12 8/7/69

First Supplement to Memorandum 69-85

Subject: Study 12 - Taking Instructions to the Jury Room

The Commission has determined to recommend that the study on jury instructions be dropped from its agenda. In this connection, you should read the attached letter (Exhibit I) forwarded by the Judicial Council from a person who served on a jury who makes a good case for taking the instructions to the jury room. In addition, you may find the editorial (Exhibit II) from the Oregon State Bar Bulletin of interest. Apparently persons who serve on a jury have a different view than the Judicial Council. Exhibit III is a copy of the Illinois provision that permits the jury instructions to be taken to the jury room. Exhibit IV is a letter from Justice Friedman indicating that it is a "practically impossible task for any 12 jurors" to keep in mind the complex instructions given in a dangerous conditions of public property case.

The staff does not suggest that the Commission change its decision to drop this topic. However, we did want you to have the information set out on the attached exhibits at the time the final decision to drop this topic is made.

Respectfully submitted,

John H. DeMoully
Executive Secretary

1st Supp. Memo 69-85 EXHIBIT I

CHIEF JUSTICE
ROGER J. TRAYNOR
CHAIRMAN

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

July 7, 1969

Miss Sara Jane Long
68 Vernon Street
Oakland, California 94610

Dear Miss Long:

This will acknowledge receipt of your letter dated June 25, 1969 which was forwarded to us from the Office of the Attorney General.

You may be interested to know that the California Law Revision Commission has considered a recommendation to the California Legislature relating to taking instructions into the jury room in civil cases. We are, therefore, sending a copy of your letter to the Commission for its information.

Very truly yours,

Ralph N. Kleps, Director

By
(Mrs.) Winifred L. Hepperle
Attorney

WLH:jt

cc: John H. DeMoully
Executive Secretary
California Law Revision Commission
Room 30, Crothers Hall
Stanford, California 94305

68 Vernon Street, Apt. 1
Oakland, California 94610
June 25, 1969

The Attorney General
State of California
Sacramento, California 95801

Dear Sir:

California Jury System -
Judge's Instructions to Jurors

I am writing to request that you propose changes to the California laws to provide that written instructions are automatically provided to jurors in both civil and criminal cases.

I recently completed jury duty in Superior Court of Alameda County, my experience consisting of a two-day criminal trial and an eight-week civil trial. In both cases and in discussions with other jurors the matter of the judge's instructions to jurors came up - why not give the instructions to the jurors in writing at the start of jury deliberations?

I wrote to the presiding judge of our Superior Court for an answer. His response was enlightening, but it also prompted me to pursue this further.

1. Penal Code Section 1137 authorizes the Court to deliver the instructions to the jury room upon request. Evidently this request is seldom made.

   I think it is seldom made because the jurors are not aware of that possibility. My particular jury duty is probably not extraordinary, and I found that inexperienced jurors are confused about what will happen next, what they can and cannot do (we were not even told we could take notes in court until someone asked the question), and the only contact they have with the Court after retiring to the jury room (when they realize they will receive no more information) is through the bailiff. An experienced juror's knowledge is limited and/or faulty for these same reasons.

   Jurors should automatically be provided with the judge's instructions in writing when they retire to the jury room for deliberation.

2. The law regarding civil cases does not permit the jury to receive written instructions.

   Why not? Are civil cases not important? Shouldn't the jurors be given all the facts on which to make their decision and be absolutely clear on the laws governing the particular case?

   Jurors cannot remember everything the judge reads in his instructions, memories are faulty, and even if one takes notes in shorthand (as I did during my second case), one cannot take down everything.

3. Evidently, some judges feel that providing written instructions to the jurors merely adds to the confusion!

   That argument is positively irrational. Is the thinking behind that "Don't confuse me with the facts"? Why, then, instruct the jury at all? If this argument means that people in general are too dumb to understand, why have juries? I disagree with this line of "thinking." I believe in the jury system but it should be made more efficient, and you do not increase efficiency by putting up obstacles.

   It is extremely important for jurors to have as much information as is reasonably possible in order for them to reach a fair verdict, and I do not think they should have to ask for it. It would be a simple and not very costly matter (indeed, lack of confusion might prevent costly retrials caused by hung juries) to provide jurors with a written copy of the judge's instructions. Whether or not they refer to it is up to them, but at least they would have the information readily available. Reconvening the Court to have instructions reread is a time-consuming procedure and not satisfactory for reasons given herein.

I urge you to request that the Legislature change the California laws so that written instructions are automatically provided to jurors in both civil and criminal cases at the start of jury deliberations.

Very truly yours,

Sara Jane Long

Miss Sara Jane Long

cc: Judge Lyle E. Cook
Hon. Don Mulford
Hon. Nicholas C. Petris
Hon. Lewis F. Sherman

Oregon State Bar
BULLETIN

Published by the Oregon State Bar, 621 Pittock Block, Portland 5, Oregon.

JOHN H. HOLLOWAY.....*Secretary*
ALEXANDER G. BROWN.....*Editor*

Editorial offices 306 City Hall, Portland 4, Oregon.

EDITORIAL

Your editor had an unusual and rewarding experience during the month of November in serving on the jury panel for Multnomah county. This opportunity seldom comes to a lawyer, but when and if such an opportunity does come we urge every lawyer to take advantage of it.

Serving on a jury may not do anything for the individual lawyer's ego, but it does reacquaint him with some of the facts of life which are frequently forgotten at the counsel table.

While it might be interesting to recite what some jurors thought about some lawyers as revealed in jury room deliberations, it is not the purpose of this editorial to do so.

Much to the surprise of your editor, every juror with whom he came in contact was greatly interested in the instructions given by the court. The great difficulty was that they had trouble remembering what the judge had said and time after time the jurors wanted to know why when the judge was reading the instructions the text could not have been sent to the jury room with the pleadings, as is done in several other states.

It is the opinion of your editor that this is a simple change in our procedure which would greatly improve the jury system. Jurors, we have found, are honest and try to the best of their ability to follow the law as the court has presented it. However, it is impossible for a group of laymen—and not easy for a lawyer—to remember all of a half hour recital of the law to be applied in any particular case.

Jurors with whom we served were particularly complimentary of those judges who at least appeared to be closely following the case as though it was the first case they had ever tried and who gave their instructions slowly in a clear, loud voice with emphasis upon those parts which were especially pertinent.

Much to the surprise of your editor, he found that the jurors carefully observed the admonishment of the court to disregard testimony where an objection had been sustained. Jurors are quick to recognize a deliberate attempt to plant some statement in the minds of the jury even though the court may direct that the testimony be disregarded. The jurors are inclined to deliberately disregard such statement and also practically everything else that the offending attorney says.

For what it may be worth, your editor passes along this suggestion: "If you can help it, don't let your client testify to something that is patently untrue or impossible." A party who testifies that he was driving at exactly 30 miles an hour when he hit a parked vehicle after skidding 75 feet on dry pavement with sufficient force to knock the standing vehicle across the street and through a brick wall, is quickly identified by the jurors for exactly what he is and from then on out he is behind the eight ball.

Illinois Practice Act § 67 and Official Comment Thereto

§ 67. (Civil Practice Act, § 67). Instructing the jury—Taking instructions and papers to the jury room

(1) The court shall give instructions to the jury only in writing, unless the parties agree otherwise, and only as to the law of the case. An original and one copy of each instruction asked by any party shall be tendered to the court. The copies shall be numbered and shall indicate who tendered them. Copies of instructions given on the court's own motion or modified by the court shall be so identified. When instructions are asked which the court cannot give, he shall on the margin of the original and copy write the word "refused", and he shall write the word "given" on the margin of the original and copy of those he gives. He shall in no case, after instructions are given, clarify, modify or in any manner explain them to the jury, otherwise than in writing, unless the parties agree otherwise.

(2) The original written instructions given by the court to the jury shall be taken by the jury to the jury room, and shall be returned by them with their verdict into court. The originals and copies of all instructions, whether given, modified or refused, shall be filed as a part of the proceedings in the cause, but on appeal only the copies need be incorporated in the record on appeal.

(3) At the close of the evidence or at any earlier time during the trial that the court reasonably directs, any party may tender instructions and shall at the same time deliver copies thereof to counsel for other parties. If the number or length of the instructions tendered is unreasonable, the court after examining the instructions may require counsel to reduce the number or length thereof. The court shall hold a conference with counsel to settle the instructions and shall inform counsel of his proposed action thereon prior to the arguments to the jury. If as a result of the arguments to the jury the court determines that additional instructions are desirable, he may after a further conference with counsel approve additional instructions. The court shall instruct the jury after the arguments are completed. No party may raise on appeal the failure to give an instruction unless he shall have tendered it. Conferences on instructions must be out of the presence of the jury.

(4) Papers read or received in evidence, other than depositions, may be carried from the bar by the jury. 1933, June 23, Laws 1933, p. 784, art. 7, § 67; 1935, July 5, Laws 1935, p. 1071, § 1; 1937, July 6, Laws 1937, p. 989, § 1; 1941, July 21, Laws 1941, vol. 2, p. 464, § 1; 1955, July 19, Laws 1955, p. 2236, § 1.

Joint Committee Comments

Subsection (1)

This is subsection (1) of former section 67 of the Act, with the addition of language recognizing that the parties may consent to oral instructions, prescribing the form in which requests for instructions shall be rendered, and changing the manner in which the court's disposition of these requests shall be noted.

In recognition of the right to waive written instructions (Bates v. Ball, 72 Ill. 108 (1874); Best v. Wilson, 48 Ill.App. 352 (3d Dist. 1892); People v. Krakowski, 308 Ill. 266, 139 N.E. 380 (1923); see Circuit Court of Cook County, Rule 51; County Court of Cook County, Rule 38) the words "unless the parties agree otherwise" have been added to the first and last sentences of subsection (1).

To assist counsel in discussing requested instructions (see subsection [3], infra), preparing a post-trial motion (section 68.1, infra) and preparing a complete record on appeal, a requirement has been added that requested instructions be submitted in duplicate. When submitted, the copies of each requested instruction, but not the originals, shall be numbered and shall indicate the identity of the party tendering them. This is also true as to the copies of instructions given on the court's own motion or modified by the court. The requirement of numbering is not intended to control the order in which instructions are to be given but is for convenience of reference at the instruction conference and on appeal. The courts have said that requested instructions should be numbered. People v. Hubbard, 355 Ill. 196, 189 N.E. 23 (1934); Jacklich v. Starks, 338 Ill.App. 433, 87 N.E.2d 802 (2d Dist. 1949).

Alleged errors in instructions cannot be raised in the reviewing court when the record does not indicate the identity of the party tendering them. Tir v. Shearn, 2 Ill.App.2d 257, 119 N.E.2d 406 (1st Dist. 1954); Seeden v. Kolarik, 350 Ill.App. 238, 112 N.E.2d 514 (2d Dist. 1953). The requirement that the copies be so identified will insure an adequate record on appeal, even though the copies are placed only in the common law record.

As a consequence of the requirement for submission of instructions in duplicate, the provision as to marking requested instructions given or refused has been amended to require the court to mark both the originals and the copies.

Statutes in Indiana and Kansas require that requests for instructions be reduced to writing, numbered and signed by the party requesting them. Ind.Stat.Ann. (Burns.1933) § 2-2010; Kan.Gen.Stat. (Corrick, 1949) § 60-2900. Colorado has a similar provision, and in addition requires that requests be submitted in duplicate. Colo.Rules Civ.Proc., Rule 51.

Subsection (2)

This is former subsection (2) of section 67 of the Act, with modifications correlating this subsection with subsection (1) and implementing the procedure prescribed by subsection (1).

The original instructions, which do not show the identity of the party tendering them, are to be taken by the jury to the jury room.

Read literally, subsection (2) of former section 67 provided that only the instructions given by the court were required to be filed as part of the proceedings in the cause. This was misleading, because, unless the instructions refused were made a part of the record on appeal, error in refusing them could not be raised in the reviewing court. City of Chicago v. Callender, 396 Ill. 371, 71 N.E.2d 643 (1947). Accordingly, subsection (2) has been changed to require that both the originals and copies of all instructions whether given, modified or refused shall be filed as a part of the proceedings in the cause, but that only the copies need be incorporated in the record on appeal.

Subsection (3)

This subsection is new and provides a detailed procedure for requesting and settling instructions.

Section 67 of the Civil Practice Act of 1933 contained an implicit requirement that any requests for instructions be made before the commencement of the argument to the jury. (Laws 1933, p. 784, § 67.)

This requirement was eliminated in 1935 by an amendment to section 67 (Laws 1935, p. 1071, § 1), and until the present amendment of section 67, the Civil Practice Act consequently had no provision governing the time for making requests for instructions. From time to time trial court rules requiring that requests for instructions must be made before commencement of the argument have been approved. Penn. Co. v. Greso, 102 Ill.App. 252 (1st Dist. 1902); Locander v. Joliet & Eastern Traction Co., 225 Ill.App. 143 (2d Dist. 1922); Kelley v. United Benefit Life Insurance Co., 275 Ill.App. 112 (2d Dist. 1934). The requirement that instructions be submitted before argument, which prevents a party from obtaining an advantage by tendering requested instructions after the conclusion of an adverse party's argument to the jury, has been incorporated in the first sentence of this subsection with an added provision, however, permitting the court, in its discretion, to direct that requests be submitted at an earlier time. In some circumstances the court has the power in its sound discretion to receive tendered instructions after the time mentioned in this subsection. Compare Standard Fire Insurance Co. v. Wren, 11 Ill.App. 242 (1st Dist. 1882).

Former section 67 of the Act did not require a party to deliver copies of his requested instructions to the other parties. Muller v. Equitable Life Assurance Society, 293 Ill.App. 555, 13 N.E.2d 96 (1st Dist. 1938). It is desirable that opposing counsel be furnished copies of all requested instructions so that they may participate effectively in the conference to settle instructions. Accordingly, the first sentence of this subsection requires a party to deliver copies of his requested instructions to counsel for other parties at the time the instructions are tendered to the court.

The second sentence of this subsection empowers the court to order a reduction in the length or number of instructions, after examining the instructions, if the length or the number of tendered instructions is unreasonable. Its purpose is to make clear that trial courts do have the power to obviate the frequent criticisms by the reviewing courts of too many and too long instructions.

Section 67 of the Civil Practice Act of 1933, as enacted, provided that before final argument the parties should be given an opportunity out of the presence of the jury to read the instructions which the court proposed to give and to make suggestions and objections to the instructions. (Laws 1933, p. 674, § 67.) This was regarded as providing for a conference between counsel and the court in which all the participants would cooperate in obtaining valid instructions. McCaskill, Illinois Civil Practice Act Annotated, p. 163 (1933). The 1935 amendment, restoring sections 72 through 76 of the 1907 Practice Act, eliminated the requirement that the court submit its proposed instructions to counsel before commencement of the argument and at the same time eliminated the provision for a conference to settle instructions. (Laws 1935, p. 1071, § 1.) Thereafter the court had no duty to advise counsel of its proposed instructions. Muller v. Equitable Life Assurance Society, 293 Ill.App. 555, 13 N.E.2d 96 (1st Dist. 1938). In order that counsel may be afforded an opportunity to develop their arguments in accordance with the instructions which will be given, the third sentence of this subsection requires the court to inform counsel before final argument of his proposed action on the requests.

Although there was no provision in section 67 of the former act authorizing it, a conference between court and counsel, for the discussion of instructions, was frequently, and in many courts always, held. See, e. g., Johnson v. Luhman, 333 Ill.App. 418, 78 N.E.2d 107 (2d Dist. 1948). Some local court rules authorize a conference when the parties consent to oral instructions. (e. g., Circuit Court of Cook County, Rule 51; County Court of Cook County, Rule 38.) A conference between court and counsel obviously will aid the court in arriving at instructions which are relatively free from error. Hence, the third sentence of this subsection provides that the court shall hold a conference with counsel to settle instructions.

Subsection (3) also provides that the court shall instruct the jury after the arguments are completed, thus codifying existing practice. The rule that a party may not assign as error the failure to give an instruction unless he shall have requested it (Nickell v. B. & O. R. Co., 347 Ill.App. 202, 106 N.E.2d 738 (4th Dist. 1952); Stivers v. Black & Co., 315 Ill.App. 38, 42 N.E.2d 349 (3d Dist. 1942); Fraider v. Hannah, 338 Ill.App. 440, 87 N.E.2d 795 (2d Dist. 1949)) is codified by the fourth sentence of subsection (3).

Subsection (3) further provides that conferences on instructions shall be held out of the presence of the jury. This provision will protect the parties against any prejudice that might otherwise result from comments made in the presence of the jury.

Subsection (4)

This is subsection (4) of former section 67 of the Act, (which had no subsection bearing the number "3") with the addition of language providing that documentary exhibits received in evidence (as well as those "read" in evidence) may be taken to the jury room.

Under former § 67(4), which had been in the Illinois statutes since at least 1845 (Hurd's Ill.R.S.1874, c. 110, par. 56, sec. 55), it was occasionally argued that a document admitted into evidence could not be taken to the jury room unless it had actually been read to the jury. Ridgway v. Crum, 343 Ill.App. 12, 98 N.E.2d 394 (3d Dist. 1951). In order to answer this argument, section 67(4) has been amended, codifying the existing law and permitting documents received in evidence, whether read to the jury or not, to be taken to the jury room.

Provisions comparable to this subsection are Cal.Code Civ.Proc. § 612; Colo.Rules Civ.Proc., Rule 47(m); Iowa Rules Civ.Proc., Rule 198; and Tex.Rules Civ.Proc., Rule 281.

Note as to Instructions in Criminal Cases

For the Supreme Court rule dealing with instructions in criminal cases, see rule 25. [NOW Ch. 110A, §451]

1st Supp. to Memo 69-85

EXHIBIT IV

STATE OF CALIFORNIA
COURT OF APPEAL
THIRD APPELLATE DISTRICT
119 LIBRARY AND COURTS BUILDING
SACRAMENTO, CALIFORNIA 95814

LEONARD M. FRIEDMAN
ASSOCIATE JUSTICE

June 6, 1969

California Law Revision Commission
School of Law
Stanford University
Stanford, Calif. 94305

Attention: John H. DeMoully
Executive Secretary

Gentlemen:

This letter is stimulated in part by recent work on litigation involving the "dangerous conditions" provisions of the 1963 tort liability legislation and your May 15, 1969, bulletin on the same subject. My comments are aimed at these provisions as drawn, rather than at the tentative amendments.

These statutes have their practical and most frequent application in the trial court and particularly in the jury room. For every appellate court that expatiates on these statutes, a dozen juries will apply them - or try to. If they are not meaningful to a jury, they fail in their prime purpose.

In my opinion no trial judge and no committee of trial judges can frame instructions making these tort liability statutes meaningful to 12 lay jurors. The BAJI committee has struggled manfully with the task. The fact that their suggestions communicate a single liability or immunity concept only through the medium of a half dozen interlocking instructions is no fault of the BAJI committee. It is the fault of the statutes.

Unfortunately, most statutory draftsmen have never entered a jury room. Many have not observed a jury trial. It is empty optimism to expect a jury to absorb and apply the interlocking statutory concepts of the tort liability law.

For example, a highway liability case might require the jury to recall and apply in combination instructions incorporating Government Code sections 830, 830.2, the second sentence of 830.8, 835(b), 835.2(b) and 835.4(b). Is not this a mountainous, practically impossible task for any 12 jurors?

"He jests at scars that never felt a wound," and I hasten to tell you that I have drafted legislation in past years. I do not minimize the draftsman's task. I think that the difficulties are increased when ideas are strung out through a series of statutory statements, when a concept in one statute depends on definitions in a second and qualifications in a third. They are lessened when a jury can decide a case on a self-contained rule. The latter alternative multiplies the number of available rules and requires a refined selection of the appropriate one by the trial judge. Nevertheless, I think we ought to give these 12 laymen a chance to do a rationally acceptable job.

Very truly yours,

Leonard M. Friedman
Associate Justice

LMF:zm