

Say What You Mean

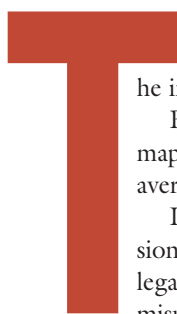
Drafting
Comprehensible
Jury
Instructions

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“Preponderance of the evidence’ means evidence that has more convincing force than that opposed to it. If the evidence is so evenly balanced that you are unable to say that the evidence on either side of an issue preponderates, your finding on that issue must be against the party who had the burden of proving it.”

—California Book of Approved Jury Instructions (BAJI) 2.0¹



The instruction above is a proper statement of law, correct in all elements.

But is this really the kind of direction you want to give to your jury? Like a faded treasure map or smudged recipe, even a well-researched jury instruction fails to fulfill its purpose if the average juror can’t adequately comprehend it and apply it to the task at hand.

In focus groups and jury polls, we often see that the instructions are pivotal in jury decision-making. Yet a substantial body of research indicates that because of the excessive use of legal terminology, complex sentence structure and other communication flaws, jurors often misunderstand even commonly used patterned jury instructions. This lack of juror comprehension impugns the integrity of verdicts and may lead juries to render “lawless decisions.”²

Many of the communication problems that plague jury instructions arise for a few reasons besides the fact that legal issues are complex by nature. The language comes from statutes and court decisions, and attorneys design them to satisfy the court—not to assist the jury.

These challenges cannot become excuses. As one court wrote, “[T]he object of a charge to a jury is not to satisfy an appellate court that you have repeated the right rigamarole of words, but to try to make jurors who are laymen understand what you are talking about.”³

Fortunately, research also shows that rewriting jury instructions in light of effective linguistic principles can significantly increase juror comprehension.⁴ Embracing such knowledge, many states have rewritten their patterned jury instructions in plain English as part of recent jury reform. In many respects, Arizona has led the way.

What’s Been Done

The Arizona Supreme Court Committee on More Effective Use of Juries began working on jury reform in 1993. One of its principal concerns was “the low level of juror comprehension of the evidence and legal instructions.”⁵ This prompted the jury instruction committee to embark on a plain-English rewrite of the RAJIs⁶ with the assistance of social scientists, psycholinguists and non-lawyer former jurors.⁷

In 2005, the American Bar Association followed suit by adopting the *Principles for Juries & Jury Trials*, which agreed that all jury instructions should be written in plain and understandable language.⁸ Many other states also have sought to rewrite their jury instructions accordingly. Nevertheless, studies indicate that jury instructions in general “remain syntactically convoluted, overly formal and abstract, and full of legalese.”⁹

We are fortunate that Arizona has been so progressive, but attorneys also may take individual responsibility to learn to write comprehensible instructions. By becoming skilled in plain-English drafting, they can create more effective case-specific instructions and better evaluate those proposed by opposing counsel. The goal is to simplify as much as possible, without sacrificing the meaning.

The following are guidelines to help in this endeavor.



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Communication Principles

Know Your Audience. Remember that in a jury trial the jury—not the court—is your audience. The Arizona Committee on More Effective Use of Juries suggested that jury instructions should be written so that an adult with a sixth-grade reading level could understand them.¹⁰

Use Appropriate Style and Tone. Formal language reduces comprehension and creates distance between the speaker and audience. However, a trial is a serious event, so slang or overly casual language would be inappropriate. Find a happy medium.¹¹

Here are some terms to avoid—and possible substitutes:

Uncommon term	Possible substitute
admonish	tell
advise	tell, instruct
at the time when	when
commence	begin
corroborate	support
credible	believable
demeanor	behavior, appearance
discredit	do not believe
discrepancy	difference, inconsistency
erroneous	wrong
impartial	fair, unbiased
in the event that	if
in order to	to
misrecollection	forgetfulness, inaccurate memory
pertain to	relate to
prior to	before
pursuant to	under
stipulate	agree, admit
subsequent to	after
terminate	end
utilize	use
veracity	truthfulness ¹⁶

Logical Organization. It is better to lead with the most important, put the general before the specific, and present the overall statement or rule before any conditions or exceptions.¹² It is also helpful to provide contextual information, such as “this instruction has two parts,” and use headings or numbered lists.

Vocabulary

Eliminate Legal Jargon & Use Common Words.

Referring back to the BAJI instruction at the beginning of this article, notice how rewriting it with common words significantly improves the clarity. “A party must persuade you, by the evidence presented in court, that what he or she is required to prove is more likely to be true than not true. This is referred to as ‘the burden of proof.’” (California Judicial Council Instructions—CACI—202)¹³

Legal jargon is more difficult to understand, and uncommon words tend to be associated with negative evaluative connotations.¹⁴ Furthermore, with some legal jargon, jurors might erroneously believe that they know the meaning. For example, when discussing *negligence*, an attorney may want to preface by explaining that in law, *negligence* is a very specific term and may not mean exactly the same as it would in everyday speech.

Another set of legal words that can cause problems are those ending in *-or* and *-ee*, such as *lessor* and *lessee*. They can be confusing and difficult to distinguish in speech. It would be better to use *landlord* and *tenant* when appropriate. Occasionally legal jargon is required. Some good advice is, “Teach it if they need it, teach it *when* they need it, translate if they don’t.”¹⁵

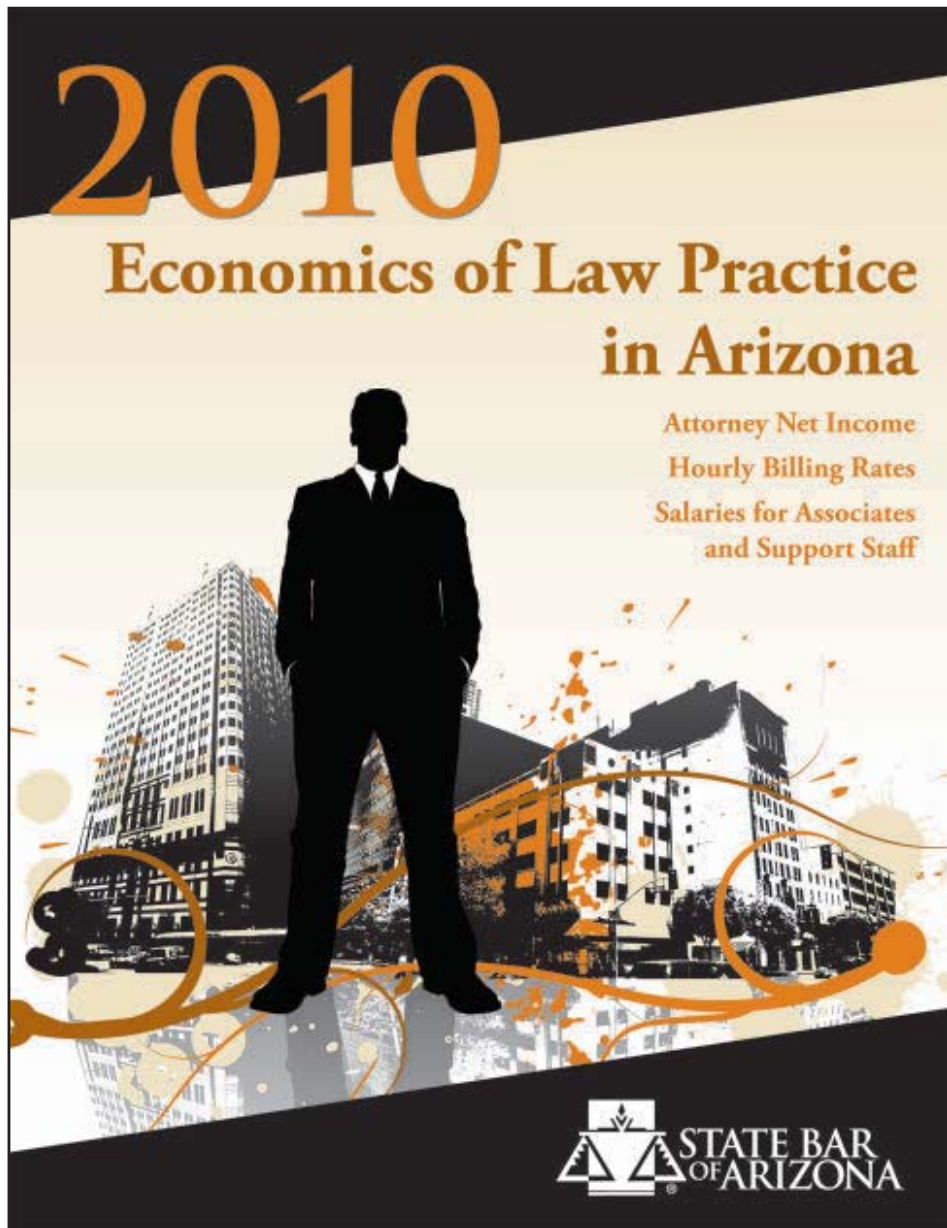
Select Words Carefully. A Texas instruction reads in part, “You are instructed that our law provides *that the failure of the defendant to testify* shall not be taken as a circumstance against him.”¹⁷ Criminal defense lawyer Mark Bennett appropriately asked, “How is it even conceivable that we should allow a court, when talking to jurors, to describe a defendant’s election not to testify—the exercise of one of the rights that we, as defenders, hold sacred—as a ‘failure’?”¹⁸

Be Concrete and Case-Specific. Concrete terms are more easily visualized, which helps jurors remember and comprehend.¹⁹ Most statutes, however, use broad, abstract language. Therefore, it is not a good idea to read to jurors directly from the statute.²⁰ For example, rather than saying “*We will prove that the defendant committed the act in question,*” say “*We will prove that Mr. Jones broke into the apartment.*”

Homonyms, Synonyms, Antonyms. Homonyms can confuse jurors. For example, jurors may not understand that the word *Court* refers to the judge. Synonyms also may impair comprehension. They are often



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used stylistically to avoid repetition, but in the legal setting, jurors can interpret the use of a synonym as an intentional attempt to distinguish. For example, an instruction may be less clear to a juror if it sometimes refers to *the car*, and other times discusses *the vehicle*. Finally, research shows that using antonyms with negative modifiers, such as *polite-impolite*, can be more difficult to understand and remember than words with completely different roots, such as *polite-rude*.²¹

Grammar

Sentence Length and Complexity. Avoid using multiple subordinate clauses, such as *while the man was washing the car, which he bought yesterday, he listened to the radio that was playing in the background*. Complex grammatical structure is more problematic than the sentence length per se. A good way to avoid convoluted sentences is to use ordinary word order: subject-verb-object. You also can reduce confusing complexities by breaking a cause of action down into its elements rather than lumping it all together in a narrative paragraph. (see the psychotherapist example given below).

Verb Use. Avoid nominalizations (nouns derived from verbs). For example, use *decided* rather than *made a decision*. In other words, make the verb do the work.

Avoid verbs that can change from transitive to intransitive. For example, *If you believe that the defendant is guilty* is better than *If you believe the defendant to be guilty*.²²

Finally, use straightforward verbs such as *can*, *must*, *should* and *will* rather than phrases like *It is possible for you to* (better: *You can*); *it is necessary for you to* (better: *You must*); or *your duty is to* (better: *You must*).²³

Use the Active Voice. Generally the active voice is better because it emphasizes the actor: *Mr. Smith accused Mr. Jones* rather than *Mr. Jones was accused by Mr. Smith*. However, the passive can be effective when your goal is to emphasize the object of the sentence instead, as when you differentiate one defendant from another.²⁴

Avoid Multiple Negatives. “Failure of recollection is common. Innocent misrecollection is not uncommon.” (BAJI 2.21).

What? A comparable instruction written without the triple negatives reads: “People often forget things or make mistakes in what they remember.” (CACI 107)²⁵ Whenever possible, it is also better to instruct the jury in the affirmative. Tell them what to do, rather than what not to do.

Avoid False Economy. Grammatically, it is acceptable to leave out clarifying words like *which*, *that is*, *are* and *that*. For example, *I heard [that] he paid the money*. However, leaving them in improves comprehension.²⁶

Jury Instruction Specifics

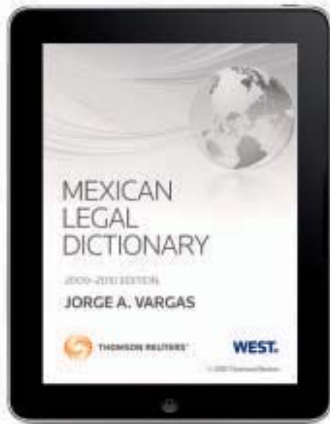
Identify the Parties Consistently. Jurors understand and remember better when attorneys identify parties and other participants clearly and consistently. It is usually most helpful to use the parties’ names. However, sometimes there may be strategic reasons for wanting to depersonalize.

Break the Cause of Action Into Clear Elements. Relating back to *Logical Organization* and *Sentence Length and Complexity*, here is a good example:

[*Name of plaintiff*] claims that [*name of defendant*]’s failure to protect [*name of plaintiff/decedent*] was a substantial factor in causing [injury to [*name of plaintiff*]/the death of [*name of decedent*]]. To establish this claim, [*name of plaintiff*] must prove all of the following:

1. That [*name of defendant*] was a psychotherapist;
2. That [*name of patient*] was [*name of defendant*]’s patient;
3. That [*name of patient*] communicated to [*name of defendant*] a serious threat of physical violence;
4. That [*name of plaintiff/decedent*] was a reasonably identifiable victim of [*name of patient*]’s threat;
5. That [*name of patient*] [injured [*name of plaintiff*]/killed [*name of decedent*]];
6. That [*name of defendant*] failed to make reasonable efforts to protect [*name of plaintiff/decedent*]; and
7. That [*name of defendant*]’s failure was a substantial factor in causing [[*name of plaintiff*]’s injury/the death of [*name of decedent*]]. (CACI 503 A)²⁷

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This instruction also uses parallel phrase construction to improve clarity, and specific names and acts to make it concrete and case-specific.

Use Examples. Examples can be very helpful to illustrate difficult concepts, but they must be chosen carefully because judges tend to be nervous about using them in jury instructions.²⁸ Examples are particularly helpful in explaining circumstantial evidence. Compare the following:


Circumstantial evidence is evidence that, if found to be true, proves a fact from which an inference of the existence of another fact may be drawn. A factual inference is a deduction that may logically and reasonably be drawn from one or more facts established by the evidence.” (BAJI 2.00)

Some evidence proves a fact directly, such as testimony of a witness who saw a jet plane flying across the sky. Some evidence proves a fact indirectly, such as testimony of a witness who saw only the white trail that jet planes often leave. This indirect evidence is sometimes referred to as “circumstantial evidence.” In either instance, the witness’s testimony is evidence that a jet plane flew across the sky. (CACI 202)²⁹

Avoid Unnecessary Instructions. Give the jury clear and complete guidance on the law and the deliberation process. But don’t confuse jurors by introducing things they don’t need to know.

Conclusion

Writing comprehensible jury instructions is not an easy task, but it is well worth the effort. We have seen in countless focus groups how seriously most jurors take their job. They want to do the right thing. However, they cannot do that without a clear set of instructions.

Choose or draft your instructions carefully, modify them as necessary, and consider testing them through a mock trial or focus group. A well-instructed jury is more likely to deliberate smoothly, render a quality verdict, and be more satisfied with their jury experience. Our judicial system demands nothing less. 

endnotes

1. Civil Jury Instructions Resource Center, Plain English Examples available at www.courtinfo.ca.gov/jury/civiljuryinstructions/plain_english.htm. This resource compares some of California’s Book of Approved Jury Instructions (BAJIs) with the comparable California Judicial Council Instructions (CACIs).
2. THE NATIONAL JURY PROJECT, JURYWORK: SYSTEMATIC TECHNIQUES (2nd ed. 1988), sec. 13-41 and sources cited therein.
3. *Cape Cod Food Prods. v. National Cranberry Ass’n*, 119 F. Supp. 900, 907 (D. Mass. 1954).
4. See Ellen Chilton & Patricia Henley, *Improving the Jury System, Jury Instructions: Helping Jurors Understand the Evidence and the Law*, PLRI UC Hastings College Of The Law (1996), available at <http://w3.uchastings.edu/plri/spr96tex/juryinst.html>.
5. See Report of the Arizona Supreme Court Committee on More Effective Use of Juries, *Jurors: The Power of 12* (1994) available at www.supreme.state.az.us/jury/Jury/jury.htm.
6. Recommended Arizona Jury Instructions.
7. See *supra* note 5, at sec. 38.
8. American Bar Association, *Principles for Juries & Jury Trials*, August 2005, available at www.abanet.org/juryprojectstandards/principles.pdf; Phoenix lawyer Patricia Lee Refo chaired the project, then-Tempe Municipal Court Judge Louraine Arkfeld co-chaired, and Maricopa County Superior Court Judge B. Michael Dann (ret.) was a member.
9. Hon. Michael A. Yarnell (ret.), *The Arizona Jury: Past, Present and Future Reform*, Executive Summary Nov. 2005, p. 32, available at www.michaelyarnell.com/TheArizonaJuryExecutiveSummary.pdf citing Peter M. Tiersma, *Jury Instruction in the New Millennium*, 36 CT. REV. 28 (1999).
10. See *supra* note 5, at sec. 38.
11. Peter M. Tiersma, *Communicating with Juries: How To Draft More Understandable Jury Instructions*, National Center for State Courts (2006), at 3, available at www.ncsonline.org/Juries/communicating.pdf.
12. *Id.* at 4.
13. See *supra* note 1.
14. A. ELWORK, B.D. SALES & J.J. ALFINI, MAKING JURY INSTRUCTIONS UNDERSTANDABLE 177 (1982).
15. Anne Reed, *How To Work With Jargon*, DELIBERATIONS, Feb. 18, 2009, available at <http://jurylaw.typepad.com/deliberations/2009/02/how-to-work-with-jargon.html>.
16. See *supra* note 11, at 8. For additional vocabulary comparisons, see *supra* note 14, at 182-88.
17. From *McClung’s Pattern Jury Charges*, emphasis added. See Jamie Spencer, *The Right Not To Testify Against Yourself (aka the 5th Amendment)*, AUSTIN CRIM. DEFENSE LAWYER, Dec. 11, 2007, available at <http://blog.austindefense.com/2007/12/articles/evidence-and-criminal-procedure/the-right-not-to-testify-against-yourself-aka-the-5th-amendment/>.
18. *Id.*
19. See *supra* note 14, at 177-78.
20. See *supra* note 11, at 5.
21. See *supra* note 14, at 179-180.
22. *Id.* at 173-74.
23. See *supra* note 11, at 9-10.
24. See *supra* note 14, at 175-76.
25. See *supra* note 1.
26. See *supra* note 11, at 13.
27. See *supra* note 1.
28. See *supra* note 11, at 15.
29. See *supra* note 1.