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ABSTRACT

Present court procedures and the lack of judge-lawyer-juror communication do little to encourage sound verdicts. To improve communication with the jury, a four part trial communication process including pre-service juror orientation training, pre-jury instructions, main jury instructions, and two-way trial communication is suggested. Pre-service juror training may include the presentation of orientation films and juror's manuals. Although it is not possible to provide the jury with all of the instructions at the beginning of the trial, it is possible to inform them of some rules as the trial progresses from state to stage. The main jury instructions at the conclusion of the trial definitely need to be redrafted in language intended for laymen. Written instructions should also be provided to all jurors for use in the jury room. In order to promote an active two-way trial communication system, jurors should be allowed to take notes and address written questions to witnesses and lawyers through the intermediary of the trial judge. (Author/DE)

COMMUNICATION PROCESS: A METHOD FOR IMPROVING JUDGE-LAWYER-JUROR COMMUNICATION

by

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> The defendant was charged with assault to commit murder. The evidence of guilt was overwhelming. The accused elected not to take the stand in his own defense.
>
> After four hours of deliberation the jurors brought in a verdict of not guilty.
>
> The trial judge was aghast. The prosecuting attorney could not believe his ears. Even the court-appointed defense attorney plainly showed his astonishment.
>
> . . . /Later/ the still unbelieving deputy D.A. /of a metropolitan county in northern California/ buttonholed the foreman.
>
> "On what possible basis could you have reached such a verdict?" he asked.
>
> One of the other jurors standing by . . . spoke: "I imagine I was responsible," she said smilingly. "You see, I happen to be a Nero Wolfe fan and I know how important little clues can be. I watched the defendant making notes at the counsel table and noticed that he wrote with his left hand, so I knew he was left-handed. But the fingerprint on the pistol grip was from his right thumb. Obviously a left-handed man could not have fired that gun."
>
> In fact, the defendant happened to be ambidextrous and used his right hand to shoot with, as could easily have been shown. But the deputy D.A. had overlooked the point and the observant juror . . . /did not/ raise the question. So justice /was/ miscarried.[1]

Other experienced trial attorneys can match or surpass this true story. Some jurists are concerned that the numerous Perry Mason type television trials have misinformed citizens about actual courtroom decorum. Some jurors expect that a guilty person will surely confess during the trial.[2]

Jurors are likewise confused by elements contained in the trial itself: legalese jargon during the main stages of the trial as well as that included in the judge's instructions to the jury at the conclusion of the trial; delays in the trial while the lawyers and judge engage in various kinds of conferences; and different stages of the trial which are not adequately explained as to how one stage is related to the others, e.g., voir dire, opening and closing arguments, and direct, cross and redirect examination

of witnesses.[3]

John H. Holloway, while Executive Director of the Oregon State Bar Association, spoke of lawyers using "high sounding phrases, managing to say in fifty words what could have been said in seven."[4] Justice Benjamin Cardozo often referred to legal sentences "so overloaded with all its possible qualifications that it will tumble down of its own weight."[5] In 1965 the Michigan Supreme Court became disturbed enough with the quality of judge-jury communication to warn that the trial judge "must translate our legal ruling, cast in the law's shorthand abstractions, into language comprehensible by the jury . . . ."[6] You might note that in the same year that court spoke of the "parthenogenic euphoria of the bench and bar."[7]

Sigworth,[8] Jones,[9] and Forston[10] in separate studies have found up to 80 per cent of the jurors misunderstood such parthenogenically euphorious phrases as inference, stipulate, credibility, voir dire, preponderance of evidence, proximate cause, efficient intervening cause, moral certainty, and contributory negligence. Sigworth and Forston in the above studies also found that the overall comprehension level of judge's instructions was approximately 50 per cent. Numerous studies have been conducted on the problem of judge-lawyer-jury communication: questionnaire studies by Hunter,[11] Hervey,[12] Kalven and Zeisel,[13] O'Mara,[14] and Meyer and Rosenberg[15] as well as other empirical studies by Sigworth[16] and Forston.[17] The unanimous conclusions of these studies can be summarized by an excerpt from Swift's Gulliver's Travels:

> It is likewise to be observed, that this society [of lawyers] hath a peculiar Cant and Jargon of their own, that no mortal can understand and wherein all their laws are written, which they take special care to multiply; whereby they have wholly confounded the very essence of Truth and Falsehood, of Right and Wrong. . . .

Another serious problem with judge-jury communication is that jury trials, as traditionally conducted, are classic examples of one-way communication.[18] Jurors have little or no opportunity to ask questions of witnesses, lawyers, or judges during trials. Although jurors may ask questions of the judge once they retire to the jury room, the deliberating conditions do not encourage such questions to be sent out as frequently as jurors may desire.[19] Andrew Hacker in this month's issue of The Atlantic Monthly angerly but eloquently exposes the short comings of not permitting jurors to take notes or to ask questions as full participants in the fact-finding process of a trial. Hacker states, "Citizens are regarded as sufficiently mature to deliver the final verdict, but not adult enough for participation in the proceedings."[20] Edises labels this problem of one-way communication as the "Achilles' Heel" of the jury system.[21] Inspite of the above findings and charges, little progress has been made to improve judge-jury communication. Hacker concludes that court procedures do little to encourage sound verdicts. The suspicion arises that too many judges and lawyers would rather have juries grope in the dark. "This should come as no surprise," Charles Alan Wright once wrote, "in a society which takes pride in the image of justice wearing a blind fold."[22]

II

Maurice Rosenberg,[23] who is regarded as a prominent legal scholar, recently stated that one of the three most important areas needing improvement in the court system is communication, especially judge-jury communication.[24]

This section of the paper will view better jury communication as a four-part communication process including pre-service juror orientation training, pre-jury instructions, main jury instructions, and two-way trial communication.

Pre-Service Juror Orientation Training

Pre-service orientation training occurs on the first morning that jurors report for duty. This so called "training" takes place prior to the juror's first voir dire experience in a specific trial. The training typically consists of introductory remarks by a judge and a trial juror's manual and other reading materials. Sometimes an orientation film is used.

Judge Frederick Woleslagel in his book, Jury, prepared for the National College of the State Judiciary, analyzed the orientation session as "Not essential for jurors but helpful; a significant aid in general understanding of procedure. . .if [the judge does not succumb] to the hear your own voice syndrome."[25] Helwig,[26] Lewis,[27] and Sprague[28] strongly recommend a pre-service training session before voir dire to help provide a better understanding of trial procedures and to correct the body of distortion and misinformation of what occurs in television trials.

In the Pre-Service Juror Orientation Training Project, Forston surveyed the jury orientation training procedures in 128 cities in all the states but Hawaii (I still hope to receive at least an Aloha from an Hawaiian judge). One hundred six judges (82.8 per cent) orally present some pre-serivce message to jurors which they would label as a training procedure. The length of and quality of these messages varied considerably (see Table 1).

TABLE 1

Length and Percentage of Total Judges' Oral Presentation: Pre-Service Orientation of Jurors

Time in Minutes	Number of Judges	Per Cent of Total
5 or less	25	19.6.
15	52	40.6
30	33	25.8
45	13	10.2
60	4	3.1
75	1	0.8
Total	128	100.1

Note that 60.2 per cent of the judges spoke for fifteen minutes or less in their oral presentations to the jurors.

In analyzing the quality of sample presentations, the Pre-Service Project found that much of the time was spent on two kinds of information:

1) Patriotic messages dealing with the history and purpose of the jury system and persuasive appeals on why one should not ask to be excused from jury service; and
2) Administrative procedures such as parking, eating, and restroom facilities and procedures for telephoning for jury service information, for obtaining fees and expenses and so forth.

Little, if any, time was spent on substantive materials to actually help the jurors better understand the legal terminology and courtroom procedures that jurors would surely encounter and wonder about.[29] Although an orally presented orientation session by a judge could be of significant help, it typically is not all

that helpful for making jury decisions.

Almost two-thirds of the cities (82) used a juror's manual in their training procedures. A juror's handbook is also potentially an excellent method for facilitating jurors' understanding of the trial process and legal concepts, but two elements are crucial. First, the handbook must be written in a readable style and include helpful substantive material; and second, the jurors must read and understand the materials.

The eighty-two jurors manuals surveyed generally appeared to be readable for laymen. The manuals come in various sizes ranging from 3 x 5 inches to 8½ x 11 size binders with a range of seven to thirty pages. The most popular size was a 4 x 9 inch pamphlet with either eight or thirteen pages. The vast majority of the handbooks included the following kinds of materials: the importance of jury service, how jurors are called for service, the kinds of case (civil or criminal), the stages of a trial, definitions of legal terms, and expected juror behavior. Many manuals also included a brief history of the jury system, patriotic messages about jury service, general information about juror compensation, and a juror's creed or oath. The consensus of the First National Conference on Rural Justice held in March 1974 was that tightly drawn jury handbooks are a preferred means of jury orientation.[30]

Many manuals however effective they may be are never read. Forston in a 1972 survey done with Polk County District Court (Des Moines, Iowa) jurors found that less than 10 per cent of the jurors had read any portion of the juror's manual after one week of service.[31] However, some evidence exists that if handbooks are sent to jurors in the mail prior to service and if jurors are

strongly encouraged to read the manuals, the percentage of manuals read increases substantially.[32] In any case jurors should be entitled to good quality handbooks.

Orientation films are utilized less frequently than oral remarks by judges or trial juror's manuals. The Pre-Service Project found that only 7 per cent (9) of the cities showed juror training films.[33] Several judges responded that the current films were not satisfactory, but they liked the idea of using films.

Pre-Jury Instructions

The second and third parts of the communication process to improve jury communication involve jury instructions.

The last stage of a typical trial is the judge's oral charge or instructions to the jury as to how to view what occurred during the trial. This is analogous to informing referees about the rules of a football game during the last few minutes of the fourth quarter and then hoping that the referees as a collective body can sift through what they remember to determine the number of points for each team so that a winner can be declared. Although it is not possible to provide the jury with all of the instructions at the beginning of the trial, it is possible to inform them of some rules as the trial progresses from stage-to-stage and as the judge himself learns what will be necessary for the jury to know. For example, the judge can instruct the jury on non-substantive information at the beginning of the trial, e.g., about voir dire, opening statements, and evidence.

Main Jury Instructions

After all evidence and closing arguments are made, and prior to the jury deliberation, the trial judge makes an oral statement to the jury informing them of the law applicable to the case in general or some aspect of the case. The jury is expected to use these instructions as the basis or criteria for finding their verdict. These oral instructions may last from ten minutes to two-hours or more.[34] As explained earlier jurors often react to these instructions "like being doused with a kettleful of law which would stagger a third-year law student."[35]

Judge McBride clearly points out the dilemma which a judge has in his charge to the jury:

> The oral delivery of instructions justifies resorting to the best and most effective use of language available. Every instruction is a test of the skill and art of the judge, a test which is not graded in points or personal success, but by justice between the parties.
>
> Instructions must meet still another test. They must be approved for technical accuracy by the reviewing court. This additional test discourages the preparation of instructions for effective oral use in the courtroom. It frightens new judges to the point that the necessity for comprehension by the jurors is ignored.
>
> How well a judge succeeds in conveying his message to twelve captive listeners may determine the verdict. There is no opportunity to rehearse, edit or improve the immediate product. There is no examination of the jurors to find out if the message was effective. The success of any instruction to a jury is not reflected in its brilliance or in its eloquence but by a fair and just verdict.[36]

Three related problems need to be tackled. First, instructions need to be drafted in language intended for laymen to comprehend and to apply rather than really intending the instructions for a state supreme court in order to guard against a reversal error (this was the primary goal of the Arizona Jury Instruction Project). Second, judges need to be aware of the self-deception

which exists when they believe that the uniform or pattern jury guide books contain the best or only phrasing acceptable for instructing a jury. Third, judges need to be especially beware of using the pattern jury guide books in a "cut and paste" method with no system, transitions, or logical arrangement for jurors to readily understand.

Another related question to the jury instruction issue is whether the jury should be provided written instructions to take into the jury room (in addition to hearing the oral instructions). Approximately twenty states permit the use of written instructions on a consistent basis.[37] Many Federal and state courts do not permit written instructions at all.

In a research project conducted in Minneapolis and Chicago with county jurors in simulated trials, the effects of oral versus written instructions were analyzed. When written instructions were permitted in the jury room, the jury discussion pertaining to the rules of law and its application increased from 6 per cent for oral instructions only to 14 per cent for oral and written instructions.[38] The Arizona Jury Instruction Project found that written instructions improved jurors' comprehension nearly 20 per cent.[39]

Tentative evidence would suggest that written instructions should be provided to <u>all</u> jurors rather than only one set per jury. Since the above Minneapolis and Chicago study was done with simulated juries in realistic courtroom situations, it was possible to video record the jury deliberations. Repeated qualitative and quantitative analysis of the deliberations revealed that juries with written instructions were generally less confused, less tempted to dwell on immaterial issues, and more effective in arriving at their verdicts than were juries which

only had the benefit of oral instructions.[40]

Some evidence also exists which shows that jurors who used the instructions as a basis of their arguments were highly influential with other jurors; hence, the effects of the judge's charge to the jury was found to be extremely important.[41] Meyer and Rosenberg argue that it is "vital that we find out what 'bugs' our jurors about the instructions they receive . . . [and that answering this question] would give a boost to efforts to improve the jury system."[42]

Two-Way Trial Communication

The fourth part of the trial communication process includes two-way communication in the courtroom by allowing jurors to be active rather than passive participants. From the wealth of empirical data and communication theory, it should be safe to predict that a two-way trial communication process with its feedback loops as outlined thus far in this paper is far more certain to get the testimony of witnesses, arguments of lawyers and instructions and rulings of the judge to the jury more accurately than the one-way communication system currently in practice in nearly every courtroom in the country. The result of two-way trial communication should yield more just decisions. Although a two-way trial communication process is considered a revolutionary idea and makes many a judge and lawyer shutter at the thought, it is not a new idea nor is it without precedent.

As mentioned previously both Edises and Hacker in the past three months have advocated two-way communication in the courtroom both on the part of the judge and the jury. The two-way communication process in the courtroom, to be sure, would need to be

modified. For the past fifteen years, Judge Robert E. Jones, Portland, Oregon, has permitted jurors during the trial to write questions to witnesses, lawyers, or to himself. These questions are then evaluated and advanced and answered if found appropriate. Sometimes Judge Jones will ask the question himself, while other times he will ask one of the lawyers whether he would like to ask the question.[43] Note that this system necessitates jurors taking notes on trial testimony. These notes may also be used in the jury room. Some jurists frown on note taking by jurors. Questions by jurors are not without precedent for jurors in English courts are permitted to ask questions.[44] Moreover, coroner's juries in our own country are allowed to regularly ask questions.[45] In addition, jurors in the State of Maryland are granted the right to ask questions in written form. The Handbook for Petit Jurors in Maryland states: ". . . /I/f a juror has a question /of a witness/ which he feels should be asked, he should write his question and present it to the court upon the conclusion of the examination of the witness. The court will then ask the questions if the information sought is material to the issue and admissible under the rules of evidence."[46]

In this country A.B.A. standards permit a judge to be an active participant in the trial to facilitate the search for truth by questioning witnesses and by subpoenaing court witnesses a la Judge John Sirica in the Watergate trials. However, such active participation by a trial judge is an exception rather than a frequent occurance in our country. France as well as other countries encourage their judges to take over the questioning of witnesses if they feel that one

or both the attorneys have shown insufficient zeal in their probing.[47]

If a jury trial is a search for truth and justice, why not encourage the inquiring minds, observant eyes, and alert ears in the jury box to become active not passive partners in the fact-finding process. This communication process will enhance the truth-determining quality of jury trials and will give jurors a sense of true participation in one of the most vital functions of self-government.[48]

III

The four-part trial communication process to improve communication to the jury involves:

1) More extensive pre-service jury orientation training procedures with refined remarks by the judge. The judge should direct the jury commissioner to handle administrative procedures such as juror compensation, eating and parking facilities and so forth so that the judge's remarks can focus on training jurors to be better fact-finders and decision-makers in a trial setting. Juror's manuals should be reviewed for quality and clarity and mailed in advance of jury service. Orientation training films may be of help; however, some new films will probably need to be produced to satisfy trial judges.

2) Pre-jury instructions should be encouraged to acquaint jurors with the rules of law as soon as is appropriate. Some repetition of important instructions coupling pre-instructions with later instructions at the conclusion

of the trial may be highly beneficial to jurors.

3) The main jury instructions at the conclusion of the trial definitely need to be redrafted in language intended for laymen not for supreme court justices. This is not to suggest that technically accurate instructions are not important. Written instructions should also be provided to all jurors for use in the jury room.

4) An adapted two-way trial communication system needs to be promoted in the American jury system. This two-way communication process would include note taking by jurors, written questions to witnesses submitted to the judge, and active participation by the trial judge through encouraging questions which should be asked of witnesses and through subpoenaing court witnesses who should be heard from.

Viewing the whole jury communication problem from the time the jurors are called to serve to the final instructions as a "communication process" with four interrelated parts should prove to be more advantageous. The "interaction effect" of promoting correlated changes in the four-part process should enhance jury communication more than giving isolated attention to separate parts of the jury problem.

FOOTNOTES

1. Bertram Edises, "One-Way Communication: Achilles' Heel of the Jury System," The Judges' Journal, 13 (October 1974), 78.

2. Walter H. Lewis, "Witness for the Prosecution," TV Guide, 22 (November 30, 1974), 5-7.

3. Judge Frederick Woleslagel, "The 'KISS' Principle of Jury Communication," Unpublished paper presented before the American Bar Association, Honolulu, Hawaii, July 1974 and Judge Robert E. Jones, Judge-Jury Relations Course at the National College of the State Judiciary, Reno, Nevada, June 23-July 5, 1974.

4. Frederick Woleslagel, Jury (Reno, Nevada: National College of the State Judiciary, 1972), p. 76.

5. Rudolf Flesch, The Art of Readable Writing (Harper & Brothers, 1949).

6. In re Wood Estate, 374 Mich. 278, 132 N.W. 2d (1965).

7. Hill v. Harbor Steel and Supply Corp., 374 Mich. 194, 132 N.W. 2d 54 (1965).

8. Heather Sigworth, "Arizona Jury Instruction Project," unpublished report to the L.E.A.A., 1974.

9. Jones.

10. Robert F. Forston, "Judge's Instructions: A Quantitative Analysis of Jurors' Listening Comprehension," Today's Speech, 18(Fall 1970), 34-38 and Robert F. Forston "Justice, Jurors, and Judge's Instructions," The Judges' Journal, 12(July 1973), 68-69.

11. R. Hunter, "Law in the Jury Room," Ohio State University Law Journal, 2(1935), 1-19.

12. John Hervey, "Jurors Look at Our Judges," Oklahoma Bar Association Journal, 18(1947), 1508-1513.

13. Harry Kalven and Hans Zeisel, The American Jury (Boston: Little, Brown, & Co., 1966), pp. 510-511.

14. J. O'Mara, "Standard Jury Charges--Findings of Pilot Project," Pennsylvania Bar Association Quarterly, 43(January 1972), 171-172.

15. B. Meyer and M. Rosenberg, "Questions Juries Ask: Untapped Springs of Insight," Judicature, 55(October 1971), 105-109.

16. Sigworth, and H. Sigworth, "Arizona Uniform Jury Instructions," Arizona Bar Journal, 8(Spring 1973), 9-32.

17. Forston (1970) and (1973).

18. Edises, p. 78.

19. Kalven and Zeisel.

20. Andrew Hacker, "Who Killed Harry Gleason?" The Atlantic Monthly, 234(December 1974), 52.

21. Edises.

22. Hacker, pp. 52 and 55.

23. Maurice Rosenberg is Professor of Law, Columbia University Law School, Past President of the Association of American Law Schools, Past Vice President of the American Judicature Society, and author of numerous publications.

24. Telephone interview with Maurice Rosenberg, February 27, 1974; also see M. Rosenberg, "New Challenges and Responses in Resolving Civil Disputes," Law and the Social Order, 3(1972), 368-369 and M. Rosenberg, "Revising Procedures that are Civil to Promote Justice Civilized," Michigan Law Review, 69(1971), 817-819.

25. Woleslagel (1972).

26. G. Helwig, "The American Jury System: A Time for Reexamination," Judicature, 55(October 1971), 96-99.

27. Lewis, p. 6.

28. Richard A. Sprague, "Objection," TV Guide, 22(November 30, 1974), 7.

29. Interviews and discussions at the American Academy of Judicial Education Conference, Des Moines, Iowa, December 4-6, 1974, and National College of the State Judiciary, Reno, Nevada, July 28-August 2, 1974.

30. Woleslagel (1974), p. 17.

31. Forston (1973).

32. Op. cit., FN. 29 and Woleslagel (1974), p. 17.

33. These films included such titles as "The Truth and the Just", "How Do You Find?", "On Uncommon Ground", and "Jury and Juror: Function and Responsibility."

34. In the Harrisburg Seven Trial in 1972 the jury heard a two-hour charge from the judge.

35. Quoting Judge Bok; see Robert F. Forston, "Does the Jury Understand? Usually Not," Des Moines Register, May 21, 1972, p. 15c.

36. Robert McBride, The Art of Instructing the Jury (Cincinnati: The W. H. Anderson Co., 1969), p. 180.

37. Maloney, "Should Jurors Have Written Instructions," Trial Judges' Journal, 6(April 1967), 18.

38. Robert F. Forston, "The Decision-Making Process in the American Civil Jury: A Comparative Methodological Investigation," Unpublished Ph.D. Dissertation, University of Minnesota, (1968), pp. 112-114.

39. Sigworth (L.E.A.A. report).

40. Forston (1973), p. 69 and Forston (1968), pp.112-114.

41. Forston (1968); Leslie L. Conner, "The Trial Judge's Demeanor: Its Import on the Jury," The Judges' Journal, 13(January 1974), 2-3; and "Gestures or Facial Expressions of Trial Judge in Criminal Case," 49 A.L.R. 3d 1186.

42. Meyer and Rosenberg, pp. 105, 109.

43. Jones; also see Edises and Hacker.

44. Hacker, p. 55.

45. Edises, p. 79.

46. Judge Robert E. Clapp, Jr., Circuit Administrative Judge of Maryland, A Handbook for Petit Jurors, p. 13.

47. Hacker, p. 55.

48. Edises, p. 79.