Riding Jury Instructions to Victory

by John L. Kane

As trials become increasingly drawn out and complex, a frequent refrain is that juries are incapable of deciding multi-issue cases because the inexorable advances of science and technology make them far too sophisticated for men and women of ordinary experience and education to understand. Former Chief Justice Warren Burger jumped on that bandwagon saying, "Even Jefferson would be appalled at the prospect of a dozen of his stout yeomen and artisans trying to cope with some of today's complex litigation." Jurors are not incompetent. The failure of comprehension lies with us, the lawyers and judges. It is not the responsibility of jurors to divine meaning by stirring the entrails of the legal monstrosities we create. With strategically timed and sufficient instructions coupled with common-sense innovations, a jury can justly decide any case.

Brooke Group, Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209 (1993) poignantly illustrates our errors. During a trial that involved the Robinson-Patman Act (15 U.S.C. § 13) and lasted more than seven months, the judge did not instruct before or during the testimony. At the close of the evidence, without providing copies of the instructions to jurors to follow along, he began reading in the morning and did not finish until mid-afternoon. Eighty-one pages of transcript contained such prose as this: "The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of supply and demand between the product itself and the substitutes for it."

Reversing the verdict for the plaintiff, the Supreme Court unabashedly opined, "A reasonable jury is presumed to know and understand the law, the facts of the case, and the realities of the market." The foreman was a 25-year-old assistant supervisor at a furniture factory; other jurors were housewives and a rural postmaster. None was a student of economics. In a post-trial interview, one juror remarked, "I never did understand what the term 'market power' meant and the judge refused to let me see a dictionary."

Lest we think *Brown & Williamson* an aberration, consider *Arthur Andersen LLP v. United States*, 544 U.S. 696 (2005), the showcase prosecution in Enron Corporation's spectacular collapse. Arthur Andersen LLP, Enron's auditor, had advised its employees to destroy documents pursuant to its document retention policy. Indicted for obstruction of justice, Arthur Andersen was convicted, effectively dealing a death blow to one of the most prestigious accounting firms in history. Chief Justice William Rehnquist reversed, holding that the jury instructions failed to convey properly the elements of a "corrup[t] persuas[ion]" conviction. It was not wrongful to instruct employees to comply with a valid document retention policy under ordinary circumstances, but the government's insistence and the trial judge's acquiescence in an instruction that changed the statutory definition of "corruptly" by excluding "dishonestly" and adding "impede" to the phrase "subvert or undermine" was reversible error. Thus, the Supreme Court held, the instruction was fatally flawed because it permitted anyone who even innocently persuaded another to withhold information from the government to be convicted. The instructions also failed to require the jury to find any nexus between the "persua[sion]" to destroy documents and any particular proceeding or investigation.

News media at the time reported that a deadlock was prevented when the holdout decided that one e-mail from an in-house lawyer at Andersen obstructed justice by suggesting a memo be changed. If such was the case—that a lone juror avoided deadlock by fastening on a single tangential fact in a monumental prosecution with counterintuitive instructions—could the jury really be blamed? No matter. A Big Five accounting firm that once employed 28,000 people was

The Honorable John L. Kane is a senior judge for the United States District Court for the District of Colorado in Denver.

banned from public audits and reduced to a skeleton crew of 200 employees. One is reminded of the description of an appellate court: After the battle is over, it walks about the smoldering field and shoots all the survivors. In this case, there were no survivors to shoot.

What are the results of inadequate preparation and use of jury instructions on a daily basis in the vast majority of cases where no appeal is taken? How reckless is it to wait until all the evidence is in and then, in a rush to get the case to the jury, cobble together instructions at the last minute? This parody of justice is not limited to mega-cases covered ad nauseam by the news media. It occurs every day in cases no one ever hears about. Despite their central importance to any trial, jury instructions are given scant, if any, attention in law schools or litigation seminars. They are usually the last thing to be considered.

In a pluralistic society where jurors are drawn from all walks of life, ethnicities, ages, and religious and political persuasions, the only cultural glue that binds them together is the law. Unlike homogeneous societies, in our nation of immigrants we do not look at life through the same glass darkly. *E pluribus unum* is not only our national motto; it is the essential description of a jury. Without a clear understanding of why they are in court and what they are supposed to do, it is highly improbable that a heterogeneous group of people can bond and reach a decision based on commonly accepted values. Sometimes, however, sound and just verdicts are rendered by juries in spite of the judges and lawyers involved rather than because of them.

That happened when I served as a juror in state court in a driving under the influence (DUI) case. The voir dire was superficial. The DUI statute was read in its entirety, but no explanation was given of the elements of the crime. No provision was made for taking notes or asking questions. The jury had not the slightest introduction to what it was supposed to do. Like ventriloquist dummies, we sat and waited for someone to pull the strings. At the close of the evidence and what seemed an eternal recess, the judge read the instructions to us in a stultifying monotone. They were standardized and did not mention any of the people involved in the trial. They included instructions on impeachment and prior inconsistent statements, though none had occurred. No explanation was given that the defendant could be acquitted of DUI but convicted of the lesser included offense of driving while impaired. Nor were we instructed on how to proceed with our deliberations. Neither the prosecutor nor the public defender referred to the instructions in closing arguments.

The foreman of the jury selected himself. He took the printed set of instructions from the bailiff and tossed them onto a side table. Announcing that he was a professional truck driver who wasn't about to convict a person when no accident or collision had taken place, he said, "You could lose your license for that." When I suggested that we ought at least to look at the instructions, especially the one on reasonable doubt, another juror said, "What for? They're just words and I don't understand half of them." The jury quickly returned a verdict of "not guilty." I felt there had been a failure of proof, but, as a jury, we had never been informed by the court of what that meant. We gave no more or less attention to the instructions than the judge and the lawyers did. I can't say that as a judge I have ever been that cavalier about instructions, but that day's experience was an epiphany for me.

To appreciate the depth of the problems the haphazard treatment of jury instructions creates, consider a brief history of jury instructions. Until quite recently, no one dared state that instructions were mostly incomprehensible. In the last half of the 19th century when jurors were not presumed to be literate, and at early common law when literacy was a disqualification, judges instructed in frank, natural language. As appellate courts emerged, an insistence developed that a written record of the jury charge be made. Cases were reversed for incorrect statements of law with the implicit assumption that the jury understood and followed them in the first place. This assumption was made explicit in *Brown & Williamson*.

Special verdicts using specific questions leading to a coherent judgment could have helped solve the problem but were not used. As trial judges are averse to being reversed and appellate courts insist on control, written instructions began to quibble. It didn't matter what jurors understood, only that the instruction was a technically correct statement of law that could be taken off the shelf—a law, by the way, blessed with the fiction that everyone was presumed to know.

Justice is achieved by weaving the weft of facts onto the warp of the law. If not coherently instructed on the law, jurors necessarily revert to what they can understand: the facts. Moreover, what occurs in the sanctity of the jury room is not subject to review. How, then, do lawyers and judges ensure that the jury is given the tools it needs to perform its job?

It is now Sunday afternoon, 11 years later. I am at home in my study reviewing and editing proposed jury instructions submitted by counsel for a trial set to begin in two weeks. At the pre-trial conference a month ago, the triable issues were limited and specified. The gauntlet of summary judgment had

already been run and the nits of discovery picked. Once the instructions are settled, the bases for in limine motions are significantly reduced. All instructions will be tailored to the case, with so-called pattern ones merely the beginning and not the final product. How will these vital tools be honed? First, a review of plain English.

Though it is not in attorneys' nature to do so, I urge them to use the parties' proper names instead of the generic "plaintiff" and "defendant," and to write "before" instead of "prior to" and "after" instead of "subsequent" and never, ever to use "whereupon" and "hereinafter" unless they promise to wear spats and pince-nez throughout the trial. Surplusage confuses rather than clarifies the application of the law. When quoting a statute, all parts extraneous to the case at bar must be redacted. Why should an entire statute on affirmative defenses in a product liability case be quoted when only one is at issue? In cases with multiple claims, the attorneys often submit more than a hundred pages of proposed instructions, and I call them in for an additional conference. I am usually able to reduce the number of instructions tendered by 20 percent.

I have yet to see a pattern jury instruction that does not require at least some modification. Most template instructions were not written with the jury in mind. Many were not written for oral presentation. A few are incomprehensible, and some are so complicated they need to be parsed and presented in constituent parts. They were drafted to satisfy the gimlet-eyed review of the appellate courts.

For litigants with the resources, mock or shadow jury trials are sometimes held. Well-heeled clients also pay for jury consultants. Their advice assumes jurors will decide matters on the basis of prejudices and predilections rather than on what they learn from the presentation of evidence and the law. What does a mock jury decide when the instructions and verdict forms, if any, are not the same as those used in the actual trial? It is much less expensive and more effective to give three or four non-lawyers the proposed instructions and ask for their questions and comments. In settling the final instructions, I have been favorably persuaded by lawyers doing just that and advising me of the lay reactions.

After I complete this edit, I send the instructions back to counsel for review. I think it is extremely unwise for lead counsel to delegate the responsibility for the instructions to the most junior lawyer on the team. I enjoy working with young lawyers, but most have never tried a case and their insecurity leads them to speak in a language the stranger knows not of. Moreover, lead counsel's mastery of the case tends to be in direct proportion to the hands-on drafting of the instructions. I remind them of three points:

First, courts of appeals do not engage in word-by-word hair-splitting when reviewing jury instructions. The trial judge is given wide discretion as to style and wording, and abuse of discretion is the standard of review. When determining whether the charge is sufficient—that is, whether the instructions, taken as a whole, fairly and adequately apprise the jurors of their obligations, the issues to be decided, and the applicable law—the standard of review is de novo. Thus, the reviewing court will look at the instructions as a whole, even if only a portion of one is assigned as error. Instructions are not weapons in the adversary's arsenal, and as *Arthur Andersen* demonstrates, lawyers incur a substantial risk of losing on appeal if they ask for too much and the trial judge accedes to their demands.

Second, the reviewing court will reverse and order a new trial only if the instructions failed to state the applicable law adequately or were highly confusing so as to create substantial doubt that the jury was correctly guided and the litigant was thereby prejudiced. The harmless error doctrine applies to review of jury instructions, and reversal is mandated only if prejudice is established on a review of the record as a whole. If, however, the charge is balanced, comprehensive, and clear so as to avoid confusion or misdirection, it is sufficient even though some principles of law may have been omitted. Within those wide parameters, trial lawyers and judges remain free to make many mistakes and obtain aberrant results.

Third, argumentative, one-sided instructions are useless. Whether based on a case or a statute, the test is how does the instruction most normally read? Adjectives and adverbs generate ambiguity. Avoid legalisms and other forms of arcane usage. Plain, easily understood declarative sentences are the objective. To be most persuasive, a proposed instruction should append explanatory comments; string cites are only somewhat better than useless.

At the final trial preparation conference, we review this set of instructions and make necessary changes, and the attorneys can make a record of whatever objections they maintain. The final set of instructions is indexed and cross-referenced with the special verdict forms for easy access during opening statements, closing arguments, and jury deliberations. With this detailed and careful drafting, I have noticed an increase in settlements. Once the parties see the precise questions the jury will answer and the law that will be given to them, it is easier for them to reach an understanding and strike a better deal than the court and jury can provide.

Eight years ago, I consulted a mediator and a psychologist to help me craft an advisory instruction to guide the deliberative process. It is common sense that 12 people who have never met should receive guidance or suggestions on how to communicate with one another and reach mutually acceptable conclusions. Other judges have used an abbreviated version of my instruction, which begins along these lines:

Having the instructions ready changes the structure of the trial itself.

> You are advised to proceed in an agreed-upon order. For example, the case can be discussed in the order of the questions presented in the special verdict form, in chronological order of facts, or according to the sequence of the witnesses, but it is inadvisable to jump from one order to another. I recommend first selecting, either by election or consensus, a foreman and a secretary to assist in counting votes and making certain that all jurors are present whenever the case is discussed. The foreman is admonished to permit all other jurors to speak before expressing his or her own opinions. I suggest refraining from voting until the particular issue has been fully discussed. To avoid being influenced by personalities rather than issues, it is best to proceed by secret ballot.

The advisory instruction goes on to discuss "active listening," meaning one should not listen with one ear while

thinking about a response. Each juror's right and obligation to participate, and to maintain mutual respect at all times, are emphasized. The instruction implores jurors to be patient with one another and assures them there will be no pressure from the court to set deadlines. Since I started giving this instruction, no trial of mine has ended in a hung jury.

The primary intent of all these efforts, of course, is to have a fair trial on the merits. As compared with the slap-dash approach of shuffling stock instructions at the last minute, the measured approach substantially reduces the possibility of reversible error. I have yet to be reversed for giving a faulty instruction, and I have been affirmed using this method of instruction. There are, of course, issues of first impression that may cause an appellate panel to reject my efforts to fashion an instruction where no binding precedent exists, but that has yet to happen. I was reversed once because the Supreme Court overruled a precedent while my case was pending on appeal, but that can happen no matter how much effort is put into preparing instructions before trial.

Having the instructions ready changes the structure of the trial itself. When the venire is called, I use the instructions as the basis for my voir dire, explaining them in detail and repeating key concepts. Some judges pride themselves on how quickly they can select a jury. The opposite is the better course. Jury selection should take time and careful attention; it is the linchpin of the case.

Once the jury is selected and sworn, I provide each juror with notepads, pens, and a copy of the instructions. I then read aloud all except the final advisory instruction on how to deliberate. My purpose is to inculcate in each juror a sense that the instructions are organic to their decision-making process. Not only are they to be taken as a whole, but also they are written to accomplish that objective by using transitions and cross-references to previous and forthcoming explanations and definitions. I advise jurors to keep their instructions notebooks handy because the lawyers and I will be referring to them throughout the trial. The instructions are a lot to learn all at once, and they will make more sense as we go along, but if they have any questions or want further explanations, I tell them to let me know by writing a note at a recess.

I also inform jurors that although I have tried to anticipate which instructions are proper, if I have made a mistake, I will correct it by retrieving the errant instruction, substituting a correct one, and explaining the difference. For example, the defendant in a criminal case may intend to testify and then elect not to. This change gives me the ideal opportunity to review with the jury the fundamental principle that the defendant is under no obligation to produce any evidence and the reason they are in court is to decide whether the prosecution has met its burden to prove the defendant guilty beyond a reasonable doubt.

This kind of mid-trial adjustment can happen in civil cases as well. For example, in one case with claims of breach of fiduciary duty, trade secrets, and outrageous conduct, I instructed on all three claims and then granted a motion under Federal Rule of Civil Procedure 50 for judgment as a matter of law on outrageous conduct. In this instance, I had the courtroom deputy remove the instructions on outrageous conduct from each juror's copy, and I advised them as follows: "Ladies and gentlemen, as you know by now you are the judges of the facts and I am the judge of the law to be applied by you. I thought when this case began that you would need to apply the law on outrageous conduct contained in Instructions 17.1, 17.2, and 17.3, but I was wrong. Therefore, I have had those instructions removed from your notebooks and they no longer have any bearing on your deliberations."

Obviously, a lawyer has some risk in pursuing a claim that is difficult to prove, or basing an affirmative defense on flimsy evidence, but that is true regardless of whether the jury is instructed in advance, because the claim or defense must be addressed in the opening statement, and opposing counsel can always use a variant of the "empty chair" or "house of cards" argument in closing. At the final trial preparation conference, when a lawyer persists in pursuing a questionable claim such as punitive damages or a weak failure-to-mitigate defense, I

say something along the lines of, "Okay, but if you are going to shoot the king, you had best be sure to kill him."

Instructions that are complete and available at the start of the trial give the lawyers an excellent foundation for their opening statements. The jurors have already heard the instructions and have them in hand. They can look at them while the lawyer is talking about them, using two learning channels rather than one. Moreover, the judge has just read them and invested each juror with a personal copy so the lawyer is referring to recognized authority that enhances the gravitas of the litigant's theme. (If a lawyer doesn't have a clearly articulated theme or storyline, she shouldn't be in court.) Instructions bespeak the judge's authority. That is not a bad horse to saddle and ride to a successful verdict.

I repeat instructions during the course of the trial. When an expert is called, I direct the jurors to open their instructions notebooks to the page on expert witnesses. This gives me the opportunity to review with them the different kinds of testimony, and why they are hearing so much about this particular witness's background and qualifications when they had not heard that sort of testimony with regard to percipient witnesses. The jurors are informed in context about what they are to look for in the testimony, and about credibility and burdens of proof.

Just as the judge can use instructions in this manner, a lawyer is free to request that an instruction or series be read at any point during the presentation of evidence. When the examiner is switching from a substantive issue to the topic of damages, reading the instructions on damages signals the jury that the focus of the examination is changing and makes it easier for them to follow. The jury becomes more engaged in the process, and having the instructions repeated in the context of testimony enhances their recognition of the issues and gives clarity to the points counsel are making. Especially in complex, lengthy trials, this repetition increases their understanding of the facts. In essence, when a lawyer asks that an instruction or two be read during her examination, she is saying to the jury, "Here, work with me; this is what we are doing."

Substantive instructions tell the jury what must be proved.

If a trial is longer than two weeks, on Friday afternoons I schedule summary statements to enable the lawyers to tell the jury what they have seen and heard and what to expect in the following week. It is tempting for lawyers to convert these summaries into "mini-closings" rather than use them as an opportunity to develop trust so that the jury will rely on them when the closing arguments are made. I spend time explaining why this conversion is ill-advised and warn the attorneys that I will be instructing the jury as to the summaries' intended purpose. In the face of such an explanation and instruction, the lawyer loses credibility if she persists in arguing rather than informing. Nevertheless, there is sufficient rope to tie the case down or to hang oneself.

Once the evidence comes to a close, that terrible time when the jury is eager to deliberate and yet must wait, sometimes hours or even days, while the judge and counsel repair to chambers is reduced to a bare minimum. I have conducted hundreds of post-verdict interviews with jurors to see what I can do to make the experience better and more purposeful for them. Most of the innovations I employ are based on these interviews. The criticism most often voiced by jurors was with delays and unexplained recesses. The delay between the time when both parties rest and the time when closing arguments and instructions are given was the most criticized of all.

With the instructions and special verdict forms in hand, a closing argument is already organized. What questions does the jury have to answer? The jurors are looking right at them. Why should they answer this question in your client's favor? Look at each instruction. Who was credible? Look at the instruction on credibility and tell the jury who was credible and why, according to the criteria in the instruction. As with the opening statements, this accesses two learning channels instead of one. The substantive instructions tell the jury what must be proved. The lawyer's closing explains how it has or has not been proved. Follow the instructions through to the most persuasive conclusion you can make; lawyers can let the instructions speak for them and on their behalf. After all the arguments are made, the judge will read the entire instructions one last time, and one can rest assured that the jurors now believe these are *their* instructions, *their* marching orders, *their* key to understanding the case. The instructions have given them the confidence needed to make a decision.

I do not know how many other judges engage in these innovations, but surely even one who does not would welcome a prepared set of instructions before trial. I have talked with a few, and their interest seems more than merely polite. Judges and lawyers are averse to change. By the very nature of our craft, we look to precedent, to what has been done and stood the test of time. The problem with that kind of caution is that the world around us is in constant and rapidly increasing change. For example, technology has affected the way we think and changed our vocabulary forever. We now must admonish jurors not to twitter. Because of recent horror stories about mistrials being declared when jurors have accessed the Internet during trial, I have added the following admonition to my opening instruction:

> I wish I didn't have to dwell on this topic, but recent events around the country and new developments in technology compel me to point out that some common practices many of you enjoy are strictly forbidden in your role as jurors. You may not, under any circumstances, have your cell phones, BlackBerries, iPhones, or the like on when court is in session. Moreover, whether you are here or away from the court during recesses and overnight, you may not "google, twitter, tweet, text message, blog, post" or anything else with those gadgets about or concerning anything to do with this case. The point of it all is to confine your judgment to what takes place in the courtroom. It would be extremely unfair to base your decision on matters that neither side has examined and tested. That is what due process is all about. Disobeying this instruction could cause a mistrial, meaning all of our efforts would have been wasted and we would have to start all over again with a new trial before a new jury. If you were to cause a mistrial by violating this order, you could be required to pay all the costs of these proceedings and perhaps even be punished for contempt of court.

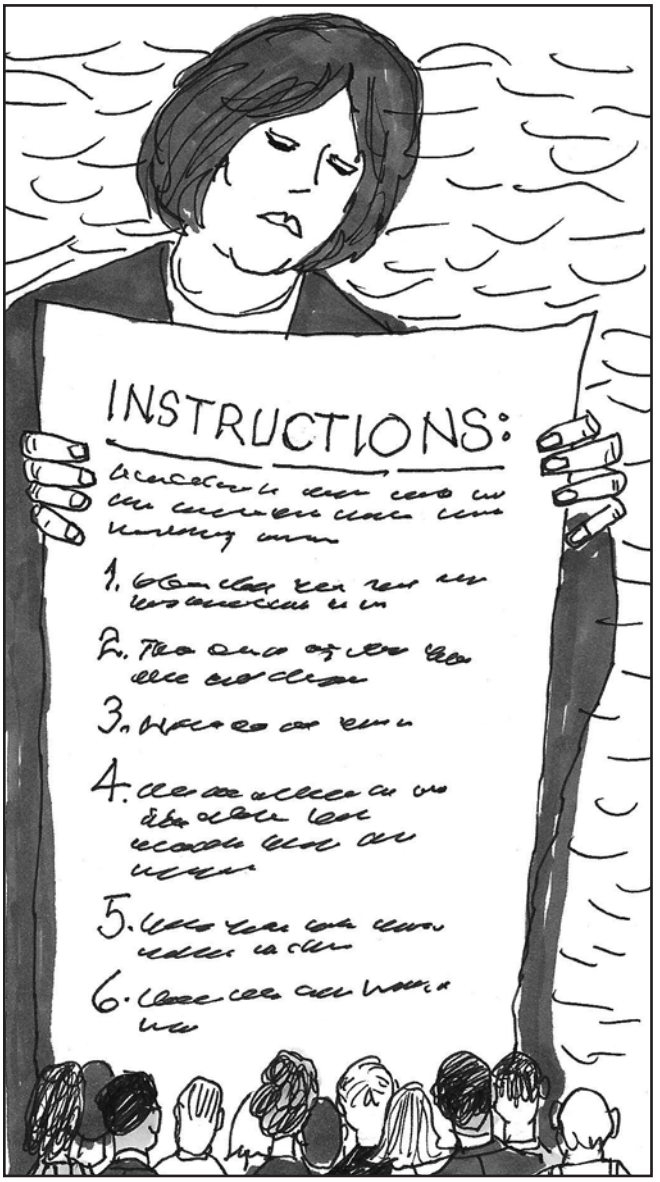
What you may do is advise anyone who needs to know, such as family members, employers, employees, schools, teachers, or daycare providers, that you are a juror in a case and the judge has ordered you not to discuss it until you have reached a verdict and been discharged. At that point you will be free to discuss this case or investigate anything about it to your heart's content.

When you reach the point in this trial when you deliberate, you must see to it that no one else on the jury ignores these instructions or attempts to decide the case on anything other than the law as I give it to you and the facts you and your fellow jurors find from the evidence given here in court. Fundamental fairness requires that we all play from the same deck of cards. It is always to be borne in mind that our collective commitment is to equal justice under law. Matters or concerns about race, creed, color, national origin, and gender have no place in this process. To the best of your ability you are to judge others as you would want others to judge you under the law I give you. The very heart of justice is that all of us apply the same law and the same spirit of fairness to the same evidence and leave our personal desires and personal information out of it.

Is starting the case with instructions and preparing them in advance worth the effort? The jury trial is a vanishing artifact of our culture. Fewer than two percent of cases are tried to verdict. Most cases settle, a very few are dismissed, and summary judgment is entered more often than judgments on verdicts. But if one drafts a complaint or answer or counterclaim based on substantive instructions the judge has already used in an earlier case, the number of successful motions an opponent can file is significantly reduced. One of the most persuasive statements a busy trial judge can read is this: "The language objected to is the exact language used in this court's prior cases."

Preparing pleadings in the language of jury instructions and having the instructions at hand also reduces discovery disputes. The magistrate judge can see immediately why the discovery sought can lead to relevant evidence or, for that matter, why it never will. So, too, when demands or rejections are couched in succinct terms devoid of quibbling and obfuscation and designed to be understood by laymen, the prospect of successful negotiation is greatly enhanced. If the opposing party can readily understand your position, rather than requiring translation from her attorney, the probability of success is even more enhanced. It is one thing to advise an opposing party what your view of the law is; it is quite another to hand over an approved instruction and say, "This is how this court looks at this issue."

When the time comes to customize the instructions you are tendering to the court, foremost in your mind should be that your objective is to win at trial by communicating with the jury. You are not writing to communicate with the appellate courts. You want to win at trial and avoid being reversed. Although I sometimes wonder, it is a fact that far more cases are affirmed than reversed on appeal. The bottom line is to write to someone who has never before thought about what you are trying to communicate because that is exactly what you are doing. Lawyers have a difficult time drafting instructions because they have never been taught how to do so and



want to tilt them in their favor as if they were briefs. Striving for objectivity and fairness somehow seems counterintuitive, but—if you want a judge to use your instruction—that is precisely what you must do. If you want all your efforts to be for naught, take another look at *Arthur Andersen*.

In today's trial culture, the use of plain English is an innovation. So, too, is the repetitive use of instructions prepared well before trial and the increased participation of jurors in the process. Letting jurors know what is going on and explaining to them why there are things they know or have heard that they may not take into consideration is a calculated effort to have the trial process conform to the behavior and expectations that jurors have in their everyday lives, and to make the courtroom more familiar and considerably less foreboding to them.

The rule of law exists only when people of ordinary education and experience can understand it. Juries apply the law by consensus, when it accords with accepted standards of fairness. Instructions are the tools by which they conform facts and law to those standards. That endeavor is not the sole province of highly trained sophisticates. It is well within the mastery of 12 men and women in a jury box.