends and family.

[5] The Supreme Court laid out several factors in Daubert that serve as a starting point for determining whether an expert's opinion is based upon reliable methodology. 657Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 593-94, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). The Court later made clear in Kumho Tire, however, that "the factors [Daubert ] mentions do not constitute a 'definitive checklist or test.' " Kumho Tire Co., Ltd. v. Carmichael, 526 U.S. 137, 150, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999) (emphasis in original); see also United States v. Conn, 297 F.3d 548, 555-56 (7th Cir.2002). Thus, the Daubert inquiry must be connected to the particular facts of the case. Kumho Tire, 526 U.S. at 150, 119 S.Ct. 1167; Conn, 297 F.3d at 555-56.

[6] Among the factors to consider, the expert witness's experience in a particular field is often quite relevant in determining the reliability of her opinion. See Conn, 297 F.3d at 556. In United States v. Allen, this Court upheld the admission of expert testimony in a drug trafficking case by a police officer with twenty-six years of experience, thirteen of which were with the DEA. Allen, 269 F.3d at 846. The expert in that case based his opinion not only on his extensive experience investigating over 200 drug cases but also on a full examination of the relevant police reports. Id.
opinion, we must also examine its helpfulness to the jury. FED. R. EVID. 702. On this issue, two cases from our sister Circuits are most enlightening and highly relevant. In United States v. Alzanki, the First Circuit upheld the defendant's conviction for holding and conspiring to hold a household employee in involuntary servitude. United States v. Alzanki, 54 F.3d 994, 1009 (1st Cir.1995). In so holding, the court also affirmed the admission of expert testimony by the same Dr. Burgess who testified in Young's case, deeming it helpful to the jury. Id. at 1005-06.

As in Young's case, Dr. Burgess based her testimony in Alzanki on the patterns abuse victims generally exhibit and whether the victim in that case exhibited those patterns. Id. at 1006. The court noted that Dr. Burgess' expertise focused on victims of sexual abuse but that she also researched comparable behavior in victims of nonsexual abuse in "unequal power" relationships (i.e.--battered spouses and children). Id. The First Circuit reviewed the admission of Dr. Burgess' testimony under an abuse of discretion standard, as we do here, and concluded that her testimony "was reasonably likely to assist the jury in understanding and assessing the evidence, in that the matter at issue was highly material, somewhat technical, and beyond the realm of acquired knowledge normally possessed by lay jurors." Id.

Similarly, in Arcoren v. United States, the Eighth Circuit affirmed the admission of expert testimony on "battered woman syndrome." Arcoren v. United States, 929 F.2d 1235, 1241 (8th Cir.1991). Like Patrick, the victim in Arcoren recanted her allegations of rape and abuse after describing her ordeal to police, medical professionals, and investigators and testifying to those events before a grand jury. Id. At the trial four months later, the victim stated that she did not remember her statements before the grand jury and that she fabricated those statements she could not remember making. Id. The government in Arcoren, as in Alzanki, called an expert psychologist who worked with battered women for ten years and with rape victims for fourteen years. Id. at 1239.

In affirming the admission of the expert testimony, the Eighth Circuit noted that a "jury naturally would be puzzled at the complete about-face [the victim] made, and would have great difficulty in determining which version of [the victim's] testimony it should believe. If there were some explanation for [the victim's] changed statements, such explanation would aid the jury in deciding which statements were credible." *658 Id. at 1240. The court then discussed how the expert testimony, strikingly similar to that offered by Dr. Burgess in both Alzanki and Young's case, provides the explanation a jury needs in order to properly weigh the victim's trial testimony. Id.

[7] Before this Court, Young initially argued that Dr. Burgess' methodology was unreliable because she arrived at her conclusion before interviewing Patrick. To support this argument, he points only to testimony from his expert witness that failing to interview Patrick first is not sound. The jury, however, is free to credit whichever witness it sees fit. United States v. Woolfolk, 197 F.3d 900, 904 (7th Cir.1999) Obviously, the jury did not find Young's expert persuasive, and it is not within the province of this Court to determine otherwise. Id.

Young also argues that Clark v. Takata Corp., 192 F.3d 750 (7th Cir.1999), demonstrates that the district court abused its discretion by admitting Dr. Burgess' testimony because she arrived at her conclusion before interviewing Patrick. Clark, however, is inapposite, as it dealt with whether or not the proffered expert merely assumed the fact he was being called to prove. Clark, 192 F.3d at 757. In this case, not even Young disputes that he beat Patrick for years. The government did not offer Dr. Burgess as an expert on whether or not Young abused Patrick, but rather, as an expert on how victims such as Patrick typically respond to such abuse. Furthermore, there is no legal authority supporting the proposition that Dr. Burgess must interview Patrick before forming her expert opinion.

Young's final two arguments are as futile as the first. Next, he claims that Dr. Burgess' methodology was based upon "anecdotal" evidence of other battered women; and finally, he argues that
her methodology was unsound because she did not interview Patrick's friends and family. As for "anecdotal" evidence, Dr. Burgess is a highly qualified psychiatric mental health nurse with over forty years of experience. She specializes in crime victims and has published well over 100 scholarly articles and other writings on forensic nursing, rape, and domestic violence. Her work is generally accepted in the mental health profession. Even Young's own expert agreed with Dr. Burgess that abuse victims often recant their statements to protect their abusers. Dr. Burgess' background makes it clear that she based her opinion in this case on her extensive nursing experience as well as her academic research on several hundred battered women. See Allen, 269 F.3d at 846 (relying, in part, on experience of police officer to affirm admission of expert testimony).

Furthermore, Dr. Burgess reached her opinion after conducting a thorough and full examination of the facts in this case. We noted above the substantial evidence Dr. Burgess reviewed in forming her opinion, including police and medical reports as well as communications between Patrick and Young. See id. (noting expert's reliance on police reports). And, lest we forget, Dr. Burgess also spent over an hour interviewing Patrick personally. To assert that Dr. Burgess' opinion was based on "anecdotal" evidence is patently inaccurate. That Dr. Burgess did not also interview Patrick's friends and family is of no concern; it seems unlikely that they would disprove the abuse Young dealt out to Patrick for over a decade.

Finally, given Patrick's recantation at trial, we find that Dr. Burgess' expert opinion was helpful to the jury in determining how to credit that testimony. We see no reason to disagree with the First Circuit's conclusion in Alzanki that Dr. Burgess' testimony is both reliable and helpful in a case such as this one. The district court did not abuse its discretion in admitting the expert testimony of Dr. Burgess.

In a last-ditch effort, Young argues that Rule 403 of the Federal Rules of Evidence prohibits the introduction of Dr. Burgess' testimony because the prejudicial effect of asserting that Young battered Patrick outweighs the probative value of her testimony. See FED. R. EVID. 403. There is no real issue disputing that Young beat Patrick during the course of their relationship and over the days at issue here. The evidence of the beatings was overwhelming, and Dr. Burgess' testimony was highly probative as to why Patrick recanted on the stand in light of her earlier statements.

B. Admission of Patrick's Grand Jury Testimony

Next, we review the district court's decision to admit Patrick's grand jury testimony under Rule 801(d)(1)(A) for an abuse of discretion. United States v. Williams, 737 F.2d 594, 608 (7th Cir.1984). Rule 801(d)(1)(A) of the Federal Rules of Evidence provides that a statement is not hearsay if the declarant testifies at trial, is subject to cross-examination concerning the statement, and the statement is "inconsistent with the declarant's [trial] testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition." F ED. R. EVID. 801(d)(1)(A). Young does not dispute that Patrick testified at his trial, nor that she was subject to cross-examination by defense counsel. It is equally obvious that Patrick's trial testimony was inconsistent with her grand jury testimony. Indeed, Patrick recanted her allegations of abuse against Young while on the witness stand at his trial; what is commonly referred to as a turncoat witness. See United States v. DiCaro, 772 F.2d 1314, 1322 (7th Cir.1985). Finally, the grand jury testimony satisfies the requirement that the prior inconsistent statement be given under oath. Id.

Young's primary argument, however, is that the district court improperly limited his cross-examination of Patrick by prohibiting him from impeaching her grand jury testimony with hearsay statements she made the day after she testified before the grand jury. He also submits that the district court abused its discretion in admitting Patrick's grand jury testimony under Rule 801(d)(1)(A) because it violated the Confrontation Clause of the Sixth Amendment and was unfairly prejudicial under Rule 403 of the Federal Rules of Evidence. None of these arguments prevail.

First, Young agrees that Patrick was subject to cross-examination at his trial and that cross-examination surely took place. His complaint is that the district court improperly limited this cross-examination because it prevented him from impeaching the government's impeachment of Patrick by eliciting statements she made to a defense investigator the day after her grand jury testimony. Apparently, Patrick told Young's investigator that the trip to Indiana was "no kidnaping." The statement, however, did not impeach any of Patrick's grand jury testimony because Patrick did not actually tell the grand jury that she had been "kidnaped."

We find no abuse of discretion in the district court's ruling. Young had a right to cross-examine Patrick within the rules of evidence, which he fully exercised. Young's proposed impeachment of Patrick's grand jury testimony sought to elicit a legal conclusion from Patrick about whether Young's conduct amounted to the kidnaping charged in count 1. See United States v. Hach, 162 F.3d 937, 945 (7th Cir.1998) (noting that answers in the form of a legal conclusion amount to unhelpful *660 opinion testimony). In the event, Young's attorney brought the sought-after statement into evidence through the investigator. Finally, Young was not convicted of kidnaping under count 1, so that any possible error was harmless.

[11] Young's Confrontation Clause and Rule 403 arguments are likewise without merit. It is well-settled law that "the Confrontation Clause is not violated by admitting a declarant's out-of-court statements, as long as the declarant is testifying as a witness and subject to full and effective cross-examination." California v. Green, 399 U.S. 149, 158, 90 S.Ct. 1930, 26 L.Ed.2d 489 (1970); DiCaro, 772 F.2d at 1326; Mason v. Duckworth, 74 F.3d 815, 819 n. 3 (7th Cir.1996).

Finally, Young relies on United States v. Doerr, 886 F.2d 944 (7th Cir.1989), to assert his Rule 403 argument that admission of Patrick's grand jury testimony is unfairly prejudicial. Young argues that the testimony does not contain a long, narrative answer from Patrick and is simply her responses to leading questions from the government that were not subject to cross-examination. He believes this pattern presents a problem because Patrick has limited education and recanted much of that testimony. While Doerr does list several factors the court should bear in mind when considering the trustworthiness of out-of-court statements, the case is concerned with hearsay statements being offered into evidence under the catch-all hearsay exception in Rule 807. Id. at 955-56. As we stated above, Patrick's grand jury testimony was not hearsay under Rule 801(d)(1)(A), and therefore, Doerr is inapplicable here.

C. Conviction for Use of a Firearm Under § 924(c)(1)(A)

[12] Young's third argument in this appeal is that the government did not prove beyond a reasonable doubt that he "used" a firearm in violation of 18 U.S.C. § 924(c)(1)(A). With a challenge to the sufficiency of the evidence, this Court considers the evidence in a light most favorable to the government and will overturn a conviction only if no rational trier of fact could conclude that the government proved the crime's essential elements beyond a reasonable doubt. United States v. Jones, 188 F.3d 773, 776 (7th Cir.1999); United States v. Jackson, 177 F.3d 628, 630 (7th Cir.1999).

Under 18 U.S.C. § 924(c)(1)(A), "any person who, during and in relation to any crime of violence ... for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm" is subject to various imprisonment terms. 18 U.S.C. § 924(c)(1)(A) (2002) (emphasis added). Young argues that there was insufficient evidence to convict him of this crime because the government did not show, per Bailey v. United States, that Young "actively employed" the firearm in connection with the charge of interstate domestic violence in count 2. See Bailey v. United States, 516 U.S. 137, 142-43, 116 S.Ct. 501, 133 L.Ed.2d 472 (1995).

The holding in Bailey is not as broad as Young would have this Court believe. The Court in Bailey
referred only to the meaning of "uses" under § 924(c)(1)(A) and did not address the meaning of "carries" or "possesses" under the statute, which is the issue presented by this case. Thus, we must determine whether Young "carried" a firearm "during and in relation to," or whether he "possessed" one "in furtherance of," the interstate domestic violence charge.

[13] This Court stated in United States v. Pike that the "in relation to" prong of § 924(c)(1)(A) may be satisfied "by evidence that the defendant carried his weapon to further the purpose or effect of his crime." United States v. Pike, 211 F.3d 385, 389 (7th Cir.2000) (quoting Smith v. United States, 508 U.S. 223, 238, 113 S.Ct. 2050, 124 L.Ed.2d 138 (1993)) (emphasis in original). In Young's case, there can be no doubt that he carried his gun during and in relation to the charge of interstate domestic violence. Witnesses saw him violently confront Patrick at Miller's apartment in Chicago, apparently with something heavy concealed in his pocket. Sidney testified that at least once during the four days Young kept Patrick in Indiana he saw Young exit the bedroom with a gun in his waistband. Young asked Sidney to dispose of the gun, but Sidney refused. Finally, before the grand jury Patrick testified that she told her aunt, police, and medical personnel that Young had a gun, that he loaded it in front of her, threatened her with it, and struck her in the face with it.

It also goes without saying that Young possessed his gun "in furtherance of" the underlying charge of interstate domestic violence. The events described above all illustrate that he possessed the gun throughout the time he terrorized Patrick and that his possession of the gun furthered the abuse he rendered upon her. Thus, there was ample evidence for a rational jury to conclude beyond a reasonable doubt that Young violated § 924(c)(1)(A), and his conviction for that crime will stand.

D. The District Court's Response to a Question from the Jury

[14] We review the district court's decision to answer a question propounded from the jury as well as the language used in the court's response for an abuse of discretion. United States v. Sanders, 962 F.2d 660, 677 (7th Cir.1992). The government urges this Court to review the district court's decision to answer the question for an abuse of discretion, but argues that Young waived this standard with respect to the language of the court's answer and therefore waived the issue on appeal. The government contends that defense counsel did not object to the language of the answer and objected only to the court's decision to give an answer. The record, however, supports that defense counsel adequately objected to both the giving and language of the answer. We will review both issues for an abuse of discretion.

[15][16] First, Young argues that the supplemental instruction should not have been given, and second, that the judge mislead the jury by defining the terms "during" and "in relation to" jointly. Young contends that the joint definition led the jury to believe the terms had similar meanings when, in fact, they do not. Young also submits that the jury's findings in the special interrogatory submitted on count 2 as well as his conviction under count 3 reveal the confusion stemming from the erroneous instruction.

[17] With respect to Young's first argument, we note that the district court has broad discretion to respond to questions propounded from the jury during deliberations. United States v. Watts, 29 F.3d 287, 291 (7th Cir.1994). When it is clear that the jury is having difficulty with the original instructions, a supplemental instruction is appropriate. United States v. Lakich, 23 F.3d 1203, 1208 (7th Cir.1994). Furthermore, the district court should strive to clear away any difficulties with concrete accuracy. United States v. Otto, 850 F.2d 323, 325-26 (7th Cir.1988) (citing Bollenbach v. United States, 326 U.S. 607, 612-13, 66 S.Ct. 402, 90 L.Ed. 350 (1946)).

Here it is quite clear from the language of the jury's question that it was having primary difficulty understanding the meaning of the term "during" in § 924(c)(1)(A). The district judge decided to respond to the jury's question because the court wished to clear away the confusion with concrete accuracy.
We find that the district court did not abuse its discretion in deciding to respond to the jury's question.

[18] When the court issues a supplemental instruction, we examine the language for the following factors: 1) whether the instruction as a whole fairly and adequately treats the issues; 2) whether the instruction is a correct statement of the law; and 3) whether the district court answered the jury's question specifically. Lakich, 23 F.3d at 1208. The supplemental instruction at issue stated that "[d]uring and in relation to the offense charged in Counts 1 or 2 means at any point within the offense conduct charged in Counts 1 or 2." As noted above, the actual question propounded by the jury concerned itself only with the meaning of "during," though the initial paragraph of the note to the district judge referenced clarification of both "during" and "in relation to." So, the issue here is whether the district judge's inclusion of the term "in relation to" in her supplemental instruction on the meaning of "during" represents an abuse of discretion.

First, the supplemental instruction fairly and adequately treated the issue presented by the jury as it fully considered only the question propounded by the jury. Second, the supplemental instruction provided a correct statement of law. But because the terms "during" and "in relation to" have separate meanings under § 924(c)(1)(A), the district judge should not have included the words "in relation to" in her response to the jury. The inclusion of those words, however, did not mislead the jury with respect to the meaning of "during." As we held above, there was sufficient evidence for a rational jury to find Young guilty of count 3 beyond a reasonable doubt. This verdict was predicated upon the fact that Young carried a gun during and in relation to the interstate domestic violence charge. The "in relation to" prong was satisfied by his carrying the gun to further the purpose or effect of the crime. Pike, 211 F.3d at 389. Thus, inclusion of the words "in relation to" in the supplemental instruction defining "during" amounted, at most, to harmless error and does not render the response an incorrect statement of law. Third, it is clear from this language that the supplemental instruction specifically answered the jury's question on the meaning of "during," as it defined a specific time period the jury could consider in its deliberations.

[19] Finally, Young argues that the jury's confusion from this supplemental instruction appears from its finding in the special interrogatory submitted with count 2 (that the government did not prove beyond a reasonable doubt that he "used" a firearm in connection with the interstate domestic violence charge) and his conviction for count 3. First, as we stated above, the § 924(c)(1)(A) conviction rests upon a finding that Young "carried" the gun during and in relation to the interstate domestic violence charge. The statutory term "uses" in § 924(c)(1)(A) retains an independent meaning from "carries." Young could "carry" the gun without "using" it, and there is no inconsistency in the jury's findings.

[20] And, even if the special interrogatory and the conviction for count 3 were inconsistent, "[a] jury that inconsistently convicts the defendant of one offense and acquits him of another is as likely to have erred in acquitting him of the one as in convicting him of the other." United States v. Johnson, 223 F.3d 665, 675 (7th Cir.2000). In other words, inconsistent verdicts do not invalidate the verdict. Id.

Accordingly, we AFFIRM the decision of the district court.

316 F.3d 649, 59 Fed. R. Evid. Serv. 1332

Briefs and Other Related Documents (Back to top)

• 02-1294 (Docket)  
  (Feb. 05, 2002)

END OF DOCUMENT
Defendant was convicted in the United States District Court for the District of Hawaii, David Alan Ezra, J., of first-degree murder, attempted murder, and assault with deadly weapon, and he appealed. The Court of Appeals, James R. Browning, Circuit Judge, held that: (1) court had duty to order competency hearing sua sponte in light of defendant's prior psychological history and counsel's concerns that defendant might not be competent; (2) referring jury to previously given instruction after jury queried court as to definition of "premeditated" was reversible error; and (3) failure to inform jury that it could consider lesser included offense was reversible error.

Reversed in part; affirmed in part.

West Headnotes

[1] Criminal Law [C=734
110k734 Most Cited Cases

[1] Criminal Law [C=737(2)
110k737(2) Most Cited Cases
District court may determine as matter of law existence of federal jurisdiction over geographic area, but locus of offense within that area is issue for trier of fact.

[2] Criminal Law [C=1173.2(2)
110k1173.2(2) Most Cited Cases
District court's failure to instruct jury that Army barracks was within special territorial jurisdiction of United States as matter of law and failure to instruct jury that, to convict, jury had to find beyond reasonable doubt that crime was committed on Army base, if error, was harmless where uncontroverted testimony was given that crime occurred outside enlisted men's club at Army base; there was no reasonable possibility that failure to instruct jury on jurisdictional element of offense affected verdict.

[3] Criminal Law [C=625.10(4)
110k625.10(4) Most Cited Cases

257Ak434 Most Cited Cases
Trial court had duty to order competency hearing sua sponte if court had reasonable grounds for concluding there was good faith doubt as to defendant's competency, and, having ordered hearing, court had discretion to order examination sua sponte.

[4] Criminal Law [C=625.10(2.1)
110k625.10(2.1) Most Cited Cases
(Formerly 110k625.10(2))
Defendant's prior psychological histories, counsel's belief that defendant might not be competent, and manner and mode in which crime allegedly took place are relevant factors in deciding whether to order competency hearing.

[5] Criminal Law [C=577.11(6)
110k577.11(6) Most Cited Cases

[5] Criminal Law [C=625.10(4)
110k625.10(4) Most Cited Cases
Court acted appropriately in ordering sua sponte competency examination and hearing which tolled running of time under Speedy Trial Act. 18 U.S.C.A. § 3161 et seq.

[6] Criminal Law [C=863(2)

In responding to jury's inquiry indicating that jurors were confused by original instructions regarding definition of "premeditation" in murder prosecution, court's failure to provide supplemental instruction rather than merely referring jury to original instructions was reversible error.

Trial court's failure to inform jury it could consider lesser included offense if it disagreed on first-degree murder or to refer jury to instruction concerning lesser included offense instruction or informing jury that they could consider lesser included offense would have made it clear that jury was not required to reach unanimous verdict of acquittal on greater charge before reaching lesser included offense.

The jury convicted Warren on all charges. The court sentenced Warren to life without parole for the murder of Canady, 20 years for the attempted murder of Watson, and five years for assault with a deadly weapon.

II.
Warren asserts the government failed to prove, and the court failed to instruct the jury, that the offense was committed within the special maritime and territorial jurisdiction of the United States. [FN1] Because Warren did not object at trial we review for plain error, and will reverse only in "exceptional circumstances." United States v. Hegwood, 977 F.2d 492, 495 (9th Cir.1992)
FN1. 18 U.S.C. §§ 113, 1111 & 1113 require that the crime be committed "within the special maritime and territorial jurisdiction of the United States," which includes:
Any lands reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction thereof, or any place purchased or otherwise acquired by the United States by consent of the legislature of the State in which the same shall be, for the erection of a fort, magazine, arsenal, dockyard, or other needful building.
18 U.S.C. § 7(3).

FN2. Warren objected to the Court's instruction on the elements of first degree murder under § 1111, but not because the instruction failed to deal with the locus of the crime. Warren proposed an instruction which also failed to include the jurisdictional element of the offense. Fed.R.Crim.P. 30 requires a party to "state distinctly the matter to which the party objects and the grounds of the objection."

[1][2] A district court "may determine as a matter of law the existence of federal jurisdiction over the geographic area, but the locus of the offense within that area is an issue for the trier of fact." United States v. Gipe, 672 F.2d 777, 779 (9th Cir.1982) (citing United States v. Jones, 480 F.2d 1135, 1137 (2d Cir.1973)). The district court did not instruct the jury that Schofield Barracks was within the special territorial jurisdiction of the United States as a matter of law, and also failed to instruct the jury that to convict the jury must find beyond a reasonable doubt that the crime was committed on Schofield Barracks. The court's failure "to charge a necessary element of the offense generally is plain error." United States v. King, 587 F.2d 956, 965 (9th Cir.1978); see also United States v. Agouon, 851 F.2d 1158, 1168 (9th Cir.1988) (en banc) (failure to charge on "vital" element is plain error).

[FN3] However, if such an error is harmless then, by definition, it does not affect a defendant's substantial rights and is not reviewable as plain error. See Fed.R.Crim.P. 52. "The failure to instruct on every element of an offense is harmless error only if the omitted element is undisputed, and, therefore, its omission could not possibly have been prejudicial." King, 587 F.2d at 966; see also *328 Hennessy v. Goldsmith, 929 F.2d 511, 514-16 & n. 3 (9th Cir.1991) (failure to instruct on element of crime may be harmless beyond a reasonable doubt).

FN3. The government notes the court's instruction was based on 9th Cir.Crim.Jury Instr. 8.24A (1989), which does not include a charge on the location of the offense. Use of a model jury instruction does not preclude a finding of error. See Hegwood, at 495-96.

In this case, the prosecution presented uncontroverted testimony that the crime occurred outside the Paradise Club, that the Paradise Club was an enlisted men's club at Schofield Barracks, and that Schofield Barracks was a United States Army base in Hawaii. An army base is within the special jurisdiction of the United States as defined in 18 U.S.C. § 7(3). Warren made no attempt to impeach this testimony and offered no contrary evidence. Indeed, in questioning a witness Warren's counsel referred on the record to the fact that the Paradise Club was located on the Schofield base. There is no reasonable possibility that failure to instruct the jury on the jurisdictional element of the offense affected the verdict. United States v. Rubio-Villareal, 967 F.2d 294, 296 n. 3 (9th Cir.1992) (en banc); see also United States v. Cabeen, 611 F.2d 257, 258 (8th Cir.1979) (failure to instruct on jurisdiction was harmless because there was no prejudice to defendant where issue was proved beyond a reasonable doubt and was uncontroverted at trial). Therefore, the judge's failure to instruct the jury that it must find beyond a reasonable doubt that the crime was committed on the Schofield Barracks was not plain error.
III.
Warren was indicted on January 30, 1991; trial was set for April 2. On March 26, 15 days before the Speedy Trial Act deadline for commencement of trial would be reached, the court ordered a competency examination and hearing, and tolled the running of time under the Act. Warren was examined at a federal facility and found competent. At a competency hearing on May 10 the court ruled Warren was competent to stand trial, and granted the defense's motion for a continuance. Trial began on May 21.

Warren challenges the district court's finding there was a good faith doubt as to his competence, and claims the court ordered the competency examination and hearing only to avoid the strictures of the Speedy Trial Act. We review the district court's finding of good faith doubt for clear error. United States v. Hoskie, 950 F.2d 1388, 1392 (9th Cir.1991).

At a status conference on March 25, seven days before the date set for trial, Warren's counsel informed the court that counsel would not be prepared for trial on the date set because of government delay in providing discovery and in bringing the defendant from prison in California to Hawaii where he would be available to counsel. Counsel also reported to the court that he had learned the previous day "there is a prior at least psychological interview with a professional in [Warren's] past": that counsel had arranged to have a psychological evaluation of the defendant by a local physician; and that this evaluation might reveal the need for further delay in the trial. The court asked counsel whether Warren would seek a continuance, and counsel responded he would not.

At another status conference the following day, the court informed counsel that on consideration of the file the court had concluded there was a good faith doubt as to Warren's competence to stand trial, and the court intended to order a competency examination and hearing. [FN4] Warren's counsel objected, stating he did not question Warren's *329 competency. Under questioning by the court, however, counsel admitted he too was concerned about Warren's competency. [FN5] The court ordered a competency examination and hearing pursuant to 18 U.S.C. § 4241(a), and continued the trial date. The court tolled the running of time under the Speedy Trial Act pursuant to 18 U.S.C. §§ 3161(h)(1)(A), 3161(h)(8)(A), & 4241(a).

FN4. The court stated: I've taken time to review the file in this case... The manner in which the alleged crime took place raises concern in this court about his competency to stand trial. Now with these revelations that he has undergone psychiatric treatment, this raises even more of a concern in this Court's mind. Therefore in an exercise of my duty and responsibility as a judge to ensure that the defendant that stands trial before me is fully competent and capable in every way, particularly to assist in his defense [I will] sua sponte order a medical examination pursuant to [18 U.S.C. § 4241(a) ]. It is necessary for this Court to have a good faith doubt as to a defendant's guilt to understand consequences and to assist in the defense and I have the good faith doubt based upon the allegations, the manner and mode in which the crime allegedly took place, and now substantially raised by the concern that he has seen a psychiatrist in the past.

FN5. Warren's counsel and the court engaged in the following discussion:
THE COURT: The fact that you need to ensure yourself ... is of great concern to the Court. I understand you need to ensure yourself because you have a question.
COUNSEL: That's correct. THE COURT: The reason you have a question is because of the nature and consequences and the nature of the way this offense occurred and because of his mental history. Well, I agree with you wholeheartedly and I want to ensure myself, this Court must ensure itself, that he is competent to stand trial. I think your questions are legitimate ones and you say you don't have concern, of
course you have a concern. That's why -- you're shaking your head up and down yes.
COUNSEL: Yes, I do, Your Honor.
THE COURT: ... [T]he Court shares that concern.

[3] It was the court's duty to order a competency hearing *sua sponte* if the court had reasonable grounds for concluding there was a good faith doubt as to Warren's competency. *Chavez v. United States*, 656 F.2d 512, 515 (9th Cir.1981); *United States v. Ives*, 574 F.2d 1002, 1004-05 (9th Cir.1978). Having ordered a hearing, the Court had discretion to order a competency examination *sua sponte*, 18 U.S.C. § 4241(b) ("Prior to the date of the hearing, the court may order that a psychiatric or psychological examination of the defendant be conducted").

[4][5] The defendant's prior psychological history was a relevant factor in deciding whether to order a competency hearing. *Chavez*, 656 F.2d at 518. Counsel's belief that the defendant might not be competent was also relevant. *Ives*, 574 F.2d at 1005; see also *Hernandez v. Ylst*, 930 F.2d 714, 718 (9th Cir.1991) ("While the opinion of ... counsel certainly is not determinative, a defendant's counsel is in the best position to evaluate a client's comprehension of the proceedings."). The court also properly relied on "the manner and mode in which the crime allegedly took place." *See Hernandez*, 930 F.2d at 718 (nature of crime may be a factor in determining whether to hold competency hearing). Taken together these factors provided reasonable grounds for entertaining a good faith doubt about Warren's competency. Given the circumstances, the Court did not abuse its discretion in ordering a full evaluation at a federal facility rather than relying on the results of a limited examination by a private doctor arranged by Warren's counsel. [FN6]

FN6. Warren argues the district court used the competency examination and hearing to toll the running time under the Speedy Trial Act because the Court was concerned Warren's counsel would not have enough time to prepare for trial. However, the Court's concern that defense counsel lacked time to prepare a defense because of the government's delay in producing the defendant and providing discovery might itself be a proper ground for excluding time under the Act. See 18 U.S.C. §§ 3161(h)(8)(A), 3161(h)(8)(B)(iv). Warren does not explain why the court would conceal its "real" reason for tolling the running of time when that reason might have been sufficient in itself.

IV.
Warren's final claim relates only to the murder conviction. He asserts the district court responded inadequately to questions from the jury about premeditation and the consideration of second degree murder. We review for abuse of discretion. *United States v. Hayes*, 794 F.2d 1348, 1352 (9th Cir.1986).

A.
On the first day of deliberation, the jury sent the court a note reading: "Is premeditated to 'hurt' the same as premeditated to 'kill'?" Warren argued the Court should answer the question "No" because premeditation to hurt, as distinguished from premeditation to kill, would not support a verdict of first degree murder. Over Warren's objection, the court instead referred the jury to a previously given instruction, Instruction No. 9, "and in particular, the *330* third element of the offense" as defined in that instruction. [FN7]

FN7. Instruction No. 9 read:
9. In order for the defendant to be found guilty of Murder in the First Degree, the government must prove each of the following elements beyond a reasonable doubt:
....
Third: that the killing was premeditated;
....
Premeditation means with planning or deliberation. The amount of time needed for premeditation of a killing depends on the person and the circumstances. It must
be long enough, after forming the intent to kill, for the killer to have been fully conscious of the intent and to have considered killing.

[6] The jury's question indicated at least some jurors had been confused by the original instructions regarding a critical legal issue not specifically covered by those instructions--whether Warren could be found guilty of first degree murder if he intended only "to hurt" Canady rather than "to kill" him. The court's original instruction focused on the nature of "premeditation" rather than upon what must be premeditated to establish first degree murder.

In responding to the jury's inquiry in these circumstances "it is not sufficient for the court to rely on more general statements in its prior charge." *United States v. Nunez*, 889 F.2d 1564, 1568 (6th Cir.1989). Referring the jury back to the original instruction would not correct the apparent impression of at least some jurors that intent "to hurt" rather than "to kill" might be sufficient to convict Warren of first degree murder. The Court should have provided a supplemental instruction sufficient to clear up the uncertainty that the jury had brought to the Court's attention. *Id.*

The Court expressed concern that a simple "no" answer to the jury's question might mislead the jury because "to hurt" might actually mean "to kill" in the street parlance employed by the young people involved. The possibility seems remote, particularly since the two terms were used in opposition to each other within the same question. Moreover, the Court's exchange was with the jury, and there was no reason to believe the jurors attached any special meaning to these common words.

B.

[7] On the last day of deliberations, the jury sent the judge a second note reading: "If the jury disagrees on Murder in the First Degree, does it automatically make it Second Degree?" Warren asked the court to refer the jury to Instruction No. 15. [FN8] Over Warren's objection, the Court instead responded:

FN8. Instruction 15 read:
15. The crime of Murder in the First Degree includes the lesser crimes of Murder in the Second Degree and Voluntary Manslaughter. If (1) any of you are not convinced beyond a reasonable doubt that the defendant is guilty of Murder in the First Degree and (2) all of you are convinced beyond a reasonable doubt that the defendant is guilty of either the lesser crime of Murder in the Second Degree or the lesser crime of Voluntary Manslaughter, you may find the defendant guilty of either....

Please see Instruction 32 and the Verdict form itself. There is no obligation upon the jury to automatically reach any verdict in this case. It is your obligation to deliberate until you reach a verdict on each of the counts. Whatever verdict you reach must be unanimous. [FN9]

FN9. Instruction 32 read:
32. As to Count 1 of the indictment, which charges Murder in the First Degree, you may bring in any one of the following unanimous verdicts:
1. Guilty as charged of Murder in the First Degree; or
2. Not guilty of Murder in the First Degree; or
3. Guilty of the lesser included offense of Murder in the Second Degree; or
4. Not guilty of the lesser included offense of Murder in the Second Degree; or
5. Guilty of the lesser included offense of Voluntary Manslaughter; or
6. Not guilty of the lesser included offense of Voluntary Manslaughter....
(Cite as: 984 F.2d 325)

Murder in the First Degree”) indicated jury confusion as to when the jury could consider *331 the second degree charge, and the court's response left the impression the lesser charge could not be considered until the jury first unanimously agreed Warren was not guilty of first degree murder. This, Warren argues, “undercut the defendant's right to have the jury consider the lesser offense of Murder in the Second Degree upon any one juror's disagreement as to guilt on Murder in the First Degree,” see United States v. Jackson, 726 F.2d 1466, 1469-70 (9th Cir.1984), (defendant may decide whether jury can consider lesser included offenses if jury cannot reach a verdict on the greater offense) and “inadvertently undermined its earlier correct instructions” on this issue, United States v. Hastings, 918 F.2d 369, 371 (2d Cir.1990).

We agree the court should have informed the jury it could consider a lesser included offense if it disagreed on murder in the first degree, or should have referred the jury to Instruction No. 15 instead of or in addition to Instruction No. 32. Either course would have made clear to the jury that it was not required to reach a unanimous verdict of acquittal on the greater charge before reaching the lesser included offense.

C.

[8] "[A]n error in criminal jury instructions requires reversal unless there is no reasonable possibility that the error materially affected the verdict, or in other words, that the error was harmless beyond a reasonable doubt." Rubio-Villareal, 967 F.2d at 297 n. 3. That standard also applies when a court errs in answering the jury's questions regarding instructions. Here the errors in the court's answers were not harmless. The evidence of premeditation was not overwhelming. [FN10] There is a reasonable possibility the jury might not have convicted Warren of first degree murder if no error had occurred. See Rubio-Villareal, 967 F.2d at 296 n. 3.

FN10. There was evidence that Johnson carried a knife when the group left the house to search for Canady, but there is no evidence Warren was aware of it at the time. Although Warren said he was going to "do somebody," there was testimony the phrase meant only that Warren planned to beat someone up. Warren himself testified he did not intend or plan to kill the victims, and did not aim the knife. He testified he did not decide to hurt Canady until the exact moment he stabbed him. On the other hand, Rogers Watson testified that after the victim asked "What's up?" Warren stepped forward, said "I want to show you what's up," and stabbed Canady in the chest. One bystander heard Warren and his friends “talking hostile” before the confrontation with the victim, and another heard someone in the group say "There he is."

The conviction for murder is reversed. The convictions for attempted murder and assault are affirmed.

984 F.2d 325

END OF DOCUMENT
Defendant was convicted in the United States District Court for the Northern District of California, Samuel Conti, J., of three counts of bank robbery. Defendant appealed. The Court of Appeals, 748 F.2d 1344, reversed. On petition for rehearing, the Court of Appeals, 762 F.2d 1314, substituted another opinion and remanded. On remand, defendant was convicted of unarmed robbery and acquitted of armed robbery. Defendant appealed. The Court of Appeals, Wallace, Circuit Judge, held that sentence of 20 years in prison for unarmed robbery after successful appeal and after sentences for armed robbery totalling 30 years and five years of probation for unarmed robbery was not net increase in sentence following retrial and did not raise presumption of vindictive motivation for sentencing. U.S.C.A. Const.Amends. 5, 14.

Defendant's 20-year sentence for unarmed robbery after successful appeal was to be evaluated in aggregate, was to be compared with consecutive sentences of 20 years and 10 years for armed robbery, which were imposed prior to appeal, and was not to be compared with prior, five-year probation sentence for unarmed robbery in order to determine whether sentencing judge had vindictive motivation for sentencing after retrial, even though robberies were unrelated and spread over nine-month period. U.S.C.A. Const.Amends. 5, 14.

Judge does not calculate sentence only on basis of nature of crime involved, but must also consider defendant's character, life, health, habits, conduct, and mental and moral propensities.

West Headnotes

[1] Criminal Law 1144.17
110k1144.17 Most Cited Cases
Presumption of vindictive motivation in sentencing

350Hk66 Most Cited Cases
(Formerly 110k986.2(1))
Sentencing judge does not merely evaluate gravity of each separate crime upon which conviction is obtained and then select punishment appropriate for each crime, if considered independently of other crimes, but judge is to consider all appropriate factors, and thus, no portion of sentence imposed on defendant convicted of multiple crimes is tied inextricably to one package of crimes.

[6] Criminal Law 1174(1)
110k1174(1) Most Cited Cases
District court's refusal to read any portions of instructions other than definition of reasonable doubt requested by jury was not reversible error in prosecution for unarmed robbery, where additional portions concerned presumption of innocence and nature of prosecution's burden.

*1512 Sanford Svetcov, San Francisco, Cal., for plaintiff-appellee.
Gregor D. Guy-Smith, San Francisco, Cal., for defendant-appellant.

Appeal from the United States District Court for the Northern District of California.

Before WALLACE, SKOPIL and CANBY, Circuit Judges.

WALLACE, Circuit Judge:

Bay appeals a 20 year sentence for unarmed robbery imposed after his retrial following his successful appeal of earlier convictions for this and two other crimes. Bay argues that the district court imposed a more severe sentence after the retrial without any justification. Bay also contends that the district court improperly instructed the jury.

We have jurisdiction pursuant to 28 U.S.C. § 1291. We affirm.

I

In 1983, Bay was convicted of two armed bank robberies and one unarmed bank robbery that had occurred between September 1982 and June 1983. The district court sentenced him to 20 years for one armed robbery, 10 years for the other, and imposed a suspended sentence with 5 years probation for the unarmed robbery. Because the court ordered all sentences to run consecutively, Bay received, in total, 30 years imprisonment plus 5 years probation. Bay appealed to this court and we remanded for a hearing on an evidentiary issue. United States v. Bay, 762 F.2d 1314 (9th Cir.1984). After the hearing, the district court granted Bay a new trial. This time a jury acquitted Bay of the two armed bank robberies and convicted him of the unarmed robbery. The district judge sentenced Bay to 20 years in prison.

II

[1] In North Carolina v. Pearce, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969) (Pearce), the Court held that, to assure the absence of a retaliatory motivation, "whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear." Id. at 726, 89 S.Ct. *1513 at 726. Bay contends that the district court has increased his sentence after the retrial and that we must vacate this sentence because the court failed to state legitimate reasons on the record for imposing the harsher sentence. Before the Pearce presumption of vindictive motivation arises, however, the second sentence imposed on a defendant must, in fact, be more severe than the first. Determining the proper method for calculating the severity of a sentence is an issue of law that we review de novo. Cf. United States v. McConney, 728 F.2d 1195, 1201 (9th Cir.) (en banc) (dicta), cert. denied, 464 U.S. 917, 104 S.Ct. 282, 78 L.Ed.2d 260 (1983).

We take our primary guidance on this issue from United States v. Hagler, 709 F.2d 578 (9th Cir.) (Hagler), cert. denied, 464 U.S. 917, 104 S.Ct. 282, 78 L.Ed.2d 260 (1983). Following Hagler's conviction on 13 counts of credit card fraud, the district court sentenced him to one year in prison and a fine of $1,000 on one of the counts, gave him a suspended sentence conditioned on five years' probation as to the other 12 counts, and required him to pay $77,000 in restitution. Id. at 579. On appeal, we reversed his conviction on five of the counts, including the count upon which the prison...
term and fine had been given, and remanded for resentencing. The district court again imposed restitution, a one year prison sentence and $1,000 on one of the counts, and a suspended sentence and five years probation on the other counts. Hagler appealed the sentence. We held that, because "there is no net increase in his punishment," the *Pearce* presumption that he was vindictively sentenced does not arise. *Id.* (emphasis added).

[2] *Hagler* dictates the outcome of this appeal. Bay did not receive a "net increase" in his sentence following the retrial. In fact, Bay's total sentence was reduced. Therefore here too, the *Pearce* presumption does not arise.

Bay argues, however, that in measuring the severity of his prior sentence, we must exclude any punishment given on the armed robbery counts for which he has now been acquitted. See *United States v. Monaco*, 702 F.2d 860, 885 (11th Cir.1983). Bay points out that as to the only count on which he was ultimately convicted, the unarmed bank robbery count, he did receive a more severe sentence after retrial. Therefore, Bay concludes, *Pearce* requires the district court to justify the increase.

[3] *Hagler* has foreclosed this argument in this circuit, however. Although Hagler obtained a reversal on the only count for which he had received a prison term in the first sentencing, we did not exclude this prison term when comparing the severity of the two sentences. Moreover, in *Hagler*, as in the present case, the defendant received a prison term in the second sentencing on a count which had earlier resulted in a suspended sentence and five years probation. Our precedent thus instructs us to evaluate Bay's sentence in the aggregate and not merely with respect to each individual count.

Bay argues that *Hagler* should nevertheless be distinguished from his case. He contends that all of the counts in the *Hagler* indictment stemmed from a common scheme or a single course of continuing conduct. See *United States v. Hagler*, 708 F.2d 354 (9th Cir.1982) (per curiam), *appealed after remand, Hagler*, 709 F.2d 578 (9th Cir.1983). Bay argues that in *Hagler* it made sense to view the sentence as a package because the crimes themselves were a package. In the present case, in contrast, the various counts in the indictment arose from similar but essentially unrelated crimes: three bank robberies spread over a nine month period. Bay concludes that in such a case the package theory cannot apply and, therefore, that the counts and their respective sentences must be considered individually.

[4][5] Bay's argument rests upon an incorrect view of the sentencing judge's role. A judge does not calculate a sentence solely on the basis of the nature of the crime involved. The judge must also consider the character of the defendant: his life, health, habits, conduct, and mental and moral propensities. See *Pearce*, 395 U.S. at 723, 89 S.Ct. at 2079, citing *Williams v. New York*, 337 U.S. 241, 245, 249, 69 S.Ct. 1079, 1082, 93 L.Ed. 1337 (1949). The punishment should fit the offender and not merely the crime. See *id.* "In each case, a criminal sentence must reflect an individualized assessment of a particular defendant's culpability rather than a mechanistic application of a given sentence to a given category of crime." *United States v. Barker*, 771 F.2d 1362, 1365 (9th Cir.1985). Consequently, a sentencing judge does not merely evaluate the gravity of each separate crime upon which a conviction was obtained, and then select a punishment that would be appropriate for each if considered independently of any other crimes. Rather, our system of criminal justice requires the judge to consider all appropriate factors and then to impose a sentence appropriate to both the defendant's criminal conduct and his character. No portion of the sentence imposed on a defendant convicted of multiple crimes, therefore, can be said to be tied inextricably to any one of the package of crimes before the judge. It is incorrect to view the total sentence imposed upon such a defendant as resulting from nothing more than a mathematical addition of each crime upon which he was convicted.

*Hagler*, therefore, does not suggest that we should interpret *Hagler*'s second conviction on eight counts...
as being for the same course of criminal conduct as the first conviction on thirteen counts. Rather, an equivalent sentence was appropriate precisely because a defendant was before the judge each time for whom the sentence in question was appropriate in view of the totality of the circumstances. The court constructed "a balanced package geared to the particular defendant." *Hagler*, 709 F.2d at 579.

Similarly, after Bay's first conviction, the district court constructed a sentencing package consisting of a prison term with respect to two of the counts and probation with respect to the third. The package would not have differed meaningfully had the court imposed the 20 year prison term on the unarmed robbery count, attached the probation term to one of the armed robbery counts, and given a 10 year prison sentence to the other. Following the retrial, the judge again concluded that, based upon Bay's character as well as his conviction, he deserved imprisonment. The 20 year sentence imposed did not exceed the 30 year sentence imposed in the earlier package. Accordingly, we hold that by imposing a sentence less severe than the sentencing package imposed the first time, the district court did not contravene the mandate of *Pearce.* [FN1]

FN1. The dissent attempts to distinguish *Hagler* by pointing out that *Hagler* involved a group of identical offenses, while in the present case the offenses--armed and unarmed robbery--were not interchangeable. We do not think, however, that *Hagler* requires all offenses considered in a sentencing package to be identical. Congress and the Supreme Court have set limits, in the Federal Rules of Criminal Procedure, on the sorts of crimes that can be "packaged" together for sentencing. "Two or more offenses may be charged in the same indictment ... if the offenses charged ... are of the same or similar character...." Fed.R.Crim.P. 8(a) (emphasis added). These limits provide an adequate restriction on the offenses which may properly be grouped in the same sentencing package.

The dissent also suggests that *Pearce* should apply because the situation at the second sentencing had "drastically changed" and was "entirely different" from the one presented at the first sentencing. This view, however, does not recognize that the same defendant, with the same background, habits, and moral propensities was before the judge each time. The only difference--fewer crimes for which Bay would be sentenced--was accounted for in the reduction of the maximum sentence for which Bay was eligible.

III
[6] The other issue Bay raises on appeal concerns the district court's answer to a question from the jury. We review the district court's response to a jury's request for additional instructions for an abuse of discretion. *See United States v. Rohrer*, 708 F.2d 429, 435 (9th Cir.1983).

During the deliberations, one of the jurors sent a note to the judge asking "as to jury instructions, how did you define reasonable doubt." The court responded by repeating a portion of the instruction given earlier:

*1515 The kind of a doubt that would make a reasonable person hesitate to act. Proof beyond a reasonable doubt must therefore be proof of such a convincing character that a reasonable person would not hesitate to rely and act upon it in the most important of his or her affairs. Bay's counsel did not object to this passage, but asked that other portions of the instruction also be repeated for the jury.

The district court refused to repeat the other instructions as requested by Bay's counsel. Bay argues that this is reversible error. Those additional portions, however, would not have directly addressed the juror's question concerning reasonable doubt. Instead, they concerned the presumption of innocence and the nature of the prosecution's burden. The district judge, therefore, acted well within his discretion by limiting his response to the section of the instructions dealing
specifically with reasonable doubt.

AFFIRMED.

SKOPIL, Circuit Judge, specially concurring:

I concur. Judge Wallace is correct that United States v. Hagler, 709 F.2d 578 (9th Cir.), cert. denied, 464 U.S. 917, 104 S.Ct. 282, 78 L.Ed.2d 260 (1983), precludes application of the Pearce presumption in this case. Bay's total sentence was reduced from thirty years to twenty years. Accordingly, there was no net increase in his total sentence and Hagler precludes us from examining each charge individually to determine whether the sentence was increased.

I write separately to express my concern about the trial court's failure to give any reasons for the new sentence. The sentence for the unarmed bank robbery was increased from five years probation to twenty years incarceration. Although the court was not compelled by Pearce to justify imposition of the increased sentence, the better practice would have been to explain based on objective information why the twenty year sentence was justified.

The failure of the district court to state any objective reason for the increased sentence has made it difficult for us to determine whether the sentence imposed was appropriate for this particular defendant. While vindictiveness cannot be presumed in this situation and there was no allegation of actual vindictiveness, I cannot conclude with certainty that this defendant has received a sentence appropriate to his crime and "life, health, habits, conduct, and mental and moral propensities." See North Carolina v. Pearce, 395 U.S. 711, 723, 89 S.Ct. 2072, 2079, 23 L.Ed.2d 656 (1969).

Whenever there is the slightest doubt about the appropriateness of a particular sentence, a court should state in the record its reasons for imposing that sentence. If that simple precaution had been taken in this case, the defendant would have had some understanding of the reasons for his incarceration and we would have had a complete record to review on appeal.

CANBY, Circuit Judge, dissenting in part:

I disagree with that part of the majority opinion which holds that Bay's new sentence of 20 years' imprisonment did not create a presumption of vindictiveness under North Carolina v. Pearce, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969). If Pearce is applied, then Bay's 20 year sentence cannot stand unless the reasons for the more severe sentence, based on Bay's conduct after the first sentence, affirmatively appear in the record. At present, they do not.

It is true that in United States v. Hagler, 709 F.2d 578 (9th Cir.), cert. denied, 464 U.S. 917, 104 S.Ct. 282, 78 L.Ed.2d 260 (1983), we held that no presumption of vindictiveness arose when a defendant was resentenced to the same total of one year's imprisonment, a fine of $10,000 and restitution of $77,000 after 5 of the 13 mail fraud counts of which he had been convicted had been reversed on appeal. But in Hagler, all of the counts were for mail fraud, and *1516 were all part of the same mail fraud scheme. It did not change the character of the conviction when 5 of the 13 counts were reversed upon the government's concession that the particular mailings charged in those counts did not further the underlying scheme to defraud. United States v. Hagler, 708 F.2d 354 (9th Cir.1982). The mail fraud counts were virtually interchangeable; they did not differ in severity with regard either to the facts of commission or the authorized maximum sentences. It was accordingly pure chance that the sentence of imprisonment and fine originally was imposed on one of the surviving counts, on which sentence had originally been suspended. But in Hagler, all of the counts were for mail fraud, and *1516 were all part of the same mail fraud scheme. It did not change the character of the conviction when 5 of the 13 counts were reversed upon the government's concession that the particular mailings charged in those counts did not further the underlying scheme to defraud. United States v. Hagler, 708 F.2d 354 (9th Cir.1982). The mail fraud counts were virtually interchangeable; they did not differ in severity with regard either to the facts of commission or the authorized maximum sentences.

Here the sentencing situation has drastically changed as a result of the appeal, retrial, and acquittal on the armed robbery counts. Bay was originally sentenced for two armed and one unarmed robberies. Now that he is acquitted of the two armed robberies, his resentencing is addressed to an entirely different situation from the one that was presented at original sentencing. It is simply wrong to treat his new sentence as the same kind of "package" as his original sentence, and to shield it from the *Pearce* presumption simply because there is no net increase in the total sentence originally imposed. That original sentence included two armed robberies of which Bay is now established not to have been guilty.

The offenses of which Bay was acquitted are not interchangeable with the one of which he was convicted again on retrial. In the original sentencing, a term of 20 years was imposed for one armed robbery, 10 years for a second armed robbery, and 5 years' probation for the unarmed robbery. If the most severe term, 20 years, was appropriate for armed robbery initially, it stands to reason that something less than 20 years was appropriate for unarmed robbery.

I agree with the majority that the district court should not be restricted on resentencing to the original sentence of probation for unarmed robbery, subject to increase only if the requirements of *Pearce* are met. The original sentence of probation may well have been imposed on the unarmed robbery count only because a long period of incarceration was already in store for the defendant on the other counts. Some higher sentence than probation ought to be permitted, under the rule of *Hagler*, before the *Pearce* presumption is triggered. *Pearce* permits an increase in sentence only for a reason based upon new facts not before the court at the time of the original sentencing. *Pearce*, 395 U.S. at 726, 89 S.Ct. at 2081; *Texas v. McCullough*, 475 U.S. 134, 106 S.Ct. 976, 980-82, 89 L.Ed.2d 104 (1986). Yet some upward adjustment in the probationary sentence should be allowable, not because of defendant's conduct after the original sentencing, but because of the circumstances of the crime itself and the criminal who committed it. The difficulty is to arrive at a formula for an appropriate increase that does not create an appearance of vindictiveness.

Any such formula is likely to be artificial, but I would nevertheless adopt one to cover this case where the surviving count is not interchangeable with the reversed count and resentencing does not constitute essentially the same "package," as it did in *Hagler*. Here, the first sentence dealt with three convictions upon which a total sentence of 70 years could have been imposed--25 years for each armed robbery and 20 years for the unarmed robbery. 18 U.S.C. § 2113(a), (d). A total of 30 years' imprisonment was imposed. The sentence deemed appropriate by the district court was three-sevenths of the maximum for the entire package. On resentencing, the authorized maximum was 20 years. I would apply the *Pearce* requirements to any sentence exceeding three-sevenths of 20 years, or approximately 8.57 years.

I would therefore vacate the 20 year sentence for armed robbery and would remand for resentencing, with instructions that any sentence in excess of 8.57 years be justified on the record by new evidence relating to the conduct of the defendant that was not before the court at the first sentencing, as *Pearce* requires. In the absence of any such justification, the present 20 year sentence for unarmed robbery gives the appearance of vindictiveness--vindictiveness in the form of punishment, to the extent possible, for taking a successful appeal, or punishment in part for crimes of which defendant now stands acquitted.
STATE of Iowa, Appellee, 
v. 
Oliver GREEN, Jr., Appellant.
No. 50821.

April 9, 1963.

The defendant was convicted in the Wapello District Court, Charles N. Pettit, J., of arson, and he appealed. The Supreme Court, Peterson, J., held that defendant was denied fair trial where jurors had been required to deliberate for a total of almost 27 hours without sleep.

Reversed and remanded for new trial.


West Headnotes

[1] Criminal Law 388.5(9)
110k388.5(9) Most Cited Cases
(Formerly 110k388)
Defendant who allegedly had agreed to take lie detector test had privilege of thereafter refusing to do so.

110k722.3 Most Cited Cases
(Formerly 110k722(2))
County attorney's reference to refusal of defendant to take lie detector test was misconduct.

110k730(12) Most Cited Cases
Instruction that jury should pay no attention to what had been said about refusal of defendant to take lie detector test did not cure county attorney's misconduct in referring to that refusal.

[4] Criminal Law 393(1)
110k393(1) Most Cited Cases
Refusal of defendant to take lie detector test is not evidence of conscious guilt similar to evidence of flight.

110k722.3 Most Cited Cases
(Formerly 110k722(2))
That county attorney acted in good faith did not excuse his misconduct in referring to refusal of defendant to take lie detector test.

[6] Criminal Law 857(1)
110k857(1) Most Cited Cases
Ordinarily, all deliberations in jury room inhere in the verdict but there are exceptions to that rule in cases where it affirmatively appears that jury has been discussing and has based its decision on evidence excluded by court or complaint of a party pertains to matters completely foreign to issues.

[7] Criminal Law 857(1)
110k857(1) Most Cited Cases
Custom in any district does not control matter of what procedure would be best as to deliberations of jury.

[8] Criminal Law 865(2)
110k865(2) Most Cited Cases
Criterion of whether jury suffers exhaustion and lacks ability to properly deliberate a case is not number of hours which jury uses in deliberation but conditions under which deliberation takes place.

[9] Criminal Law 865(2)
110k865(2) Most Cited Cases
Defendant was denied fair trial where jurors had been required to deliberate for a total of almost 27 hours without sleep. 58 I.C.A. Rules of Civil Procedure, rule 202.

[10] Arson 40
36k40 Most Cited Cases
Circumstantial evidence raised jury question whether defendant, observed entering store with two G.I. type gasoline cans about two hours before store broke into flames, was guilty of arson.

[11] Criminal Law \(\text{Cite as: 254 Iowa 1379, 121 N.W.2d 89)\}
110k778(11) Most Cited Cases
Flight instruction was in proper form according to evidence produced by state.

[12] Criminal Law \(\text{Cite as: 476.2)\}
110k476.2 Most Cited Cases
(Formerly 110k476)
Testimony of experts, in answer to hypothetical questions setting forth circumstances of fire defendant allegedly started, that fire was of incendiary origin was admissible.

*1381 **90 James Lawyer, Des Moines, for appellant.

Evan A. Hultman, Atty. Gen. of Iowa, John Allen, Asst. Atty. Gen. of Iowa, Sam Erhardt, County Atty. of Wapello County, John Moreland, Asst. County Atty. of Wapello County, for appellee.

PETE RSON, Justice.

County Attorney's information was filed on March 24, 1961, against Oliver Green, Jr., charging him with arson. The fire occurred on the evening of October 1, 1960. The evidence was all circumstantial.

In substance as to the highlights, the facts offered in evidence*1382 were as follows: One witness testified that at approximately 6 o'clock P.M. on October 1, 1960, the appellant was observed entering the Marshall Auto Store in Ottumwa with two G.I. type gasoline cans. Defendant, a truck driver, admitted he was in Ottumwa, but denied he entered the Marshall store.

A few minutes before 8 o'clock on the evening of October 1st a pedestrian walking past the Marshall Auto Store detected a strong odor of gasoline.

At approximately 8 o'clock P.M. a loud explosion occurred at the Marshall Auto Store scattering debris over the adjacent streets. The building burst into red flames. Heavy black smoke came from the store. In spite of the almost immediate arrival of the firemen, and the application of great quantities of water, the building was consumed within one hour.

Three experts on the subject of fires testified in answer to hypothetical questions setting forth the circumstances of the Marshall Auto fire. They stated in their opinion the fire was of incendiary origin. The natural gas connection to the Marshall Auto building was closed at the time of the fire and tanks containing fuel oil in the basement of the building were intact after the fire.

A Deputy State Fire Marshall started looking for defendant on October 7, 1960, but did not find him until January 17, 1961. The Marshall found he had left his home in Kansas City a short time after the occurrence of the fire.

The State Fire Marshall, William Johnson, accompanied by M. D. Huffman, agent for the National Board of Fire Underwriters, found defendant living at El Monte, California. They interrogated him for four hours. He stated verbally he was willing to take a lie detector test. They made an appointment with him to see him at his home at 9 o'clock the following morning. When they arrived the next morning they found he had moved out with his wife and five children during the night, without leaving any forwarding address. They reported his disappearance to the F.B.I. and he was later found at Kansas City, Missouri.

In response to the County Attorney's information he was *1383 brought to Iowa, filed bail bond for appearance and was tried at Ottumwa in Wapello County in December, 1961.

Appellant urges six assignments of error. 1. The circumstances shown by the evidence offered were not sufficient to establish guilt and the case should not have been submitted to the jury. 2. The hypothetical questions submitted to three witnesses, did **91 not give sufficient details as to the facts, to
justify submitting them for an opinion as to the incendiary nature of the fire. 3. Instruction No. 13 with reference to flight was wrongfully submitted to the jury. 4. The trial court should have considered affirmatively the offer of newly discovered evidence submitted by defendant. 5. The County Attorney was guilty of misconduct in his opening statement to the jury in which he emphasized what he was going to prove with reference to defendant taking a lie detector test. 6. Keeping the jury in the jury room through the night and for almost 27 hours without sleep or rest caused such a condition of mental and physical fatigue as to several jurors that defendant did not get the fair trial to which he was entitled.

We will consider later very briefly the four first assignments of error. They are without merit.

Defendant filed motion for arrest of judgment, and this we are rejecting.

On the basis of assignments 5 and 6 we are sustaining the motion for new trial and remanding the case.

[1][2] I. In his opening statement to the jury as to the proof he was going to offer, the County Attorney stated that defendant had agreed to take a lie detector test in his conversation with the witnesses Huffman and Johnson in California on January 17, 1961. He never took the test, which was his privilege. When the County Attorney made this statement to the jury at the beginning of the trial he knew the test had not been taken. He was an able and experienced lawyer and knew that the decisions of this court, as well as the decisions of the courts in almost all other states of the nation, held that reference could not be made to the taking or not taking of a lie detector test, and that such reference was misconduct. There was an attempt later in the trial of the case to inject the matter into the evidence but the trial court very carefully and meticulously sustained objections to the evidence being given to the jury.

The agreement to take a lie detector test in State v. McNamara, 252 Iowa 19, 104 N.W.2d 568, was in writing, and the court held on such basis, evidence about it was admissible. However, the court said in the McNamara case: ‘The weight of authority in the courts of last resort is against receiving evidence of such tests in criminal cases either for or against the defendant.’

This is a very sensitive and touchy subject. It may appear somewhat insignificant upon casual consideration, but careful thought establishes the fact that the matter of taking a lie detector test is so important to a party in a criminal case that it has the possibility of making or breaking his case.

[3] It is true the trial court in the case at bar cautioned the jury that they were to pay no attention to what had been said, nor to the evidence which had been elicited as to the lie detector test. However, the difficulty with this situation is that even in the face of such caution by the court the poison still remains. It is akin to the placing of a nail in a board. The nail can be pulled out, but the hole made by the nail cannot be removed.

[4] This question received careful attention in the Minnesota case of State v. Kolander, 236 Minn. 209, 52 N.W.2d 458. We adopt the reasoning in this opinion. The court said: ‘A great deal has been written on the development and reliability of the so-called lie detectors, but up to the present time the almost unanimous holding of all courts which have passed upon the question is that the results of such tests are inadmissible. * * * The state concedes that the results of a lie-detector test would not be admissible, but contends that it may nevertheless be shown that defendant refused to take such test, since such refusal is evidence of a consciousness of guilt similar to evidence of flight. With this we cannot agree. * * * The impact upon the minds of the jurors of a refusal to submit to something which they might well assume would effectively determine guilt or innocence, under these conditions, might well be more devastating than a disclosure of the results of such test, if given after a proper foundation had been laid showing how the apparatus functioned. Where a conviction rests so completely on circumstantial evidence, the erroneous admission of such action on the part of

defendant might well be enough to tip the scales against him. We believe that it was prejudicial error to permit such refusal of defendant to submit to the test to be shown.'

In the case at bar the existence of the poison in the jury room appears in the affidavit of Juror Garnett Shank when she states in her affidavit in support of defendant's motion for new trial as follows: 'Nina McNamer repeatedly asked the question: If Oliver Green is so innocent, why didn't he take that lie-detector test?' Miss McNamar denied this in a counter affidavit, but the fact remains that three other jurors referred to the substance of this statement. One juror could have been mistaken, but this would hardly apply to four jurors.

[5] The trial court attempted to excuse the statement and action of the county attorney by saying he acted in good faith. This is not the measuring stick to be used. The criterion is whether or not defendant was improperly and unduly prejudiced.

We said recently in State v. Tolson, 248 Iowa 733, 82 N.W.2d 105: 'A prosecuting attorney should use his best efforts to represent the state, vigorously and forcefully, in presenting its case within the bounds of proper legal procedure. He owes a second duty, of no less importance, to see that the accused has a fair trial. He is an officer of the court, and must observe the requirements of due process of law. We have commented upon this duty many times, and have been compelled to reverse many cases because it was disregarded.' Three citations.

As a general statement see 89 C.J.S. Trial § 462, Page 96: 'The verdict will be vitiated, however, if the jury discuss and consider as a basis for their findings of fact something which is not legally admitted evidence, or if they let their verdict be influenced by the discussion and consideration of improper matters not in issue and which cannot legally have and effect on the rights of the parties.'

Because of these remarks by the County Attorney at the time of the commencement to the trial, and his attempt to inject *1386 the matter into the trial, defendant was prejudiced and did not receive a fair trial. Defendant's counsel moved for a mistrial immediately after these statements were made by the County Attorney, which motion was overruled by the trial court.

[6] II. We start with the premise that ordinarily all deliberations in the jury room inhere in the verdict. If this were not true it would be difficult to ever finally conclude a case. However, there are rare exceptions to this rule: 1. If it definitely and affirmatively appears the jury has been discussing and have based their decision on evidence excluded by the court. 2. If the complaint of the party pertains to matters completely foreign to the issues, like the inability of the jury, or a substantial number of the jurors, to properly deliberate because of physical and sometimes mental conditions interfering in deliberation.

In the case at bar the jury proceeded to the jury room at 11:20 A.M. on December 14, 1961. They deliberated all of the remainder of that day and all through the night, without sleep, and until 9:40 A.M. on December 15th when they were called back to the jury room by the trial court. He first inquired as to how they stood on the case. He was very careful to explain to the jury that they must not give him the manner of voting, but simply the number, to see how they stood. The foreman told him that during all of the preceding 22 hours they had voted on a basis of 9 **93 to 3. It had stood at that number through several ballots, and was the same on a ballot recently taken.

The jury did not ask and the court did not give the jury any further or amended instructions. The court in substance told them that the case would have to be decided by either this jury or some jury sometime. That the court felt that they should be able to discuss the issues of the case further and arrive at a verdict. They returned to the jury room and remained in session for an additional 4 hours and 45 minutes. In other words, the jury had deliberated for a total of almost 27 hours.

The trial court did not arrange for the jury to get a nights lodging on the evening of December 14th.
R.C.P., No. 202, 58 I.C.A., provides: 'The court may order the sheriff to provide suitable food and lodging at *1387 the expense of the county for a jury being kept together to try or deliberate on a cause.'

[7] In its order overruling the motion for new trial the court gave two reasons for not providing for lodging for the jury. The first was that it had 'never been the practice in said judicial district to separate the jury after final submission, and lodging has not been furnished jurors after commencement of their deliberations.' The custom in any district does not control the matter of what procedure would be the best as to the deliberations of a jury. The trial court must have been aware of the fact that there were 4 elderly ladies upon this jury; aged 56, 58 and 60, and an all night vigil for such persons would not be inducive to continuous sensible discussion of the issues. The second reason given by the trial court was the length of time consumed by a jury in deliberation inhered in the verdict. The court cited State v. Siegel, 221 Iowa 429, 264 N.W. 613; and State v. Banks, 227 Iowa 1208, 290 N.W. 534, in support of its position on this point.

In State v. Siegel the jury deliberated for a total period of 90 hours. During said period they lived a normal life of lodging at night and eating at regular times. In State v. Banks, the jury apparently were hurried to their conclusion by seeing a newspaper article which stated the jury would be held over Menorial Day. Two of the jurors said this caused them to decide the case before Menorial Day.

[8] In both cases there was a suggestion that the length of time during which a jury deliberated inhered in the verdict. However, conditions in the two cases differ from the conditions as we find them in the case at bar. There was no evidence of complete exhaustion and failure to be able to properly deliberate in said cases, as we find in the case at bar. The criterion is not the number of hours which a jury uses in deliberation, but the conditions under which such deliberation takes place.

[9] After the jury returned from hearing the wholesome statements made by the trial court, and continued its deliberation, various jurors gradually one by one changed their ballot from acquittal to conviction. Even this took over 4 hours.

Defendant filed the affidavits of five members of the jury in *1388 support of his motion for new trial. The State filed the affidavits of seven members of the jury in support of its resistance to the motion. In some respects various affidavits were in contradiction of each other, but as to most matters there was little conflict. There was a suggestion in substance that the affidavits balanced each other off about evently. This was not correct as to the vital point: lack of sleep and rest on the part of the jury, and complete exhaustion, with inability to properly consider the merits of the case.

Juror Garnett Shank, 56 years of age, stated as to conditions after returning from the interview with the court: 'At this point I got scared, panicked, and even trembled. At this point I was so tired that I couldn't comprehend the instructions when I would read them, due to my worn out condition after so many hours of deliberation. I had gotten up at approximately 6:00 A.M. on December 14 and hadn't had any sleep for approximately 32 hours when the verdict was finally reached, * * * I found it almost impossible to stay awake during the last few hours of our deliberation, and found when I would read the instructions during those last few hours of our deliberation that I just could not grasp the instructions. The jury was so tired by noon on December 15, 1961 that after approximately 25 hours of deliberation no one of us wanted to go out to eat lunch. We were so tired that we had sandwiches, coffee, milkshakes, etc., sent up to the jury room. * * * my mind seemed to be a blank, and I just didn't feel capable of making any decision on anything in my exhausted condition. I just fell apart and was actually trembling during the last hour or so of the jury deliberation. I was one of the last two to vote for conviction. * * * I felt like I had been 'brainwashed' and beaten down in my weakened condition, and finally got so tired I didn't feel like I could trust my own judgment. * * * I was exhausted both physically and mentally so that pressure from other members of the jury unduly
influenced me. * * * I have worried and brooded about the result of this trial ever since because I do not feel that justice was done. I don't think that Oliver Green, Jr., had a fair trial. I don't think the jury was fit to judge anybody in their frame of mind and worn out condition after we re-entered the jury room after 24 hours of deliberation.'

Juror Olive Johnson, 58 years old, stated in her affidavit: 'After 24 hours of deliberation, I was mentally exhausted. I don't think it is right and I don't think it is right to a defendant to require a jury to deliberate without rest as long as we were required to deliberate in this case. A person's mind just isn't alert after so many hours of deliberation without rest and sleep. * * * I had never taken any No Doze pills before the trial, but during the course of the trial, I took a whole box of No Doze pills or tablets in order to try and keep from going to sleep. I understood that I was only to take one No Doze tablet at a time, but it got so that one tablet wouldn't do me any good, so I would take two, and one time I even took three at a time in order to keep from going to sleep. * * * In addition to the No Doze tablets I also took two 25¢ boxes of Anacin tablets for relief of pain.'

Faith Morrow, 58 years old, stated: 'We were required to deliberate during the entire 27 hours without being given an opportunity to go to bed or get any sleep. * * * I voted for the acquittal of the defendant in every ballot that was taken except the very last ballot, and I did not think he was guilty when I voted for conviction on the last ballot, but gave in and voted for conviction because I was completely worn out. * * * I know that I would never have given in and voted for conviction of the defendant if I had had an opportunity to have a reasonable amount of rest and sleep.'

Juror Orlena Brownell, 58 years old, stated: 'I had voted not guilty for the entire first 24 hours of our deliberations. After this period of time, I was befuddled, and wondered if I was reading the instructions right when I would try to read the instructions of the Judge. After 24 hours of deliberation, I was mentally exhausted.'

*1390 Juror Clella Hardesty, 60 years of age, said: 'I had gotten up at approximately 6:00 A.M. on December 14, 1961, the day the jury began their deliberation, and hadn't had any sleep for approximately 32 hours when the jury verdict was finally reached. I voted not guilty for the entire first 24 hours of our deliberation. I was very tired after 24 hours of deliberation. * * * It doesn't seem right to me to expect a jury to deliberate without sleep or rest as long as we were required to deliberate on something as important as the guilt or innocence of a person charged with arson. * * * I never have felt and still don't feel that Oliver Green, Jr., set the fire at the Marshall Auto Store.'

If this had been the testimony of one juror it could be possible that he or she was mistaken as to the implication involved in loss of sleep. However, five jurors (almost one-half of the jury panel) stated in their affidavits that they were exhausted and that it was impossible for them to properly deliberate, and some of them at least toward the end of the jury deliberation changed their ballot from acquittal to conviction by reason of complete exhaustion.

It is our conviction that because of the circumstances and conditions above outlined, the rights of defendant were seriously prejudiced and he failed to secure the fair trial to which every defendant is entitled under our system of jurisprudence. We, therefore, reverse the case and send it back for a new trial.

[10][11][12] III. The new trial is granted only on the two assignments of error outlined above. Having made the decision we will devote only brief space to the other four assignments of error made by defendant. 1. As to the first assignment which contends that the circumstantial evidence was not sufficient to submit the case to the jury, we are not in accord and hold the evidence was sufficient. 2.
Instruction 13, which is the flight instruction, is in proper form according to the evidence as produced by the State. No error was committed by the trial court in the giving of this instruction. 3. The trial court was correct in admitting the evidence of the duly proven competent witnesses as to the hypothetical question submitted to such witnesses bearing upon the question of the fire being of incendiary origin. 4. Defendant's contention as to newly discovered evidence does not need our attention. Any evidence, material, or pertinent, can be offered at the new trial.

The case is reversed and remanded for a new trial.

Reversed and remanded.

All Justices concur as to Division II and as to the reversal.

SNELL, MOORE, and THOMPSON, JJ., and GARFIELD, C. J., dissent as to Division I.

SNELL, Justice (dissenting in part).

I agree that this case should be reversed and remanded for the reasons discussed in Division II of the opinion.

I dissent from the conclusions reached in Division I.

I do not agree that reference to an agreement to take a lie detector test followed by sudden departure before the appointed time was reversible error. We are not determining the admissibility of results of a test or of a refusal to take a test. Here there was an agreement by defendant to take a test at a specified time at his home. The time was 9 o'clock the next morning. When the time arrived it was discovered that defendant with his wife and five children had departed for parts unknown. I see no error in reference to an agreement breached by flight.

GARFIELD, C. J., and THOMPSON and MOORE, JJ., join in this dissent.
H. Albert Lehrman and Frank Seiders, Jr., Harrisburg, for Clark.

Norman M. Yoffee, Harrisburg, for Flood.

*144 **847 H. Albert Lehrman and Frank Seiders, Jr., Harrisburg, for Clark.

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Trial court in murder case abused discretion in ordering jury, which had deliberated from 5 p.m. to 4 a.m. and, being confused, returned for instruction on a point which was not fully clarified, to continue deliberations.

*144 **847 H. Albert Lehrman and Frank Seiders, Jr., Harrisburg, for Clark.

Norman M. Yoffee, Harrisburg, for Flood.


*144 Before CHARLES ALVIN JONES, C. J., and BELL, MUSMANNO, BENJAMIN R. JONES,

170 A.2d 847
404 Pa. 143, 170 A.2d 847
(Cite as: 404 Pa. 143, 170 A.2d 847)

Supreme Court of Pennsylvania.
COMMONWEALTH of Pennsylvania

v.
Alexander Hyram CLARK.
COMMONWEALTH of Pennsylvania

v.
Marion Elizabeth FLOOD.


Murder prosecution. The Court of Oyer and Terminer, Dauphin County, at No. 4 June Sessions, 1959, Herman R. Dixon, J., rendered judgments and sentences, and the defendants appealed. The Supreme Court, at Nos. 26 and 27, May Term, 1961, Cohen, J., held that trial court abused discretion in ordering jury, which had deliberated from 5 p.m. to 4 a.m. and, being confused, returned for instruction on a point which was not fully clarified, to continue deliberations.

Reversed and remanded.

West Headnotes

Criminal Law © 865(2)
110k865(2) Most Cited Cases
Trial court in murder case abused discretion in ordering jury, which had deliberated from 5 p.m. to 4 a.m. and, being confused, returned for instruction on a point which was not fully clarified, to continue deliberations.

*144 **847 H. Albert Lehrman and Frank Seiders, Jr., Harrisburg, for Clark.

Alexander Hyram Clark and Marion Elizabeth Flood were found guilty of murder in the first degree and sentenced to life imprisonment. On appeal to this court appellants raise several grounds for a new trial which were rejected by the court below en banc.

The record of the proceedings below reflects a number of unusual incidents which, it is alleged, may have affected the propriety of the disposition of this prosecution. The jury in this case retired to deliberate at 5:37 p.m. after five days of testimony. At 2:00 a.m. the next morning a verdict of first degree murder with a recommendation of life imprisonment was returned and recorded against both appellants. Thereafter appellants' motion for a poll of the jury was allowed and it was discovered that Juror No. 9 was not in accord with his fellow jurors as to the guilt of either defendant. That juror stated that he found the defendants guilty only of robbery. Thereupon, over counsel's objection, the jury was sent back to the jury room for further deliberation. At 4:12 a.m. the jury returned and announced that they were 'hopelessly deadlocked.' A discussion ensued between the court and the jury during which Juror No. 12 posed a problem that had been confusing the jury. The jury, he said, had no trouble in finding a robbery, but could not reconcile this finding with a verdict of second degree murder. ('We all agree there has been a robbery, but the murder business just doesn't come into it.') The court, in reply to this question, stated that a verdict of guilty in any degree 'would stand on its own two feet.' However, it is clear from a reading of the record that several members of the jury had developed an erroneous fixation on the absolute necessity of inclusion of robbery as a basic and integral component of the ultimate verdict. This is evidence by: (1) Juror No. 9's disagreement

with the initially recorded verdict; (**848 2) Juror No. 12's inquiries at 4:12 a. m. The jury returned to the jury room at 4:17 a. m. and the final verdict was rendered at 5:25 a. m.

Under these circumstances the court, in all fairness to the defendants who were on trial for a capital offense, should have adjourned the jury's deliberations at 4:17 a. m. in order to have minimized the possibility of a verdict which was the product of impatience, fatigue and confusion.

We recognize that in Commonwealth v. Moore, 1959, 398 Pa. 198, 157 A.2d 65, this court held, in a situation somewhat similar to the case at bar, that it was within a trial judge's discretion to direct a jury to deliberate through the night. In the Moore case, supra, however, we gave the widest latitude permissible to the court's discretion consistent with a defendant's right to a fair trial. We did not recommend the particular procedure used in that case and we certainly do not feel that an extension of our holding in Moore is warranted. To uphold the procedure followed in this case would be to greatly expand the permissive scope of a judge's discretion in such situations.

The Moore court in the small hours of the morning called the jury from its deliberations and offered them aid in the form of clarification of the issues involved in the case. The forelady of the Moore jury declined the court's offer of aid and stated that the jury was deadlocked. There was no indication whatsoever that confusion was responsible for the deadlock. On the other hand, in this case, the jury itself asked to be brought into the courtroom for further instructions. There is little doubt that the atmosphere prevalent in the courtroom was one of utter confusion at 4:17 a. m. when the jury was returned to the jury room to find a *147 unanimous verdict. It is also clear that the court did not seriously endeavor to dispel this disorder and confusion other than by terse and unilluminating advice. The trial court obviously abused its discretion when at 4:17 a. m. it ordered a confused and overworked jury to continue its deliberations.

Reversed and remanded for a new trial.
Law and Society Review
1992
The Active Juror
*513 BLINDFOLDING THE JURY TO VERDICT CONSEQUENCES: DAMAGES, EXPERTS, AND THE CIVIL JURY
Shari Seidman Diamond, Jonathan D. Casper [FNa1]

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This research examines the behavior of jurors as active information processors. Our experimental examination of the performance of the civil jury in response to a complex price-fixing case varies the information provided to jurors about the consequences of their damage award decisions (i.e., the treble damage rule) and the type of expert testimony (statistical models vs. concrete yardstick models). We find, consistent with a picture of the jury as active rather than passive, that jurors are more likely to follow judicial instructions when they are given explanations rather than bald admonitions. In addition, complex expert testimony neither overpowers the jurors nor is dismissed by them. The expert presenting a statistical model is viewed as having higher expertise but lower clarity; as a result the statistical expert and the expert presenting a more concrete model are not significantly different in their persuasiveness. Finally, in contrast to most research on the criminal jury, we find that deliberations do affect jury awards.

The American justice system confers extraordinary power on the jury. It allows the jury to determine guilt or innocence in criminal cases and to decide whether an offender should be sentenced to death. It also permits the jury to determine liability and set damages in civil cases. Yet if the system offers the jury great responsibilities, it is also ambivalent about the ability *514 of laypersons adequately to perform their assigned tasks. Thus, critics and even admirers of the jury often express doubt that the jury can find its way through the labyrinth of complex and inconsistent facts or that the jury is able or willing to follow the legal rules it is asked to apply.

Early research portrayed the jury as a decisionmaker generally responsive to the evidence presented at trial (Kalven & Zeisel 1966). More recently, critics of the jury have raised a variety of questions about jury competence, voicing doubts about the ability of jurors to analyze complex data logically and to return verdicts based on evidence rather than irrelevant considerations (see, e.g., Burger 1979). Critics have advocated a variety of methods of reining in and controlling the jury, from a complexity exception to the constitutional right to a jury trial (In re Japanese Electronic Products Antitrust Litigation 1980:1086) to less drastic measures like specially qualified juries (Nordenberg & Luneberg 1982) and rules that limit the information juries receive and are permitted to use in making their decisions (see Diamond et al. 1989).

I. Images of the Jury

In this research, we explore how juries react to two types of legal strategies designed to control decisionmaking: blindfolding the jury by denying it certain types of information, and channeling its decisions by providing information accompanied by directions as to how the information should be used. We focus on controlling jury decisionmaking in situations in which jurors' expectations about the consequences of their decisions may influence the way they evaluate
evidence and apply legal standards.

We also examine the jurors’ responses to a common and growing type of complex evidence: the testimony of experts. Some observers of the jury have suggested that jurors are incapable of evaluating the credibility of expert witnesses and of understanding the complex information contained in their testimony. Here we focus on how jurors assess and weigh statistical evidence.

Finally, we examine the process by which the predeliberation preferences of the individual jurors are transformed into the jury's final award. We analyze jury deliberations to explore the effects of the structure of initial preferences on jury awards, the selection and influence of the foreperson, and an inflation effect by which jury deliberation appears to increase the jury's award.

While there is a large body of research on the jury, much of it fails to go beyond studying the production of a verdict to examine the jury as an active information processor attempting *515 to make sense out of its task (for an example that does focus on information processing, see Hastie et al. 1983). By treating the jury as an active collaborator helping to develop a meaningful basis for decision rather than as a passive recipient simply accepting information and instruction, we can develop a clearer understanding of how this powerful institution performs.

A. The Jury as a Passive Participant

Much legal doctrine proceeds on the assumption that the jury is a passive participant in the trial until it is asked to deliberate and render its verdict. The jury is selected and placed in the jury box where it is presented with testimony elicited by questions from lawyers and occasionally from judges. Jury members typically are not permitted to clarify points by asking questions. [FN1] They are instructed to listen carefully to testimony but not to form impressions or make judgments about their ultimate verdict until all the testimony is completed and judicial instructions have been issued. Jurors are told not to discuss the evidence or possible verdicts until the end of the trial and after they have received final instructions on the law. While common sense suggests that few jurors will actually achieve the nearly complete passivity envisioned by these norms, the legal system proceeds as though these expectations are attainable goals. After hours, often days, and occasionally months of reviewing testimony and instructions, the jury is finally mobilized to deliberate. Metaphors like "sponge" or "tape recorder" seem accurately to capture the passive role that formal legal doctrine assumes the jury will fill until deliberations begin.

An image of the jury as tape recorder or sponge is also exemplified by rules dealing with such matters as pretrial publicity or instructions to disregard testimony. In both instances, the jurors are instructed to set aside information that is already available to them and to reach their verdicts based simply on the evidence that has been appropriately presented at the trial. While legal norms recognize that sometimes jurors simply cannot be expected to proceed in this fashion—a conclusion that may lead to a change of venue or a declaration of a mistrial—these rules emphasize the perception of the jury as a blank slate on which the trial testimony can be written—and sometimes even erased (Tanford 1991).

*516 B. The Jury as Active Information Processor

There is substantial evidence that like other human decisionmakers (Wong & Weiner 1981), jurors do not conform to these assumptions of passivity (e.g., Pennington & Hastie 1986). Rather, jurors bring expectations and preconceptions with them to the jury box, actively search for causal explanations to make sense of events about which they are told, and consciously or unconsciously process information, filling in blanks or interpreting ambiguities in testimony in ways that may strongly influence their decisions.

Perhaps the clearest example involves the role of juror expectations. The idealized legal model presumes that jurors simply listen to the testimony and proceed as though it contains most or all of what they know about the case. For example, parties generally cannot tell jurors whether the defendant in an automobile accident case carries liability insurance (see, e.g., Fed. R. of Evid. 411), for such information is held to be irrelevant to a determination of negligence. [FN2] Yet jurors are likely to bring to their deliberations the expectation that most defendants are insured, for most states require such insurance. To the extent that jurors are influenced by belief that the damage award will be paid not by the defendant alone but by the deep pocket of the insurance company, these expectations may have a substantial impact on jury decisions (Broeder 1959; Kalven 1957).

To make sense of the testimony they hear, jurors also search diligently for explanations for the conduct described to them at trial. As the Pennington-Hastie "story model" research suggests (Hastie et al. 1983; Pennington & Hastie 1986), jurors do not simply listen to testimony and apply verdict categories to the facts that have been related. The jurors they studied listened to the testimony, brought to bear their knowledge about the world and general rules of inference, and produced logically coherent "stories" of what happened in the set of events that led to the court proceeding--stories that included such elements as who did what, motivation, or intention. Jurors, according to Pennington and Hastie, then tested these stories against the set of verdict categories the judge provided. These mental representations were said to be the best predictors of verdict. Thus, under this view jurors are quite energetic information processors who actively (although of course often unconsciously) organize the testimony and make crucial inferences about motivation and causation.

Knowledge structures or information-processing heuristics may also influence the ways jurors interpret ambiguous testimony *517 and fill in "blanks"--information about which there is no testimony at all. In the work by Casper et al. (1988, 1989) on the role of the hindsight bias (Fischhoff 1975), jurors hearing evidence in a civil damage suit against officers alleged to have engaged in an illegal search were influenced by knowledge about the outcome of the search (whether evidence of crime was found in the search of the suspect-become-plaintiff's apartment). The influence of this outcome information operated primarily through its effect on jurors' recall of the testimony at the trial. Jurors hearing a suit by a defendant whose search produced evidence of a crime were more likely to interpret ambiguous testimony and to recall "facts" about which there had been no testimony (e.g., How experienced were the police officers making the search? How reliable was the informant who gave them a tip?) in ways favorable to the police than those who heard a case in which no evidence of illegal conduct was found. Processes like the hindsight bias or knowledge structures like scripts (Abelson 1981) may produce important interpretive activity on the part of the jurors.

Thus, jurors and juries play an important and active role in evidence interpretation. Such activities take place during the trial itself, affecting what is perceived and the way evidence is understood, not simply during deliberations.

Based on the evidence that jurors are active information processors, we can make a number of predictions about their response to the various approaches to channeling their decisionmaking. Some of the techniques we have examined are in common practice today: blindfolding, instructions to ignore information, and limiting instructions. Others are less often used--for example, directly discussing information that jurors may be troubled by and explaining why it ought to be used in a certain fashion or attempting to deal with jury concerns and inclinations by specifying that they will be addressed by the actions of the judge.

C. Efforts to Control the Jury

Blindfolding the Jury

One of the most commonly employed techniques for controlling juror decisionmaking is blindfolding, that is,
withholding certain information. Juries typically cannot be told of the criminal record of a defendant who does not testify (Fed. R. Evid. 609); whether and how much liability insurance a defendant in a civil case has (Fed. R. Evid. 411); arrangements for payment of attorneys' fees; whether any original parties have settled, and for how much (Burns 1965); settlement offers that were rejected (Fed. R. Evid. 407); and that a jury award in a *518 private antitrust suit will by law automatically be tripled by the court (e.g., Pollack & Riley, Inc. v. Pearl Brewing Co. 1974). [FN3] Such rules about blindfolding typically are justified on several grounds, including the possible bias that might be introduced by the undisclosed information; the possibility that some facts are so complicated that they might confuse rather than inform the jury; and the common exclusion of "irrelevant" evidence that by definition lacks probative value and will thus at best waste the jury's time and at worst improperly bias its decision.

Blindfolding is unlikely to achieve its purposes when juries hold strong expectations about the information they are given. As noted above, if most jurors believe that defendants in automobile cases have substantial liability coverage, not telling them that the insured defendant has such coverage does not eliminate a possible deep-pocket effect. By the same token, if the defendant actually has little or no insurance, a blindfolded jury operating under a presumption that the defendant is insured may award more than true compensation because it incorrectly assumes a deep pocket will pay.

In a similar fashion, blindfolded jurors in private antitrust cases who are unaware of the trebling rule may add amounts for punishment and deterrence. In doing so, they may thus award damages greater than the amount they believe would be sufficient to achieve compensation.

Finally, blindfolding may produce undesired inter-jury variation. Some juries may have correct expectations (e.g., that damage awards will be trebled), while others operate on incorrect assumptions (e.g., that the total award to the plaintiff will be the amount chosen by the jury or that the jury itself is supposed to award triple damages).

Thus, both correct and incorrect expectations may lead the blindfolded jury astray. Moreover, by pursuing a policy limited to blindfolding, the legal system may ignore or rule out more effective alternative techniques like voir dire or judicial instructions to deal with the problems which blindfolding is intended to address.

Instructions to Ignore Evidence

Another common method of juror control that emerges from the assumptions of jury passivity involves instructing juries to ignore available evidence. Perhaps the most studied case concerns instructions to disregard testimony (e.g., Sue et al. 1973; Wolf & Montgomery 1977). This approach is perhaps the *519 clearest example of the crude tape-recorder or sponge model of jury behavior. After information is provided and a successful objection is lodged, the judge simply instructs the jurors to disregard the testimony. A similar process is employed in cases in which pretrial publicity has provided information to prospective jurors (see, e.g., Sue et al. 1974; Kramer et al. 1990). They are instructed to attend only to evidence presented in court, and jurors who assert they will base their decision solely on such information can be seated on juries even when they have been exposed to potentially biasing information. Both social science evidence and the advice of experienced attorneys who tell us that "you can't unring the bell" suggest that neither of these instructional approaches is effective. Jurors' search for causation and the attribution of motives make it difficult for them to ignore evidence that they find useful in making sense of the facts of the case, and an admonition to ignore cannot overcome this information-processing activity. Moreover, certain types of outcome information may directly affect jurors' recall and interpretation of testimony so that even the conscientious juror may be unable to obey the judicial instruction, for the encoding and recall of other information are affected by the very testimony that the juror is supposed to ignore (Casper et al. 1988, 1989).

Limiting Instructions

A third approach designed to harness jurors involves limiting instructions. Jurors are given information and are told that they are to consider it for one purpose but not for others. One frequently examined instance involves the prior criminal record of defendants who take the stand and testify in their own behalf (see, e.g., Wissler & Saks 1985). In most federal and state courts, the prosecutor is entitled in such a case to introduce the prior criminal record of the testifying defendant. When such information is introduced, the judge gives the jurors a limiting instruction telling them that they may consider such evidence only in evaluating the credibility of the defendant's testimony and that a prior conviction is not to be considered as evidence of guilt in the current case.

Common sense suggests that following this instruction is difficult, and substantial research indicates that it is probably impossible (Doob & Kirshenbaum 1972; Hans & Doob 1975; Wissler & Saks 1985). Jurors told about the defendant's prior record tend to convict at a higher rate than those not told, particularly if a defendant has a prior conviction for a crime much like the current one. Moreover, there is persuasive evidence that jurors do not simply discount the defendant's exculpatory testimony, but rather they use the criminal record itself as evidence of probable guilt. Again, information-processing models that focus on attribution and the search for coherent stories may explain jurors' inability to use the information in the prescribed limited fashion.

All of these commonly employed methods of controlling the jury are based on rather crude models of jurors as passive information absorbers. All may be defeated by the information-processing activities in which jurors and juries actively engage. In this study of juries in antitrust cases, we examine the effects of some alternative approaches to jury control that were designed to be more consistent with what is known about how jurors handle information.

D. The Evaluation of Expert Testimony

The complexity and potential influence of expert testimony has been the subject of a good deal of recent debate about jury competence (e.g., Vidmar 1989; Imwinkelreid 1981; Hosch 1980; Tribe 1971). Many observers of the jury at work, and some researchers, have questioned the ability of jurors to comprehend and employ the many types of complex information that trials increasingly entail. Complex statistical evidence appears in suits involving antitrust violations, trademark infringements, deceptive advertising, race and gender discrimination in employment, and estimates of losses in a range of tort suits (Fienberg 1989; Saks & Van Duizend 1983). Medical malpractice, product liability, and criminal cases have brought a variety of complex medical and technological evidence into the courtroom.

This debate about whether typical lay juries can sift through expert testimony in an adversary setting implicates the traditional "spoon" theory. It revolves around the issue of whether the jury is able to soak up, retain, and accurately apply an assortment of complicated information, distinguishing complex but untrustworthy information from more reliable data. There has been a good deal of comment and argument about these issues (e.g., Rosenthal 1983), but little systematic research.

One concern often raised is the weight jurors attach to statistical evidence. While some authors have predicted that jurors will overvalue the apparent precision that statistical results appear to provide (e.g., Tribe 1971), others have suggested that jurors are, if anything, likely to discount statistical information inappropriately (e.g., Saks & Kidd 1981; for a review of the evidence concerning jury evaluation of statistical data on base rates and error rates, see Thompson 1989).

Evidence from research on information processing and persuasion suggests that concrete or clinical models should be more influential than statistical models. Work on decision heuristics (Nisbett & Ross 1980; Kahneman et al. 1982) would predict that availability produced either by vividness or other sources of accessibility favors the more anecdotal approach of concrete and clinical models. More recent work on vividness tends to question its power as an explanatory concept (Taylor &
Thompson 1982), but there does seem to be general agreement that, as McGuire (1985) suggests, anecdotal examples do tend to be more persuasive than statistics. If not a vividness effect, this outcome may occur because concrete evidence facilitates attention and comprehension more effectively, making it more available than abstract, statistical information (Taylor & Thompson 1982). This work would characterize the greater appeal of anecdotal over statistical evidence as a "bias" in decisionmaking. Attaching greater weight to a striking or easily recalled story as opposed to the more broadly sampled evidence from a statistical model violates traditional notions of rationality.

Substantial evidence also exists that concrete case studies are somewhat more persuasive than abstract statistical arguments (Ginosar & Trope 1980; Hamill et al. 1980; Reyes et al. 1980). The literature on persuasion also indicates that use of obscure and unusual words appears to reduce persuasiveness (Bowers 1963; Carmichael & Cronkite 1965), again suggesting that statistical models may suffer in comparison to the more concrete approaches.

The expert testimony we examine in this research was designed to test these predictions. In this study of antitrust juries, we compared a statistical model with another common method used to prove damages, the more concrete yardstick model.

II. Research Design and Methods

We showed 12 versions of a simulated videotaped antitrust price-fixing case to 1,022 jurors in a Cook County (Ill.) court-house over a period of 8 months. We used six sets of judicial instructions to test the effects of blindfolding on the jury. The design also included two versions of expert testimony, creating a 6x2 factorial design, shown in Figure 1.

A. Instruction Conditions

In the first five conditions, jurors were instructed to compensate the plaintiff for any injury caused by the defendants' antitrust violations. The amount required to compensate the plaintiff is the standard for jury damage awards in antitrust cases, and the judge then trebles this amount to produce the final award. In experimental condition 6 ("unconstrained"), the jurors were instructed simply to award the amount they felt was appropriate and reasonable in the circumstances. We introduced this condition in order to obtain a measure of juror preference unfettered by judicial instruction on the standard for a damage award.

Figure 1. Basic design for antitrust study

TABULAR OR GRAPHIC MATERIAL SET FORTH AT THIS POINT IS NOT DISPLAYABLE

In the first three conditions, the judge informed the jurors that their verdict would automatically be trebled:

In condition 1 ("trebling without admonition"), the jurors were simply told that their verdict would automatically be trebled. They were told neither to disregard nor to consider this information in their decision. [FN5] The policy of blindfolding the jury to trebling assumes that jurors in this condition will give reduced awards to avoid a plaintiff windfall.

*523 In condition 2 ("trebling with admonition"), the jurors were told that their verdict would automatically be trebled but that this information should not influence the size of their damage award. [FN6] This condition was the general practice prior to the mid-1970s when courts began to advocate blindfolding the jury to the trebling provision of the statute (Pollock & Riley, Inc. v. Pearl Brewing Co. 1974). Research on limiting instructions in other contexts suggests that such a simple admonition is a crude and ineffective way to control jury behavior (see, e.g., Wissler & Saks 1985).

In condition 3 ("trebling with explanation"), the jurors were told that their verdict would automatically be trebled and were instructed that this information should not influence the size of their award. In addition, the instructions explained the
reasons for the trebling provision of the statute, pointing out that the provision was designed to deter and punish price-fixing agreements; jurors were thus provided with a rationale for awarding full compensation even when that amount would be tripled by the judge. [FN7] Although several researchers have tested the effects of juror instructions and found only a modest impact on jurors (e.g., meaning of negligence—Elwork et al. 1977; burden of proof—Severence et al. 1984), in all previous cases the instructions have amounted to bald directives. No prior work has tested the effect of reasoned admonitions. Thus, in condition 3, trebling with explanation, we gave jurors the information that their damage awards would be trebled and explained why they should not employ this information to go below their assessment of the amount required for compensation. [FN8]

*524 In condition 4 ("motive control"), jurors were not told about the automatic trebling provision of the statute but instead were informed that the judge would add an amount for punishment and deterrence if appropriate. This approach was designed to counteract any juror inclination to add to the compensatory award in order to punish or deter, without fully removing the blindfold as to how the damages would be calculated (keeping them in the dark about automatic trebling). [FN9] The instructions do not guarantee an award for punishment or deterrence but indicate that the judge will address such concerns if appropriate. [FN10]

In condition 5 ("no information"), jurors received no indication that the judge would add to their damage award. [FN11] This is the form of instruction used by most courts.

Finally, in condition 6 ("unconstrained"), jurors were asked simply to award an amount that was appropriate and reasonable in the circumstances. [FN12]

Effects of Trebling Information

We designed the study to test five hypotheses about the effects *525 of judicial instructions. The first and most general deals with the effect of knowledge about trebling on juror awards, while the remainder explore in more detail how such knowledge might influence juror verdicts.

Hypothesis 1: Jurors told about the automatic trebling provision of the antitrust statute (conditions 1-3) will award less than jurors who are not told that their verdict will automatically be trebled (conditions 4-6).

This result might be the product of two quite different juror reactions, windfall avoidance or punishment-deterrence. If windfall avoidance is operating, the trebling information should cause jurors informed of trebling to reduce their award to avoid giving the plaintiff a windfall. Thus, these jurors would lower the award they would have given had they not been informed of the trebling rule.

But a difference in awards by jurors told or not told about trebling can also arise in another way. Jurors not informed that their award will be trebled may include in their award not only the amount they feel is necessary to compensate the plaintiff but also an additional amount aimed at punishing the defendants and deterring them and others from future similar behavior. Unaware that the statute itself provides for punitive damages by tripling the jury's award, they may add to the award they otherwise would have given.

Hypotheses 2-5 test the operation of these two potential influences on awards: windfall avoidance and punishment-deterrence.

Controlling Windfall Avoidance Effects with Judicial Instructions

If jurors informed about the automatic trebling rule are motivated to reduce their damage awards to avoid a plaintiff windfall, judicial explanation of the trebling rule may reduce this motivation.

Hypothesis 2: Jurors admonished to disregard the fact that their verdict will be automatically trebled (condition 2) will award no more than jurors who are told that their verdict will automatically be trebled and who receive no admonition to disregard that information (condition 1).

Hypothesis 3: Jurors informed about the automatic trebling provision and given an explanation for this policy (condition 3) will give larger awards than jurors informed of trebling but given no explanation for the policy (conditions 1 and 2).

*526 Hypothesis 2 predicts that a judicial admonition to disregard the fact that the award will be trebled will not dissuade jurors from lowering their damage awards. Such admonitions to disregard generally have little or no effect, presumably because they offer little incentive to comply or, in this case, to change views on the appropriate damage amount. In contrast, hypothesis 3 predicts that a judicial instruction informing jurors about the trebling rule but explaining why they ought not let this information cause them to lower their award (i.e., that such behavior would defeat Congress’s purposes of adding punishment and deterrence to the appropriate compensation amount) will alleviate some or all of the tendency to reduce damage awards.

Punishment and Deterrence Hypotheses

If blindfolding jurors to the automatic trebling provision leaves them with a motive to punish and deter, their verdicts will exceed the amounts they would award strictly to compensate the plaintiff:

Hypothesis 4: Jurors instructed to award an amount necessary to compensate the plaintiff for the damages caused by the defendant’s antitrust violation (condition 5) will award less than jurors who are told to award an amount that is reasonable and fair (condition 6).

Hypothesis 5: Jurors who are told the judge will, if necessary, add to their award for the purposes of punishment and deterrence (condition 4) will award less than if they are simply told to compensate (condition 5).

Hypothesis 4 suggests that jurors not told to focus on compensation (condition 6) will give higher awards than those told to focus on compensation (condition 5). Hypothesis 5 predicts that informing jurors that the judge may add amounts for punishment and deterrence will prevent jurors from adding to their own award in order to punish and deter. The hypothesis is based on the assumption that learning that the judge will take care of punishment and deterrence will reduce the motivation to add such amounts.

As these hypotheses indicate, we predicted that awards would generally increase from condition 1 through condition 6, with no difference expected between conditions 1 and 2.

*527 B. Alternative Models of Damages in Antitrust Cases

The plaintiff and the defendant in an antitrust suit generally propose quite different estimates of the damages allegedly suffered as a result of the defendant’s alleged antitrust violation. Thus, in a price-fixing case like the one we used, if the jury finds that the defendants have engaged in an illegal agreement to fix prices, it must determine how much damage the agreement caused the plaintiff. This task involves a “but for” calculation of the extent to which the plaintiff’s profits would have been higher had there been competitive rather than monopoly pricing. Two common approaches employed by parties in such cases are the “yardstick” and regression models.
Yardstick models employ comparative data from similar firms that conducted their business in competitive markets at the time of the defendant's anticompetitive activity and are based on the premise that the difference in prices paid or profits made by the benchmark firms and the plaintiff will index the excess costs imposed on or profits lost by the plaintiff company (e.g., Zenith Radio Corp. v. Hazeltine Research, Inc. 1969; Moore v. Jas. H. Matthews & Co. 1982). Valid comparisons are, of course, quite difficult to obtain, [FN13] for a valid comparison involves acquiring data from a firm or firms similar in nearly every respect other than the experience of the alleged antitrust violations. But such yardstick measurements are concrete and relatively easy to understand.

Another common approach involves the use of regression models, typically employing time-series analyses of pricing patterns before, during, and sometimes after the price-fixing agreement. These models attempt to predict what prices would have been like during the period of price fixing had there been no illegal agreement (see Rubinfeld 1985:1087-94 for a description of forecasting methods). Such an approach is more abstract and technically complex than the yardstick method.

We constructed two versions of the case to test the effects of different expert models. In version 1, the expert presenting the yardstick model testified for the plaintiff while the expert presenting the statistical model testified for the defense; in version 2, the statistical model was presented on the plaintiff's side and the yardstick model was presented for the defense. If the two expert models were equally persuasive, the versions *528 should have produced similar awards. If one of the models was more persuasive, awards should have been higher when that model was presented on behalf of the plaintiff. (See Figure 2 and the accompanying section below for a more detailed presentation of the expert hypotheses.)

C. The Price-fixing Case

The case we used involved a price-fixing agreement in the road construction business. Two suppliers of crushed rock who controlled 70% of the business in Colorado agreed to set the same price for their product. The plaintiff was a road construction company, a long-time customer of the two suppliers. The owner of the company sued, claiming that the price-fixing agreement had caused $490,000 in damages. An earlier trial had established that the illegal price-fixing agreement had indeed occurred, and the issue for the jurors in this trial was to determine damages. The defendants claimed that any damages that had occurred probably amounted to only $35,000. The case presented testimony from opposing expert witnesses who presented conflicting damage models. The damage claimed by the plaintiff's expert was $490,000, although he conceded that the figure might be as low as $420,000. The defendant's expert presented a model which produced a damage amount of $35,000 but also admitted that the number might be as high as $105,000.

The simulated trial lasts about an hour and 15 minutes and contains all of the basic elements of an actual trial. It includes opening statements by plaintiff and defense attorneys, direct and cross examination of witnesses by both sides, closing arguments by both sides, and instructions by the judge. Professional actors following a script played all roles in the trial, which was videotaped in the courtroom at Loyola Law School in Chicago.

D. Procedures

The jurors who participated in the study were randomly selected from those called for jury service at a Cook County (Ill.) courthouse. They were informed of the nature of the study and were told that their participation was completely voluntary. They filled out a brief pretrial questionnaire on demographic attributes (e.g., age, race, education, occupation), prior jury experience, and attitudes toward business and toward expert witnesses. After completing the first questionnaire, they viewed the simulated trial. At the end of the trial, the jurors were asked to fill out an individual verdict form, indicating the dollar amount they would award to the plaintiff in the case. They were *529 then randomly divided into two groups, which we will refer to as deliberators and nondeliberators. Nondeliberators then filled out a 17-page questionnaire, which had
a few open-ended questions and a large battery of closed-ended questions, dealing with such matters as their reasons for their verdict, their strategies in arriving at their damage award, evaluations of the plaintiff and defendant companies, evaluations of the price-fixing agreement and the motives of the defendants in taking part in it, assessment of all the witnesses and the attorneys, items testing their comprehension of the testimony and of the judicial instructions, items designed to assess the general "story" the jurors had constructed of what happened in the case (cf. Pennington & Hastie 1986), and items dealing with their assessment of the difficulty of the testimony and of making a decision in the case. The nondeliberators were excused after completing their questionnaires.

The six randomly selected deliberators in each panel were first taken to lunch, allowing them some time to become acquainted with one another and simulating in a modest way the types of interpersonal interactions that a real jury might experience in the course of an extensive trial. Deliberators were then sent to a jury room and asked to deliberate to a verdict on the size of the damage award. After completing their deliberations, the deliberators were asked to fill out a somewhat truncated version of the questionnaire given to nondeliberators and were then excused. [FN14] The deliberations were videotaped; they took an average of 34 minutes.

The original research design called for the simulated trials to be shown to 70 groups of jurors, divided between 420 (6 x 70) who took part as deliberators and an additional 480 nondeliberators. Because of the one-day/one-trial system used in Cook County, court officials know relatively early in the day how many members of the jury venire are needed for trials that will take place, and were very cooperative in allowing those not likely to be called for jury service to be invited to participate. Jurors themselves proved very willing to participate in the study as well; 91% of those invited to participate accepted the invitation and a total of 1,022 adults called for jury service [FN15] *530 participated in the antitrust jury research, 417 deliberators and 605 nondeliberators. [FN16]

III. Results

The case provided conflicting evidence on the amount of damage caused by the price-fixing agreement. As a result, when the jurors began deliberating, there was generally substantial disagreement among them, a pattern common for jury deliberations (e.g., Kalven & Zeisel 1966). Despite the rather dry testimony and complex expert evidence that is typical of trials like this one, the jurors showed substantial interest in the trial and demonstrated lively involvement during deliberations. We begin here with the predeliberation awards of all jurors, deliberators and nondeliberators. Later, we will discuss the patterns of awards among juries that deliberated to verdict.

A. Variability in the Dependent Variable

The dependent variable, award size, is characterized by high variance. The testimony by the two sides implied that damages caused by the price-fixing agreement might range from 0 to $490,000. The individual juror verdicts had an overall mean of $208,905, a range of 0 to $1,470,000, and a standard deviation of $182,701; as indicated in Table 1, the high variance occurred in all six instruction conditions. In the primary statistical analyses reported here, we will focus on the damage award as measured in terms of the jurors' actual dollar awards. [FN17] When we transformed the damage awards into ranked data, there was no change in the results reported here.

B. Data Sources

The results reported here come from two primary sources. The first are the questionnaires filled out by all 1,022 subjects, including the pretape questionnaire, the predeliberation verdict, and the posttrial questionnaire dealing with recall and *532 evaluation of witnesses, testimony, instructions, and the like. For some purposes (e.g., characterizing the whole sample or
examining the relationship between personal attributes and pre-deliberation verdicts), we employ data from the whole sample. Since the deliberators filled out their main questionnaire only after deliberations and thus their responses could have been affected by what occurred in their jury, we employ the subsample of 605 nondeliberating jurors when we explore the ways in which individual attitudes relate to other case-related judgments (e.g., the relationship between evaluations of the experts and damage awards). In exploring the transformation process by which pre-deliberation judgments are turned into a jury decision, we focus on the subsample of 417 deliberators, who filled out the main questionnaire after they had completed their deliberations. In examining some aspects of the transformation process, we compare the nondeliberators to the deliberators, using the data from the nondeliberators as a baseline for assessing the effects of deliberation on judgments and decisions of those who participated in a jury. Finally, for some of the analyses dealing with the jury itself, we focus on aggregate attributes of the 70 juries. Thus, the sample sizes vary, depending on which samples are appropriate. The second major source of data comes from the deliberations of the 70 juries. These deliberations were videotaped, and complete and verified verbatim transcripts of 60 of the deliberations were prepared. [FN18] These transcripts were subjected to various forms of content analysis, some performed by individual coders and some employing computer-based text analysis.

Table 1. Tested Contrasts

[Note: The following TABLE/FORM is too wide to be displayed on one screen. You must print it for a meaningful review of its contents. The table has been divided into multiple pieces with each piece containing information to help you assemble a printout of the table. The information for each piece includes: (1) a three line message preceding the tabular data showing by line # and character # the position of the upper left-hand corner of the piece and the position of the piece within the entire table; and (2) a numeric scale following the tabular data displaying the character positions.]
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C. Effects of Judicial Instructions

Table 1 shows the planned contrasts corresponding to the five tested hypotheses. As the table indicates, there was substantial variation in the level of predeliberation awards across the six instruction conditions. The level generally increased from condition 1 to condition 6, as the hypotheses predicted, although not all of the expected differences were found.

Hypothesis 1

Jurors who were told about trebling gave significantly lower awards than jurors who were not told (t=−4.19, df=1,003, p < .001), [FN19] as hypothesis 1 predicted. [FN20] Thus, either trebling information was causing jurors to reduce their awards below what they believed would be necessary to compensate the plaintiff or the desire to punish and deter was causing jurors not informed of the trebling rule to elevate their awards above what they believed would be necessary to compensate the plaintiff. The third possibility was that both forces were operating, the first reducing awards and the second increasing them.

Hypothesis 2

Although jurors told about automatic trebling but not admonished to ignore the trebling rule gave somewhat lower awards ($155,281) than did jurors who were told but admonished to disregard it ($176,067), the difference did not approach significance (t=−.97, p > .10). The absence of a significant difference is consistent with other research which has shown that simple admonitions to disregard are ineffective methods of jury control (e.g., Wissler & Saks 1985 on the defendant's prior criminal record; Broeder 1959 on defendant insurance). [FN21]

Hypothesis 3

If jurors informed about trebling do tend to lower their awards to avoid a windfall for the plaintiff, can this effect be overcome or reduced by an instruction that informs the jurors about trebling but also provides an explanation to justify the larger award? The average award of $313,722 given by jurors in condition 3 (trebling with an explanation) was significantly higher than the average award of $165,674 given by the jurors in conditions 1 and 2 who were told about trebling but given no explanation for it (t=−2.63, p < .01). The fact that the explanation raised awards provides evidence that windfall avoidance was indeed occurring in conditions 1 and 2.

Our preliminary analysis of the deliberations by the juries in conditions 1, 2, and 3 reveals that the admonition did affect what was discussed during the deliberations. We examined the jury deliberations for mentions of the trebling rule. [FN22] Juries in condition 1 who were told about trebling but received no admonition averaged 20.2 relevant mentions, significantly more than the juries in conditions 2 and 3, who averaged 4.5 and 3.2 mentions (F(2,27)= 11.57, p < .001). Thus, the admonition alone, without the explanation for the rule, failed to remove the effect of the trebling information on juror verdict preferences, even though it was quite successful in controlling jury discussion.

The tests of the first three hypotheses thus indicate that trebling information does produce a reduction in awards but that the reduction is either partly or fully avoided when jurors receive an explanation for the trebling provision. The tests of the final three hypotheses (4 and 5) assess juror inclination to punish and deter, inflating jurors' awards when they are not told about trebling.

Hypothesis 4

If jurors are inclined to punish antitrust violators and to mete out substantial awards designed to deter them and others from future antitrust violations, jurors unconstrained by an instruction to focus exclusively on compensation should give higher awards than jurors

instructed to restrict their awards to compensation. Yet the average award of $221,101 by the unconstrained jurors in condition 6 was not significantly higher than the average award of $211,960 given by the jurors in condition 5 who were simply instructed to compensate the plaintiff for his antitrust losses (t = -0.55, p > .10). One possible explanation for these similar responses is that neither set of jurors was inclined to add to their awards in order to punish and/or deter. Alternatively, both may have added to the awards, and the directive to award only the amount necessary to compensate in condition 5 may have been unsuccessful in controlling the desire to punish and/or deter. As we shall see below, the first explanation appears more consistent with other findings.

Hypothesis 5

If the jurors in condition 5 were motivated to punish and/or deter, we expected that their awards would be higher than those of the jurors in condition 4 who were given information designed to control that motivation. We designed the motive control instruction to examine a policy that was proposed (Michigan Law Review 1983) to prevent inflated awards by jurors who wish to punish defendants in antitrust cases. The notion behind the proposal is that if jurors are told that the judge will mete out appropriate punishment, the jurors should be more inclined to confine their damage award to the amount they believe is necessary to achieve compensation. If the instruction had functioned as expected, jurors given the motive control instruction (condition 4) should have given awards that were lower than those of jurors in condition 5 who were provided with no information about trebling. Certainly they should not have given awards that were significantly higher. But the jurors in the motive control condition awarded an average of $259,172, an amount significantly higher than the average award of $211,960 in condition 5 (t = 2.19, p < .05). It appears that something in the motive control instruction inflated rather than controlled jurors' awards.

Two factors appear to have combined to produce this inflation: framing and a response to uncertainty. Our analyses indicate that by mentioning punishment and deterrence, the motive control instructions framed the case as more serious and the behavior of the defendants as more blameworthy, or at least made punishment and deterrence more available to the jurors as goals in setting awards. [FN23]

To test for a framing effect, we compared juror ratings on a 12-item index of defendant blameworthiness for jurors in conditions 3 and 4 in which punishment and deterrence were mentioned in the judicial instructions with the ratings of jurors in other conditions (in which punishment and deterrence were not mentioned). [FN24] Jurors who heard an instruction that mentioned punishment and deterrence did tend to see the defendants as somewhat more blameworthy (M = 64.4) than those who heard no mention of punishment and deterrence in the instruction (M = 62.3; t = 2.04, df = 544, p < .05). [FN25]

Framing, however, cannot be the entire explanation. Despite the fact that the instructions in both conditions 3 and 4 mentioned punishment and deterrence, subjects in the motive control condition gave awards that were on average $45,000 higher than those in condition 3. The reason for this difference, we believe, lies in the uncertainty of what the judge will award in the motive control condition. In the trebling with explanation condition, the judge both discussed punishment and deterrence and at the same time described a clear formula by which these goals would be achieved—the trebling of the jury's award for compensation. In the motive control condition, the judge also introduced the issues of punishment and deterrence, but in this instruction condition he offered a vague and contingent method for dealing with them. [FN26] As a result, jurors in the motive control condition were confronted with a case that had been framed as more serious (than in all other conditions except condition 3) but without clear guidance about how much of an award the plaintiff would ultimately receive. Their response was to take control of the damage award process themselves, ensuring that the plaintiff would receive an award commensurate with the defendants' harmful acts. This unanticipated effect for motive control not only produced a result contrary to our fifth hypothesis—damage awards larger than those in the condition 5 (no information)—but produced awards in the motive control condition that were larger than those in any of the other five.

Comparing the Effects of Instructions against True Compensation

Much of the discussion of the effects of blindfolding or informing jurors about the treble damage rule turns on the notion of "true compensation." Those favoring the policy of blindfolding fear that knowledgeable jurors might dip below this level to avoid providing a perceived windfall to the plaintiff. An alternative view suggests that blindfolded jurors will go $537 above true compensation to provide a measure of punishment and deterrence in their damage award.

Our original assumption was that the true compensation level would fall between conditions 3 (trebling with explanation) and 4 (motive control). We reasoned that the three trebling conditions would tend to produce a windfall effect moving awards below the compensation level, with the explanation condition reducing this effect and moving awards up toward true compensation, thus placing true compensation at or above average awards in condition 3. On the other side of the coin, we reasoned that the three conditions not mentioning trebling (motive control, no information, and unconstrained) would produce the highest awards because subjects would be most inclined to add amounts for punishment or deterrence in these conditions, raising awards above the compensation level. We assumed that the motive control condition would be most effective at removing this inflation effect and thus that true compensation would fall at or below awards in condition 4.

As indicated above, if inflation occurred in conditions 4, 5, and 6, the motive control instruction did not remove it, for awards by these subjects were the highest of any group. If we then set aside the motive control condition, our estimate of true compensation should fall between condition 3 (trebling with explanation) and condition 5 (no information). The results indicate that these two conditions are nearly identical ($211,960 and $213,722, respectively), and we thus conclude that true compensation lies in the $210,000-$215,000 range.

One puzzle remains: What of the expectations that jurors not informed about trebling would raise their awards substantially above true compensation in order to add amounts for punishment and deterrence? Although we and others assumed that the motive to punish and deter would operate, our evidence does not suggest that it played a significant role in our jurors' consideration and decisionmaking. Our analysis of the transcripts of jury deliberations reveals that very little discussion focused on the need or desirability of punishing the defendants or deterring them or others. [FN27]

Even when jurors were set free to employ any criteria they wished (condition 6), there is little evidence that the motivation to punish and deter played a significant role in individual or group decisionmaking. Thus, the evidence from the deliberations suggests that the expected strong motivation to punish does not appear to be present in the jurors we studied. [FN28] This absence of an apparent inflation over compensation in the non-trebling conditions produces the similarity between the awards in the no information condition and those in the trebling with explanation condition.

Evaluating Current Policy

The most common instruction in current use makes no attempt to control jurors' punitive impulses or to inform them of the consequences of their decision: the jurors cannot be told, by the judges or by the parties, that their verdict will be trebled. This no information condition produced juror awards that were nearly identical to juror awards in the trebling with explanation condition. The instruction in the explanation condition attempts to recognize the jurors as active information processors, both by telling them that their verdict will be trebled and explaining the purposes of the statutory trebling provision. If no information and a more complete explanation produce comparable results, are there any reasons to prefer one over the other?

One value of the full disclosure approach is that it deals with the potential "wild-card" juror who happens to know that antitrust awards are automatically trebled. The blindfolded jury that hears about the automatic trebling provision from a fellow juror will not receive a judicial admonition warning that trebling should not be considered, let alone a judicial explanation of why it should not affect the jury's decision. The official blindfold may thus lead to a reduced award to eliminate the perceived windfall—just as it does in condition 1 (trebling without admonition) of this experiment.

While jurors knowledgeable about trebling are rare, the odds of getting at least one on a jury are not insignificant. In a survey we conducted of jury-eligible Chicagans, 2 of 192 knew about automatic trebling in private antitrust suits. Extrapolating from that rate of knowledge, 6% of six-person juries would be expected to have at least one member with knowledge of trebling when the case begins. [FN29] In the course of the trial, *539 others may learn from uncontrolled sources outside the courtroom. Moreover, the likelihood may be growing because a number of states in recent years have eliminated the exemption of attorneys from jury service (e.g., Illinois Rev. Stat. 1987). A policy of blindfolding may thus be a policy favoring blinders that are insufficient to the task.

Worse yet, a "knowledgeable" wild-card juror actually may be misinformed about the precise meaning of the policy of trebling. Judge William Schwarzer (1990) provides a compelling example of wild-card mischief in an antitrust case in which the jury was not instructed about treble damages. After trial, a juror told the judge that he had heard from his daughter, a law student, that the damages would be quadrupled by the court. As Judge Schwarzer (ibid., p. 134) suggests, "Surely in that case it would have been better to tell the jury the whole truth."

D. Effects of the Expert Testimony

To test the effects of statistical versus concrete expert testimony, two videotaped versions of the trial were prepared. In both versions, one expert testified for the plaintiff and a second expert testified for the defense. In version 1, the plaintiff's expert presented a statistical model and the defendants' expert presented a concrete model of the damages produced by the price-fixing agreement; in version 2, the plaintiff's expert presented a concrete model and the defendants' expert presented a statistical model. [FN30] The actor who presented the concrete model did so in both versions; the same was true for the actor who presented the statistical model.

Statistical models are in general more complicated and harder to understand than the more homely and concrete yardstick models. The concrete yardstick model in this case was based on the actual experience of another road-building company operating in a different state and thus not a victim of the price-fixing agreement that allegedly injured the plaintiff. The owner of the other company testified about his experience during the time of the price-fixing agreement. [FN31] The primary issue about the yardstick model was whether the plaintiff's company and the yardstick company and their marketing environments were similar enough to draw the inference that their prices, *540 which had been similar in the past, would have been similar during the conspiracy period if not for the price-fixing agreement. In contrast, the statistical expert built a model of the plaintiff's past price performance and, based on that earlier performance, projected what prices would have been in the absence of the price-fixing agreement. The adequacy of the statistical model as a basis for projecting prices hinged in large measure on the completeness of the model in including and properly measuring all relevant variables.

If statistical evidence is more persuasive than concrete evidence, as Tribe (1971) and others have claimed, damage awards should have been higher when the plaintiff's expert put forward a statistical model than when the plaintiff's expert presented a concrete model of damages (see Fig. 2, A). Alternatively, if concrete evidence is more persuasive than statistical testimony, as studies comparing the persuasiveness of concrete case studies versus abstract statistical arguments (e.g., Ginosar & Trope 1980) would predict, damage awards should have been higher when the plaintiff's expert put forward a concrete model than when the plaintiff's expert presented a statistical model (see Fig. 2, B).

The jurors did give somewhat higher awards when the statistical expert testified for the plaintiff than when the expert presenting the concrete model did so ($216,515 versus $200,813), [FN32] but the difference was not statistically significant ($F_{(1,1007)} = 1.86, p > .15$). [FN33] To assess juror reaction to the experts' testimony, we looked at the way the jurors evaluated the two experts. The comparisons indicate that the jurors reacted quite differently to the statistical and concrete models, and that those different reactions cut against each other, so that, on balance, the experts exerted substantially equivalent influence on the jurors' awards.

We compared the jurors' ratings of the two experts on four dimensions: persuasiveness, expertise, clarity, and trustworthiness,
[FN34] using a repeated measures analysis of variance because each juror rated both experts on each dimension. Thus, the within-subjects variable (EXPERT) represented each juror's two ratings of the two experts. The between-subjects variable (VERSION) indicated whether the statistical or the concrete model was presented first, that is, for the plaintiff. The results of the repeated measures analysis of variance show that the jurors perceived the experts differently. The mean differences are displayed in Table 2. While the statistical expert was not rated as significantly different on persuasiveness or trustworthiness, he was seen as more expert and less clear than the expert who presented the concrete yardstick model (p < .001). This pattern of differences and similarities held in both versions of the trial, that is, whether the statistical expert or the expert presenting the concrete model testified for the plaintiff. [FN35]

Figure 2. Hypothetical effects of expert damage models on juror awards

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</tr>
<tr>
<td></td>
</tr>
<tr>
<td>Expertise (N=562)</td>
</tr>
<tr>
<td>Testifies for plaintiff</td>
</tr>
<tr>
<td></td>
</tr>
<tr>
<td>Clarity (N=568)</td>
</tr>
</tbody>
</table>

Testifies for plaintiff 3.96 5.18
Testifies for defendants 3.38 4.63
Trustworthiness 3.09 3.14 -0.05 1.91 .17
(N=574)
Testifies for plaintiff 3.27 3.36
Testifies for defendants 2.90 2.94

NOTE: Significant order effects were indicated by an interaction between
VERSION (Statistical Model for Plaintiff-Concrete Model for Defendants vs.
Concrete Model for Plaintiff-Statistical Model for Defendants) and EXPERT
(Presents Statistical vs. Presents Concrete Model); for all four expert
characteristics, the order effect was significant at p < .001.

FNa. N indicates nondeliberators who rated all items composing the scale.
FNb. Higher scores indicate more favorable evaluations of the expert.

These differences in jurors' perceptions on expertise and clarity provide some insight as to why the statistical and concrete damage models had relatively comparable effects on the jurors' damage awards. It appears that while the statistical expert's greater perceived expertise made him more convincing, *543 the lower clarity of his model made him less convincing. The net result was that the statistical and concrete models were equally persuasive, because both perceived expertise and perceived clarity are associated with expert influence. As the regression equations in Table 3 reveal, trustworthiness, expertise, and clarity all were significant predictors of the persuasiveness of each expert.

Table 3. Determinants of Expert Persuasiveness

<table>
<thead>
<tr>
<th>Expert Rating</th>
<th>Expert Presenting</th>
<th>Expert Presenting</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Statistical Model Beta</td>
<td>Concrete Model Beta</td>
</tr>
<tr>
<td>Expertise</td>
<td>.363 [FNa1]</td>
<td>.412 [FNa1]</td>
</tr>
<tr>
<td>Trustworthiness</td>
<td>.328 [FNa1]</td>
<td>.386 [FNa1]</td>
</tr>
<tr>
<td>Clarity</td>
<td>.278 [FNa1]</td>
<td>.115 [FNa1]</td>
</tr>
</tbody>
</table>

Variance accounted for |
\[ R^2 \]

N of cases |
548 |
553 |

\[ FNa1. \ p < .001 \]

The role of lack of clarity in reducing the influence of the statistical model on juror awards can be seen most clearly by examining the awards in cases in which the experts presenting the statistical and concrete models were perceived as roughly equivalent in clarity. When the two experts were rated as less than two points apart on the seven-point clarity scale, the mean juror award when the statistical expert testified for the plaintiff was $220,517 (N=201), but when the expert presenting the concrete model testified for the plaintiff, the mean award dropped to $168,223 (N = 139). Thus, with clarity controlled, the statistical expert exerted greater influence on awards (t = -2.64, p < .01). He was also seen as higher in persuasiveness (t=8.02, p < .001).

In raising questions about the limits of juror competence, some have suggested that jurors will be overpowered by complicated testimony that they do not understand; sometimes this argument is pressed to its extreme, suggesting that the less jurors understand, the more they may be influenced by the logic of statistics. The analyses presented thus far suggest that lack of clarity, that is, perceived complexity and difficulty, discourages the jurors from accepting an expert's position rather than inducing them to accept it. Another way to test the extent to which the juror naively adopt the position of experts they do not understand is to look at the relationship between their comprehension of expert testimony and their evaluation of the expert's persuasiveness. If jurors are being persuaded to adopt positions because they are impressed by what they do not understand, we should see a negative correlation between comprehension of the expert's testimony and the evaluation of the \[ n=544 \] expert. In fact, the correlation between juror comprehension of the statistical expert and his judged persuasiveness was positive (r=.12, n=564, p < .01) as was the parallel correlation for the expert presenting the concrete model (r=.09, n=569, p < .05). Thus, there is no evidence that lack of understanding is associated with greater expert persuasiveness.

**E. From Juror to Jury Awards**

Kalven and Zeisel (1966) suggested that the role of individual preferences of jury members in the process of deliberation is akin to a photographic negative waiting to be developed. Although the appearance of the final picture may be different from the negative, its critical elements and much of its form are already established before deliberations commence. This metaphor suggests that the transformation process is relatively straightforward and that the decisions of the individual members of the jury prior to deliberation are the critical elements in the ultimate jury verdict. Most of the work on this individual to group transformation process has explored criminal cases (e.g., Kalven & Zeisel 1966; Hastie et al. 1983). The antitrust case discussed here presents one of the first opportunities to explore this issue in the context of civil damage awards. Moreover, in criminal cases, the individual to jury transformation process has often been found to produce consistent changes in the direction of leniency toward the defendant (see MacCoun & Kerr 1988). Here we examine such asymmetric effects in the civil context and find a systematic inflation of award size as a result of jury
deliberations.

We examine several aspects of the process by which juror predeliberation preferences are converted through group interaction into a jury verdict. [FN36] The first involves the ability of various attributes of the initial distribution of preferences to predict the ultimate jury award. The second focuses on the role of the foreperson in the deliberation process, first describing the process of foreperson selection and then discussing the conditions under which those who occupy this role are likely to exert particular influence on the jury's verdict. The third deals with a general inflation effect by which the group verdict appears to be systematically increased by group interaction.

*545 Some Group Predictors of Jury Verdict

If we look at the verdict preferences of the jurors before they begin deliberations, can we observe patterns—as Kalven and Zeisel suggested we would—that predict the final award of the jury? We examined several potential predictors of final award, employing data from the 69 juries that deliberated to verdict in the antitrust case, excluding the one jury that was unable to resolve its differences.

In Table 4 we display the predictors we examined. The top half of the table (panel A) focuses on individual award preferences. If the first award proposal offered during deliberations acted as an anchor, providing a reference point for subsequent proposals, we would expect it to be particularly good predictor of the eventual group award. The highest and lowest awards might also have special influence: by framing the range of acceptable awards, they might affect subsequent proposals or an eventual compromise.

Table 4. Predictors of the Transformation of Individual Juror Predeliberation Awards into Jury Verdicts

<table>
<thead>
<tr>
<th>Predictor</th>
<th>Correlation with Jury Verdict [FNa]</th>
<th>N</th>
</tr>
</thead>
<tbody>
<tr>
<td>A. Individual award amounts</td>
<td></td>
<td></td>
</tr>
<tr>
<td>All jurors' predeliberation awards</td>
<td>.26 [FNaal]</td>
<td>(404)</td>
</tr>
<tr>
<td>First award proposed during deliberations</td>
<td>.20 [FNa1]</td>
<td>(56)</td>
</tr>
<tr>
<td>Highest individual predeliberation award</td>
<td>.25 [FNa1]</td>
<td></td>
</tr>
<tr>
<td>Lowest individual predeliberation award</td>
<td>.20 [FNa1]</td>
<td></td>
</tr>
<tr>
<td>B. Measures of average individual awards</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Mean predeliberation award</td>
<td>.54 [FNaal]</td>
<td></td>
</tr>
<tr>
<td>Median predeliberation award</td>
<td>.62 [FNaal]</td>
<td></td>
</tr>
<tr>
<td>Mode predeliberation award</td>
<td>.48 [FNaal]</td>
<td>(34)</td>
</tr>
</tbody>
</table>

FNa. N=69 unless otherwise indicated.
FNa1. p < .05
FNaal. p < .01
FNaaal. p < .001

Panel B of the table focuses on the configuration of the initial preferences of the members prior to deliberation rather than on

particular individual awards. It reveals the impact of various measures of the initial central tendency (the mean, the median, and mode) of the group on final award decisions.

The measures of individual verdicts produce rather modest effects. Taking the correlation between all predeliberation verdict preferences and the final jury awards as a baseline, neither the first proposed award during deliberations nor the highest or lowest predeliberation preferences improve our ability to predict the jury's final verdict.

The measures of central tendency are better predictors of final award. Although these measures do not significantly differ from one another, the median is the best single predictor of the jury's final verdict, with mean and mode nearly as strong. Thus, the central tendency of the jury's members prior to deliberation appears to drive the group's decision more than any distinctive individual vote. Moreover, the contributions of the potential anchors examined above appear to make no independent contributions to predicting the jury award apart from their influence on the group's central tendency: when we take the strongest group predictor—the predeliberation median—and first regress jury award on this variable and then add any of the individual verdict variables (first proposed award; highest and lowest predeliberation preferences), none makes a significant independent contribution to our ability to predict the final award.

The importance of the group's initial central tendency as a predictor of its ultimate award might be taken as suggesting a notion sometimes put forth by those critical of civil juries, that juries actually engage in some form of very crude averaging. To examine this possibility we analyzed the 60 verbatim transcripts of deliberating juries. The text analysis software employed enabled us to search for words that might indicate that the jury actually averaged individual awards at some point in deliberation (we identified and examined all references to "average," "averaging," "middle," "split," "splitting," and "compromise"). Although these words appeared often (562 times in 56 of the juries), the reference usually referred to other aspects of the testimony and not to combining individual juror award preferences. The idea of averaging individual awards to produce a verdict was proposed in only 8 of the 60 juries; in one the idea was rejected, and in the remaining 7 an actual average of individual award preferences was computed. In only 4 of these juries was the eventual award the same as the average that had been computed. Even the 7 juries that did compute an average at some point did not fit a crude image in which the jury simply got together and quickly exchanged preferences, averaged, and then accepted the result as their verdict. Rather all debated on matters of substance for a substantial time before actually computing an average. Indeed, the average deliberation time in the 4 juries in which the computed average became the jury award did not differ from the average deliberation time for those that did not engage in averaging at all. This pattern indicates that even in the few instances in which it was clear that averaging did have an influence on jury awards it was not employed as a shortcut that avoided consideration of the evidence and the judge's instructions. Thus, the ability of measures of central tendency in initial preferences to predict jury award occurs not because the juries engaged in crude averaging of their preferences but because the deliberation process itself is more strongly influenced by those in the middle rather than by outliers.

We have focused thus far in this section on the jurors as a group. The foreperson, however, occupies a leadership role and as a result has significant opportunity to play an especially influential role in the damage-setting process.

The Foreperson

We can see a first indication of the foreperson's influence in the substantial correlation between the foreperson's predeliberation verdict and the jury's award (r=.44, p < .001). It is significantly greater than the correlation between the predeliberation verdicts of each of the other jury members and their respective jury awards (r=.22, p < .001; z_diff = 1.82, p < .05, one-tailed).

Before concluding that the foreperson influences the jury's verdict, however, we must consider an alternative source for the foreperson's higher predeliberation award-jury verdict correlation. The correlation might also be high if the foreperson is chosen because his or her preferred verdict is particularly representative of the group's view prior to deliberation. The latter explanation
assumes that the jury has at least some sense of the foreperson’s preferred verdict before selection occurs and then chooses the foreperson based on that information. While it is possible in principle for jurors to share such information before deliberation, jurors are usually admonished not to discuss the case until deliberations begin. Moreover, the jurors in our study, as in other research (e.g., Strodbeck et al. 1957; Ellsworth 1989), selected the foreperson quickly, nearly always completing selection before the group turned to a discussion of the case. Almost two-thirds of our cases chose a foreperson within 10 statements of the beginning of deliberations, and nearly 90% chose within 20 statements. [FN40] Nonetheless, jurors do have the opportunity to learn something about one another before deliberations begin and may indirectly signal their reactions to the evidence without explicitly discussing the case. Therefore, we examined the predeliberation verdicts of the *548 forepersons versus those of other jurors to see whether the foreperson reflected the sense of the group more accurately than other jurors did.

We found no evidence that the forepersons were particularly good reflections of the jury’s position before deliberations began. The correlation between the predeliberation awards of the forepersons and the mean and median predeliberation awards of the jurors they came to lead were similar to the correlations for other jurors. [FN41] The correlation of the foreperson’s verdict with the jury’s mean predeliberation award was .42 (n=68, p < .001), and their correlation with the median was .43 (n=68, p < .001). But the correlations for the forepersons were no different from the correlations for other members of the jury, indicating that forepersons were no better representatives of the central tendency of their jury than were any other jurors.

Thus, the foreperson’s apparent influence is more than simply representational. Several pieces of evidence suggest a more active leadership role for the foreperson. By the end of deliberations, forepersons were viewed by their fellow jurors as more influential than other jurors. After the jurors completed their deliberations, the final question on their postdeliberation questionnaire asked each juror to rate the influence of each member of the jury. [FN42] Forepersons received an average rating of 5.49, while other jurors averaged 4.66 (t=7.24, df=129, p < .001). [FN43] This difference in ratings reflects juror perceptions and is only one of several possible proxies for actual influence. However, there is some indication that the rating differences reflects more than the higher activity level of the foreperson. Although forepersons talked substantially more than other jurors (M=1770.22 words vs. M=789.35 words, t=5.29, df=67, p < .001), [FN44] they were seen as more influential than their fellow jurors, even when we controlled for the number of words spoken. Number of words spoken explained 14% of the variation in the average influence rating a juror received (p < .001). Whether the juror was foreperson accounted for an additional 3% (p < .01).

*549 We also have evidence that the foreperson’s predeliberation vote independently contributed to the verdict over and above its contribution to the initial sense of the jury as captured in its mean or median predeliberation award. Thus, while the mean predeliberation award accounted for 27% of the variance in jury awards, the foreperson’s award significantly increased the explained variance (p < .05), bringing the total explained variation to 32%. And while the median award accounted for 36%, the foreperson’s award brought the explained variance to 39% (p=.056).

We have shown that forepersons appear to exert actual influence on other jurors in the course of the deliberation process rather than merely representing the predeliberation preferences of the jury. To identify attributes that may help to explain the foreperson’s influence over the jury, we turn now to a consideration of the characteristics of forepersons and the process by which they are selected.

We coded the jury deliberations for jurors’ mentions of attributes they thought should be considered in choosing their foreperson. The attributes that were mentioned (Table 5), emerged primarily in the context of discussing the qualifications of particular individuals, rather than being mentioned as abstract qualifications that forepersons ought to possess. Thus, among the three most commonly mentioned attributes were (1) occupying the seat at the head of the table, [FN45] and (2) the occupation, education, or expertise of a particular member of the group. The third often-mentioned attribute, prior jury service, was the one factor that jurors did discuss in the abstract (e.g., by asking if anyone had been on a jury before and suggesting *550 that such experience might be useful for the foreperson). Of course, other attributes not explicitly discussed also might have affected the choice of foreperson. For example,
although gender was mentioned only a few times, it still could have influenced who volunteered to serve or who was nominated. [FN46]

Table 5. Attributes Discussed during Selection of the Foreperson

<table>
<thead>
<tr>
<th>N of Juries Mentioning</th>
</tr>
</thead>
<tbody>
<tr>
<td>At head of table</td>
</tr>
<tr>
<td>Previous jury service</td>
</tr>
<tr>
<td>As juror</td>
</tr>
<tr>
<td>As jury foreperson</td>
</tr>
<tr>
<td>Occupation/education/expertise</td>
</tr>
<tr>
<td>Gender</td>
</tr>
<tr>
<td>Age</td>
</tr>
<tr>
<td>Talks a lot/good talker</td>
</tr>
<tr>
<td>Took notes/has paper and pen</td>
</tr>
<tr>
<td>Other</td>
</tr>
</tbody>
</table>

NOTE: Based on the deliberations of 67 juries; 3 juries began discussions before the tape was started.

To examine the effect of both implicit and explicit criteria used in foreperson selection, we tested the predictive power of various juror attributes on the choice of foreperson. [FN47] As Table 6 shows, four of the attributes tested were significant. Two of them, position at the table and occupation, were attributes specifically mentioned during deliberations. Jurors at the head of the table and those who had professional or managerial occupations were more likely to become forepersons. Other researchers have also identified these attributes as significant predictors in choosing a foreperson (e.g., Strodbeck & Lipinski 1985).

Table 6. Logistic Regression Coefficients for Selecting as Foreperson

<table>
<thead>
<tr>
<th>Regression Coefficient</th>
</tr>
</thead>
</table>

A third predictor, experience with statistics, relates to a type of juror expertise that was likely to be particularly valuable in determining damages in this antitrust case. Jurors who indicated on the pretrial questionnaire that they had taken a statistics course were significantly overrepresented among forepersons. Finally, one way a juror can subtly express interest or ability to serve as foreperson is to open the conversation, either with the bailiff before deliberations formally begin or with the jury at the start of deliberations. We recorded the identity of the first juror who spoke on each jury, and found that jurors who spoke first were significantly more likely to be chosen as forepersons than jurors who did not. Unlike earlier researchers, we did not find gender and prior jury experience to be significant predictors of foreperson selection.

We have now identified a number of factors that are associated with the choice of foreperson, and we have seen that the foreperson has an influence on the jury's award beyond the influence exerted by other jurors. But does the foreperson's enhanced influence stem from personal characteristics, the same qualities that led this individual to be selected by the other jury members? Or can the foreperson's enhanced influence be explained only by the deference of other jurors to whoever becomes foreperson or by the
opportunities to control deliberations that accrue to the person in the foreperson's position? One possibility is that the foreperson is influential because the same characteristics that led to the foreperson's selection tend to make any juror more influential, whether or not that juror becomes foreperson. That is, all jurors who sit at the head of the table may have enhanced influence, and forepersons may appear more influential simply because they are more likely to be selected from the set of jurors who sit at the head of the table. In the comparisons shown in Table 7, we use the correlation between jurors' predeliberation verdicts and their jury awards as a measure of juror influence. [FNS1] By comparing *552 forepersons and nonforepersons who do and do not possess these characteristics, we can test whether any of these attributes can account for the influence of the foreperson. If the foreperson appears influential simply because, for example, he or she is more likely to sit at the head of the table, then we would expect (1) that the correlation between the foreperson's predeliberation verdict and the jury's award would be reduced when the foreperson selected was not seated at the head of the table, and (2) that the predeliberation verdicts of nonforepersons seated at the head of the table would correlate more highly with their jury verdicts than would the verdicts of nonforepersons not seated at the head of the table. The results in Table 7 indicate that neither speaking first nor being at the head of the table modified the apparent influence of the foreperson. Nor did those characteristics affect the influence of nonforepersons. Similarly, forepersons who had professional or managerial occupations were no more influential than those who did not, and although the correlation for nonforepersons with a professional or managerial background was somewhat higher than for those in other occupations, the difference was not significant (z=1.22, p > .10). These results indicate that while forepersons were more likely to speak first, sit at the head of the table, and have a professional or managerial occupation, these attributes do not explain the foreperson's greater influence on the jury's verdict.

Table 7. Correlations between Individual Predeliberation Verdicts and Jury Awards for Jurors with Characteristics Associated with Leadership

<table>
<thead>
<tr>
<th>Characteristics</th>
<th>Forepersons</th>
<th>Not Forepersons</th>
</tr>
</thead>
<tbody>
<tr>
<td>All jurors</td>
<td>.44 [FNaal] (67)</td>
<td>.22 [FNaal] (337)</td>
</tr>
<tr>
<td>Position at table</td>
<td></td>
<td></td>
</tr>
<tr>
<td>At head of table</td>
<td>.43 [FNaal] (26)</td>
<td>.20 (40)</td>
</tr>
<tr>
<td>Not at head of table</td>
<td>.46 [FNaal] (41)</td>
<td>.23 [FNaal] (295)</td>
</tr>
<tr>
<td>Spoke first or later</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Spoke first</td>
<td>.46 [FNaal] (17)</td>
<td>.20 (46)</td>
</tr>
<tr>
<td>Spoke later</td>
<td>.40 [FNaal] (46)</td>
<td>.22 [FNaal] (272)</td>
</tr>
<tr>
<td>Occupation</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Professional or manager</td>
<td>.40 [FNaal] (43)</td>
<td>.31 [FNaal] (119)</td>
</tr>
<tr>
<td>Not professional or manager</td>
<td>.49 [FNaal] (24)</td>
<td>.18 [FNaal] (218)</td>
</tr>
</tbody>
</table>

Had course  .63 [FNaal]  (42)  .25 [FNaal]  (78)
Did not have course  .08  (25)  .20 [FNaal]  (238)

FNaal.  p < .01
FNaal.  p < .001

The pattern associated with having a statistics course tells a very different story. Having a statistics course significantly increased the influence of forepersons ($z=2.48$, $p < .05$). It had no apparent effect on the influence of the nonforepersons. The power of this indicator of expertise was apparently so crucial *553 for the foreperson that if the foreperson lacked that experience, the foreperson was no more influential than any other juror. Task-relevant expertise thus increased the likelihood that a person would be selected as foreperson, and when such a person was chosen, the foreperson appeared to exert a substantial impact on the jury's outcome. [FN52]

Forty-three of the 70 juries faced with a case involving antitrust damages selected a foreperson with relevant expertise, as measured by some statistics training. [FN53] The probability of being selected foreperson for jurors who said they had taken a statistics course was .30 ($n=145$), while the probability for jurors without such a course was .10 ($n=270$; $<\text{chi}^2> = 24.61$, $1 \text{ df}$, $p < .001$). [FN54] These results may suggest that jurors are able to select leaders who will help them reach rational decisions, but it is also possible that they are simply willing to choose a leader and be influenced by the advice of other jurors who have apparent expertise even when that expertise is not associated with a more reasoned approach to the evidence and the law. We expect to learn more from future analyses of the deliberations about how this statistical experience actually was used during deliberations.

Inflation Effects of the Deliberation Process

A clear inflation of damage awards occurred between the individual and the group level. On average the juries produced awards about $56,000 (or 26%) higher than the average of their members prior to deliberation. [FN55] Thus, the deliberation process produced a substantial inflation of the award size, and its effect occurred across all conditions and both orders of expert testimony. [FN56]

*554 One possible explanation for this effect might come from the literature on the "risky shift" or group polarization (Stoner 1968; Lamm & Myers 1978). This process, well established in the group decisionmaking literature, involves situations in which the initial tendency of group members' preferences become exaggerated in the ultimate group decision (e.g., members of a group composed of moderate opponents of abortion might, after discussion, become much more intense in their views). The effects of group polarization have been attributed to a variety of processes, including the operation of persuasion within the group and an interaction between individual impulses to be close to the group mean and the updating effects of information obtained from learning others' positions during discussion. (For a recent review of this literature, see Isenberg 1986.) Such a group polarization process would seem on theoretical grounds to be a fertile source for explaining the inflation process we are observing. For example, if a subgroup of jurors began the deliberation with awards consistently higher or lower than those of their peers, the jury deliberation might pull the ultimate award toward the preferred verdict of the subgroup, moving it beyond the mean of the individual jurors' initial preferences. If juries tended to begin deliberation with subgroups of jurors more supportive of the plaintiff's than the defendants' case, then this group polarization might tend to produce systematic inflation across juries.

Our analysis indicates that this explanation does not account for the inflation process we are observing. We have classified the 69 juries reaching a verdict on the basis of the configuration of initial preferences, identifying those juries having subgroups of at least three with initial awards in the plaintiff or defense ranges. Of the 47 juries with initial configurations favoring one of the parties, three-quarters initially favored the defendants rather than the plaintiff. Thus, a group polarization effect should have produced a
deflation effect. We also examined the relationship between the mean of each jury's individual pre-deliberation awards and its ultimate award. The juries do not appear to be systematically influenced by their initial polarization. Although juries with an initial configuration favoring the plaintiff's range are more likely to produce a verdict above their initial mean (as opposed to below it or at the same level), those that begin with a predisposition toward the defendants' range are twice as likely to end up above their mean. [FN55] Thus, even juries predisposed in favor of the defendants' damage estimate tended to move toward the plaintiff's damage request, which is inconsistent with the shifts predicted by the group polarization literature.

Three other aspects of the deliberation process do appear to provide some insights into the inflation effect. First, deliberation appears to increase the jurors' sense that the defendants' behavior was blameworthy. The 12-item defendant blameworthiness scale used in the analysis of the framing effects of mentioning punishment and deterrent contained five items that were asked of both nondeliberators and deliberators. These five items were used to form a second defendant blameworthiness scale. [FN58] Because jurors were randomly assigned to be deliberators or nondeliberators, and because deliberators completed the questionnaires after deliberation, we were able to compare the two groups on this index to test whether deliberation itself affected assessments of the defendants' conduct. When we controlled for the effects of condition on blameworthiness assessments, we found that deliberators scored significantly higher on the scale of defendant blameworthiness than jurors who did not engage in deliberation (F1,993 = 20.2, p < .001). [FN59] Assessments of defendant blameworthiness were associated with higher damage awards at the individual level for both nondeliberators and deliberators, [FN60] and the mean score on the scale within juries was related to the jury award. [FN61] Thus, deliberation appears to increase a sense of blameworthiness, and this attitude tends to increase verdict size. This effect for deliberation may occur in part because many jurors are unfamiliar with the issues in antitrust cases. Thus, they may begin to think of the jury's experience with only a tentative sense of what serious such violations are. If deliberation exposes such individuals to opinions which suggest that such activities are blameworthy, it may promote the inflation effect observed. And, indeed, the deliberations contain numerous references to the inappropriateness of the defendants' price-fixing behavior. Moreover, in the civil context we are examining, the jurors are not exposed, as they are in a criminal case, to extensive instructions stressing that they should err on the side of the defendant if they are uncertain, so the leniency effect observed in criminal cases is given no justification in this context. (On the effects of standards of proof on individual-to-group transformation processes, see Kaplan & Miller 1987; MacCoun & Kerr 1988.)

A second factor contributing to the inflation effect emerges from a content analysis of the jury deliberation transcripts. For each jury, we coded the first four proposed awards suggested by jurors. [FN62] Jurors who came to the deliberation with preferences for relatively low verdicts were substantially less likely to mention their proposed awards than those who had higher damage award preferences when they began deliberating. This pattern is most clearly suggested by comparing the mean and median of the pre-deliberation preferences of each jury with the mean and median of the first four proposals made in that deliberation. The mean of the first four awards proposed during deliberation was $25,000 higher than the pre-deliberation mean and $45,000 higher than its median. [FN63] This suggests a process by which inflation of jury awards might have been enhanced. In many juries, the "central tendency" actually displayed by the jurors was somewhat higher than the group's pre-deliberation preferences. Thus, the first four proposals provided a frame for further discussion and anchor points that were higher than the initial preferences brought to the deliberation.

*557 A third factor that may have contributed to an inflation effect involves the influence of the foreperson. As noted above, when forepersons had expertise in the subject area, they appeared to exercise greater influence on verdicts than did other members of the jury. Forepersons brought to deliberations award preferences which were on average $40,000 higher than the average of their group. [FN64] As indicated above, forepersons typically exercised more influence on jury awards than other jurors, and as a result their higher initial predispositions may have contributed to the inflation process.

Thus, the inflation process observed may be accounted for by the effects of deliberation on judgments of defendant
blameworthiness, the process by which lower pre-deliberation award preferences were less likely to be proposed as awards, and the fact that forepersons were both especially influential and likely to bring a preference for higher awards to the deliberation process.

IV. Conclusion

The jury evokes an ambivalent and inconsistent set of responses. Ambivalence emerges in the tension expressed between vesting great responsibility in groups of laypersons asked to decide important and often complex issues and nagging concerns about whether the institution is up to its tasks. Inconsistency arises in the variety of different jury images that range from the legal fiction that jurors are passive participants in the process of evidence presentation and assessment to the view that they bring to their tasks expectations, biases, and other attributes that affect their decisions and often lead them to resist efforts to control their behavior by legal instruction.

The evidence we present is quite inconsistent with the model of the jury as a passive and malleable recipient of testimony. Moreover, even when the testimony is arcane, complex, and difficult to follow, jurors make conscientious and often successful efforts to deal with the substance of what they hear, and their decisions reflect such activity. Yet, even if juries seem to pay close attention to both facts and law, they do not always follow the letter of the law. Rather, the jury portrayed in this research is a receptive but not uncritical audience for legal instruction, more responsive to the law when an acceptable rationale for the legal rule is provided.

The image of the jury as an active information processor emerges from a variety of our findings. The windfall avoidance effect when jurors are informed that their damage awards will *558 be trebled suggests that legal rules and their consequences play an important role in juror decisionmaking. The responses to expert testimony we observe also suggest that jurors play an active role in assimilating and assessing testimony. Jurors did not simply adopt the view of a witness they rated high on expertise, using apparent expertise as a peripheral cue to conclude that the expert must be correct (Petty & Cacioppo 1986). Rather, consistent with deeper processing of information which produces attitude change when the listener is highly involved, the jurors appeared to consider and evaluate the content of what the expert was presenting, and were less likely to be persuaded if they did not feel they understood it.

This approach not only suggests active evaluation and perhaps even sublety in dealing with expert testimony, but it also indicates the care jurors use in evaluating evidence to reach their decisions. When presented with complex statistical testimony, jurors were not simply overpowered by material they did not understand. Rather, the persuasive force of such testimony appears to depend in substantial measure on the ability of the expert to express clearly the basis for the conclusions it is being used to support. Our results thus suggest that concerns about jurors' uncritical willingness to accept statistical evidence may be overstated.

The relationship between active information processing and sensible decisionmaking is further illustrated by the difference observed among the conditions in which jurors learned about the treble damage rule. When jurors were simply informed of the rule but not admonished to disregard it, the windfall avoidance effect operated strongly; a bald admonition to ignore the effect produced less discussion in the jury of the trebling policy but no significant increase in damage awards. But when judicial instructions acknowledged jurors' inclinations to reduce their awards and jurors were given a clear justification for not reducing their awards, the windfall avoidance effect was substantially mitigated. When jurors are taken seriously and efforts are made to deal with their concerns and expectations, that is, when they are treated as active co-participants rather than passive sponges, they appear to be willing and able to respond more appropriately to the dictates of legal rules. Studies such as this one examine the sources of jury reactions to legal constraints, especially the individual and collective processes which produce such reactions. Such investigations can both increase our understanding of jury behavior (and lay response to legal rules more generally) and explore alternative approaches to jury control.

But establishing the conditions and procedures to achieve such jury control is not a simple matter. The results of our motive control condition dramatically show how an intuitively *559 plausible instruction, grounded in equity theory, produced unintended consequences: the effects of framing or availability that occurred in this condition appeared to lead jurors away from rather than
toward the goal that the instruction was designed to achieve. Although the most commonly used policy—our no information condition—turned out to approximate true compensation, this outcome should not simply reassure legal policymakers that their common sense is as good as or better than systematic empirical research. More appropriately, this finding—taken in conjunction with the unexpected inflation in the motive control condition—suggests that plausible predictions will sometimes, but not always, receive empirical support. Thus, policymaking by legislators or appellate judges is best served not by reliance on common wisdom, casual observation, or even promising theory but rather by careful exploration of the likely effects of policies prior to their implementation. Moreover, such empirical work provides an opportunity to compare multiple approaches to jury control simultaneously. Thus, we found that the trebling with explanation condition also produced awards quite close to our true compensation level, suggesting that carefully crafted efforts that both provide jurors with important information and give them reasons why they ought not employ it may, indeed, be successful. In addition, because full disclosure to all jurors may also avoid the potential unpredictability that can occur if only some jurors learn about trebling, there may be good policy arguments to prefer this approach to simple blindfolding. More generally, the ways in which the various instruction conditions affect juror and jury decisionmaking suggest that expectations, attention to consequences of their verdicts, and conscious and unconscious information processing all play significant roles in juror and jury decisionmaking.

The last set of issues we discuss centers on the process by which deliberation transforms initial individual preferences into a jury decision. Clearly the group verdict is the product of the preferences, expectations, inferences, and stories that individual jurors bring to the deliberations, but the algorithms that produce this transformation are not well understood. Some of the patterns emerging here—the special influence exercised by the foreperson and the inflation from juror to jury awards—are all in need of further analysis. Moreover, they contradict an image of the jury that has permeated the literature, namely, the view that deliberations have relatively little effect on jury outcomes. Kalven and Zeisel (1966) argued that the study of jury deliberations could add little to our understanding of juries because the final verdict was implicit in the distribution of the jury's predeliberation votes. The social decision theory literature on juries continued this theme (e.g., Davis et al. 1975; Stasser et al. 1982). Most of this research developed from the criminal context in which juries are faced with few verdict choices. In the civil context, when money damages are at issue and more extensive avenues for compromise are available, the deliberation phase may have a substantial impact on outcomes. The effects of deliberation on perceptions of defendants' behavior and the attendant inflation effect we have found here suggest that research on deliberations provides a fertile ground for understanding jury decisionmaking in civil trials.

References


Burns, Robert Emmett (1965) "A Compensation Award for Personal Injury or Wrongful Death Is Tax Exempt: Should We Tell the Jury?" 14 De Paul Law Rev. 320.


Elwork, Amiram, Bruce D. Sales, & James J. Alfini (1977) "Juridic Decisions: In Ignorance of the Law or in Light of It?" 1 Law & Human Behavior 163.


*561 Ginosar, Zvi, & Yaacov Trope (1980) "The Effects of Base Rates and Individuating Information on Judgments about Another Person," 16 J. of Experimental Social Psychology 228.


Thompson, William C. (1989) "Are Juries Competent to Evaluate Statistical Evidence?" 52 Law & Contemporary Problems 9


Cases Cited


Pollock & Riley, Inc. v. Pearl Brewing Co., 498 F.2d 1240 (5th Cir., 1974).


Statutes Cited


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courthouse a congenial place for jury service. Associate Dean James Faught, Professor James Carey, and audio visual expert Rick Partyka of Loyola Law School made it possible for us to videotape the multiple versions of our trial in a realistic courtroom setting. We were also enormously fortunate to have an enthusiastic and extremely capable group of research assistants: Linda Dimitropoulos, Scott Barclay, Lynne Ostergren, and Elizabeth Murphy; and undergraduates Otto Beatty III, Julie Bernstein, Gabriella Gonzalez, Karen Harris, James Hurt, and Lori Thomas, who were supported on summer research fellowships from NSF and the ABF. Finally, we are grateful for suggestions from Rick Lempert, Frank Munger, and Neil Vidmar.

[FN1]. While some audiences have been receptive to the idea of allowing jurors to ask questions, many attorneys have objected on the grounds that parties should have the right to control the production of testimony. For a judge’s report on his experiences with allowing jurors to ask questions, see Wolfson 1987, and for some experiments in which jurors were allowed to ask questions, see Heuer & Penrod 1988.

[FN2]. Note, however, that the existence and extent of insurance may affect the parties’ incentives and thus such information may be relevant in judging their credibility.

[FN3]. Treble damage provisions are not limited to antitrust suits. The Racketeer Influenced and Corrupt Organizations Act (1988) (RICO) also provides that any person injured by a RICO violation may sue in federal court and recover treble damages. 18 U.S.C. 1964(c) (1988).

[FN4]. For notable recent exceptions to this neglect, see Thompson & Schumann 1987; Raitz et al. 1990.

[FN5]. The instruction in the trebling with no admonition condition on the issue of trebling was:
   Now, under the antitrust laws, the judge will award to Granite Road three times the amount of damages which the jury finds.
   That is, if you find that Granite Road suffered $X$ dollars in damages, the judge will order the defendants to pay a total of 3 times that amount to Granite Road.

[FN6]. The instruction in the trebling with an admonition condition on the issue of trebling began with the language quoted in note 5, followed by:
   Your job, however, is to decide only on the amount of damages, if any, suffered by Granite Road. The fact that the damage award will be tripled should in no way affect your decision. It is the judge’s job to multiply the amount you award by 3 and to order the defendants to pay that amount.

[FN7]. The instruction in the explanation condition on this issue was:
   Now, under the antitrust laws, the judge will award to Granite Road three times the amount of damages which the jury finds.
   That is, if you decide that Granite Road suffered $X$ dollars in damages, I will order the defendants to pay a total of 3 times that amount to Granite Road. Your job, however, is to decide only on the amount of damages, if any, suffered by Granite Road. The fact that the damage award will be tripled should in no way affect your decision.
   If you reduce your damage award below what you believe to be the appropriate compensation amount in anticipation of its being tripled, you will be defeating Congress’s purpose in providing for triple damages. Congress decided to have jury compensation awards tripled in order to provide for punishment of the defendants for their law violation and to deter them and others from future law violation.

[FN8]. Some of our earlier research suggested that jurors may understand and accept the rationale for trebling of damage awards if they are given an explanation for trebling (Diamond et al. 1989). In a telephone survey of 192 jury-eligible citizens, we asked respondents if they thought trebling was a good idea or a bad idea. Half the respondents were asked to evaluate the trebling rule before they were told about the purposes of the rule, and half evaluated the rule after they were told of its suggested purposes. Support for the
rule was significantly higher—75% versus 60%—among respondents who were told the purposes of the rule ($\chi^2 = 4.12$, $p < .05$). These preliminary data suggested that an explanation of purposes might encourage jurors not to reduce awards to avoid a plaintiff windfall.

[FN9]. This approach to jury control was suggested in Michigan Law Review 1983.

[FN10]. The judicial instruction on this issue in the motive control condition was:

In deciding upon damages to be awarded to the plaintiff, you should consider only the amount necessary to compensate the plaintiff for the damages caused by the price-fixing agreement. After you have decided the appropriate amount necessary to compensate the plaintiff for harm done, my job as the judge will be to add an additional amount to the plaintiff's award, if such an addition is deemed necessary to punish the defendant companies for their law violation and to deter them and others from similar acts in the future.

[FN11]. The judicial instruction in the no information condition included the general instructions from conditions 1–4 informing jurors to focus on compensation and providing general principles about how damages were to be computed (e.g., they should not be based on mere guesses or estimates of witnesses; damages should be awarded only if they flowed necessarily and immediately from the wrong). The jurors were then told to deliberate and set a damage award, with no reference to trebling or any other additional amounts that might be added by the judge.

[FN12]. The judicial instruction for computing damages in the unconstrained condition read:

It is now my duty to instruct you as to how to compute the measure of damages in this case. You must determine the amount of money which it is reasonable and fair for the plaintiff to receive in light of the actions of the defendant companies.

The general rule of the subject of damages is that the amount of money to be awarded shall be appropriate and reasonable in light of the actions of the defendants. The law does not require that the plaintiff make exact proof, in dollars and cents. But the law does require that the amount of your award be based upon the testimony that you have heard in this case or upon inferences that reasonably flow from such testimony.

Note: The last two sentences appeared in all instruction conditions.

[FN13]. Note the similarity of this approach to the nonequivalent control group quasi-experimental design

\[ O \times O / O / O \]

where X is the price-fixing agreement and O is the measure of profit. The strength of the design depends on the comparability of the nonequivalent groups (Cook & Campbell 1979).

[FN14]. This research strategy of random assignment to deliberation or nondeliberation conditions was designed to facilitate understanding the process by which individual verdicts are transformed into jury awards. By comparing the perceptions and evaluations of nodeliberators with responses to the same questions made by jurors after they have completed deliberations, we can examine the effects of the deliberation process itself. See sec. III.E below.

[FN15]. Of the jurors, 49% were females and 51% were males; 22% were less than 30 years old, 49% were between 30 and 49, and 29% were 50 or older; 69% less than a high school education, 24% a high school diploma or technical training, 28% some college, 23% a college degree and 18% graduate school experience; 70% classified themselves as white, 23% as black, and 7% as Hispanic, Asian, or Native American. There were no differences in the characteristics of deliberators and nodeliberators.

[FN16]. Three of the juries had five members. The number of nodeliberators was determined in part by the number of jurors available for participation on any particular day.
[FN17]. Although log transformations are often appropriate for variables involving dollar amounts because of their strong positive skew, a log transformation is not appropriate here. Rather than having a positive skew, the distribution is rather lumpy, with substantial nodes at award amounts emphasized by the two sides in the testimony (e.g., $35,000, $105,000, $420,000, $490,000). We did, however, test the sensitivity of our results to extreme values by truncating the awards at $500,000 to reduce the effect of the 4 extreme awards ($1 million or above) on the results. This produced no change in the findings.

[FN18]. As indicated above, the original 70 juries which deliberated to verdict included twice as many in the unconstrained condition (20) as in the other instruction conditions (10 each). As a result, we randomly selected 10 of those 20 juries, producing 10 transcriptions for each of the six instruction conditions.

[FN19]. A Bartlett-Box test indicated no violation of the assumption of homogeneity of variance in verdicts across the six instruction conditions, so the pooled variance estimate was used; degrees of freedom for each contrast were 1,003.

[FN20]. We conducted the same analyses on the jury as well as the juror awards. As indicated below, the order of the average jury awards in the six conditions mirrored the order of the average juror awards.

<table>
<thead>
<tr>
<th>Instruction Condition</th>
<th>Mean Jury Award</th>
</tr>
</thead>
<tbody>
<tr>
<td>Trebling without admonition</td>
<td>$201,000 (n=10)</td>
</tr>
<tr>
<td>Trebling with admonition</td>
<td>223,850 (n=10)</td>
</tr>
<tr>
<td>Trebling with explanation</td>
<td>237,100 (n=10)</td>
</tr>
<tr>
<td>Motive control</td>
<td>317,778 (n=9)</td>
</tr>
<tr>
<td>No information</td>
<td>250,750 (n=10)</td>
</tr>
<tr>
<td>Unconstrained</td>
<td>330,231 (n=20)</td>
</tr>
</tbody>
</table>

FNa. The jury in this condition not included in the jury analysis could not reach a verdict. At the end of the deliberation, 5 of the jurors agreed on $490,000, but the lone hold-out was unwilling to award more than $250,000.

Although the small number of juries in each cell of the design meant that the power of the comparisons was low, the test of hypothesis I did produce a significant difference (t=-2.69, df=63, p=.009).

[FN21]. Most work on the effect of admonitions has examined the effects of admonitions to disregard testimony: jurors thought important (e.g., the criminal record of the defendant) and/or which was likely to be directly implicated in the jurors' "stories" or understanding of what happened in the case (e.g., whether a search produced evidence of illegal conduct). In such cases, either jurors may consciously choose to ignore an admonition to disregard testimony they see as important, or the material may be so embedded in

the "story" they have arrived at; that even a conscientious juror may be unable to comply with the admonition (Pennington & Hastie 1986; Casper et al. 1989). Here we deal with an admonition to disregard on an issue that seems less likely to be the subject of conscious juror nullification or to the information-processing effects observed in prior studies. Yet the ineffectiveness of bald instructions to disregard is again observed. It is only when the admonition is coupled with an explanation that the admonition influences verdicts.

[FN22]. Using the text analysis software, we searched the 30 jury deliberation transcripts from the first three conditions to identify all mentions of the following words and phrases: (1) "three times"; (2) "3 times"; (3) "treble" or a word with "trebl-" as a root; or (4) "triple" or a word with "tripl-" as a root. We identified 436 mentions of any of these words and phrases and coded 293 as referring to the treble damage provision.

[FN23]. If the mention of punishment and deterrence made these goals cognitively more available to jurors (Kahneman et al. 1982), jurors might have taken these goals more into account in their individual decisions and been more likely to employ them in arguing for higher awards during deliberation. Our data do not enable us to distinguish between framing and availability effects.

[FN24]. The blameworthiness index was the total of 12 seven-point rating scales which assessed jurors' perceptions of defendants' fairness, justness, lack of greed, and honesty; the price-fixing agreement's rightness, fairness, morality; and the defendants' lack of intent to harm and lack of careful planning, how much harm the price-fixing agreement did to the plaintiff, whether it was appropriate for the plaintiff to sue the defendants, and whether jurors thought that price fixing should be a criminal offense. Cronbach's Alpha for the composite scale was .84.

[FN25]. The potential impact of framing on awards is indicated by the correlation of .43 between the index of defendant blameworthiness and the size of juror awards.

[FN26]. See last sentence of the instruction quoted in note 10.

[FN27]. Using the text analysis software, we searched the 60 deliberation transcripts for all statements mentioning words likely to index the motive to punish or deter, and examined all instances in which the following words occurred: "penalty"; "punish" and other words with "punish-" as a root; "lesson"; "deter" and other words with "deter-" as a root. We identified 280 mentions of these words or phrases and coded 83 of them as indicating the desirability of punishing or deterring the defendants. The bulk of the other mentions of punishment and deterrence came in the trebleting conditions and involved speculations by jurors about the reasons for the treble damage policy. The average number of mentions across all juries was 1.4 per jury.

[FN28]. It is possible that this lack of motivation to punish and deter might in part be an artifact of our case and that in cases with more egregious violations or larger damages to the plaintiff, such a motivation might play a more significant role.

[FN29]. We examined the deliberations of all 20 juries in conditions 4 and 5 and 10 of the juries in condition 6. None of these juries received a trebling instruction, but the topic of trebling came up in 3 of the juries. Although it is unclear whether the discussion influenced any jury verdicts, in one case the foreperson (an attorney) hesitantly raised the topic, saying "I don't think you're allowed to take that under consideration, but I think we should." In the other two cases, the topic was briefly mentioned but did not produce any discussion.

[FN30]. When the statistical expert testified for the plaintiff, his model attributed $490,000 in damages to the price-fixing agreement; when he testified for the defendants, the same model allegedly revealed $35,000 in damages. In each version, the statistical expert's damage estimate was disputed by the expert presenting the concrete model who offered the lower damage figure ($35,000 when the statistical expert said it was $490,000) or the higher damage figure ($490,000 when the statistical expert said it was $35,000).
[FN31]. When he appeared for the plaintiff, he testified that his costs for crushed rock had not risen during this period; when he appeared for the defendants, he testified that he had experienced a price increase similar to that experienced by the plaintiff.

[FN32]. There was no evidence of an interaction between the expert and instruction conditions (F < 1).

[FN33]. There is some additional evidence that the statistical expert was slightly more convincing. When the juror awards are categorized according to whether they were in the range claimed in the statistical model, in that claimed in the concrete model, or somewhere in between, the results suggest a slight advantage for the party presenting a statistical model (i.e., 38% of the awards in the range of the statistical model vs. 32% in that of the concrete model). Moreover, when jurors were asked to indicate how they computed their verdicts, they cited the statistical model 18% of the time and the concrete yardstick model 14% of the time. (The majority said they used both models or selected an amount and adjusted it because it seemed too high or too low.)

[FN34]. Persuasiveness was computed by summing seven-point items rating how believable and convincing the expert was; expertise by summing items rating how well informed, knowledgeable, and competent he was; clarity by summing how clear, easy to understand, and simple he was; and trustworthiness by summing three five-point items measuring (1) disagreement that he twisted the evidence to suit his own purpose, (2) agreement that he seemed eager to explain in a fair and balanced way, and (3) agreement that he was someone who could be trusted in other matters. The Cronbach's Alphas for the scales, computed separately for each expert, were for the statistical expert, .68, .76, .77, and .70; for the expert presenting the concrete model, .72, .74, .65, and .70.

[FN35]. Order, too, affected jurors' ratings. When a witness testified for the plaintiff, he was rated more persuasive, more expert, clearer, and more trustworthy than when he testified for the defendants (p < .001 in each case). This order effect is consistent with the primary effects typically observed in studies of person perception (e.g., Anderson & Jacobson 1965). More recent research suggests that early information frames the issues and modifies the way the receiver of a message processes later information. The adversary structure of trial proceedings does alert jurors to expect later disconfirming evidence and thus partially to reserve judgment (Lind et al. 1976), but the strong order effect observed here suggests that early influence by the plaintiff's witness may be difficult to counteract.

[FN36]. In this report, we examine data from the questionnaires filled out by all 417 deliberators and a content analysis of 60 jury deliberations. The verbatim transcripts of these juries were content analyzed using computer-based text analysis software. In addition, for the analysis of foreperson selection and proposals of awards in the juries discussed in this section, we performed a similar and parallel content analysis of portions of videotaped deliberations of the remaining 10 juries for which a transcript had not been prepared. Thus, the content analysis of deliberations is based on 60 juries, except for the discussions of foreperson selection and award proposals, which are based on all 70 juries.

[FN37]. In her study of damage awards in an automobile accident case, Sonaik (1978) also reports that the median of individual juror predeliberation awards is a better predictor of the juries' damage awards than the mean. This result was obtained by assigning a value of 0 to verdicts for the defendant.

[FN38]. When averaging actually occurred, six juries computed the arithmetic mean of the set of six expressed verdict preferences, while one jury computed the average of the four remaining preferences after the highest and lowest had been discarded.

[FN39]. This correlation is based on 67 juries. The foreperson did not indicate a predeliberation verdict on two of the juries. The remaining jury ended in deadlock.

[FN40]. A new statement began when one juror stopped speaking or was interrupted by another juror. The average jury deliberation contained 363 statements.
[FN41]. Thus, e.g., for jurors who occupied seat 1 at the jury table, the correlation of their predeliberation award with their jury’s mean predeliberation award was .57 (n=56, p < .001) and it was .49 (n=56, p < .001) with their jury’s median predeliberation award. The corresponding correlations with the mean awards for jurors who occupied the other five seat positions varied from .40 to .56; the correlations with the median awards varied from .37 to .57.

[FN42]. Jurors rated each member of their jury on a 7-point scale on which 1=not very influential and 7=very influential.

[FN43]. The degrees of freedom are adjusted because the variance of ratings for the nonforepersons was significantly greater than the variance of the ratings for the forepersons (F=1.90, p < .01).

[FN44]. The degrees of freedom are adjusted because the variance in the number of words used by the forepersons was significantly greater than the variance in word usage by the nonforepersons (F=3.02, p < .001).

[FN45]. The jury table was rectangular, with three chairs arranged on one side, two on the other, and one at one end. The seat position of the juror on the end was thus distinctive.

[FN46]. Nearly all of the forepersons (96%) were nominated rather than volunteering to serve.

[FN47]. Correlations among these 6 predictor variables were less than .20 in all cases with the exception of a .41 correlation between occupation and having taken a statistics course. Educational level was not included as a predictor because it correlated .54 with occupation and .60 with statistics experience.

[FN48]. Strodbeck et al. (1957) found that men, at least in the 1950s, were far more likely to become forepersons than women.

[FN49]. Strodbeck and Lipinski (1985) as well as Kerr et al. (1982) found that jurors with previous jury experience were more likely than inexperienced jurors to become forepersons, while Ellsworth (1989) did not find that prior jury experience increased the probability of becoming a foreperson. In the jurisdictions studied by Strodbeck and Kerr, jury service lasted several weeks, giving jurors the opportunity to serve on multiple juries. As a result, jury experience was common (34% and 42% of their jurors had served on juries previously), recent, and salient. In contrast, under the one day/one trial system of jury service currently in use in Cook County, only 16% of our jurors reported that they had been jurors previously, and because by law none of them would have been eligible to serve if they had served within the past year, the potential salience of that experience was probably reduced.

[FN50]. Because 21 of the juries did not include any jurors who indicated on their questionnaire that they had prior jury experience, we repeated the logistic regression reported in Table 6 excluding these juries. The same four factors were significant, and gender and prior jury experience remained not significant.

[FN51]. Assessing the influence of jurors and their attributes on the jury verdict is complicated by the fact that many attributes (e.g., prior jury service, sex, position at the table, prior statistical training) make no directional prediction about the size of the award that might be preferred by those with one or another attribute. Thus, in this analysis we examine the correlations between the individual predeliberation awards and jury verdicts for sets of individuals possessing various attributes. These correlations permit us to evaluate whether influence was exerted differently by jurors with and without these attributes.

[FN52]. A somewhat similar pattern of correlations was obtained comparing jurors who had at least a bachelor's degree with those who had less education: for forepersons with a B.A., r=.56 (n=43, p < .001); for forepersons without a B.A., r=.16 (n=24, not signif.); for nonforepersons with a B.A., r=.24 (n=123, p < .01); and for nonforepersons without a B.A., r=.20 (n=212, p < .01).

[FN53]. Thus, over 60% of the juries had forepersons who said on their questionnaires that they had taken a statistics course. Four of
the juries had no member with such a background; 65% of the juries which included a member with a statistics course chose one as their foreperson.

[FN54]. Note that 35% of the jurors claimed to have taken a statistics course. In view of this unexpectedly high figure, we suspect that jurors were including other mathematics classes in this account.

[FN55]. The mean juror predeliberation award is the average of the mean individual verdicts obtained for each of the 69 sets of jurors prior to their deliberation, excluding the jury that hung. The mean jury award consists of the average of the awards made by the 69 juries after deliberation. The mean juror predeliberation award was $213,440; the mean jury award was $269,444 \( t=4.42, df=68, p < .001 \).

[FN56]. Similar effects have appeared in other studies of damage awards as well, including Zuehl (1982), Wasserman & Robinson (1980), and Kaplan & Miller (1987), in which an inflation effect was observed for punitive but not compensatory awards. Hastie et al. (1983) report an analogous inflation effect in the criminal context--by which deliberating jurors tended to move toward a more serious conviction charge than their initial predeliberation verdict preference. The Hastie model predicts this inflation effect on the basis of the distribution of faction sizes favoring various verdict alternatives. Its applicability to a civil context like ours is limited by the lack of clear definitions of "factions" when initial damage award positions have such a large range compared to the smaller number of verdict categories available to jurors in the criminal context.

[FN57]. Note that regression toward the mean cannot explain these results. Two-thirds of the juries reached verdicts that were higher than their average predeliberation verdict. This increase occurred as often for juries that began with an average above their mean as for juries that began below their mean.

[FN58]. The items asked respondents to evaluate the defendants' behavior on such dimensions as whether they intended to harm the plaintiff, how much harm they did to the plaintiff, whether their act was carefully planned, whether price fixing ought to be a criminal offense, and whether the plaintiff was justified in taking the matter to court. These five items each had a seven-point response scale (e.g., Did Rocky Mountain Crushed Rock and Western Rock Supply intend to harm Granite Road Company? 1=definitely did; 7=definitely did not) and formed a satisfactory scale (Cronbach's Alpha=.63).

[FN59]. The analysis of variance included two factors: (1) whether the juror was assigned to instruction condition 3 or 4, in which the instructions mentioned punishment and deterrence or was assigned to another instruction condition; (2) whether they were deliberators or nondeliberators. The first factor was also significant (\( F=7.79, df=1,990, p < .005 \)). No interaction was obtained.

[FN60]. The Pearson correlations between the blameworthiness scale and predeliberation verdicts for nondeliberators and deliberators were .39 (p < .001; n=582) and .34 (p < .001; n=400), respectively.

[FN61]. The Pearson correlation between the jury award and mean score for the jury as a whole on the blameworthiness scale was .51 (p < .001; n=69).

[FN62]. If a juror suggested more than one award before three other jurors had made award proposals, we coded only the juror's first proposal. Two coders were trained to identify proposals of award amounts in the transcribed deliberations of 60 juries. In addition, the coders used the same conventions to analyze the videotapes of the remaining 10 juries whose deliberations were not transcribed. Thus, the data on award proposals reported here are based on all 70 juries. The coders made independent judgments and then met and discussed coding decisions with the two authors. After discussion, a consensus decision was made about the appropriate coding for each jury. The following conventions were employed for proposals which did not involve a single specific dollar amount. Proposals which suggested a range (e.g., $150,000 to $250,000) were coded at their midpoint. The 28 proposals which were not codable into a
specific amount (e.g., less than $490,000; greater than $35,000) were not included in the calculations of mean proposals.

[FN63]. Using a correlated t-test to compare the mean of the first four proposals with the median of the predeliberation awards, we found that the difference between them is significant ($190,408 vs. 235,639; t=3.05; df=60; p < .003) while the difference between the mean of the first four proposals and the mean of the predeliberation verdict preferences is marginally significant ($235,639 vs. $210,731; t=1.88; df=60; p < .07). The mean of the first four proposals was calculated only for the 62 juries in which at least 3 codable proposals were made prior to conclusion of the deliberations.

[FN64]. $248,250 for all forepersons vs. $206,579 for all other deliberating jurors (t=1.78; df=408; p < .075).

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Real Jurors' Understanding of the Law in Real Cases*

Alan Reifman, Spencer M. Gusick, and Phoebe C. Ellsworth†

A survey of 224 Michigan citizens called for jury duty over a 2-month period was conducted to assess the jurors' comprehension of the law they had been given in the judges' instructions. Citizens who served as jurors were compared with a base line of those who were called for duty but not selected to serve, and with those who served on different kinds of cases. Consistent with previous studies of mock jurors, this study found that actual jurors understand fewer than half of the instructions they receive at trial. Subjects who received judges' instructions performed significantly better than uninstructed subjects on questions about the procedural law, but no better on questions about the substantive (criminal) law. Additionally, jurors who asked for help from the judge understood the instructions better than other jurors. Since the results replicate previous research using simulated trials, this study provides evidence for the generalizability of earlier work to actual trials.

The belief that juries in most cases apply the relevant law correctly to the facts in reaching their verdicts has been referred to as an "invariable assumption of the law" (Richardson v. Marsh, 1987). Appellate court judges routinely endorse the idea that juries understand the instructions, and appeals based on juries' mistaken

* This study would not have been possible without the cooperation and assistance of the judges, administration, and jurors of the Twenty-Second Circuit Court of Michigan, in Ann Arbor. Special thanks to Judge William Ager, James Inloes, David Walsh, and Corey Peña for their extensive efforts in facilitating this research. We are also indebted to Judges Patrick Conlin, Ross Campbell, William Ager, Edward Deake, and Melinda Morris for allowing us to send questionnaires to their jurors. Judge Ager and Samuel Gross made helpful comments on an earlier draft of the manuscript. We are grateful to Daniel Weintraub, of the University of Michigan Psychology Honors Program for his guidance, and to Nancy Exelby for her superior skill and boundless patience. Spencer Gusick is now at the University of Michigan Law School. Alan Reifman is at the Research Institute on Alcoholism, 1021 Main Street, Buffalo, NY 14203. Requests for reprints should be sent to Phoebe C. Ellsworth, Research Center for Group Dynamics, University of Michigan, P.O. Box 1248, Ann Arbor, MI 48106.

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interpretation of the law are rarely successful (Parker v. Randolph, 1979; City of Los Angeles v. Heller, 1986; United States v. Lane, n. 13, 1986; Martin v. Ohio, 1987). The appellate bench, however, may be the only place where this invariable assumption is widely expressed.

Among social scientists who have studied jury decision making the opposite assumption prevails: Jurors may be quite competent at sorting out the facts, but they have a very difficult time understanding the judge’s instructions and often miss crucial distinctions. Study after study has shown that jurors do not understand the law they are given, often performing at no better than chance level on objective tests of comprehension (Charrow & Charrow, 1979; Elwork, Sales, & Alfiniti, 1977, 1982; Ellsworth, 1989; Forston, 1975; Hastie, Penrod, & Pennington, 1983; Kaplan & Kemmerick, 1974; Kassin & Wrightsman, 1979; Kerr et al., 1976; Severance & Loftus, 1982; Smith, 1987). Ellsworth (1989) found that although subject-jurors spent over 20% of their deliberation time discussing the law, only about half of their statements were correct, and one fifth were seriously in error. Nor did the juries show much progress toward the correct interpretation of the instructions over the course of the deliberation. Although some jurors’ mistakes were corrected by other jurors, an equal number of correct statements about the law were abandoned in favor of mistaken ones. The same jurors were generally quite competent in their discussions of the facts; their confusion was specific to their attempts to define and apply the law.

Several reasons for this poor performance have been suggested. The most obvious is the legal language itself (Charrow & Charrow, 1979; Elwork et al., 1982). Rewriting judicial instructions with more conventional vocabulary and sentence structure can significantly increase jurors’ recall of the law (Charrow & Charrow, 1979; Elwork et al., 1977; Severance & Loftus, 1982). Even when the language is simplified, however, accuracy is far from perfect, indicating that the convoluted legal language is not the only obstacle to comprehension.

Typically, jurors receive their education in the law by listening to the judge read the instructions aloud—far from the ideal way to absorb complex information. Some states currently require the inclusion of written instructions, while other states specifically prohibit them. In most states, it is up to the trial judge to decide whether or not to provide written instructions. The argument is that the judge is in the best position to determine what form of instructions is most appropriate for the particular case at hand, but in practice most judges either give written instructions all the time, or they do not give them at all.

There is very little research on the consequences of supplementing the oral instructions with a written copy, and the results are mixed. Although jurors seem to like the innovation and feel that it helps them understand, the evidence that it actually does so is weak (Forston, 1975; Hastie, 1983; Heuer & Penrod, 1989).

Another source of poor juror comprehension of the law may be the timing of the instructions. Although attorneys may make piecemeal reference to the law during the trial, it is not until the conclusion of the trial—after the testimony of all the witnesses and the closing statements of the attorneys—that the judge systematically instructs the jurors in the substantive law. Smith (1987) found that jurors
who were given both pretrial and posttrial instructions had significantly greater comprehension of the judges' instructions for the substantive law and were better able to apply their knowledge to the facts of a case than were subjects who received pretrial or posttrial instructions only.

Still another possible shortcoming of current practice is that jurors are rarely told that they are allowed to request help from the judge if they have a question about the law; thus it may not occur to them to ask for guidance when they need it. Even if a jury does request help, such "help" commonly takes the form of a verbatim repetition of the confusing instructions. Empirical research on this question is nonexistent; we do not know whether subjects do better when they are told that they can ask for help, nor do we know which kind of help (repetition, provision of written instructions, restatement, etc.) is most beneficial.

Although empirical research has consistently indicated that jurors have trouble comprehending the law presented at trials, and seems to have defined some of the sources of these difficulties, few changes have been introduced in the way judges instruct juries. Even when appellate courts have cited the research on juror comprehension of judges' instructions, they have consistently held that reform was unnecessary. If anything, recent judicial opinions have been more likely to change the rules governing instructions in ways contrary to the research findings than in ways consistent with them, such as prohibiting written instructions in jurisdictions where they were formerly permitted (Tanford, 1991). Legislatures, state agencies, and special commissions have been somewhat more receptive to research-based reform, but still, movement has been glacial (Tanford, 1991).

Although rapid implementation of social science findings is hardly the norm in the legal system (cf. Ellsworth & Getman, 1987), in some ways the lack of impact of research on juror comprehension of the law is surprising. The basic issue is not politically controversial: no one is arguing that mistaken applications of the law are desirable. The proposed reforms are relatively simple, and neither researchers nor judges who have tried them have reported any negative consequences (cf. Sand & Reiss, 1985).

One reason for this apathy may be that legal policymakers do not trust the research. Judges may be particularly skeptical of social science research that attempts to simulate what judges do or what happens in a real courtroom. They may be reluctant to consider the possibility that the juries they instruct might not do better than random guessing on a test for memory of the law.

Indeed, most of the studies demonstrating jurors' poor comprehension of the law have been simulations, performed in laboratories with mock jurors hearing (or reading) mock cases. Early studies typically relied on students to serve as jurors. Students are not representative of actual jurors in age, education, experience, or political beliefs. Although more recent studies have commonly used adult subjects who are eligible for jury service, some doubts remain about the representativeness of the samples. An actual jury is not simply 12 people called from tax, election, or motor vehicle lists: Rather, a jury consists of people selected by judges and attorneys through voir dire, a process that eliminates as many as half of all potential jurors. Few researchers have bothered with this expensive procedure. In
terms of basic theory, and in terms of internal validity, it adds little. There is no reason to believe that the results should not apply to actual jurors; on the other hand, there is little direct evidence that they do.

Questions have also been raised about experimenters' ability to capture the atmosphere of a real trial in a laboratory setting. Certain aspects of a trial are costly, time-consuming, or simply impossible to recreate in an experiment. Actual trials include a judge, attorneys, plaintiffs, defendants, witnesses, court officers, a courtroom, deliberation chambers for the jury, unlimited deliberation time, and jury sequestration, if necessary. Simulations have ranged from extremely schematic to extremely realistic, the most realistic to date being the Hastie et al. (1983) study of the unanimity rule.

No matter how realistic the simulation, however, research ethics typically require that the subjects be aware that it is a simulation, that no one's fate actually depends on their decision. No matter how long simulated juries deliberate (Hastie et al., 1983) or how passionately they dispute the issues (Cowan, Thompson, & Ellsworth, 1984), there is always the possibility that real juries might behave differently; thus our confidence in the generalizability of a laboratory finding is usually greatly enhanced by the demonstration of the same result in a study of real jurors. With respect to juror comprehension of the law, one might argue that a juror who is personally involved in the drama of a real trial might try harder to understand the relevant law and might, therefore, perform better than a subject in a simulation.

Finally, in most laboratory studies, the judge's instructions are the only source of the relevant law, but in real trials, the attorneys also have opportunities to communicate to the jurors about the legal rules. Few good attorneys are content to rely on the judge to transmit the law. Instead, trial manuals advise attorneys to explain the pertinent law during voir dire, during opening argument, and again during closing argument (Belli, 1954; Bailey & Rothblatt, 1974; Imwinkelreid, 1981; see also Tanford, 1983). In real trials, it is argued, all relevant law will be described by the attorneys as well as by the judge, since in the adversarial system both sides will emphasize the information that helps their case. Thus many legal scholars believe that simulations miss the point, because any ambiguities in the judges' instructions are compensated for when the attorneys present their cases to the jury and instruct them in the law. According to Tanford (1990):

> by the time the court reads the final jury charge, all important legal issues should have been explained to the jury in simplified language three times by each side [voir dire, opening statement, closing argument]. If the lawyers were minimally competent, the jury will have been alerted at the beginning to the important issues and jurors who cannot comprehend the law will have been removed. In argument, the law will have been placed in the context of the facts of the case and probably written in outline form on a chalkboard. Therefore, most of the suggestions by psycholinguists [about ways to improve juror understanding] merely duplicate what a competent trial attorney already does. (p. 105)

The purpose of this study is to test the generalizability of the laboratory demonstrations of poor juror understanding of the law by examining real jurors' ability to recognize the law in the cases they decided. Unlike the subjects in most
simulation studies, these jurors were selected (and instructed) by attorneys during voir dire, were responsible for the fates of the people on trial, and were exposed to the full range of relevant legal information characteristic of a trial—the formal judicial instructions as well as whatever informal instruction was provided by the attorneys during voir dire and opening and closing arguments.

The design of the study allowed us to assess the jurors' comprehension of the law in several ways. First, of course, their memory of the instructions could be judged against an absolute standard of accuracy. Second, citizens who were chosen to serve on juries (and thus received instructions) could be compared to citizens who were called for jury duty but did not actually sit on a jury. Finally, we could test whether jurors who received instructions in a particular area of substantive law understood that law better than they understood other areas of law, and whether they understood that law better than jurors who had not heard those particular instructions. That is, if instructions are effective, jurors in an assault case should know the definition of assault better than the definition of delivery of controlled substances (a within-subject comparison) and better than jurors who served in drug sale cases (a between-subjects comparison). Although none of these comparisons provides a complete solution to the various problems of nonrandom assignment, convergent results from all four comparisons would greatly strengthen our confidence in their validity.

METHOD

Participants

Participants were recruited from a pool of 558 citizens who were called for jury duty for the Twenty-Second Judicial Circuit Court in Washtenaw County, Michigan, during February and March of 1989. Shortly after completing their jury service, they were mailed a questionnaire designed to test their knowledge of substantive and procedural law. Questionnaires were mailed to all those who appeared for jury duty, whether or not they actually sat on a trial. Of these people, 224 returned completed questionnaires (response rate = 40%); 140 of those responding had served on juries (63%).

Ninety-seven percent of the participants had high school diplomas, 53% had finished college, and 22% had graduate degrees. Age of participants ranged from 20 to 70, with 80% between 30 and 59, and 60% between 30 and 49. Twenty-six percent had previous jury experience (N = 59). One hundred participants were male (45%). Eighty-five percent were employed; most of the unemployed people were retired.

Jurors in Michigan are recruited from the state driver’s license and Michigan Identification lists. Jury duty lasts for a month, during which those called must appear at the courthouse each Monday for the week’s jury selections; if they are not selected for a jury they do not have to come back to the courthouse until the next Monday. A juror may be allowed to serve on a 1-day, one-trial basis, if he or she can show that the usual procedure would be a serious hardship. The court
typically allows each attorney 3 peremptory challenges in civil cases, 5 in most
criminal cases, and 12 in criminal cases involving a possible life sentence.

**Comparison Groups**

During the course of their jury duty, some served on trials; others did not. Those who served on criminal trials \((n = 118)\) received procedural instructions from the judge on the evaluation of testimony and evidence, the presumption of innocence and reasonable doubt, and the factors that may and may not be considered during deliberation. Those who did not serve on a trial did not receive any instructions \((n = 84)\). A third, smaller set served only on civil trials \((n = 22)\), which have somewhat different procedural regulations, most notably on burden of proof. Therefore, we were able to compare those who served on criminal trials, civil trials, and no trial.

Participants who served on criminal trials were also instructed in the substantive law governing the crime(s) charged. For example, a juror for a stolen property case would have heard instructions specific to stolen property, and so forth. The majority heard cases involving drug deals ("delivery of controlled substances"; \(n = 63\)), cases involving assaults ("assault with intent to cause great bodily harm," "assault with intent to murder," or "assault with a dangerous weapon"; \(n = 26\)), or cases involving possession of stolen property \((n = 22)\), with the others who heard criminal cases distributed across a large variety of crimes. Thus we were able to compare participants who were instructed in a specific area of substantive law with those who were not, in terms of their knowledge of that particular body of law, and we were able to compare their knowledge of the law they had heard with their knowledge of the law governing other types of crime.

The jury instructions on substantive and procedural law are standardized throughout the state of Michigan (*Michigan Criminal Jury Instructions*, State Bar of Michigan, 1987). For a given crime, all judges must give the same instructions, word for word, to their juries (State Bar of Michigan, 1988). However, there is no required method for delivering these instructions. Michigan judges may, at their discretion, deliver the instructions orally only, or they may supplement their spoken instructions with a tape recorded version of the instructions, and/or a written copy. All three methods of instruction are used by the judges of the Twenty-Second Judicial Circuit. Therefore, we were able to compare jurors who received oral instructions only versus oral and taped versus oral and written instructions.

**The Questionnaire**

The first three pages of the 7-page questionnaire asked about the type of trial the jurors had served on (if any), the method the judge had used to deliver the instructions, and their previous experience with the law or jury duty. Jurors were also asked if they had requested additional instructions from the judge during their deliberation. The rest of the questionnaire included 29 questions about the law relevant to the various crimes. These questions consisted of one- or two-sentence
true–false statements, with a "Don't know" option included so that subjects who knew they were ignorant could say so.

The statements were taken from the Michigan Criminal Jury Instructions (State Bar of Michigan, 1987) and followed closely the standardized wording. Occasional plain-English changes were made in order to simplify excessively legalistic passages (example: "The jury may reject the whole testimony of a witness who willfully has testified falsely about any one point" was changed to "If a witness lies about any one point the jury may decide not to believe anything the witness has said"). However, in order to assure that the statements' legal validity was preserved, we made no simplifications that changed or "clarified" the meaning of the instruction. For example, the definition of reasonable doubt, as stated in the instructions, requires that jurors possess a "moral certainty" that a crime has been committed in order to cast a guilty vote. This phrase appeared verbatim in the questionnaire, because any ambiguity is inherent in the instruction, and to remove the ambiguity would be to change the meaning.

The first ten questions concerned the procedural duties of jurors. These are instructions that all jurors in criminal trials receive, telling them how to evaluate testimony and evidence, explaining the presumption of innocence and reasonable doubt, and delineating the factors that may be considered during deliberation. Examples of these questions were: "Unless a juror is morally certain of the truth of the charge, that juror has reasonable doubt, as defined by the law" (True); "In reaching a decision, the jury may consider the consequences of their verdict" (False). These 10 questions were taken from a study by Smith (1987; Smith based her questions on California law, but all the statements are also legally correct in Michigan).

The remaining 19 questions concerned the substantive law for various types of crimes (see Table 1). Questions were developed for each of the 10 most commonly tried crimes in Washtenaw County. Examples of these questions are (a) for assault with a dangerous weapon, "If the defendant threatened the victim with a pistol which looked dangerous but was really a toy, the defendant is still guilty of assault with a dangerous weapon" (True); (b) for delivery of controlled substances, "A person who gives a bottle containing illegal drugs to another person, without knowing what is in the bottle, is not guilty of delivering a controlled substance" (True).

Procedure

On the first day of their jury duty, the clerk told the members of the panel that they would receive a questionnaire from the University of Michigan at the termination of their jury service and requested that they fill it out, though the voluntary nature of the study was emphasized. After their service was over, they received an envelope in the mail containing their paycheck, a cover letter, the questionnaire, and a postage-paid return envelope addressed to the Michigan Law School. The cover letter was on University of Michigan letterhead and explained that the study was being conducted by the university with the approval and cooperation of the Washtenaw County Circuit Court. The importance of preserving and under-
standing the jury system was emphasized, and they were told that this was an opportunity to communicate their views.

The response rate would probably have been higher had we been able to administer the questionnaires at the courthouse, and jurors’ memory for the law might have been somewhat better. However, the court administrators feared that filling out the questionnaires before jury service was completed might affect jurors’ future deliberations.

A 40% response rate is not unusual for mail surveys, where response rates over 50% are rare (Kerlinger, 1973). Our sample was somewhat unrepresentative of the pool from which it was drawn in two ways: First, 63% of our sample had actually served on a jury, as compared to 45% of the pool as a whole. (This also means that our sample included 56% of the actual jurors.) It is not surprising that the people who served on juries should be more interested in filling out the questionnaire than those who did not, and for our purposes this “unrepresentativeness” is useful, since we are primarily interested in the performance of people who actually heard the law as presented at trial, rather than in background levels of legal knowledge in the population. Second, highly educated people were somewhat overrepresented in our sample. Thus, if education is correlated with juror comprehension, our results may overestimate jurors’ understanding of the law.

RESULTS

Performance of the Jurors—Procedural Law

For the 10 questions involving jurors’ duties and procedural rules, jurors who heard criminal cases answered an average of 4.78 correctly, jurors who heard civil cases averaged 4.18 correct, and subjects who did not sit on a trial averaged 3.81 correct. This effect is highly significant, \( F(2,221) = 8.67; p < .0005 \). Instructed jurors scored higher than those not instructed, indicating that judges’ instructions on procedural law improve juror understanding. Jurors who sat on civil cases performed somewhat worse than jurors who sat on criminal cases, though the effect was of marginal significance \( (p < .12) \). The difference between civil jurors and jurors who heard no trial was not significant. The intermediate performance of the civil jurors is understandable, as the procedural instructions for civil jurors coincide in part and differ in part from the criminal instructions on which the questions were based.

Jurors were more often right than wrong in their answers to questions about the impermissibility of considering the consequences of their verdict, the fact that statements made by attorneys are not evidence (criminal jurors only), their right to consider anything in determining witness credibility, their right to reject the entire testimony of a witness who lies on one point, and “moral certainty” as part of the definition of reasonable doubt (over 50% of nonjurors got this right as well). Jurors were more often wrong than right in their answers to questions about their right to ignore irrelevant instructions, the difference between direct and circumstantial evidence, the fact that the prosecution had the burden of proof (less than
a third of those who served on criminal juries got this right), the prohibition against inferring guilt if a defendant did not testify, and their freedom to reject expert testimony.

Although the instructions significantly improved the jurors’ knowledge of the procedural rules, their absolute levels of understanding were rather low; even instructed jurors got fewer than half of the questions correct. Nor were they aware of their ignorance—they very rarely chose the “I don’t know” option (criminal jurors: 10% of the time; civil jurors: 11%; nonjurors: 18%).

Performance of the Jurors—Substantive Law

Tables 1 and 2 list the results for the substantive law questions. If jurors understand the instructions they hear, one would expect that those who served on a particular type of criminal case would understand the laws defining that particular crime better than other areas of criminal law. This was not the case. A comparison of columns A and B in Table 2 shows that criminal jurors were correct on 41% of the legal issues pertinent to the cases that they heard; and 33% of the legal issues that were irrelevant to those cases. This difference was not significant. One might also expect that they would understand the instructions better than people who had never heard those instructions. This was not the case either. Column C shows that 35% of the questions were answered correctly by individuals who did not hear the instructions bearing on the particular crimes, not significantly less than the 41% correct response rate by those who did hear the

<table>
<thead>
<tr>
<th>Question</th>
<th>Incorrect</th>
<th>Correct</th>
<th>Don't know</th>
</tr>
</thead>
<tbody>
<tr>
<td>Criminal sexual conduct: victim resistance</td>
<td>.08</td>
<td>.60</td>
<td>.32</td>
</tr>
<tr>
<td>Criminal sexual conduct: victim free to leave</td>
<td>.40</td>
<td>.17</td>
<td>.43</td>
</tr>
<tr>
<td>Stolen property: knowledge</td>
<td>.38</td>
<td>.24</td>
<td>.38</td>
</tr>
<tr>
<td>Stolen property: value of property</td>
<td>.03</td>
<td>.54</td>
<td>.43</td>
</tr>
<tr>
<td>Assault with intent to murder: intent to kill</td>
<td>.54</td>
<td>.16</td>
<td>.30</td>
</tr>
<tr>
<td>Assault with intent to murder: premeditation</td>
<td>.04</td>
<td>.73</td>
<td>.23</td>
</tr>
<tr>
<td>Assault with intent less than murder: intent</td>
<td>.44</td>
<td>.26</td>
<td>.30</td>
</tr>
<tr>
<td>Assault with intent less than murder: no injury</td>
<td>.18</td>
<td>.50</td>
<td>.33</td>
</tr>
<tr>
<td>Assault with a deadly weapon: no injury</td>
<td>.05</td>
<td>.72</td>
<td>.23</td>
</tr>
<tr>
<td>Assault with a deadly weapon: toy gun</td>
<td>.04</td>
<td>.61</td>
<td>.35</td>
</tr>
<tr>
<td>Armed Robbery: victim no property</td>
<td>.73</td>
<td>.06</td>
<td>.21</td>
</tr>
<tr>
<td>Armed Robbery: gun not used</td>
<td>.55</td>
<td>.17</td>
<td>.29</td>
</tr>
<tr>
<td>Manufacturing a controlled substance: personal use</td>
<td>.74</td>
<td>.07</td>
<td>.19</td>
</tr>
<tr>
<td>Manufacturing a controlled substance: relabel bottle</td>
<td>.18</td>
<td>.22</td>
<td>.59</td>
</tr>
<tr>
<td>Delivery of a controlled substance: knowledge</td>
<td>.43</td>
<td>.17</td>
<td>.40</td>
</tr>
<tr>
<td>Operating under the influence: blood alcohol level</td>
<td>.18</td>
<td>.46</td>
<td>.36</td>
</tr>
<tr>
<td>Operating under the influence: no physical impairment</td>
<td>.03</td>
<td>.75</td>
<td>.22</td>
</tr>
<tr>
<td>Operating while intoxicated: loss of control</td>
<td>.19</td>
<td>.41</td>
<td>.41</td>
</tr>
<tr>
<td>Operating while intoxicated: blood alcohol level</td>
<td>.33</td>
<td>.26</td>
<td>.41</td>
</tr>
<tr>
<td>Total</td>
<td>.30</td>
<td>.37</td>
<td>.34</td>
</tr>
</tbody>
</table>

N = 224 for each question.
Table 2. Percent Correct on Substantive Law Questions by Instructed Versus Uninstructed Jurors

<table>
<thead>
<tr>
<th>Jurors instructed for</th>
<th>Instructed jurors</th>
<th>Uninstructed jurors</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>A. Instructed</td>
<td>B. Other</td>
</tr>
<tr>
<td></td>
<td>questions</td>
<td>questions</td>
</tr>
<tr>
<td>Stolen property</td>
<td>22</td>
<td>.34</td>
</tr>
<tr>
<td>Assault with intent to murder</td>
<td>5</td>
<td>.40</td>
</tr>
<tr>
<td>Assault with intent less than murder</td>
<td>11</td>
<td>.59</td>
</tr>
<tr>
<td>Assault with dangerous weapon</td>
<td>10</td>
<td>.70</td>
</tr>
<tr>
<td>Armed Robbery</td>
<td>9</td>
<td>.17</td>
</tr>
<tr>
<td>Delivery of controlled substances</td>
<td>63</td>
<td>.25</td>
</tr>
<tr>
<td>Total</td>
<td>120</td>
<td>.41</td>
</tr>
</tbody>
</table>

Note. An individual may have answered questions about more than one crime, either through serving on more than one trial, or through hearing instructions on different possible verdicts in the same trial (e.g., lesser included offenses).

* This figure represents the number of jurors who received each type of instruction.

instructions. Thus both within-subjects and between-subjects analyses suggest that the law as communicated in trials is not well understood by jurors.¹

Another way to examine the results of the substantive law questions is to examine each question individually. There were six crimes for which five or more jurors were instructed. For only two of these crimes (assault with intent to do great bodily harm less than murder and delivery of controlled substances) did instructed jurors score higher than 10% over uninstructed subjects (additionally, subjects scored higher on their instructed questions than on their uninstructed questions for only three of the six crimes, but this may be an effect of comparing across questions of varying difficulty). For three of the individual questions (one

¹ Our statement that jurors should understand the law they heard better than the law they did not hear would be true in the case of perfectly effective instructions. Obviously the instructions were far from perfectly effective, so the situation is more complicated: The laws relating to some crimes were inherently more difficult to understand with or without instructions. For some crimes, correct responding was over 50%; for others, it was below 25%. Thus jurors may not understand the law they heard better than the law they did not hear, if they happened to hear instructions on an especially difficult law. The comparison between instructed and uninstructed jurors becomes particularly important in this context. Even this comparison, however, may be affected by instruction difficulty. If there were more jurors who served in trials with "difficult" instructions than in trials with "easy" instructions, the overall effect of instructions might be artificially depressed. The percentages at the bottom of Table 2 are unweighted means of the six percentages above. Were the individual percentages to be weighted according to the number of jurors hearing each instruction, the overall means might be higher or lower than the unweighted values, thus making the jurors appear somewhat more or somewhat less competent. Weighting the percentages in Column A according to the number of jurors hearing each instruction results in an overall mean of .34. Weighting the values in Column C by n results in an overall mean of .26. Thus, regardless of how the individual percentages are combined, absolute levels of performance are low, and the difference between instructed and uninstructed jurors is small.
on delivery of controlled substances and two on stolen property), there were
enough respondents to perform chi-square analyses comparing the responses of
instructed jurors to jurors who served on other trials. Instructed jurors performed
significantly better on the delivery of controlled substance question than did ju-
rors serving on other trials, \( \chi^2(1, N = 224) = 3.89, p < .05 \), but neither of the
other two questions showed significant differences.

Instruction Type

Of the 118 jurors who served on a criminal trial, 67 received oral instructions
only, 42 received oral and tape-recorded instructions, and 9 received oral and
written instructions. For purposes of analysis, jurors were grouped into oral in-
structions only (\( n = 67 \)) and augmented instruction (tape or written; \( n = 51 \))
groups. These two groups did not differ in the number of procedural law questions
answered correctly (\( M's = 4.70, 4.78 \)) or in the percentage of substantive law
questions (for which they received instructions) answered correctly (\( M's = .35, .40 \)).

Requesting Help from the Judge

Thirty-two jurors indicated that their jury had requested help from the judge
during their deliberation; only one received no response. In most cases, they had
asked for clarification of the criminal law. Some heard the judge repeat the pre-
vious instructions, some heard a tape recording, some received a written copy of
the instructions from the judge, and some had the judge explain the statutes in
simpler words. However, all of these jurors had in common the fact that they both
requested and received help from the judge. These jurors did not score signifi-
cantly differently from other jurors on the procedural law. However, for questions
about substantive law on which they were instructed, those who requested help
were correct 54% of the time, whereas the jurors who were instructed but did not
ask for help were correct 31% of the time (see Table 3); this difference was highly
significant, \( \chi^2(1, N = 187) = 8.61, p < .01 \).

In order to discover which type of assistance was most useful to the jurors,
participants who had requested help were classified by the type of response they
got. Two categories were created—jurors who returned to the courtroom and
simply listened to the same instructions again (in spoken or tape recorded form),
and jurors who received instructions in a new form (either they received a written
copy of the instructions to take with them into the jury room, or the judge ex-
plained the statutes in his or her own words). The jurors who received additional

<table>
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<th>Asked judge?</th>
<th>Number of questions</th>
<th>Incorrect</th>
<th>Correct</th>
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<td>.26</td>
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<tr>
<td>No</td>
<td>133</td>
<td>.38</td>
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information from the judge were correct on 67% of the substantive law instructions for which they were instructed (N = 21 questions), while those who simply heard a repetition of the instructions were correct 45% of the time (N = 33 questions). Although these groups are too small for reliable statistical analysis, the data are suggestive. Simply hearing the instructions repeated improved understanding (14% over the jurors who did not receive help), but receiving supplemental information from the judge, be it a written copy of the instructions or a description in less complicated terms, seemed to improve understanding even more (36% over the jurors who did not receive help).

Background Factors

The data were examined to see whether age, previous experience on juries, education, or gender were predictors of performance. Two-way cross tabulations were performed on each demographic variable for both procedural and substantive law questions. No significant effects were found due to age or previous jury experience. Education had no effect, except that the 5 participants who had law degrees all scored approximately 20% higher than the average. Gender did not predict knowledge of procedural law, but men were correct 40% of the time on the substantive law questions, whereas women were correct 35% of the time. This difference was significant, t(222) = 2.11, p < .05; however, after removing the lawyers from the sample (four of the five lawyers were male), and participants who did not indicate their education level, the gender difference was only marginally significant, t(206) = 1.73; p = .08.²

Analyses of covariance were performed to determine whether any of these factors affected the results previously obtained. After controlling for these variables, the differences between instructed and uninstructed jurors’ performance on procedural law questions were still significant, F(2, 202) = 7.07, p < .002, and all other tests remained insignificant.

DISCUSSION

Overall, jurors’ understanding of the judges’ instructions was far from complete; they responded correctly to questions of law less than half the time. However, some procedural conditions were found to have a significant effect on juror performance. Judges’ instructions significantly improved performance on questions about the procedural law, but instructions had no effect on jurors’ knowledge of the substantive law they were supposed to apply. The procedural law

² For statistical purposes, it should be noted that in the latter sample the variance among women (12.05) was much greater than the variance for men (8.61); this was a significant difference, F(113,93) = 1.40; p < .05. Women’s scores had more outlying data points at both ends of the distribution curve than did men’s scores. Because it is an assumption of a t test that the variances are similar, caution should be used when evaluating the statistics on gender differences.
instructions, though effectively raising jurors’ knowledge above baseline levels, failed to raise it to a level desirable for fair and meaningful deliberation. Jurors who requested help from the judge scored significantly higher than other jurors when tested for recall of judges’ instructions. Written or plain-English responses from the judges in response to requests for help seemed to improve performance more than a simple reiteration of previous instructions.

Our results also indicate that the idea that the attorneys resolve ambiguities of the pattern instructions may reflect the ideal attorney performance described in trial manuals rather than the actual behavior of most attorneys in most real trials. This ideal is very likely a fiction in most cases. First, it may not occur to the attorneys to mention more than one or two obvious points of law, such as the reasonable doubt standard (for criminal defense lawyers). In consulting with trial lawyers, one of us has often been faced with blank stares when she suggested that voir dire and closing argument should educate the jurors about the law. Second, the attorneys may be unevenly matched, so that only the law favorable to one side is clarified. Third, points of law that neither side considers particularly advantageous may go unmentioned. If the prosecutor is charging first degree murder and the defense attorney is arguing for self defense, who is going to explain the difficult concepts of second-degree murder and manslaughter, even though these may be the most likely verdicts?

Jurors who received written or tape-recorded instructions did not perform better than those who received only oral instructions. Although these results are counterintuitive, they are consistent with the meager body of previous research (Hastie, 1983; Heuer & Penrod, 1989). A useful next step might be a deliberation study in which subjects’ actual use of the written or taped instructions is examined.

A new finding of this study is that jurors who requested help from the judge performed substantially better than those subjects who did not. When the judge responded by providing supplemental information, either in the form of written instructions or by explaining the instructions in their own words, the jurors’ understanding of the instructions reached fairly high levels (up to 67%).

Unfortunately, comments we received on the questionnaires indicated that judges do not always encourage jurors to ask questions, and that judges’ demeanor in the courtroom is often intimidating, making jurors reluctant to interrupt the proceedings. One participant, a 34-year-old who had finished some college, felt that the judge “just wanted us to reach a decision. He seemed worried that there would be a hung jury when we asked for more instructions.” A 38-year-old participant with a high school diploma said that after asking for additional information about the instructions for tax fraud, “We were told that we were responsible for deciding appropriate definitions of terms in tax law. We felt adrift and being [sic] in a position of making law instead of applying it.” Since our results indicate that jurors who receive help perform significantly better than those who muddle through, we would recommend that jurors be informed that they may ask questions and encouraged to do so. Additionally, further research in this area would be desirable, in order to confirm this finding and examine in greater detail the dynamics of asking the judge for assistance.
Some Methodological Considerations

Of course it is possible that our questionnaire was exceptionally difficult. However, all our questions were based on the very jury instructions that were given in court, with some plain-English changes made in an attempt to enhance participants' understanding. Despite our efforts, some subjects commented that they thought the questionnaire was difficult, imposing, or vague. The majority of these participants were well-educated people who expressed frustration, no doubt because they were unaccustomed to having difficulty with written material. Ironically, hostility was usually directed at the experimenters and not at the actual instructions from which the taxing questions were taken. A 24-year-old college graduate commented, "This is really a joke! Maybe ask the questions in laymen's terms. I'm hardly sure of some of these answers. But you U-M lawyers probably like to make the average citizen feel 'dumb.' I, too, have a degree—but I'm not stuffing it in others' faces!" Another participant, a 23-year-old college graduate, wrote a long memo on the back of her questionnaire which began as follows, "I am a copy editor for a major magazine. As a defender of clear and meaningful prose, I feel compelled to correct some of the language in your questionnaire." Clearly, many participants disliked the wording of the questions, but few recognized that the language was the same as they had heard in court.

Given the less-than-perfect response rate, it is also possible that the results reflect a skewed sample. Though the participants performed poorly on most tasks, it seems unlikely that the sample was systematically biased toward those who were most ignorant, inattentive, or uninterested. Rather, one would expect that those who returned the survey were the people most interested in juries and the law, and possibly most knowledgeable. In fact, if the participant pool was unrepresentative, it was because it tended to favor the well-educated.

Finally, because we did not communicate with our respondents until after they had completed their month of jury service, the data from this study, standing alone, could reflect poor recall of the judge's instructions rather than poor comprehension. It is conceivable that real jurors understand the instructions well when they hear them, but forget them once their jury service is over. We feel that this interpretation is unlikely, because our findings do not stand alone. Given the numerous laboratory studies that have demonstrated poor comprehension on immediate posttest measures, the parsimonious explanation is that the poor performance of our jurors reflects the same disability, rather than a different one.

Further Questions and Implications

Our aim in this study was to discover whether the poor understanding of the law repeatedly shown by subjects in jury simulation studies generalizes to real jurors sitting on real cases. The answer is clearly yes. The amount of supplementary instruction given by the attorneys in our study did not dramatically improve juror comprehension over the dismal levels found in laboratory studies. Our study does not address the question of the potential effectiveness of attorney instruction—that is, we cannot tell whether our jurors were exposed to frequent repeti-
tions of important instructions and still missed the point, or whether the attorneys failed to take advantage of their opportunity to communicate the law. Probably attorney performance was quite variable.

One might approach this question by counting the number of times various legal points were mentioned in the course of actual trials to discover whether frequency of repetition correlates with juror performance. Given the wide variability in types of case, and the ambiguities inherent in trying to code the accuracy of the attorney's attempts to communicate the law, it would be very difficult to “score” attorneys' communication of the law during an actual trial. Also, in order to control for type of case and judicial instructional style, a very large number of trials would have to be observed. A better method for answering this question would be to conduct further experimental studies, in which systematic variation of attorney techniques could provide useful information on how lawyers might improve juror comprehension.

We have shown that jurors' performance is low in an absolute sense, in that it falls far short of perfection, but we have not discussed that performance relative to anyone else's. What baseline is appropriate in evaluating our claim that juror comprehension is low? Could anyone do better?

We feel that the fact that jurors are unable to understand half the instructions they are supposed to apply is a serious cause for concern regardless of what a realistic baseline might be. There are, however, some glimmers of information in our data suggesting that better comprehension is possible. Two of the lawyers in our sample actually served on juries. Their performance was better than that of the lay jurors (70% correct) and better than that of the uninstructed lawyers. Although they did better than other jurors, they too fell rather short of perfect performance, suggesting first, that 100% accuracy may be an unrealistic assumption, and second, that the problem is not simply a function of the incompetence of lay jurors, but of the current methods of jury instruction.

Also, jurors who asked for clarification and got it performed better than the others, substantially so when they received more than a simple reiteration. Thus while 100% performance may (or may not) be out of reach, considerable improvement over the 40% level seems an eminently realistic goal.

Does it matter? Do legal policymakers care about the effective communication of legal instructions to the jury? An enormous proportion of appellate court decisions involve errors in instruction. Every day cases that have gone through months or years of preparation and litigation are reversed because the judge failed to state the law with exact accuracy. Jury instructions are constantly being rewritten to reflect more precisely the nuances of the law, but legal policymakers and courts rarely concern themselves with jurors’ comprehension of the law. Unless some attention is paid to the jurors’ use of the instructions they are given, the never-ending, intensive solicitude for the wording of the law is pedantry in fantasyland: The law as spoken by the judge is of the utmost consequence; the law as understood by the jurors, moments later, is not a matter of concern. Either this implies the assumption that the jurors do understand what the judge says, or it implies that judicial instructions are magical incantations, in which the perfect utterance is not a means to understanding but an end in itself.
REFERENCES


American Bar Association

Defending Liberty
Pursuing Justice

Principles for Juries and Jury Trials

American Jury Project

Patricia Lee Refo, Chair

Co-Chairs

Hon. Catherine Anderson, Chair, ABA Criminal Justice Section
Hon. Louraine Arkfeld, Chair, ABA Judicial Division
Dennis Drasco, Chair, ABA Section of Litigation

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PREAMBLE

The American jury is a living institution that has played a crucial part in our democracy for more than two hundred years. The American Bar Association recognizes the legal community's ongoing need to refine and improve jury practice so that the right to jury trial is preserved and juror participation enhanced. What follows is a set of 19 principles that define our fundamental aspirations for the management of the jury system. Each principle is accompanied by a standard designed to express the best of current-day jury practice in light of existing legal and practical constraints. It is anticipated that over the course of the next decade jury practice will improve so that the standards set forth will have to be updated in a manner that will draw them ever closer to the principles to which we aspire.
DISCLAIMER: The views expressed herein have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and, accordingly, should not be construed as representing the policy of the American Bar Association.

GENERAL PRINCIPLES

PRINCIPLE 1– THE RIGHT TO JURY TRIAL SHALL BE PRESERVED

Standard 1

A. Parties in civil matters have the right to a fair, accurate and timely jury trial in accordance with law.

B. Parties, including the state, have the right to a fair, accurate and timely jury trial in criminal prosecutions in which confinement in jail or prison may be imposed.

C. In civil cases the right to jury trial may be waived as provided by applicable law, but waiver should neither be presumed nor required where the interests of justice demand otherwise.

D. With respect to criminal prosecutions:

1. A defendant's waiver of the right to jury trial must be knowing and voluntary, joined in by the prosecutor and accepted by the court.

2. The court should not accept a waiver unless the defendant, after being advised by the court of his or her right to trial by jury and the consequences of waiver, personally waives the right to trial by jury in writing or in open court on the record.

3. A defendant may not withdraw a voluntary and knowing waiver as a matter of right, but the court, in its discretion, may permit withdrawal prior to the commencement of trial.

4. A defendant may withdraw a waiver of jury, and the prosecutor may withdraw its consent to a waiver, both as a matter of right, if there is a change of trial judge.
E. A quality and accessible jury system should be maintained with budget procedures that will ensure adequate, stable, long-term funding under all economic conditions.

PRINCIPLE 2 – CITIZENS HAVE THE RIGHT TO PARTICIPATE IN JURY SERVICE AND THEIR SERVICE SHOULD BE FACILITATED

Standard 2

A. All persons should be eligible for jury service except those who:

1. Are less than eighteen years of age; or

2. Are not citizens of the United States; or

3. Are not residents of the jurisdiction in which they have been summoned to serve; or

4. Are not able to communicate in the English language and the court is unable to provide a satisfactory interpreter; or

5. Have been convicted of a felony and are in actual confinement or on probation, parole or other court supervision.

B. Eligibility for jury service should not be denied or limited on the basis of race, national origin, gender, age, religious belief, income, occupation, disability, sexual orientation, or any other factor that discriminates against a cognizable group in the jurisdiction other than those set forth in A. above.

C. The time required of persons called for jury service should be the shortest period consistent with the needs of justice.

1. Courts should use a term of service of one day or the completion of one trial, whichever is longer.

2. Where deviation from the term of service set forth in C.1. above is deemed necessary, the court should not require a person to remain available to be selected for jury service for longer than two weeks.

D. Courts should respect jurors’ time by calling in the minimum number deemed necessary and by minimizing their waiting time.
1. Courts should coordinate jury management and calendar management to make effective use of jurors.

2. Courts should determine the minimally sufficient number of jurors needed to accommodate trial activity. This information and appropriate management techniques should be used to adjust both the number of persons summoned for jury duty and the number assigned to jury panels.

3. Courts should ensure that all jurors in the courthouse waiting to be assigned to panels for the first time are assigned before any juror is assigned a second time.

E. Courts should provide an adequate and suitable environment for jurors, including those who require reasonable accommodation due to disability.

F. Persons called for jury service should receive a reasonable fee.

1. Persons called for jury service should be paid a reasonable fee that will, at a minimum, defray routine expenses such as travel, parking, meals and child-care. Courts should be encouraged to increase the amount of the fee for persons serving on lengthy trials.

2. Employers should be prohibited from discharging, laying off, denying advancement opportunities to, or otherwise penalizing employees who miss work because of jury service.

3. Employers should be prohibited from requiring jurors to use leave or vacation time for the time spent on jury service or be required to make up the time they served.

**PRINCIPLE 3 – JURIES SHOULD HAVE 12 MEMBERS**

**Standard 3**

A. Juries in civil cases should be constituted of 12 members wherever possible and under no circumstances fewer than six members.

B. Juries in criminal cases should consist of:

1. Twelve persons if a penalty of confinement for more than six months may be imposed upon conviction;
2. At least six persons if the maximum period of confinement that may be imposed upon conviction is six months or less.

C. At any time before verdict, the parties, with the approval of the court, may stipulate that the jury shall consist of fewer jurors than required for a full jury, but in no case fewer than six jurors. In criminal cases the court should not accept such a stipulation unless the defendant, after being advised by the court of his or her right to trial by a full jury, and the consequences of waiver, personally waives the right to a full jury either in writing or in open court on the record.

PRINCIPLE 4 – JURY DECISIONS SHOULD BE UNANIMOUS

Standard 4

A. In civil cases, jury decisions should be unanimous wherever possible. A less-than-unanimous decision should be accepted only after jurors have deliberated for a reasonable period of time and if concurred in by at least five-sixths of the jurors. In no civil case should a decision concurred in by fewer than six jurors be accepted, except as provided in C. below.

B. A unanimous decision should be required in all criminal cases heard by a jury.

C. At any time before verdict, the parties, with the approval of the court, may stipulate to a less-than-unanimous decision. To be valid, the stipulation should be clear as to the number of concurring jurors required for the verdict. In criminal cases, the court should not accept such a stipulation unless the defendant, after being advised by the court of his or her right to a unanimous decision, personally waives that right, either in writing or in open court on the record.

PRINCIPLE 5 – IT IS THE DUTY OF THE COURTS TO ENFORCE AND PROTECT THE RIGHTS TO JURY TRIAL AND JURY SERVICE

Standard 5

A. The responsibility for administration of the jury system should be vested exclusively in the judicial branch of government.

1. All procedures concerning jury selection and service should be governed by rules and regulations promulgated by the state’s highest court or judicial council.
2. A unified jury system should be established wherever feasible in areas that have two or more courts conducting jury trials. This applies whether the courts are of the same or of differing subject matter or geographic jurisdiction.

3. Responsibility for administering the jury system should be vested in a single administrator or clerk acting under the supervision of a presiding judge of the court.

B. Courts should collect and analyze information regarding the performance of the jury system on a regular basis in order to ensure:

1. The representativeness and inclusiveness of the jury source list;
2. The effectiveness of qualification and summoning procedures;
3. The responsiveness of individual citizens to jury duty summonses;
4. The efficient use of jurors; and
5. The reasonableness of accommodations being provided to jurors with disabilities.

**PRINCIPLE 6 – COURTS SHOULD EDUCATE JURORS REGARDING THE ESSENTIAL ASPECTS OF A JURY TRIAL**

**Standard 6**

A. Courts should provide orientation and preliminary information to persons called for jury service:

1. Upon initial contact prior to service;
2. Upon first appearance at the courthouse; and
3. Upon reporting to a courtroom for juror voir dire.

B. Orientation programs should be:

1. Designed to increase jurors’ understanding of the judicial system and prepare them to serve competently as jurors;
2. Presented in a uniform and efficient manner using a combination of written, oral and audiovisual materials; and
3. Presented, at least in part, by a judge.

C. Throughout the course of the trial, the court should provide instructions to the jury in plain and understandable language.

1. The court should give preliminary instructions directly following empanelment of the jury that explain the jury’s role, the trial procedures including note-taking and questioning by jurors, the nature of evidence and its evaluation, the issues to be addressed, and the basic relevant legal principles, including the elements of the charges and claims and definitions of unfamiliar legal terms.

2. The court should advise jurors that once they have been selected to serve as jurors or alternates in a trial, they are under an obligation to refrain from talking about the case outside the jury room until the trial is over and the jury has reached a verdict. At the time of such instructions in civil cases, the court may inform the jurors about the permissibility of discussing the evidence among themselves as contemplated in Standard 13 F.

3. The court should give such instructions during the course of the trial as are necessary to assist the jury in understanding the facts and law of the case being tried as described in Standard 13 D. 2.

4. Prior to deliberations, the court should give such instructions as are described in Standard 14 regarding the applicable law and the conduct of deliberations.

PRINCIPLE 7 – COURTS SHOULD PROTECT JUROR PRIVACY IN SO FAR AS CONSISTENT WITH THE REQUIREMENTS OF JUSTICE AND THE PUBLIC INTEREST

Standard 7

A. Juror interest in privacy must be balanced against party and public interest in court proceedings.

1. Juror voir dire should be open and accessible for public view except as provided herein. Closing voir dire proceedings should only occur after a finding by the court that there is a threat to the safety of the jurors or evidence of attempts to intimidate or influence the jury.
2. Requests to jurors for information should differentiate among information collected for the purpose of juror qualification, jury administration, and voir dire.

3. Judges should ensure that jurors’ privacy is reasonably protected, and that questioning is consistent with the purpose of the voir dire process.

4. Courts should explain to jurors how the information they provide will be used, how long it will be retained, and who will have access to it.

5. Courts should consider juror privacy concerns when choosing the method of voir dire (open questioning in court, private questioning at the bench, or a jury questionnaire) to be used to inquire about sensitive matters.

6. Courts should inform jurors that they may provide answers to sensitive questions privately to the court, and the parties.

7. Jurors should be examined outside the presence of other jurors with respect to questions of prior exposure to potentially prejudicial material.

8. Following jury selection and trial, the court should keep all jurors’ home and business addresses and telephone numbers confidential and under seal unless good cause is shown to the court which would require disclosure. Original records, documents and transcripts relating to juror summoning and jury selection may be destroyed when the time for appeal has passed, or the appeal is complete, whichever is longer, provided that, in criminal proceedings, the court maintains for use by the parties and the public exact replicas (using any reliable process that ensures their integrity and preservation) of those items and devices for viewing them.

B. Without express court permission, surveillance of jurors and prospective jurors outside the courtroom by or on behalf of a party should be prohibited.

C. If cameras are permitted to be used in the courtroom, they should not be allowed to record or transmit images of the jurors’ faces.
PRINCIPLE 8 -- INDIVIDUALS SELECTED TO SERVE ON A JURY HAVE AN ONGOING INTEREST IN COMPLETING THEIR SERVICE

Standard 8

During trial and deliberations, a juror should be removed only for a compelling reason. The determination that a juror should be removed should be made by the court, on the record, after an appropriate hearing.

ASSEMBLING A JURY

PRINCIPLE 9 – COURTS SHOULD CONDUCT JURY TRIALS IN THE VENUE REQUIRED BY APPLICABLE LAW OR THE INTERESTS OF JUSTICE

Standard 9

A. In civil cases where a jury demand has been made, a change of venue may be granted as required by applicable law or in the interest of justice.

B. In criminal cases, a change of venue or continuance should be granted whenever there is a substantial likelihood that, in the absence of such relief, a fair trial by an impartial jury cannot be had. A showing of actual prejudice should not be required.

C. Courts should consider the option of trying the case in the original venue but selecting the jury from a new venue. In addition to all other considerations relevant to the selection of the new venue, consideration should be given to whether the original venue would be a better location to conduct the trial due to facilities, security, and the convenience of the victims, court staff, and parties. This should be balanced against the possible inconvenience to the jurors.

PRINCIPLE 10 – COURTS SHOULD USE OPEN, FAIR AND FLEXIBLE PROCEDURES TO SELECT A REPRESENTATIVE POOL OF PROSPECTIVE JURORS

Standard 10

A. Juror source pools should be assembled so as to assure representativeness and inclusiveness.
1. The names of potential jurors should be drawn from a jury source list compiled from two or more regularly maintained source lists of persons residing in the jurisdiction. These source lists should be updated at least annually.

2. The jury source list and the assembled jury pool should be representative and inclusive of the eligible population in the jurisdiction. The source list and the assembled jury pool are representative of the population to the extent the percentages of cognizable group members on the source list and in the assembled jury pool are reasonably proportionate to the corresponding percentages in the population.

3. The court should periodically review the jury source list and the assembled jury pool for their representativeness and inclusiveness of the eligible population in the jurisdiction.

4. Should the court determine that improvement is needed in the representativeness or inclusiveness of the jury source list or the assembled jury pool, appropriate corrective action should be taken.

5. Jury officials should determine the qualifications of prospective jurors by questionnaire or interview, and disqualify those who fail to meet eligibility requirements.

B. Courts should use random selection procedures throughout the juror selection process.

1. Any selection method may be used, manual or automated, that provides each eligible and available person with an equal probability of selection, except when a court orders an adjustment for underrepresented populations.

2. Courts should use random selection procedures in:

   a. Selecting persons to be summoned for jury service;
   b. Assigning jurors to panels;
   c. Calling jurors for voir dire; and
   d. Designating, at the outset of jury deliberations, those jurors who will serve as “regular” and as “alternate” jurors.

3. Departures from the principle of random selection are appropriate:

   a. To exclude persons ineligible for service in accordance with basic eligibility requirements;
b. To excuse or defer jurors in accordance with C. below;
c. To remove jurors for cause or if challenged peremptorily in accordance with D. and E. below; or
d. To provide jurors who have not been considered for selection with an opportunity to be considered before other jurors are considered for a second time, as provided for in Standard 2 D. 3.

C. Exemptions, excuses, and deferrals should be sparingly used.

1. All automatic excuses or exemptions from jury service should be eliminated.

2. Eligible persons who are summoned may be excused from jury service only if:

   a. Their ability to perceive and evaluate information is so impaired that even with reasonable accommodations having been provided, they are unable to perform their duties as jurors and they are excused for this reason by a judge; or
   b. Their service would be an undue hardship or they have served on a jury during the two years preceding their summons and they are excused by a judge or duly authorized court official.

3. Deferrals of jury service to a date certain within six months should be permitted by a judge or duly authorized court official. Prospective jurors seeking to postpone their jury service to a specific date should be permitted to submit a request by telephone, mail, in person or electronically. Deferrals should be preferred to excuses whenever possible.

4. Requests for excuses or deferrals and their disposition should be written or otherwise made of record. Specific uniform guidelines for determining such requests should be adopted by the court.

D. Courts should use sensible and practical notification and summons procedures in assembling jurors.

1. The notice summoning a person to jury service should be easy to understand and answer, should specify the steps required for answering and the consequences of failing to answer, should allow for speedy and accurate eligibility screening, and should request basic background information.

2. Courts should adopt specific uniform guidelines for enforcing a summons for jury service and for monitoring failures to respond to
a summons. Courts should utilize appropriate sanctions in the cases of persons who fail to respond to a jury summons.

E. Opportunity to challenge the assembled jury pool should be afforded all parties on the ground that there has been material departure from the requirements of the law governing selection of jurors. The court should maintain demographic information as to its source lists, summonses issued, and reporting jurors.

PRINCIPLE 11 – COURTS SHOULD ENSURE THAT THE PROCESS USED TO EMPANEL JURORS EFFECTIVELY SERVES THE GOAL OF ASSEMBLING A FAIR AND IMPARTIAL JURY

Standard 11

A. Before voir dire begins, the court and parties, through the use of appropriate questionnaires, should be provided with data pertinent to the eligibility of jurors and to matters ordinarily raised in voir dire, including such background information as is provided by prospective jurors in their responses to the questions appended to the notification and summons considered in Standard 10 D. 1.

1. In appropriate cases, the court should consider using a specialized questionnaire addressing particular issues that may arise. The court should permit the parties to submit a proposed juror questionnaire. The parties should be required to confer on the form and content of the questionnaire. If the parties cannot agree, each party should be afforded the opportunity to submit a proposed questionnaire and to comment upon any proposal submitted by another party.

2. Jurors should be advised of the purpose of any questionnaire, how it will be used and who will have access to the information.

3. All completed questionnaires should be provided to the parties in sufficient time before the start of voir dire to enable the parties to adequately review them before the start of that examination.

B. The voir dire process should be held on the record and appropriate demographic data collected.

1. Questioning of jurors should be conducted initially by the court, and should be sufficient, at a minimum, to determine the jurors’ legal qualification to serve in the case.
2. Following initial questioning by the court, each party should have the opportunity, under the supervision of the court and subject to reasonable time limits, to question jurors directly, both individually and as a panel. In a civil case involving multiple parties, the court should permit each separately represented party to participate meaningfully in questioning prospective jurors, subject to reasonable time limits and avoidance of repetition.

3. Voir dire should be sufficient to disclose grounds for challenges for cause and to facilitate intelligent exercise of peremptory challenges.

4. Where there is reason to believe that jurors have been previously exposed to information about the case, or for other reasons are likely to have preconceptions concerning it, the parties should be given liberal opportunity to question jurors individually about the existence and extent of their knowledge and preconceptions.

5. It is the responsibility of the court to prevent abuse of the juror selection examination process.

C. Challenges for cause should be available at the request of a party or at the court's own initiative.

1. Each jurisdiction should establish, by law, the grounds for and the standards by which a challenge for cause to a juror is sustained by the court.

2. At a minimum, a challenge for cause to a juror should be sustained if the juror has an interest in the outcome of the case, may be biased for or against one of the parties, is not qualified by law to serve on a jury, has a familial relation to a participant in the trial, or may be unable or unwilling to hear the subject case fairly and impartially. There should be no limit to the number of challenges for cause.

3. In ruling on a challenge for cause, the court should evaluate the juror's demeanor and substantive responses to questions. If the court determines that there is a reasonable doubt that the juror can be fair and impartial, then the court should excuse him or her from the trial. The court should make a record of the reasons for the ruling including whatever factual findings are appropriate.

D. Peremptory challenges should be available to each of the parties.
1. In the courts of each state, the number of and procedure for exercising peremptory challenges should be uniform.

2. The number of peremptory challenges should be sufficient, but limited to a number no larger than necessary to provide reasonable assurance of obtaining an unbiased jury, and to provide the parties confidence in the fairness of the jury.

3. The court should have the authority to allow additional peremptory challenges when justified.

4. Following completion of the examination of jurors, the parties should exercise their peremptory challenges by alternately striking names from the list of panel members until each side has exhausted or waived the permitted number of challenges.

E. Fair procedures should be utilized in the exercise of challenges.

1. All challenges, whether for cause or peremptory, should be exercised so that the jury panel is not aware of the nature of the challenge, the party making the challenge, or the basis of the court's ruling on the challenge.

2. After completion of the examination of jurors and the hearing and determination of all challenges for cause, the parties should be permitted to exercise their peremptory challenges as set forth in D. 4. above. A party should be permitted to exercise a peremptory challenge against a member of the panel who has been passed for cause.

3. The court should not require a party to exercise any challenges until the attorney for that party has had sufficient time to consult with the client, and in cases with multiple parties on a side, with co-parties, regarding the exercise of challenges.

4. No juror should be sworn to try the case until all challenges have been exercised or waived, at which point all jurors should be sworn as a group.

F. No party should be permitted to use peremptory challenges to dismiss a juror for constitutionally impermissible reasons.

1. It should be presumed that each party is utilizing peremptory challenges validly, without basing those challenges on constitutionally impermissible reasons.
2. A party objecting to the challenge of a juror on the grounds that the challenge has been exercised on a constitutionally impermissible basis, establishes a prima facie case of purposeful discrimination by showing that the challenge was exercised against a member of a constitutionally cognizable group; and by demonstrating that this fact, and any other relevant circumstances, raise an inference that the party challenged the juror because of the juror's membership in that group.

3. When a prima facie case of discrimination is established, the burden shifts to the party making the challenge to show a nondiscriminatory basis for the challenge.

4. The court should evaluate the credibility of the reasons proffered by the party as a basis for the challenge. If the court finds that the reasons stated are not pretextual and otherwise constitutionally permissible and are supported by the record, the court should permit the challenge. If the court finds that the reasons for the challenge are pretextual, or otherwise constitutionally impermissible, the court should deny the challenge and, after consultation with counsel, determine whether further remedy is appropriate. The court should state on the record the reasons, including whatever factual findings are appropriate, for sustaining or overruling the challenge.

5. When circumstances suggest that a peremptory challenge was used in a constitutionally impermissible manner, the court on its own initiative, if necessary, shall advise the parties on the record of its belief that the challenge is impermissible, and its reasons for so concluding and shall require the party exercising the challenge to make a showing under F. 3. above.

G. The court may empanel a sufficient number of jurors to allow for one or more alternates whenever, in the court’s discretion, the court believes it advisable to have such jurors available to replace jurors who, prior to the time the jury retires to consider its verdict, become or are found to be unable or disqualified to perform their duties.

1. Alternate jurors shall be selected in the same manner, have the same qualifications, be subject to the same examination and challenges, and take the same oath as regular jurors.

2. The status of jurors as regular jurors or as alternates should be determined through random selection at the time for jury deliberation.
3. In civil cases where there are fewer than 12 jurors, all jurors, including alternates, should deliberate and vote, but in no case should more than 12 jurors deliberate and vote.

H. Courts should limit the use of anonymous juries to compelling circumstances, such as when the safety of the jurors is an issue or when there is a finding by the court that efforts are being made to intimidate or influence the jury's decision.

CONDUCTING A JURY TRIAL

PRINCIPLE 12 – COURTS SHOULD LIMIT THE LENGTH OF JURY TRIALS IN SO FAR AS JUSTICE ALLOWS AND JURORS SHOULD BE FULLY INFORMED OF THE TRIAL SCHEDULE ESTABLISHED

Standard 12

A. The court, after conferring with the parties, should impose and enforce reasonable time limits on the trial or portions thereof.

B. Trial judges should use modern trial management techniques that eliminate unnecessary trial delay and disruption. Once begun, jury trial proceedings with jurors present should take precedence over all other court proceedings except those given priority by a specific law and those of an emergency nature.

C. Jurors should be informed of the trial schedule and of any necessary changes to the trial schedule at the earliest practicable time.

PRINCIPLE 13 – THE COURT AND PARTIES SHOULD VIGOROUSLY PROMOTE JUROR UNDERSTANDING OF THE FACTS AND THE LAW

Standard 13

A. Jurors should be allowed to take notes during the trial.

1. Jurors should be instructed at the beginning of the trial that they are permitted, but not required, to take notes in aid of their memory of the evidence and should receive appropriate cautionary instructions on note-taking and note use. Jurors should also be
instructed that after they have reached their verdict, all juror notes will be collected and destroyed.

2. Jurors should ordinarily be permitted to use their notes throughout the trial and during deliberations.

3. The court should ensure that jurors have implements for taking notes.

4. The court should collect all juror notes at the end of each trial day until the jury retires to deliberate.

5. After the jurors have returned their verdict, all juror notes should be collected and destroyed.

B. Jurors should, in appropriate cases, be supplied with identical trial notebooks which may include such items as the court’s preliminary instructions, selected exhibits which have been ruled admissible, stipulations of the parties and other relevant materials not subject to genuine dispute.

1. At the time of distribution, the court should instruct the jurors concerning the purpose and use of their trial notebooks.

2. During the trial, the court may permit the parties to supplement the materials contained in the notebooks with additional material that has been admitted in evidence.

3. The trial notebooks should be available to jurors during deliberations as well as during the trial.

C. In civil cases, jurors should, ordinarily, be permitted to submit written questions for witnesses. In deciding whether to permit jurors to submit written questions in criminal cases, the court should take into consideration the historic reasons why courts in a number of jurisdictions have discouraged juror questions and the experience in those jurisdictions that have allowed it.

1. Jurors should be instructed at the beginning of the trial concerning their ability to submit written questions for witnesses.

2. Upon receipt of a written question, the court should make it part of the court record and disclose it to the parties outside the hearing of the jury. The parties should be given the opportunity, outside the hearing of the jury, to interpose objections and suggest modifications to the question.
3. After ruling that a question is appropriate, the court may pose the question to the witness, or permit a party to do so, at that time or later; in so deciding, the court should consider whether the parties prefer to ask, or to have the court ask, the question. The court should modify the question to eliminate any objectionable material.

4. After the question is answered, the parties should be given an opportunity to ask follow-up questions.

D. The court should assist jurors where appropriate.

1. The court should not in any way indicate to the jury its personal opinion as to the facts or value of evidence by the court’s rulings, conduct, or remarks during the trial.

2. When necessary to the jurors’ proper understanding of the proceedings, the court may intervene during the taking of evidence to instruct on a principle of law or the applicability of the evidence to the issues. This should be done only when the jurors cannot be effectively advised by postponing the explanation to the time of giving final instructions.

3. The development of innovative mechanisms to improve juror comprehension of the issues and the evidence presented should be encouraged consistent with the rules of evidence and the rights of the parties.

4. The court should exercise self-restraint and preserve an atmosphere of impartiality and detachment, but may question a witness if necessary to assist the jury.

a. Generally, the court should not question a witness about subject matter not raised by any party with that witness, unless the court has provided the parties an opportunity, outside the hearing of the jury, to explain the omission. If the court believes the questioning is necessary, the court should afford the parties an opportunity to develop the subject by further examination prior to its questioning of the witness.

b. The court should instruct the jury that questions from the court, like questions from the parties, are not evidence; that only answers are evidence; that questions by the court should not be given special weight or emphasis; and the fact that the court asks a question does not reflect a view on the merits of the case or on the credibility of any witness.
E. The court should control communications with jurors during trial.

1. The court should take appropriate steps ranging from admonishing the jurors to, in the rarest of circumstances, sequestration of them during trial, to ensure that the jurors will not be exposed to sources of information or opinion, or subject to influences, which might tend to affect their ability to render an impartial verdict on the evidence presented in court.

2. At the outset of the case, the court should instruct the jury on the relationship between the court, the parties and the jury, ensuring that the jury understands that the parties are permitted to communicate with jurors only in open court with the opposing parties present.

3. All communications between the judge and members of the jury panel from the time of reporting to the courtroom for juror selection examination until dismissal should be in writing or on the record in open court. Each party should be informed of such communications and given the opportunity to be heard.

F. Jurors in civil cases may be instructed that they will be permitted to discuss the evidence among themselves in the jury room during recesses from trial when all are present, as long as they reserve judgment about the outcome of the case until deliberations commence.

G. Parties and courts should be open to a variety of trial techniques to enhance juror comprehension of the issues including: alteration of the sequencing of expert witness testimony, mini- or interim openings and closings, and the use of computer simulations, deposition summaries and other aids.

H. In civil cases the court should seek a single, unitary trial of all issues in dispute before the same jury, unless bifurcation or severance of issues or parties is required by law or is necessary to prevent unfairness or prejudice.

I. Consistent with applicable rules of evidence and procedure, courts should encourage the presentation of live testimony.

J. The court may empanel two or more juries for cases involving multiple parties, defendants, or claims arising out of the same transaction or cause of action, in order to reduce the number and complexity of issues that any one jury must decide. Dual juries also may be used in order to promote judicial economy by presenting otherwise duplicative evidence in a single
trial.

JURY DELIBERATIONS

PRINCIPLE 14 – THE COURT SHOULD INSTRUCT THE JURY IN
PLAIN AND UNDERSTANDABLE LANGUAGE REGARDING THE
APPLICABLE LAW AND THE CONDUCT OF DELIBERATIONS

Standard 14

A. All instructions to the jury should be in plain and understandable
language.

B. Jurors should be instructed with respect to the applicable law before or
after the parties’ final argument. Each juror should be provided with a
written copy of instructions for use while the jury is being instructed and
during deliberations.

C. Instructions for reporting the results of deliberations should be given
following final argument in all cases. At that time, the court should also
provide the jury with appropriate suggestions regarding the process of
selecting a presiding juror and the conduct of its deliberations.

D. The jurors alone should select the foreperson and determine how to
conduct jury deliberations.

PRINCIPLE 15 – COURTS AND PARTIES HAVE A DUTY TO FACILITATE
EFFECTIVE AND IMPARTIAL DELIBERATIONS

Standard 15

A. In civil cases of appropriate complexity, and after consultation with the
parties, the court should consider the desirability of a special verdict form
tailored to the issues in the case. If the parties cannot agree on a special
verdict form, each party should be afforded the opportunity to propose a
form and to comment upon any proposal submitted by another party or
fashioned by the court. The court should consider furnishing each juror
with a copy of the verdict form when the jury is instructed and explaining
the form as necessary.

B. Exhibits admitted into evidence should ordinarily be provided to the jury
for use during deliberations. Jurors should be provided an exhibit index to
facilitate their review and consideration of documentary evidence.
C. Jury deliberations should take place under conditions and pursuant to procedures that are designed to ensure impartiality and to enhance rational decision-making.

1. The court should instruct the jury on the appropriate method for asking questions during deliberations and reporting the results of its deliberations.

2. A jury should not be required to deliberate after normal working hours unless the court after consultation with the parties and the jurors determines that evening or weekend deliberations would not impose an undue hardship upon the jurors and are required in the interest of justice.

D. When jurors submit a question during deliberations, the court, in consultation with the parties, should supply a prompt, complete and responsive answer or should explain to the jurors why it cannot do so.

E. A jury should be sequestered during deliberations only in the rarest of circumstances and only for the purposes of protecting the jury from threatened harm or insulating its members from improper information or influences.

F. When a verdict has been returned and before the jury has dispersed, the jury should be polled at the request of any party or upon the court's own motion. The poll should be conducted by the court or clerk of court asking each juror individually whether the verdict announced is his or her verdict. If the poll discloses that there is not that level of concurrence required by applicable law, the jury may be directed to retire for further deliberations or may be discharged.

PRINCIPLE 16 – DELIBERATING JURORS SHOULD BE OFFERED ASSISTANCE WHEN AN APPARENT IMPASSE IS REPORTED

Standard 16

A. If the jury advises the court that it has reached an impasse in its deliberations, the court may, after consultation with the parties, inquiry the jurors in writing to determine whether and how court and the parties can assist them in their deliberative process. After receiving the jurors' response, if any, and consulting with the parties, the judge may direct that further proceedings occur as appropriate.
B. If it appears to the court that the jury has been unable to agree, the court may require the jury to continue its deliberations. The court should not require or threaten to require the jury to deliberate for an unreasonable length of time or for unreasonable intervals.

C. If there is no reasonable probability of agreement, the jury may be discharged.

**POST-VERDICT ACTIVITY**

**PRINCIPLE 17 – TRIAL AND APPELLATE COURTS SHOULD AFFORD JURY DECISIONS THE GREATEST DEFERENCE CONSISTENT WITH LAW**

**Standard 17**

Trial and appellate courts should afford jury decisions the greatest deference consistent with law.

**PRINCIPLE 18 – COURTS SHOULD GIVE JURORS LEGALLY PERMISSIBLE POST-VERDICT ADVICE AND INFORMATION**

**Standard 18**

A. After the conclusion of the trial and the completion of the jurors’ service, the court is encouraged to engage in discussions with the jurors. Such discussions should occur on the record and in open court with the parties having the opportunity to be present, unless all the parties agree to the court conducting these discussions differently. This standard does not prohibit incidental contact between the court and jurors after the conclusion of the trial.

B. Under no circumstances should the court praise or criticize the verdict or state or imply an opinion on the merits of the case, or make any other statements that might prejudice a juror in future jury service.

C. At the conclusion of the trial, the court should instruct the jurors that they have the right either to discuss or to refuse to discuss the case with anyone, including counsel or members of the press.

D. Unless prohibited by law, the court should ordinarily permit the parties to contact jurors after their terms of jury service have expired, subject, in the court’s discretion, to reasonable restrictions.
E. Courts should inform jurors that they may ask for the assistance of the court in the event that individuals persist in questioning jurors, over their objection, about their jury service.

**PRINCIPLE 19 – APPROPRIATE INQUIRIES INTO ALLEGATIONS OF JUROR MISCONDUCT SHOULD BE PROMPTLY UNDERTAKEN BY THE TRIAL COURT**

**Standard 19**

A. Only under exceptional circumstances may a verdict be impeached upon information provided by jurors.

1. Upon an inquiry into the validity of a verdict, no evidence should be received to show the effect of any statement, conduct, event, or condition upon the mind of a juror or concerning the mental processes by which the verdict was determined.

2. The limitations in A.1 above should not bar evidence concerning whether the verdict was reached by lot or contains a clerical error, or was otherwise unlawfully decided.

3. A juror’s testimony or affidavit may be received when it concerns:

   a. Whether matters not in evidence came to the attention of one or more jurors; or
   b. Any other misconduct for which the jurisdiction permits jurors to impeach their verdict.

B. The court should take prompt action in response to an allegation of juror misconduct.

1. Upon receipt of an allegation of juror misconduct, the court should promptly inform the parties and afford them the opportunity to be heard as to whether the allegation warrants further enquiry or other judicial action.

2. Parties should promptly refer an allegation of juror misconduct to the court and to all other parties in the proceeding.

3. If the court determines that the allegation of juror misconduct warrants further inquiry, it should consult with the parties concerning the nature and scope of the inquiry, including:

   a. Which jurors should be questioned;
b. Whether the court or the parties should ask the questions; and
c. The substance of the questions.

4. If the court ascertains that juror misconduct has occurred, it should afford the parties the opportunity to be heard as to an appropriate remedy.

5. If the allegation of juror misconduct is received while the jury is deliberating, the recipient must ensure as quickly as possible that the court and counsel are informed of it, and the court should proceed as promptly as practicable to ascertain the facts and to fashion an appropriate remedy.