12 2/21/69

Memorandum 69-47

Subject: Study 12 - Jury Instructions

Attached are two copies of a draft of a tentative recommendation designed to carry out the decision made at the last meeting on this topic. Also attached are exhibits that contain background material on this topic.

Please mark your editorial revisions on one copy of the tentative recommendation and turn the copy in to the staff at the March meeting so that your suggestions can be taken into account when the tentative recommendation is revised after the meeting.

Respectfully submitted,

John L. Cook
Junior Counsel

Memorandum 69-47

EXHIBIT I

[HOLBROOK, A SURVEY OF METROPOLITAN TRIAL COURTS LOS ANGELES AREA (1956) at 119-120]

7. Jury Comprehension of Instructions

We have explored certain areas concerning the comprehensibility of jury instructions including the words used in the instructions, the manner of reading them, and the length of them. Let us examine the subjective opinions of 1,071 jurors as to whether they understood the instructions.

About 94 per cent of the jurors who answered the question said that they did understand the instructions, while about 4 per cent said that they did not. Examination of further answers of these jurors, however, cast some doubts on this score.

About 87 per cent of the jurors said that the instructions were discussed in the jury room. Approximately 10 per cent said that they were not discussed and 1 per cent said that they sometimes were. Over 48 per cent of the jurors said that there was disagreement as to the meaning of the instructions and about 43 per cent said that there was not. The only conclusion which can be drawn is that while most jurors thought that they personally understood them, nearly half of this group conceded that *somebody* on the jury did not.

EXHIBIT II

Forum Feature

Should Instructions Go Into

The Jury Room?

By Thomas J. Cunningham*

Can't civil juries read?
Don't criminal juries hear well?

These lawyers' questions suggest the confusion, and the controversy surrounding a jury's right to take written instructions into the jury room. Some lawyers, indeed, may not realize that one major distinction between the administration of civil and criminal justice in California arises from the fact that criminal juries may, but civil juries may not, take copies of the court's instructions on the law into the jury room to aid them in their deliberations.

The oral rendition by the judge of the written instructions containing the points of law which must be applied by the jury to the facts of a given case constitutes the conventional method of jury instruction. Written requests for instructions, in civil cases, are presented to the court early in the trial, and the court decides whether to give, refuse, or modify the proposed instructions. The submitted instructions subsequently may be amended by the parties only when new issues have been raised during the course of the trial. In the March-April, 1957, issue of the STATE BAR JOURNAL, I suggested several ways to improve this method of preparation and presentation of the court's instructions to the jury.[1]

It is upon completion of the oral presentation of instructions by the court that the aforementioned practice of distinguishing between criminal and civil juries arises. One may well question the rationality of the rule which permits a criminal jury to have possession of copies of the instructions during its deliberations, while denying the same privilege to a civil jury. One may inquire, furthermore, as to the desirability of a rule which would make possession of instructions during deliberation by a jury, either civil or

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[1] Cunningham, T. J., "Instructing Juries," 32 Calif. St. B. J. 127-136 (1957).

criminal, a mandatory requirement. Coincidentally with the foregoing issues one should investigate the possibility of improving the method of preparation of written jury instructions in a manner consistent with the protection of the rights of the litigating parties and the expeditious conduct of the business of the court. In this article I shall examine these problems.

Present Inconsistent Practices

California law relating to the possession of written instructions by the jury appears to be inconsistent.[2] Since 1872 the Penal Code has permitted criminal juries to take copies of the court's instructions into the jury room.[3] The Code of Civil Procedure, however, does not extend this privilege to juries in civil matters.[4] The practice has been held to be permissible in civil cases if the parties consent thereto,[5] but an extension of the privilege by the court on its own motion has been held to be irregular, although not necessarily prejudicial.[6] The taking of instructions into the jury is not mandatory, however, in either criminal or civil cases.

Jurors attempting to arrive at just verdicts in either criminal or civil cases would be affected equally, it would seem, by the opportunity to study the instructions of the court

[2] The argument could be made, however, that the distinction is sound in that, in criminal cases involving, for the most part, considerations of life and liberty, the purportedly unfavorable aspects of the practice are outweighed. These considerations are not present in civil cases which are concerned generally, with the possible loss of property. In this respect it should be noted that, although expressly provided by statute in California, it has been held elsewhere that the use of written instructions by a jury in a criminal case was improper in that it infringed upon the right to a public trial by the accused. *Holton v. State*, 2 Fla. 476 (1849). See note, 96 A.L.R. 899 (1935).

A practical justification which might be offered for allowing juries in criminal cases to have the written instructions is that the average number of instructions in a criminal case is usually much smaller than in civil cases. While it would not be reversible error in a criminal case to give only the few mandatory instructions required (see Fricke, C. W., California Criminal Procedure 268 (4th ed. 1955)), the law is not clear in civil cases (see note 1, *supra*), and most judges give innumerable instructions, especially in negligence cases.

[3] Cal. Pen. Code, sec. 1137, in part provides: "Upon retiring for deliberation, the jury may take with them . . . written instructions given. . . ."

[4] Cal. Code Civ. Proc., sec. 612; *Pereira v. Silvey*, 33 Cal.App. 346, 358, 176 Pac. 317 (1918).

[5] *Pereira v. Silvey*, *supra*, note 4.

[6] *Melikian v. Independent Paper Stock Co.*, 8 Cal.App.2d 166, 168, 47 P.2d 539, 540 (1935).

during their deliberations. If the practice has merit in criminal cases, it would seem equally meritorious in civil cases. Furthermore, if the practice is sound as an optional undertaking, it would appear equally sound as a mandatory requirement.

It cannot be contended, certainly, that the foregoing suggestions embrace any radically new theory. As early as 1901 the California Legislature amended section 612 of the Code of Civil Procedure to provide that "[u]pon retiring for deliberation, the jury *must* take with them *all* instructions given. . . . No instruction handed to the jury must contain anything to show at whose request it was given." (Emphasis added.) The bill containing the amendment was declared unconstitutional for technical reasons.[7]

It can be argued, on the other hand, that the aforementioned distinction between criminal and civil juries, as a practical matter, does not exist to any material extent. In civil cases, as well as in criminal matters, jurors may request that the court reread its instructions, and in criminal cases juries are not always permitted to have copies of the instructions, since some judges oppose the practice,[8] and many jurors are unaware that they may ask for the instructions. Many practicing lawyers, moreover, and some judges, oppose any extension of the existing practice,[9] stating their reason for such opposition to be that the practice is disruptive and tends to prolong the deliberations of the jury.

The procedures employed in other states are as diverse as the opposing practices followed in California.[10] Most states provide for jury possession of instructions during deliberation, either as a requirement or by permission, in civil and criminal cases. Some states follow California in distinguishing between the nature of the cases. Indiana prohibits the practice entirely. A few states have no law on the subject, and, although there exists no federal statute or rule requir-

[7] The amendment, Cal. Stats. 1901, c. 102, sec. 111, p. 145, was part of the act of March 8, 1901, Cal. Stats. 1901, p. 117, which was an act revising the Code of Civil Procedure. The act was held to be unconstitutional because it was not re-enacted and published at length as revised, and because it did not comply with the requirement that only one subject be expressed in its title. *Lewis v. Dunne*, 134 Cal. 291, 66 Pac. 478 (1901).

[8] Fussell, Paul, The Holbrook Report, Eight Months Later, 60 (Aug., 1957).

[9] *Ibid.*

[10] See Tabular Summary of Law of Other States, California Law Revision Commission, Recommendation and Study Relating to Taking Instructions to the Jury Room, C-15 to C-17, inc. (Nov. 10, 1956).

ing the practice, it has been held that it is not error for a federal trial court to give the jury a copy of its instructions.[11]

In the absence of any uniform precedent for revision of the present procedure, California legislators, in reviewing this problem, themselves must provide answers to four basic questions:

1. Does the provision of written instructions to any jury, either civil or criminal, constitute an improvement in the administration of justice?

2. Is there any rational basis for distinguishing between civil and criminal juries with respect to the provision of written instructions?

3. If copies of written instructions should be given to juries, should they be given on a permissive or a mandatory basis?

4. Would proper preparation of instructions for use by a jury be consistent with the exigencies of the normal trial court situation?

Recently Proposed Revisions

The California Law Revision Commission in its report of November 10, 1956,[12] recommended that juries be given written instructions in both civil and criminal cases, "upon the request of any party, made before the jury has retired to begin its deliberations, or upon the request of any juror, made at any time before verdict," as well as upon the court's own motion.[13] Existing law as to requests for further instructions would not be changed, except that the proposed amendments to the Penal Code and to the Code of Civil Procedure would also provide that "the jury may communi-

[11] *Carrado* v. *United States*, 210 F.2d 712, 722-723 (D. C. Cir., 1953), cert. denied sub nom.; *Smith* v. *United States*, 349 U.S. 932 (1955); *Haupt* v. *United States*, 330 U.S. 631, 643 (1947) (giving copy of court's charge to jury not reversible error).

[12] California Law Revision Commission, Recommendation and Study Relating to Taking Instructions to the Jury Room (Nov. 10, 1956).

[13] *Id.*, at C-6.

Section 1137 of the Penal Code would be amended to read: "Upon retiring for deliberation, the jury may take all papers except depositions which have been received as evidence in the cause, or copies of such public records or private documents given in evidence as ought not, in the opinion of the Court, to be taken from the person having them in possession. They may also take with them notes of the testimony or other proceedings on the trial, taken by themselves or any of them, but none taken by any other person." *Ibid.*

A section 1137.5 would be added to the Penal Code to read: "After

cate the request . . . through the officer if the jury determines that it is not necessary to be conducted into court for this purpose and the court may send the instructions to the jury by the officer."[11] The commission concluded that there is no rational basis for continuing the present distinction between civil and criminal cases, and that "[t]he advantage of having available to the trier of fact in all cases a statement of the issues to be decided and of the controlling legal principles would seem to outweigh the risk, if any, that in some cases the jury might be confused by the language of the instructions or misled by the 'sharp ones' in their number or that in others they may be distracted from the main job at hand."[12]

The Holbrook Report[13] recommended, in civil cases, experimentally at least, that the jury should be permitted to take instructions into the jury room. A review of the reaction of various Los Angeles area groups to the foregoing recommendation indicates that the Los Angeles Superior and Municipal Court judges and the Los Angeles Bar Association disagreed with the suggestion, while the Beverly Hills Bar Association agreed, but with important modifications and limitations.[14] It should be noted, however, that the conclusions of the foregoing groups did not reflect, in each case, the opinions of the entire membership, nor did the Holbrook Report document all facets of the problem.

it has instructed the jury, the court may give the jury a copy of the written instructions given and the court shall do so upon the request of any party, made before the jury has retired to begin its deliberations, or upon the request of any juror, made at any time before verdict." *Ibid.*

A section 612.5 would be added to the Code of Civil Procedure to read: "After it has instructed the jury, the court may give the jury a copy of the written instructions given and the court shall do so upon the request of any party, made before the jury has retired to begin its deliberations, or upon the request of any juror, made at any time before verdict." *Ibid.*

[11] *Id.*, at C-7.

To section 1138 of the Penal Code and to section 614 of the Code of Civil Procedure there would be added the following paragraph:

"If, after the jury has retired for deliberation, any juror requests a copy of the written instructions given by the court, the jury may communicate the request to the court through the officer if the jury determines that it is not necessary to be conducted into court for this purpose and the court may send the instructions to the jury by the officer." *Ibid.*

[12] *Id.*, at C-13.

[13] Holbrook, J. G., A Survey of Metropolitan Trial Courts, Los Angeles Area, 393-395 (1956).

[14] Fussell, Paul, The Holbrook Report, Eight Months Later, 60 (Aug., 1957).

In 1957, Senator Jess R. Dorsey introduced a bill in the Legislature which adopted verbatim the enactment recommended by the California Law Revision Commission.[18] In the same legislative session, Assemblyman Patrick D. McGee introduced a bill which was limited in its scope to the amendment of section 612 of the Code of Civil Procedure to provide that the jury, upon retiring for deliberation, may take with it "the court's instructions to the jury" in addition to all other documents received in evidence.[19] Section 612 with respect to civil trials then would approximate the present provisions of Penal Code section 1137, which applies to criminal cases.

In this respect it should be noted that Penal Code section 1093(6) grants to the court the power to "cause copies of the instructions . . . to be delivered to the jurors" in criminal matters. It could be contended that, in the absence of a corresponding section in the Code of Civil Procedure, the court, in a civil case, would not be empowered to deliver instructions to the jury without a request therefor.

It is not certain, furthermore, that the proposed amendment to section 612 would give the jury or individual jurors a right to compel the court to provide written jury instructions upon a request therefor. It is not certain, for that matter, that the right is given to criminal juries presently by section 1137 of the Penal Code.[20] It is my belief, however, that the word "may" as used in section 137 and proposed

[18] Senate Bill No. 33, which would enact into law the changes in the Penal Code and in the Code of Civil Procedure, set forth in notes 13 and 14, *supra*.

[19] Assembly Bill No. 3758, which would amend section 612 of the Code of Civil Procedure to read as follows: "Upon retiring for deliberation the jury may take with them *the court's instructions to the jury and* all papers which have been received as evidence in the cause, except depositions, or copies of such papers as ought not, in the opinion of the court, to be taken from the person having them in possession; and they may also take with them any exhibits which the court may deem proper, notes of the testimony or other proceedings on the trial, taken by themselves or any of them, but none taken by any other person."

[20] In *People v. Cochran*, 61 Cal. 548, 551 (1882), the court, in interpreting section 1137 of the Penal Code, observed that "[t]he statute is not mandatory. It directs the Court to allow the jury to take with them any papers received as evidence which may be of service to them in making up their verdict, *but none can be taken without the permission of the Court.*" (Emphasis added.) In his concurring opinion, Justice McKinstry stated that "[i]n aid of their recollection of the contents of a paper given in evidence, or of an instruction given, the jury may ask for the paper or instruction; but if they believe themselves sufficiently acquainted with the contents, they may decline to take the paper or instruction with them. It is not the

for use in section 612 should be interpreted as granting discretion to the jury to determine whether or not it should take the written instructions into the jury room. Any uncertainty as to either point, however, would be dispelled by the recommendations of the California Law Revision Commission as incorporated in Senator Dorsey's bill, which empowers the court to give instructions in either criminal or civil cases, and, further, makes mandatory the provision of instructions to the jury upon "the request of any party . . . or . . . juror." Neither the Dorsey nor the McGee bills were acted upon by the Legislature.

In his Memorandum No. 9, dated February 19, 1957, the Executive Secretary of the California Law Revision Commission suggested that the commission consider two additional matters.[21] The first, that "[t]he copy of the instructions given to the jury shall be typewritten without substantial handwritten modification and shall not contain any . . . material which would identify particular instructions as having originated with a party or with the court," would specify the form of the instructions to be given to the jury.[22] The second, that the statute, perhaps, should specify that "[i]f the jury is given any of the instructions, it must be given all of them," would require the recording of extemporaneous instructions of the court.[23] Each of these proposals

absolute right of the prosecution or defense to have the papers or instructions sent with the jury, *unless the jury demand* it." *Id.*, at 554. (Emphasis added.) Justice McKinstry's concurring statement was used as authority, in subsequent cases, for the proposition that the jury, under section 1137, had a right to the jury instructions on its demand therefor. See *People v. Dunlap*, 27 Cal.App. 460, 470 (1915); *People v. Horowitz*, 70 Cal.App.2d 675, 701 (1945). The California Law Revision Commission also assumed this right in the jury. California Law Revision Commission, Recommendation and Study Relating to Taking Instructions to the Jury Room, C-13 (Nov. 10, 1956). The language of section 1137, however, certainly is not clear on the point.

[21] Memorandum No. 9, Subject: Study No. 12 Taking Instructions to the Jury Room (Feb. 19, 1957).

[22] *Id.*, at 2. The following sentence would then be added to proposed section 612.5 of the Code of Civil Procedure and proposed section 1137.5 of the Penal Code, set forth in note 13, *supra*: "The copy of the instructions given to the jury shall be typewritten without substantial handwritten modification and shall not contain any citation of authority, argument, or material which would identify particular instructions as having originated with a party or with the court." *Ibid.*

[23] *Id.*, at 4. The word "written" would then be deleted from proposed section 1137.5 of the Penal Code and proposed section 612.5 of the Code of Civil Procedure, and the following sentence would be added: "If the jury is given any of the instructions, it must be given all of them."

originated with practicing lawyers, and they reflect the view that an extension of existing practices is desirable, if, at the same time, there are provided safeguards to protect the right of the parties to be tried by a jury versed generally in all the law of the case. It was suggested further that the provision to the jury of instructions bearing handwritten changes and additions, resulting, possibly, in a tendency to place undue emphasis thereon, and instructions identifying the party proposing the same be avoided.

Arguments in Favor of Giving Written Instructions to the Jury

1. Even in a relatively simple case the court's instructions may be long and complex; therefore, it is unreasonable to expect a lay juror to remember oral instructions well enough to apply the law of the instructions to the facts of the case.

2. If the jurors were to know that copies of the instructions would be available in the jury room for later reference during their deliberations, they would be less apt to place possible undue emphasis upon certain instructions which may seem particularly pertinent at the moment of oral delivery, and miss the pertinency of other instructions.

3. If the jury had ready access to copies of the court's instructions, there would be less opportunity for a strong-willed juror to impose his recollection of the court's instructions on the other jurors.

4. If the jury had copies of the court's instructions no jury time would be spent in attempting to recall the oral instructions of the court and less jury time would be spent in debating real or supposed distinctions in the law as declared in the instructions.

5. Physical possession of the instructions in the jury room would obviate the necessity for note-taking by jurors during the instruction period[24] and would result in the devotion of increased attention to and concentration upon the oral delivery of the instructions by the court.

[24] "Upon retiring for deliberation the jury may take with them . . . notes of the testimony or other proceedings on the trial, taken by themselves or any of them. . . ." Cal. Code Civ. Proc., sec. 612. *Ferner v. Casalegno*, 141 Cal.App.2d 467, 475-476, 297 P.2d 91 (1956).

Arguments in Opposition to Giving Written Instructions to the Jury

1. Those in opposition to the provision of written instructions to the jury contend that the practice would result in a substantial prolongation of the length of a trial because of the possibility of considerable rereading of the instructions either by the entire jury or by single jurors.

2. Some jurors would give undue weight to particular instructions, or consider them out of context, and not consider the instructions as a whole, if copies were available in the jury room.

3. The oral presentation of instructions by the court is sufficient to provide the general background required by the jury for the conduct of its deliberations.

4. If there are no written instructions available to the jury, intellectually superior jurors will be less apt to impose their will on the jury.[25]

5. Some opponents argue, moreover, that if attorneys cannot agree on the legal distinctions set forth in the instructions, lay jurors cannot be expected to do any better by reading the instructions. These opponents contend that the practice in civil cases is preferable and that the law in this respect should not be changed. They contend, furthermore, that the Penal Code should be amended to prohibit the present practice of permitting even criminal juries to take instructions into the jury room.

Psychological Considerations

Since jurors have varying degrees of education, and are individually more or less receptive to the visual and auditory methods of instruction,[26] psychological considerations favor both oral instruction by the court and the provision of written instructions in the jury room. Psychologists point out

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[25] In the case of *Smith* v. *McMillen*, 19 Ind. 391 (1862), the court said: "If . . . the court sends the written instructions to the jury, inasmuch as jurors are not upon equality in their ability to read and interpret writing, it puts it in the power of sharp ones on the jury to read and become the interpreters for the court, and mislead their less skilful fellow jurors. We think instructions should not be sent to the jury room, without consent of both parties."

[26] See Allport, G. W., and Postman, L., The Psychology of Rumor (Holt and Company, 1947); Newman, E. B., "Effect of Crowding of Material on Curves of Forgetting," 52 Am. J. of Psych. 601 (1939); Jones, M. C., and English, H. B., "Notional vs. Rote Memory," 37 Am. J. of Psych. 602 (1926).

that material heard or read once is not recalled as well as material heard or read more than once, and although main points can be retained after a single presentation, that the accurate retention of details or of precise phraseology requires more than one presentation. Jury instructions frequently contain a considerable quantity of material. In this respect psychologists make the further observation that the greater the amount of the material presented, the lesser the percentage thereof is retained and remembered."

Mechanical Considerations

A determination regarding the desirability of permitting or requiring juries to have written instructions relates to only one facet of the general problem discussed herein. As stated previously, the procedural rights of the parties require not only that the jury be instructed on the law of the case but, further, that the instructions used for this purpose be complete and impartial.

Although instructions, for the most part, are proposed by the respective litigants, in theory, at least, they are the instructions of the court. Working instructions are important and should remain a part of the record. The court, furthermore, would continue to receive requests for submitted instructions from the attorneys for the parties and the court, as presently required, would indicate which litigant submitted a given instruction. The court would continue to consolidate the instructions, make additions, deletions and corrections therein, refuse some instructions and add new ones of its own."[8] It would not be advisable, however, to permit the jury to see these working instructions, since the requirement of impartiality would be defeated, perhaps, if the jurors were to know which litigant submitted a given instruction. It is possible, furthermore, that the jurors would place undue emphasis on the importance of handwritten deletions and additions made by the court with respect to particular instructions. In this respect it has been held that where interlined matters in instructions were not obliterated so that the jury could not read them, the sending of such instructions into the jury room was improper.[29] In a recent California criminal case, a conviction was reversed

[8] *Ibid.*
[29] Cal. Code Civ. Proc., sec. 607a; Cal. Pen. Code, sec. 1127.
[29] *Walters v. Indiana*, 319 Ill.App. 162, 48 N.E.2d 791, 794 (1943).

because the judge had added an instruction in his own handwriting to the printed instructions.[30]

As indicated previously, if the suggested practice is adopted, the instructions should be retyped and given to the jury as the "court's instructions." Even though the details of this procedure could be provided, for the most part, by the Rules of the Court,[31] opponents of the practice contend that factors of time and expense would make this additional step impractical. Proponents of the practice, however, believe that the instructions could be prepared during the final arguments, if not before that time. Since the instructions presented orally constitute, for purposes of the record, the instructions actually given, it would seem that only this version should be given to the jury after transcription thereof by the reporter. Such practice would allow for any variations between the submitted written instructions and those orally presented by the court. These "clean" instructions could be transcribed immediately and given to the jury either prior to or soon after the commencement of its deliberations. In this respect it should be noted that at least one Federal District judge, by the use of a tape recording machine in the jury room, permitted the playback of his instructions upon the request of the jury.[32] Either of the foregoing procedures would insure the reception by the jury of all the instructions, which would seem to be a necessary requirement since it has been held erroneous, even by accident, to give the jury some but not all of the instructions.[33]

It would seem that when the focus of disagreement shifts to mechanical considerations, susceptible of more or less simple solution, from the valid substantive considerations involved, i.e., does or does not the provision of written instructions to the jury make for better administration of civil and criminal justice, it is time to re-examine the sincerity of the purported desire really to accomplish needed reform.

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[30] *People* v. *Lyons*, 17 Cal.2d 311, 322-323, 303 P.2d 329 (1956).
[31] The mechanics of making the instructions available in suitable form could be accomplished through revision of Rule 16 of the Superior Court Rules.
[32] Katz, Sanford N., "Reinstructing the Jury by Tape Recording," 41 J. Am. Jud. Soc'y 146-150 (1958).
[33] *Hammond* v. *Foster*, 4 Mont. 421, 1 Pac. 757, 759 (1882).

Conclusion

If the jury verdict is to be just and in conformity with the court's instructions as to the applicable law, it would seem obvious that the jury should possess the highest possible degree of comprehension of the instructions it receives. It would follow, therefore, that the bench and bar should promote any practical method of providing such increased understanding. A procedure whereby a jury would have access to the instructions delivered by the court would appear to be such a method. While there are arguments for and against the proposal, the psychological arguments tend to favor the proposition of the court's reading the instructions and then allowing the jury to have them. Certainly arguments such as the increased time involved and mechanical considerations, capable of solution, should be given little weight if the ends of justice, in any single case, are defeated by adherence to such arguments.

Another consideration of special importance to the legal profession relates to the desirability of consistency in the law. An inconsistency should be tolerated only when some rational basis for its existence can be asserted. In permitting the court to provide written instructions to criminal juries, our Legislature, impliedly at least, has endorsed the practice. There appears to be no sound reason for permitting the procedure in criminal cases and failing to make provision therefor in civil matters. Furthermore, if the practice is sound, it would appear that it should be mandatory in all cases, and not left to the whim or desire of judges, litigants, counsel, or jurors in a particular case.

If some change in procedure is adopted, it is my belief that the written instructions available to the jury should be given in the form of a transcription of the instructions actually rendered by the court. The possibility of reversible error may be avoided if the transcription contains all the instructions rendered to the jury and if the source of a given instruction is not identified.

In the interest of insuring fair and equitable justice for all litigants and consistency in this field of law, I believe the bench and bar of California should give greater support to an adequate solution of this problem by the State Legislature.

#12 February 21, 1969

STATE OF CALIFORNIA

C A L I F O R N I A L A W

R E V I S I O N C O M M I S S I O N

TENTATIVE RECOMMENDATION

relating to

TAKING INSTRUCTIONS INTO THE JURY ROOM IN CIVIL TRIALS

CALIFORNIA LAW REVISION COMMISSION
School of Law
Stanford University
Stanford, California 94305

WARNING: This tentative recommendation is being distributed so that interested persons will be advised of the Commission's tentative conclusions and can make their views known to the Commission. Any comments sent to the Commission will be considered when the Commission determines what recommendation it will make to the California Legislature.

The Commission often substantially revises tentative recommendations as a result of the comments it receives. Hence, this tentative recommendation is not necessarily the recommendation the Commission will submit to the Legislature.

NOTE

This recommendation includes an explanatory Comment to each section of the recommended legislation. The Comments are written as if the legislation were enacted since their primary purpose is to explain the law as it would exist (if enacted) to those who will have occasion to use it after it is in effect.

LETTER OF TRANSMITTAL

The California Law Revision Commission was authorized by Resolution Chapter 207 of the Statutes of 1955 to make a study to determine whether the jury should be authorized to take a written copy of the court's instructions into the jury room in civil as well as criminal cases.

The Commission published a recommendation and study on this subject in November 1956. See Recommendation and Study Relating to Taking Instructions to the Jury Room, 1 Cal. L. Revision Comm'n Reports at C-1 (1957). A bill was introduced at the 1957 session of the Legislature to effectuate that recommendation. However, the Commission determined not to seek enactment of the bill because it concluded that further study was needed of the procedural problems involved in making a copy of the court's instructions available to the jury in the jury room. This recommendation takes into account the problems that caused the Commission to withdraw its previous recommendation.

12 February 21, 1969

TENTATIVE

RECOMMENDATION OF THE CALIFORNIA

LAW REVISION COMMISSION

relating to

TAKING INSTRUCTIONS INTO THE JURY ROOM IN CIVIL TRIALS

Section 1137 of the Penal Code authorizes the jury in a criminal trial to take a copy of the jury instructions to the jury room. There is no similar provision for civil trials and it is uncertain whether a copy of the instructions may be taken to the jury room in a civil trial.[1] Apparently, because of this uncertainty, it is not the practice to make a copy of the instructions available to the jury during its deliberations in a civil case.[2]

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1 See Cunningham, Should Instructions Go Into the Jury Room?, 33 Cal. S.B.J. 278 (1957); 2 Witkin, California Procedure Trials § 73 (1954).

In several civil cases it has been contended that the trial court may not give the jury a copy of the instructions because there is no statute authorizing it to do so. Day v. General Petroleum Corp., 32 Cal. App.2d 220, 89 P.2d 718 (1939); Melikian v. Independent Paper Stock Co., 8 Cal. App.2d 166, 47 P.2d 539 (1935); Fererira v. Silvey, 38 Cal. App. 346, 176 Pac. 371 (1918). Cf. Granone v. Los Angeles County, 231 Cal. App.2d 629, 42 Cal. Rptr. 34 (1965); Shelton v. Burke, 167 Cal. App.2d 507, 334 P.2d 616 (1959). In each of these cases the appellate court held that if the trial court did err in sending a copy of the instructions into the jury room, the error was not prejudicial in the particular circumstances involved. Dicta in one case indicates that the practice of providing the jury with a copy of the instructions is permissible if the parties expressly consent. Fererira v. Silvey, supra.

2 Holbrook, A Survey of Metropolitan Trial Courts Los Angeles Area 304 (1956).

The function of instructions is to guide the jury's deliberations. In most cases the instructions are lengthy and complex, particularly when considered from the point of view of a lay jury composed of persons unfamiliar with either law or legal language.[3] It is doubtful that the jury, having heard the instructions once as given orally by the court, can remember them in detail after retiring to the jury room. The availability of a copy of the instructions in the jury room would permit the jury to refer to the instructions for a written statement of the issues in the case and the applicable law if it wishes to do so. In fact, in most states, the court is authorized or required to provide the jury with a copy of the instructions.[4]

The Commission has concluded that a copy of the instructions should be made available to the jury during its deliberations[5] and recommends

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3 A survey of the subjective opinions of over one thousand jurors found that nearly one-half of the jurors said that there was disagreement among the members of the jury as to the meaning of the instructions. Holbrook, A Survey of Metropolitan Trial Courts Los Angeles Area 304 (1956).

4 See Appendix to this recommendation. See also 5 Busch, Law and Tactics in Jury Trials § 723, p. 711 (1963).

5 Revision of the law relating to the taking of jury instructions into the jury room is not a new idea. As early as 1901, the California Legislature amended Section 612 of the Code of Civil Procedure to provide that the jury must take all instructions with them into the jury room. Cal. Stats. 1901, Ch. 102, § 111, p. 145. The bill containing the amendment was declared unconstitutional for technical reasons. Lewis v. Dunne, 134 Cal. 291, 66 Pac. 478 (1901). In 1956 the California Law Revision Commission recommended that the law be revised to permit the instructions to be taken to the jury room. See Recommendation and Study Relating to Taking Instructions to the Jury Room, 1 Cal. L. Revision Comm'n Reports at C-1 (1951). The bill introduced to effectuate this recommendation was withdrawn in order to permit further study of the procedural problem of providing the jury with a clean copy of the instructions.

that the Judicial Council be authorized by statute to prescribe rules governing the manner and conditions under which the court's instructions may be taken to the jury room in civil cases. Establishment of the procedure for providing the jury with a copy of the instructions by court rule rather than by statute would permit revision of the procedure from time to time as experience under the rules demonstrates a need for revision and would facilitate the development of alternative procedures if the situation in particular counties requires a special procedure in those counties.[6]

The enactment of legislation authorizing the Judicial Council to adopt rules concerning the taking of instructions into the jury room would reflect a legislative decision that the taking of instructions into the jury room in civil cases is a desirable practice. However, until the Judicial Council has adopted rules and they become effective, trial courts would be authorized to permit jury instructions to go to the jury room only in criminal trials. Nevertheless, because drafting of satisfactory rules might require the solution of unanticipated problems concerning the manner and conditions under which instructions could be taken to the jury room, the recommended legislation should be permissive rather than mandatory.

The Commission's recommendation would be effectuated by the enactment of the following measure:

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[6] The procedure for presenting proposed instructions to the court and for giving instructions to the jury is outlined in Sections 607a, 608, and 609 of the Code of Civil Procedure. The form of proposed jury instructions is governed by the California Rules of Court. See Superior Court Rule 229; Municipal Court Rule 517.

An act to add Section 612.5 to the Code of Civil Procedure relating to taking a copy of the jury instructions to the jury room.

The people of the State of California do enact as follows:

Section 1. Section 612.5 is added to the Code of Civil Procedure, to read:

612.5. The Judicial Council may adopt rules prescribing the manner and conditions under which a copy of the court's instructions to the jury in a civil trial may be or is required to be made available to the jury during its deliberations.

Comment. The adoption of rules pursuant to Section 612.5 will eliminate the uncertainty whether the court may provide the jury with a copy of the instructions in a civil trial. A Study to Determine Whether the Jury Should Be Given a Copy of the Court's Instructions to Take Into the Jury Room, 1 Cal. L. Revision Comm'n Reports at C-9 (1957). See also 2 Witkin, California Procedure, Trials § 73 (1954); Cunningham, Should Instructions Go Into the Jury Room?, 33 Cal. S.B.J. 278 (1957). Granone v. Los Angeles County, 231 Cal. App.2d 629, 42 Cal. Rptr. 34 (1965); Shelton v. Burke, 167 Cal. App.2d 507, 334 P.2d 616 (1959); Day v. General Petroleum Corp., 32 Cal. App.2d 220, 89 P.2d 718 (1939); Melikian v. Independent Paper Stock Co., 8 Cal. App.2d 166, 47 P.2d 539 (1935); Fererira v. Silvey, 38 Cal. App. 346, 176 Pac. 371 (1918). Section 612.5 reflects a legislative decision that the taking of instructions into the jury room in a civil trial is a desirable practice. However, until the Judicial Council has adopted rules and they become effective, there is no statutory authority for such practice. Cf. Penal Code § 1137. However, such practice would not normally result in prejudicial error. Shelton v. Burke, 167 Cal. App.2d 507, 334 P.2d 616 (1959). This section does not make it mandatory that the Judicial Council adopt such rules nor does it require that, if such rules are adopted, the instructions be given to the jury in every case. The rules could, for example, make it

discretionary with the court in all cases or could require that the instructions be sent into the jury room upon request of any party. or only if all parties consent.

TABULAR SUMMARY OF LAW

TAKING INSTRUCTIONS TO THE JURY ROOM

STATE	Civil (1) Prohibited	Civil (2) Required	Civil (3) Permitted	Criminal (4) Prohibited	Criminal (5) Required	Criminal (6) Permitted	AUTHORITY
Ala.		X			X		Ala. Code tit 7, § 273 (civil & criminal); Hart v. State, 21 Ala. App. 621
Alas.	-	-	-	-	-	-	
Ariz.			X			X	Valley Nat'l Bank v. Witter, 58 Ariz. 491 (civil); Rule Crim. Proc. 280 (if any are taken all must be taken)
Ark.		X				X	Ark. Stat. Ann. § 27-1732 (civil); Ark. Stat. Ann. § 43-2138 (criminal)
Calif.	-	-	-			X	Cal. Penal Code § 1137
Colo.		X			X		Rule Civ. Proc. 51; Rule Crim. Proc. 30
Conn.	-	-	-	-	-	-	
Dela	-	-	-	-	-	-	
Fla.	-	-	-			X	Rule Crim. Proc. 1.400
Ga.			X	-	-	-	Chattahoochee Brick Co. v. Sullivan, 86 Ga. 50
Ha.	-	-	-	-	-	-	
Idaho		X				X	Idaho Code Ann. § 10-206 (civil); Idaho Code Ann. § 19-2203 (criminal)
Ill.		X			X		Ill. Stat. Ann. Ch. 110, § 67 (civil); Ill. Stat. Ann. Ch. 110A, § 451 (criminal)
Ind.	X			X			Smith v. McMillen, 19 Ind. 391; Jones v. Austin, 26 Ind. App. 399, 405-08 (civil); Hall v. State, 8 Ind. 439 (criminal). But see 33 Ind. L. J. 96 (1957).
Iowa			X			X	Rule Civ. Proc. 198, Iowa Code § 784.1 (criminal)
Kan.			X			X	Clark v. Brady, 126 Kan. 59 (civil); State v. Bennington, 44 Kan. 583

STATE	Civil (1) Prohibited	Civil (2) Required	Civil (3) Permitted	Criminal (4) Prohibited	Criminal (5) Required	Criminal (6) Permitted	AUTHORITY
Ky.	-	-	-	-	-	-	
La.	-	-	-			X	State v. Strachner, 190 La. 457 (criminal)
Me.	-	-	-	-	-	-	
Md.			X			X	Rule Civ. Proc. 558, Rule Crim. Proc. 757
Mass.	-	-	-	-	-	-	
Mich.			X	-	-	-	Behrendt v. Wilcox, 277 Mich. 232 (requested by jury)
Minn.	-	-	-	-	-	-	
Miss.			X			X	Miss. Code Ann. § 1530 (both)
Mo.		X				X	Mo. Rev. Stat. § 510.300; Rule Civ. Proc. 70.01 (civil); State v. Colson, 325 Mo. 510 (criminal)
Mont.			X	-	-	-	Hammond v. Foster, 4 Mont. 421, 433 (if any are given all must be given)
Neb.	-	-	-		X		Langworthy v. Connelly, 14 Neb. 340 (by implication); Neb. Rev. Stat. § 29-2016
Nev.			X			X	Rule Civ. Proc. 51; Nev. Comp. Laws § 175.441 (criminal
N.H.	-	-	-	-	-	-	
N.J.	-	-	-	-	-	-	
N.M.		X			X		N.M. Stat. Ann. §§ 21-8-23 (civil), 41-11-12 (criminal) (upon request of either party); Rule Civ. Proc. 51a
N.Y.	-	-	-			X	People v. Monat, 200 N.Y. 308 (semble: part of charge given to jury at its request and without objection by parties)
N.C.		X			X		N.C. Gen. Stat. Ann. § 1-182 (if instructions are in writing and if requested by either party)(both)
N.D.		X				X	N.D. Rev. Code 29-2204; Rule Civ. Proc. 51a (civil); N.D. Rev. Code § 29-2131(if in writing)(criminal)
Ohio		X			X		Ohio Rev. Code Ann. §§ 2315.01 (civil); 2945.10 (criminal)

STATE	Civil (1) Prohibited	Civil (2) Required	Civil (3) Permitted	Criminal (4) Prohibited	Criminal (5) Required	Criminal (6) Permitted	AUTHORITY
Okla.			X			X	Lowenstein v. Holmes, 40 Okla 33,37 (civil); Okla. Stat. tit. 22, § 893 (criminal)
Ore.		X			X		Ore. Rev. Stat. §§ 17.255 (civil), 136.330 (criminal
Pa.	-	-	-	-	-	-	
R.I.	-	-	-	-	-	-	
S.C.	-	-	-	-	-	-	
S.D.		X				X	S.D. Code §§ 33.1317 (civil), 34.3654 (criminal)
Tenn.	-	-	-		X (felonies)		Tenn. Code Ann. § 40-2516
Tex.			X			X	Rule Civ. Proc. 36.18; Rule Crim. Proc. 671
Utah			X			X	Rule Civ. Proc. 47(m); Utah Code Ann.§ 77-32-2 (criminal)
Vt.	-	-	-	-	-	-	
Va.	-	-	-			X	Bowles v. Commonwealth, 103 Va. 816 (dictum)
Wash.		X				X	Rule Civ. Proc. 51; State v. Hart, 175 P.2d 944 (criminal)
W. Va.			X			X	Rule Civ. Proc. 51 (consent of all parties); State v. Stover, 64 W. Va. 668, 671 (dictum)(crimine
Wisc.			X			X	Wood v. Aldrich, 25 Wisc. 695 (civil); Loew v. State 60 Wisc. 559 (dictum)(criminal)
Wyo.	-	-	-		X		Wyo. Stat. Ann. § 7-228
TOTALS	1	13	14	1	10	22	