

6/13/69

## Memorandum 69-82

Subject: Study 12 - Taking Instructions to Jury Room

Attached to this memorandum are two copies of the tentative recommendation relating to taking instructions to the jury room in civil cases. This tentative recommendation was distributed to the State Bar, Judicial Council, and some other persons who requested copies.

I have been advised informally that the State Bar Committee on the Administration of Justice earlier in 1969 disapproved a somewhat similar recommendation but that the Committee at a meeting held on May 23, 1969, approved the Commission's tentative recommendation. Several members of the Committee voted to disapprove the tentative recommendation.

As Exhibit I (attached) indicates, the Judicial Council has disapproved the tentative recommendation. I am informally advised that a variety of views were expressed. One view was that, if a person wants the law applied to his case, he does not request a jury. The view is that a jury achieves "justice" and that further emphasis on the instructions is not desirable. Another view is that the jury can always obtain a reading of the instruction after it retires to the juryroom and that the parties are protected under existing law in such a situation because no instruction will be unduly emphasized. Under our recommendation, on the other hand, a juror could pick out one instruction and give it undue emphasis.

Exhibit II is a letter from a Long Beach attorney. He states that more than a few judges already give the instructions to the jury and that the practice is undesirable.

The staff concludes from the views expressed by the Judicial Council and others that it is far from clear that the tentative recommendation would be a

desirable enactment. The State Bar Committee on Administration of Justice (which does not necessarily represent the view of the State Bar which can only be expressed by the Board of Governors) disapproved a prior proposal because it did not provide an adequate procedure. Our tentative recommendation meets this objection but, unfortunately, the Judicial Council which would be the body responsible for developing the procedure by court rule disapproves of sending instructions into the juryroom as a matter of policy. Accordingly, the staff suggests that the Commission request that this topic be dropped from its agenda and that a statement be prepared for inclusion in the next Annual Report indicating that, after considering the views expressed by various persons and organizations, the Commission is not persuaded that it would be desirable to provide for the taking of instructions into the juryroom.

Respectfully submitted,

John H. DeMouilly  
Executive Secretary



EXHIBIT I

JUDICIAL COUNCIL OF CALIFORNIA

ADMINISTRATIVE OFFICE OF THE COURTS

4200 STATE BUILDING, SAN FRANCISCO 94102

217 W. First St., Room 1001, Los Angeles 90012

109 Library and Courts Bldg., Sacramento 95814

RALPH N. KLEPS  
DIRECTOR

RICHARD A. FRANK  
DEPUTY DIRECTOR

May 16, 1969

Mr. John H. DeMouilly  
Executive Secretary  
California Law Revision Commission  
Room 30, Crothers Hall  
Stanford, California 94305

Dear John:

The Judicial Council at its May 9-10 meeting considered the Law Revision Commission's tentative recommendation relating to Taking Instructions into the Jury Room in Civil Cases. The Council concluded that it disapproves any provision permitting the sending of written jury instructions to the jury in the jury room in civil cases. It directed that the Law Revision Commission be advised of the Council's disapproval of the tentative recommendation.

Very truly yours,

  
Ralph N. Kleps  
Director

RNK:jp

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FILE NO. \_\_\_\_\_

April 18, 1969

CALIFORNIA LAW REVISION COMMISSION  
School of Law  
Stanford, California 94305

Re: Taking Court's Instructions to Jury Room  
in Civil Cases.

Gentlemen:

C I understand that the Commission has some tentative recommendations on this subject and I would like to have a copy of them.

I would also like to leave with you my comment after 18 years of trying civil cases, mostly injury plaintiff's cases, in a fairly high volume that generally the giving of instructions to the civil jury leads to much longer deliberations and in the long run, less satisfactory results.

More than a few Judges already give these instructions to the jury and they are already stamped as to who requested them, plaintiff or defendant, and that doesn't help if the other side is the one who requested it. It also doesn't help very much because some jurors will light on one or two of the instructions and give an undue amount of importance to those particular instructions, whereas when they come back in for re-instructing by the Court, each counsel has the opportunity of finding out what the jury is concerned about and each counsel has the opportunity to make sure that the jury not only gets the one or two specific instructions that it asks about, but that they can also get related instructions which may, as it turns out, be more important than the one they're asking for.

C By ~~and~~ large, I would have the opinion that the more material you give a jury, the more likely it is to lose sight of the

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CALIFORNIA LAW REVISION COMMISSION  
April 18, 1969  
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substantial justice which should be rendered in the case.

Very truly yours,



HARRY J. SIMON

HJS:dka

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March 25, 1969

STATE OF CALIFORNIA  
CALIFORNIA LAW  
REVISION COMMISSION

TENTATIVE RECOMMENDATION

relating to

TAKING INSTRUCTIONS INTO THE JURY ROOM IN CIVIL CASES

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: COMMENTS OF INTERESTED PERSONS AND ORGANIZATIONS MUST BE IN THE HANDS OF THE COMMISSION NOT LATER THAN JUNE 2, 1969, IN ORDER THAT THEY MAY BE CONSIDERED BEFORE THE COMMISSION'S RECOMMENDATION ON THIS SUBJECT IS SENT TO THE PRINTER.

**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.



March 25, 1969

TENTATIVE

## RECOMMENDATION OF THE CALIFORNIA

## LAW REVISION COMMISSION

relating to

## TAKING INSTRUCTIONS INTO THE JURY ROOM IN CIVIL CASES

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.<sup>1</sup>

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.<sup>2</sup>

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<sup>1</sup> 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.

<sup>2</sup> 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.<sup>3</sup> 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 most states, the court is authorized or required to provide the jury with a copy of the instructions.<sup>4</sup>

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<sup>3</sup> 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).

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

For these reasons, the Commission recommends that the court be permitted to send a copy of the instructions into the jury room in a civil trial and be required to do so upon request of any party. The procedure for providing the jury with a copy of the instructions should be established by rules adopted by the Judicial Council.<sup>5</sup> This 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 different procedure in those counties.

Enactment of the legislation recommended by the Commission would reflect a legislative decision that the taking of instructions into the jury room in civil cases is a desirable practice.<sup>6</sup> Nevertheless, because the drafting of satisfactory rules may require the solving of unanticipated

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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.

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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 (1957). 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.

procedural problems, the statutory provision for furnishing the jury with a copy of the instructions should not become operative until the rules become effective.

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

An act to add Section 612.5 to the Code of Civil Procedure,  
relating to jury instructions.

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

Code of Civil Procedure Section 612.5 (added)

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

612.5. (a) At the discretion of the court or upon request of any party, a copy of the court's instructions to the jury in a civil action or proceeding shall be made available to the jury during its deliberations. In furnishing the jury with a copy of the instructions, the court shall follow the procedure established by rules adopted by the Judicial Council.

(b) The Judicial Council shall adopt rules governing the procedure to be followed under this section. Subdivision (a) does not become operative until such rules become effective.

Comment. Although it will not be clear whether a copy of the court's instructions may be taken into the jury room in a civil trial until subdivision (a) of Section 612.5 becomes operative, such practice normally would not result in prejudicial error. See Shelton v. Burke, 167 Cal. App.2d 507, 334 P.2d 616 (1959); Recommendation of the California Law Revision Commission Relating to Taking Instructions Into the Jury Room in Civil Cases, n. 1, supra, cf. Penal Code § 1137.

# TABULAR SUMMARY OF LAW

## TAKING INSTRUCTIONS TO THE JURY ROOM

STATE	Civil			Criminal			AUTHORITY
	(1) Pro- hibi- ted	(2) Re- quired	(3) Per- mit- ted	(4) Pro- hibi- ted	(5) Re- quired	(6) Per- mit- ted	
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). <u>But see</u> 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			Criminal			AUTHORITY
	(1) Pro- hibi- ted	(2) Re- quired	(3) Per- mit- ted	(4) Pro- hibi- ted	(5) Re- quired	(6) Per- mit- ted	
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			Criminal			AUTHORITY
	(1) Pro- hibi- ted	(2) Re- quired	(3) Per- mit- ted	(4) Pro- hibi- ted	(5) Re- quired	(6) Per- mit- ted	
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)(criminal)
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	