February 19, 1957

Memorandum No. 9

Subject: Study No. 12 - Taking Instructions to the Jury Room.

This recommendation and study has been printed and distributed to the statutory list. It was sent to the State Bar on September 25, 1956 but no official report of State Bar reaction to the Commission's recommendation has been received. The revisions recommended by the Commission are embodied in S.B. 33, introduced by Senator Dorsey at the Commission's request.

Early in December we received a letter from Roy A. Gustafson, District Attorney of Ventura County, who had considered Study No. 12 in his capacity as a member of the State Bar Committee on Criminal Law and Procedure to which it was apparently referred by the Board of Governors. (I assume it was also referred to CAJ since it affects civil as well as criminal actions.) In his letter, a copy of which is attached, Mr. Gustafson raised some questions concerning the mechanics of getting the instructions to the jury. The Commission considered these questions at its December meeting and decided to leave the problems suggested by Mr. Gustafson for solution by the courts or the Judicial Council, by court rule or otherwise.

Recently, we received a letter relating to Study No. 12 from Mr. Robert E. Reed, attorney for the Department of Public Works. A copy of Mr. Reed's letter is also attached. Mr. Reed raises the same questions as were raised by Mr. Gustafson and, in addition, states he feels very strongly that if the jury is to have any of the instructions in the jury room it should have all of them.

The Commission may wish to consider both questions raised in Mr. Reed's letter, with a view to amending S.B. 33 before it is presented to the Judiciary

Committees. If it does, the following is offered for such assistance as it may provide:

1. Whether the statute should specify the form in which the instructions given to the jury to take to the jury room shall be. The problem here, as suggested by both Mr. Gustafson and Mr. Reed, is that proposed instructions as presently submitted by counsel bear the attorney's name, citation of authority, and sometimes even argument and that instructions submitted in such form are unsuitable to give to the jury, particularly when modified in handwriting by the judge. Both men feel that any instructions given to the jury should be given as the instructions of the court and in a form described by Mr. Gustafson as "a nice, neat form (such as they are in when a reporter's transcript is made of the instructions given by the judge)."

If upon reconsideration of the matter the Commission concludes that this suggestion is well taken, the matter could be covered by adding the following sentence to proposed Section 612.5 of the Code of Civil Procedure and proposed Section 1137.5 of the Penal Code:

> 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.

The mechanics of making the instructions available in such form to the trial judge would seem to be a matter within the province of the Judicial Council in the exercise of its power to make rules for the superior and municipal courts. Presumably, the necessary changes would be made through revision of Rule 16 of both the Superior Court Rules and the Municipal Court Rules. Each Rule presently reads as follows:

Rule 16. Proposed jury instructions.

(a) [Citation of authorities] Each proposed jury instruction presented by a party, except instructions requested by number reference to forms previously approved by the court, shall contain at the bottom thereof a citation of authorities, if any, supporting the statement of law therein.

(b) [Form of instruction] Except as to such approved forms, each proposed instruction shall be in the form specified by Rule 1 (e), indicating the party upon whose behalf it is requested. Instructions shall be numbered consecutively, but not firmly bound together.

(c) [Time for presentation in criminal cases] Instructions requested by either party in a criminal case shall be presented to the court and served on opposing counsel before the taking of testimony; provided, however, additional instructions may be presented when the occasion therefor arises at a later time.

(d) [Disregarding proposed instructions] Proposed instructions, except those required by law, which do not comply with this rule may be disregarded, in which event the judge shall endorse thereon the reason for his refusal to consider the same.

2. Whether the Jury Should Be Given All of the Instructions If It Is Given Any of Them. The Commission considered this question in connection with Study No. 12. It was decided that the Commission should make no recommendation concerning this matter but should bring it to the Legislature's attention by including in its recommendation the following statement:

"If this recommendation [to make the instructions available to the jury] is accepted, the Legislature may wish, in addition, to require that all instructions given be in writing so that the jury will have all of the instructions in the jury room if it has any of them".

If Mr. Reed's suggestion is thought to be well taken, it could be put into effect by simply deleting the word "written" in proposed Section 1137.5 of

the Penal Code and proposed Section 612.5 of the Code of Civil Procedure or by both doing this and adding the following sentence to each of these proposed sections:

"If the jury is given any of the instructions, it must be given all of them".

However, this apparently simple amendment of proposed Section 1137.5 of the Penal Code and proposed Section 612.5 of the Code of Civil Procedure may be thought to raise a further problem with which the Commission ought to deal if it accedes to Mr. Reed's suggestion. It is arguable that if the proposed sections were enacted as thus amended, they would, as a practical matter, require that the trial judge have all of the instructions before him in a form suitable to give to the jury (see discussion re form above) when he instructs the jury orally, thus precluding the giving of some or all of the oral instructions extemporaneously or by reading them from a book or other source. This is because the court would not otherwise have a copy of all of the instructions immediately available to give to the jury should this be desired or requested unless the reporter had taken them down. Even if they had been taken down, there would be a considerable delay involved in transcribing a copy of the instructions for the jury.

It may be thought that if the court is, in effect, to be required to have a written copy of all of the instructions before him when he gives them orally, this requirement should be imposed directly rather than indirectly. If the Commission takes this view, it will have to consider what revisions, if any, of the Penal Code and the Code of Civil Procedure would be required in this regard.

Penal Code. Section 1127 of the Penal Code provides in relevant part:

1127. All instructions given shall be in writing unless there is a phonographic reporter present and he takes them down, in which case they may be given orally; provided, however, that in all misdemeanor cases oral instructions may be given pursuant to stipulation of the prosecuting attorney and counsel for the defendant . . . .

It is not precisely clear what "shall be in writing" means. The cases suggest that its meaning is that the judge shall read from a written copy of the instructions when he instructs the jury orally. In view of the "unless" and "provided, however" clauses in Section 1127 a revision of this section may be thought to be necessary or at least desirable in the interest of clarity if the judge is expected to have before him, when he instructs the jury orally, a written copy of the instructions in suitable form to give the jury to take to the jury room. The following revision of Section 1127 is suggested for the Commission's consideration:

1127. ~~All instructions shall be in writing~~ When the court instructs the jury at the beginning of the trial or from time to time during the trial he shall have before him a written copy of such instructions from which the instructions shall be read unless there is a phonographic reporter present and he takes them down; provided however, that in all misdemeanor cases ~~oral~~ such instructions may be given orally pursuant to stipulation of the prosecuting attorney and counsel for the defendant. When such instructions are read from a written copy, the copy shall be made a part of the record in the case.

When the court charges the jury at the close of the case he shall have before him a written copy of the charge, in a form suitable to give to the jury to take

into the jury room pursuant to Section 1137.5, from which the charge shall be read. Such written copy of the charge shall be made a part of the record in the case.

In charging the jury the court may instruct the jury regarding the law applicable to the facts of the case, and may make such comment on the evidence and the testimony and credibility of any witness as in its opinion is necessary for the proper determination of the case and in any criminal case, whether the defendant testifies or not, his failure to explain or to deny by his testimony any evidence or facts in the case against him may be commented upon by the court. The court shall inform the jury in all cases that the jurors are the exclusive judges of all questions of fact submitted to them and of the credibility of the witnesses.

Either party may present to the court any written charge on the law, but not with respect to matters of fact and request that it be given. If the court thinks it correct and pertinent, it must be given; if not, it must be refused. Upon each charge presented and given or refused, the court must endorse and sign its decision and a statement showing which party requested it. If part be given and part refused, the court must distinguish, showing by the endorsement what part of the charge was given and what part refused.

The following comments on this proposed revision of Section 1127 of the Penal Code are in order:

1. While, as has been said, the meaning of the requirement of present Section 1127 that all instructions given "shall be in writing" is not clear, its purpose would seem to be to make a copy of the instructions a part of the record on appeal so that the appellate court can determine whether erroneous instructions were given; this alone would seem to explain the exception made when oral instructions are taken down by the reporter.

2. The first paragraph is included because Penal Code Section 1093 expressly refers to the giving of instructions at the beginning of the trial and from time to time during the trial and present Section 1127 is broad enough to cover these instructions as well as those given in the court's charge to the jury. Presumably a reporter will usually be present and will take down these earlier instructions so that the requirement that they be in writing will seldom apply. When it is applicable, provision is made for the inclusion of the written copy of such instructions in the record in order that they will be available to the appellate court. It is not required that these instructions be in a form suitable to take to the jury room on the assumption that proposed Section 1137.5 applies only to the court's charge at the end of the case; any party who wishes an instruction given earlier to go to the jury room can presumably request that it be repeated in the charge.

3. No "unless" or "provided" clause is included in the second paragraph which deals with the court's charge because the very purpose of the revision is to require the court to have before him in all cases a copy of the charge which he can hand over to the jury at once should the court, a party, or a juror wish this to be done.

Code of Civil Procedure. There is no present statutory requirement that jury instructions in civil cases be "in writing", whether given during the trial or in the court's charge to the jury. In order to make a copy of the instructions immediately available to take to the jury room, however, Code of Civil Procedure Section 608 should be amended as follows:

> 608. When the court charges the jury at the close of the case he shall have before him a written copy of the charge, in a form suitable to give to the jury to take to the jury room pursuant to Section 612.5, from which the charge shall be read. Such written copy of the charge shall be made a part of the record in the case.
>
> In charging the jury the court may state to them all matters of law which it thinks necessary for their information in giving their verdict; and, if it state the testimony of the case, it must inform the jury that they are the exclusive judges of all questions of fact. ~~The court must furnish to either party, at the time, upon request, a statement in writing of the points of law contained in the charge, or sign, at the time, a statement of such points prepared and submitted by the counsel of either party.~~

Two comments may be made:

1. The first paragraph makes the last sentence of the present section unnecessary so it is struck out.

2. There could be included in a revision of Section 608 the counterpart of the first paragraph of the proposed revision of Penal Code Section 1127,

relating to instructions given during the trial. This has not been done because there is apparently no present requirement that instructions given during a civil trial be in writing and it is not necessary to include such a requirement to achieve the Commission's limited purpose.

Respectfully submitted,

John R. McDonough, Jr.
Executive Secretary

att.

COPY COPY

DISTRICT ATTORNEY
Ventura County
Room 236 Court House
Ventura, California

December 5, 1956

Mr. John R. McDonough
Executive Secretary
California Law Revision Commission
School of Law
Stanford, California

Dear Mr. McDonough:

A couple of weeks ago the Committee on Criminal Law and Procedure of the State Bar considered the "Report and Recommendation of Law Revision Commission to Legislature Relating to Whether the Jury should be given a copy of the Court's Instructions to take into the Jury Room." We agreed that the principle was a good one, but we thought that a great deal of further study is necessary to work out the mechanics of a system whereby the written instructions which the jury would get would be in such form as not to cause confusion or prejudice.

I want to explain my own position on the matter. If written instructions as they are now generally constituted are handed to the jury, the jury will see that the instruction comes either from the plaintiff or the defendant or from the court itself. Very often, a typewritten instruction will have the attorney's name and address on it. Furthermore, there is likely to be citation of legal authority and perhaps even argument in support of the instruction. Quite often there will be a rubber stamp on the page indicating the judge's action on the instruction and containing information which has no purpose before the jury.

My reservations about the recommendation of the Law Revision Commission were strengthened by the decision in People v. Lyons (1956), 47 A.C. 316. In substance, the conviction was reversed because the jury took into the jury room a written instruction part of which was in printing and part of which was in the judge's own handwriting. The court felt that the handwriting gave undue emphasis to the statement of law embodied therein. Until we figure out some method of getting the instructions to the jury in a nice, neat form (such as they are in when a reporter's transcript is made of the instructions given by the judge), I think the Law Revision Commission should withdraw its recommendation.

Sincerely yours,

ROY A. GUSTAFSON
District Attorney

RAG:ag

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STATE OF CALIFORNIA

COPY

DEPARTMENT OF PUBLIC WORKS

Division of Contracts and Rights
of Way (Legal)

February 8, 1957

Honorable Thomas E. Stanton, Jr.
Chairman, California Law Revision Committee
111 Sutter Street
San Francisco, California

Dear Mr. Stanton:

Following receipt of the three recommendations and studies of your commission, we have given considerable thought to the one dealing with "Taking instructions to the jury room". As you know, our office tries a large number of jury cases, most of them, of course, being condemnation cases. Although there is some slight disagreement, most of our trial attorneys believe that there is merit in the suggestion that the instructions be given to the jury, subject, however, to the solution of several serious problems involved. Failing such a solution, they feel that what might not now be an ideal solution would be made worse.

I note that in the beginning of the recommendation it is stated "If this recommendation (that juries be given copies of written instructions) is accepted, the Legislature may wish, in addition, to require that all instructions given be in writing so that the jury will have all of the instructions in the jury room if it has any of them".

We feel very strongly that if any instructions are to be given to the jurors to take into the jury room, they should have all of the instructions. Probably the only way to accomplish this would be to require that all instructions be given in writing. I wondered whether your commission has prepared appropriate language to furnish to the Legislature in the event it evidenced a desire to include this provision. A few judges disregard all submitted instructions and then orally instruct the jury. This creates quite a problem in the event either party is dissatisfied with the instructions because it is difficult to determine which of the submitted instructions have been given, modified, or are covered by other instructions. The work of the attorney preparing the motion for a new trial or an appeal is made very difficult so that we would be inclined to favor a requirement that all instructions be in writing.

We are concerned about some additional considerations. Under existing practice both plaintiff and defendant submit instructions to the court and there is typed on each instruction that it is requested by the particular party. The court often modifies the submitted instructions with pen and ink. It seems to us that if written instructions are to be submitted to the jury they should be

submitted as the court's instructions so that the jury would not be advised as to which side had requested the instruction. The fact that the court had modified one that was requested might well be prejudicial to the party who had submitted the original instruction and, in effect, had been overruled by the court. Unless the form in which the parties submit instructions is changed, it would either be necessary to retype the instructions to be submitted to the jury or require the respective counsel to furnish extra copies unmarked as to the identity of the party requesting the instruction. In many cases this would be difficult to accomplish without considerable delay.

I would be glad to have your reactions to the above comments. We are very interested in seeing that any proposal that changes the existing procedure is made as workable as possible.

Very truly yours,

Original signed Robert E. Reed

Robert E. Reed
Attorney

RER:AD
cc Jones
Hadley

COPY THE STATE BAR OF CALIFORNIA COPY

2100 Central Tower
San Francisco 3

March 5, 1957

Thomas E. Stanton, Jr., Esq.
Chairman, California Law Revision Commission
111 Sutter Street, Rm. 2200
San Francisco 4, California

Dear Mr. Stanton:

I am writing in supplementation of our telephone conversation of March 4 relating to the action of the Board of Governors with respect to the Law Revision Commission's proposal re taking instructions to the jury room.

At its December 1956 meeting the Board of Governors had before it the Interim Report of December 1956 of the Committee on Administration of Justice. That report indicates that by a bare majority the committee approved the principle of the Commission's main proposal, recommending, however, that Penal Section 1138 and CCP 614 be amended in part as follows:

> "...if they desire to be informed on any point of law arising in the cause, or as to the meaning of any of the instructions given, they must require the officer to conduct them in court."

The Report indicates, too, that suggestions were made that by rule it be provided that copy furnished to the jurors be devoid of citations, identity of the offering party, numbers, and without interlineations or handwriting by the judge. The Report indicates also that the majority felt that: (1) instructions are so involved and in such technical language that the juror should have a copy; (2) the Penal Code now permits such action and (3) many states have the procedure and it has been declared improper in only one. The Report indicates that the minority believed in part (and in brief) that: (1) in most cases instructions are quite simple; (2) the procedure intrudes upon the essential functions of the court to advise the jury on matters of law; (3) "sea lawyers" will use law instead of arguments on fact to advance their views; (4) the attention of the jury will be diverted from issues of fact in its deliberations; and (5) some objection was made to the particular procedure provided, i.e., in giving the party or any juror the right to invoke the procedure.

As I inferred above, the Report does not set forth in full the entire deliberations of the Committee on Administration of Justice with respect to this matter, nor is the foregoing a complete statement of all of the views expressed.

Upon consideration of the Interim Report, the Board disapproved the proposal of the Commission. I am unable to tell you the reasons for the actions of the several members of the Board. The minutes state none.

The Southern Section of the Committee on Criminal Law and Procedure "disapproves the submission of jury instructions to the jury under the present methods and practices and recommends further study as to the practical method in correcting or in preparing jury instructions for submission to the jury room." The minutes of the Southern Section reveal that it was concerned about the fact that parties requesting instructions are identifiable, that where the court modifies a written instruction that fact is apparent to the jury, resulting in the danger of misuse of the instructions by the jury. Its consideration went to the matter of so preparing what is handed to the jury that no emphasis could be inferred by the jury from identification, etc.

The Northern Section of the Committee on Criminal Law and Procedure independently, and at a meeting subsequent to that held by the Southern Section, recommended referral of the proposal to the Judges Conference and the Judicial Council.

Enclosed herewith please find copy of my memo of this date to Mr. Ball relative to the matter.

Very truly yours,

Jack A. Hayes
Secretary

JAH:b
cc: Messrs. Ball, Goldberg, McDonough