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Jury Instructions v. Jury Charges

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STUDENT NOTES

JURY INSTRUCTIONS V. JURY CHARGES

It is unfortunate that so much effort has been expended to revise the intricate rules of procedure and evidence which govern the trial process while one of the most critical stages of the trial has been largely ignored—the rendering of instructions as to the law to be applied by the jury. In theory, the jury is supposed to hear testimony and decide the facts in controversy while the judge rules on all matters of law. After all the evidence in the particular case has been presented, the judge instructs the jury as to the law to be applied to the facts as ultimately determined by the jury. The actual operation of this process may be no more than a legal fiction. It is difficult to perceive how a jury could “go back over a stream of conflicting statement of alleged facts, recall the intonations, the demeanor, or even the existence of the witnesses, and retrospectively fit all these recollections into a pattern of evaluation and judgment given him for the first time after the events. . . .”¹

The traditional practice in West Virginia is to give jury instructions before the closing arguments.² By stubbornly adhering to this traditional practice, the courts disregard the fact that the instructions so given at this stage of the trial are inadequate in performing their intended function.³ It is unnecessary to tolerate this ineffectiveness for the sake of tradition or for other reasons because of modern advances in the understanding of

¹ Prettyman, *Jury Instructions — First or Last?*, 46 A.B.A.J. 1066 (1960).

² See text accompanying notes 52-55 *infra* which provides a survey of the West Virginia circuit judges regarding their respective methods of instructing the jury.

³ The function of an instruction is to inform the jury of the law applicable to the evidence of the case in a simple, impartial, clear and concise statement. The instructions are to aid the jury in reaching a just and proper verdict. 10A MICHIGAN JURIS. *Instructions* §2 (1977 Replacement Vol.).

communication.⁴

JURY CHARGES

There is a viable alternative which will permit the courts to enhance jury comprehension — the giving of jury charges. A jury charge eliminates some of the problems inherent in the giving of instructions while it performs the same function.⁵ The court can draft a charge based upon the background and sophistication of the jury and commensurate with the complexity of the case so as to promote greater understanding of the law that is to be applied to the factual variables. The flexibility provided by the timing of the charge also contributes to jury comprehension. Jury instructions are given at the close of the case on the assumption that they will be fresh in the minds of the jurors as deliberations are made. While this assumption may be valid, other factors suggest the level of retention and understanding of the law of the case are higher when charges are given at various stages of the trial.

To ascertain the preference among the judiciary in West Virginia as to the utilization of jury instructions or charges, a survey was conducted in which a questionnaire was sent to each circuit judge.⁶ The questionnaire asked whether the judge uses a jury charge or instruction, whether the judge would be opposed to a mandatory jury charge, and what the judge's practice and position are as to the use of opening and midtrial charges. This note

⁴ It appears that common law practice permitted the courts to comment on the evidence and charge the jury. Judge Soper, of the U.S. Circuit Court of Appeals for the Fourth Circuit suggested there were two reasons for adopting jury instructions: first, because of the incompetence of the judges and second, it was felt that the lawyers should be permitted to participate in this critical stage of the trial. Soper, *The Charge to the Jury*, 1 F.R.D. 540, 543 (1940). If these were in fact the reasons for adopting jury instructions then the courts should return to the common law practice of charging the jury. Given the intended purpose of jury instructing and the failure of jury instructions to adequately fulfill this function, the fact that the attorneys are not totally precluded from participating in preparation of the charge, and that competent judges sit on today's circuit courts, the reasons for favoring instructions over charges have vanished and the practice of giving instructions should be discontinued.

⁵ The use of charges does not necessarily preclude the attorney from submitting instructions to be considered.

⁶ The author would like to express his appreciation to those circuit judges who cooperated with this survey.

is based on the results of that survey, but before the survey may be discussed, it is necessary to examine the problems affecting jury comprehension.

Factors Affecting Jury Comprehension

The viability of the jury system has been challenged for decades.⁷ The system, however, is the cornerstone of our judicial process and trial by jury is not likely to be abolished. Thus, the approach for improving the trial process should be focused on identifying and eliminating the problems with jury comprehension. The problem of comprehension has been separated into two segments: misconception by the jurors as to the role of the jury in the trial process and confusion on the part of the jurors as a result of the technical and complicated nature of instructions in general. Two studies discussed below illustrate these problems. The first study deals with the scope and reasons for the juror's misunderstanding and the second concerns the source of misunderstanding.

A 1976 study was conducted on behalf of the Pennsylvania bar to evaluate the usage and understanding of the Pennsylvania Standard Jury Instructions by jurors.⁸ A test was developed to assess the juror's understanding regarding the nature of his duty⁹ and the instructions given.¹⁰ To evaluate the extent of the juror's

⁷ Moffat, *As Jurors See a Lawsuit*, 24 OR. L. REV. 199 (1941). As early as 1941, a survey was conducted by Justice Moffat to study the relationship of judge and jury in the state court. The jurors were asked "Did the instructions of the court make clear to the jury the issue or issues between the parties so as to enable you to determine the fact or facts necessary to be found from the evidence in arriving at a verdict." *Id.* at 203. The results drew the following comment: "... much goes over the heads of the jurors or that the juror pays more regard to evidence than to the words of the court as given to him by way of instructions." *Id.* at 205. Part of the confusion was blamed on the technical language of the instruction and the method of organizing and reading of the instructions. *Id.* at 204. See also, J. FRANK, *COURTS ON TRIAL* at 108-45 (1949) for an interesting but scathing discussion of the jury system.

⁸ O'Mara & von Eckartsberg, *Proposed Standard Jury Instructions—Evaluation of Usage and Understanding*, 48 PA. B.A.Q. 542 (1977).

⁹ The nature of the duty involved the juror's responsibility to determine the facts, apply the law, and arrive at a verdict. *Id.* at 549.

¹⁰ The instructions were taken from the Pennsylvania Standard Jury Instructions. Eight specific instructions were given: Negligence, Reasonable Doubt, Accomplice, Legal Cause, Justification, Ordinary Care, Voluntary, and Concurrent

knowledge of his role in the trial process the jurors were asked, "Who decides questions of law?" and "Who decides questions of fact?"¹¹ The surveyors found that 21% had a clear comprehension of their role while 76% had partial clarity and 3% had a total lack of comprehension.¹²

To evaluate the comprehension of instructions the jurors were first requested to evaluate their "sense of certainty" regarding the correctness of the instructions and then to paraphrase the meaning of each instruction so the jurors' actual understanding could be measured.¹³ Eighty-three percent of the jurors thought they correctly understood the instructions given. However, when the researchers evaluated the jurors' objective comprehension of the specific instructions, their actual understanding ranged from 68% to 96%¹⁴ depending on the type of instruction.

Two conclusions were drawn from the results of the tests. First, in order to increase a jury's effectiveness, the jurors must be educated as to their proper role in the judicial system; secondly, the instructions must be given in light of the jurors' understanding and experience with the trial process.¹⁵

The second study was conducted to test pattern jury instructions against instructions rewritten "in accordance with empirical knowledge of what elements affect perception, memory, and comprehension of language."¹⁶ The elements were divided into four factors — vocabulary, grammar, organization,¹⁷ and timing. There

Cause. *Id.* at 550.

¹¹ *Id.* at 549.

¹² Jurors were clear as to who decided questions of law, but not quite as clear as to who decided questions of fact and to their role in arriving at a verdict. *Id.*

¹³ *Id.* at 550.

¹⁴ *Id.*

¹⁵ *Id.* at 556. Most jurors are not familiar with the language and practices employed in trials.

¹⁶ Elwork, Sales & Alfini, *Juridic Decisions—In Ignorance of the Law or in Light of it*. 1 LAW AND HUMAN BEHAVIOR 163, 163 (1977).

¹⁷ The structure of a charge is broken down into three components: vocabulary, grammar and organization. The vocabulary component has three variables to be considered in writing jury charges: the use of "legalese", the use of uncommon words and the use of concrete words in place of abstract terms (i.e. the use of the parties' names and the actual occurrence). By using familiar words the jurors' ability to recall is improved. The grammatical complexity of an instruction was thought to have an effect on comprehension and memory. The length, structure,

were seven groups tested. One was a control group that received no jury instructions, while the others received either pattern or rewritten instructions (written in recognition of the factors noted above) at different points in the trial.¹⁸

It was found that the jurors receiving the rewritten instructions scored significantly higher in their comprehension of the instructions.¹⁹ Furthermore, the rewritten instructions were found to be more effective in "helping the jurors to apply appropriate legal criteria to the facts of the case, and to integrate those beliefs into a correct verdict."²⁰ The procedural variable of timing was found to have affected the jurors' belief in two of three issues in the trial.²¹ It was concluded that by rewriting the instructions in accordance with empirical knowledge of the elements that affect comprehension, the jurors were able to "reach verdicts in light of the law rather than in ignorance of it."²²

It is imperative that the courts recognize and resolve these problems. It is difficult to expect the jury to properly function when the jurors are uncertain of what their duty is. In addition, instructions as to the law to be applied are of little value if they cannot be understood by the jurors. Under the present system, instructions are not prepared so much for the juror's understanding as they are for acceptance by the court and the interested parties. Thus, the system as it presently functions is contrary to its intended purpose.

There are several advantages in using jury charges, but the most important is the opportunity given the courts to design the charge in accordance with the empirical knowledge available and in light of the jurors' understanding and experience with the legal system. Any failure by the courts to take the opportunity to tailor

(use of independent and dependent clauses) and the use of active sentences (as opposed to passive) all have an effect on understanding. Finally good organization is essential for comprehension. Unstructured sets of instructions can cause repetition and lack of continuity. *Id.* It is essential the charges be written with these variables in mind.

¹⁸ The instructions were given before the evidence, after the evidence, and both before and after the evidence. *Id.* at 174.

¹⁹ *Id.* at 171-75.

²⁰ *Id.* at 176.

²¹ *Id.*

²² *Id.* at 163.

charges to the experience of the jury can only serve to weaken the function of the jury.

*Advantages of Jury Charges*²³

The terms, jury charges and jury instructions, are used somewhat interchangeably in practice; there is, however, a fundamental difference between the two terms. The major difference is that instructions are merely a collection of individual points of law submitted by the attorneys while the charge contemplates the obligation of the trial judge to instruct the jury in a well organized, shorter, more precise, and normally less biased statement of applicable law.

Jury instructions are not the best approach for a judge to fulfill his duty in aiding the jury to arrive at a proper verdict. Jury instructions usually

contain conflicting hypothetical statements of fact and conflicting views of the law, they tend to become technical and artificial, and give little aid to the jury even when legally correct; but they afford opportunity for the judge to make some reversible error, and thus fulfill the fervent hopes of counsel on the weaker side.²⁴

Jury charges offer a more practical alternative to jury instructions. The use of charges is advantageous in many ways. First, the charge is usually a more concise, unbiased statement of the law. The judge is removed from the controversy and is the only lawyer in the courtroom in a position to give an unprejudiced, objective charge to the jury. It is natural for a lawyer involved in his case to slant the instructions for his client. It is even conceivable that in some instances that a lawyer might find it advantageous for the jury to be confused or misled by the instructions. Instructing the jury merely becomes a game, another trial

²³ In West Virginia, instructions are preferred under statutory language, but the language is broad enough to give the judge discretion in using charges. W. VA. CODE §§ 56-6-19 to 22 (1966). The obligation is on the attorney to submit instructions to the court on approval. If no instructions are submitted, the court is under no obligation to charge the jury. While this Note discusses charges in terms of the present statutes, it advocates shifting the preference to charges and placing the duty on the trial judge to charge the jury.

²⁴ Soper, *The Charge to the Jury*, 1 F.R.D. 540, 542 (1940). As a result, the juries pay scant attention to this type of instruction.

tactic. There is no logical basis to permit instructions from doing anything more than clarifying the law.

Second, the jury studies discussed above illustrate that to a large degree the cause of misunderstanding is the technical wording and structure of the instructions.²⁵ A judge is continuously confronted with the opportunity to educate the juror. By virtue of his office, he is in the best position to understand the needs of the juror. Most importantly, he is in the position to structure the wording and style of the case in such a manner as to avoid technical legal expressions while defining in simple layman's terms the legal terms that cannot be avoided.²⁶

The charge will also eliminate the problems of stringing instructions,²⁷ particularly converse instructions. A juror is often faced with a lengthy discourse sometimes exhibiting two views on the same point of law, giving a seemingly inconsistent statement of law. The charge is not only more concise²⁸ (and thus better able to hold the juror's attention),²⁹ but also enables the judge to make the charge resemble a connected and coherent statement of the law. A final advantage of using a charge is, "it saves time and expense in reducing the number of disagreements and the number of new trials granted for error by the trial judge."³⁰ The charge can reduce a number of reversible errors by eliminating most of the prejudicial instructions.³¹

²⁵ O'Mara, *Standard Jury Charges—Findings of Pilot Project*, 43 PA. B.A.Q. 166, 171-72 (1972). "[F]actors such as verbosity or unfamiliar language may interact thus producing a detrimental effect on the jurors' comprehension of what is said; and a jury cannot judge what it does not understand!"

²⁶ Thomas, *Improvement in Charges to Juries*, 1 F.R.D. 141, 142 (1940).

²⁷ In most instances, instructions are given consecutively, in a grocery list fashion.

²⁸ See, note 25 *supra*. There were findings that a charge of undue length apparently has a negative effect upon juries.

²⁹ Soper, *The Charge to the Jury*, 1 F.R.D. 540, 542 (1940).

³⁰ *Id.* at 544.

³¹ At least reversals for biased instructions are reduced. It is questionable whether the reversible errors for inclusion or exclusion of law is affected. The use of charges should to some degree reduce this type of error. The judge would no longer be subject to reversal for failure to give a requested instruction. Having the duty to instruct the jury on all applicable law in the case he should be less inclined to giving insufficient or incorrect statements of law. (This is assuming statutory preference for instructions is shifted to charges.)

There are a few disadvantages to using charges rather than jury instructions. First, the judge will be required to spend more time in preparation for trial until he has developed his own set of charges over a period of time or until the promulgation of standard charges.³² Second, it is feared that by advocating the strict use of a charge, the attorneys might simply let the court research the applicable law.³³ This occurrence is doubtful. The use of charges does not preclude the attorneys from submitting to the judge their views as to the correct status of law. As a matter of fact, it would be foolish for an attorney not to aid the judge with his prior research of the law.³⁴ A third disadvantage might arise where the judge has developed a slight bias of his own and incorporates it into his charge.³⁵ Finally, the attorneys will probably claim that by eliminating instructions the court is taking a critical stage of the trial away from them.

We know already that jury instructions do not adequately perform the task they were meant to accomplish. Jury charges at least have the potential for fulfilling the court's obligation to both the jury and the parties. It places that obligation where it belongs—in the hands of the trial judge.

*Timing of Charges*³⁶

The timing of a charge is an important variable to be recognized. Studies examining the effect of repetition upon recall, and the differences between intentional and incidental learning,³⁷

³² There is a need for the West Virginia Supreme Court of Appeals to develop and adopt pattern charges.

³³ The concerns raised in the survey are discussed later in the Note.

³⁴ A pretrial conference should be held to discuss with counsel the charges to be given. The attorneys' preparation will have advanced well past the stage of determining applicable law.

³⁵ For example, where a judge feels strongly against recovery in slip-fall cases.

³⁶ There is no law in West Virginia which prohibits the trial judge from exercising his discretion as to the time of charging the jury. W. VA. CODE § 56-6-21 (1966) provides:

The court shall . . . prescribe the stages of the trial, at which instructions must be presented to the opposing counsel and to the court, at which objections may be made to charges and instructions prepared by the court, and at which the instructions and charge shall be settled by the court and read by it to the jury.

³⁷ Zerdy, *Incidental Retention of Recurring Words Presented During Audi-*

show that the traditional method and reasoning for giving instructions at the close of the evidence (or arguments) no longer exist.³⁸

a. Opening Charges

The opening charges should address two areas. It is appropriate to instruct the jury before the trial begins as to the nature of the case, the functions of the judge, jury, and attorneys, and the rules of conduct during the trial. This can be done quickly without prejudice to either side while educating the jury and relieving the anxiety normally present when one is in a strange environment. The charge should also include the fundamental legal principles upon which the particular case is based. Such standard charges as presumption of innocence, reasonable doubt, and other such charges³⁹ which may or may not be repeated in the final

tory Monitoring Tasks, 88 J. OF EXPERIMENTAL PSYCH. 82-89 (1971).

The study presented a list of 1440 common English words to students who were instructed to press a button whenever the "target" words appeared. There were twelve recurring words which served as criteria items on subsequent test of free recall and recognition memory. *Id.* at 83. The study involved three experimental variables which resulted in the following observations. Intentional learners were clearly superior in their retention than incidental learners. (Incidental learning involves the retention of stimulus material exposed to the learner in absence of explicit instructions to learn or remember the relevant material.) *See also*, note 16 *supra*, for additional authorities.

The giving of charges at the beginning increases retention by focusing the jurors' attention upon relevant evidence, however just because intentional learning increases the jurors' comprehension, the jurors' ability to perceive stimuli outside the scope of instructions is not necessarily diminished. Thus there should be no prejudice to the parties in any way.

A 1972 study found that while orienting stimuli (questions) focused the students' attention on the important aspects of the content and enhanced learning, the questions *do not* depress incidental learning and that in some instances it is increased. So intentional learning while increasing the juror's comprehension does not diminish their ability to observe the whole trial environment. Rothkopf & Kaplan, *Exploration of the Effect of Density and Specificity of Instructional Objectives on Learning from Text*, 63 J. OF EDUC. PSYCH. 295-302 (1972).

See generally Duchastel & Brown, *Incidental and Relevant Learning with Instructional Objectives*, 66 J. OF EDUC. PSYCH. 481-85 (1974).

³⁸ The notion that if instructions are given at the end the jurors will have them fresh in their minds completely disregards other variables affecting comprehension.

³⁹ A few of the other charges that might be given depending on the case—glossary of terms to be used, restriction of their consideration to the evi-

charge⁴⁰ should be given at this time. The opening charge should also contain the elements of the law on the substantive law in question. This charge should always be given at the end of the trial as well.

The opening charges may be delivered prior to the attorney's opening statements or in several stages, such as when the jury is impaneled, or before voir dire.⁴¹ The use of opening charges does not suggest discarding the practice of giving charges at the end of trial but produces an alternative measure to make those final charges comprehensible.⁴²

The objectives of opening charges are: (1) to enable the "jurors to be better able to distinguish the relevant evidence as it is being presented and to later remember it";⁴³ (2) to reduce the length of the final charge;⁴⁴ (3) to induce a better understanding of the legal system by the jurors and consequently a better public attitude; and (4) to improve the quality of the verdict.

b. Midtrial Charges

If the charges are to be given at both the opening and closing of a trial, why shouldn't the judge charge the jury during the course of a trial? Midtrial charges can be used just as effectively as opening and closing charges in educating the jury and guiding them to a proper verdict.

The following illustration will demonstrate the various functions of midtrial charges and their timing during the trial.

A owns a truck with which he delivers coal to surrounding areas. A speeding down I-64 passes C who is in the right hand

dence, matters concerning creditability, admonition as to outside conversation, newspaper accounts and how to weigh evidence. Prettyman, *Jury Instructions—First or Last?*, 46 A.B.A.J. 1066 (1960).

⁴⁰ It is entirely within the judge's discretion in determining whether any charge should be repeated.

⁴¹ Pope, *The Judge-Jury Relationship*, 18 Sw. L.J. 46 (1964).

⁴² See, note 18 *supra*. The highest comprehension scores resulted where the instructions were given at both the beginning and end of the trial (i.e. close of evidence.)

⁴³ *Id.* at 177.

⁴⁴ Some charges need to be read only once. (For example—functions of court and jury, burden of reasonable doubt.) It is a handicap rather than an aid to the jury to give a large number or lengthy instructions at the close of trial.

lane. Upon re-entering the right hand lane A collides with B who had just pulled off the access ramp onto the highway. B files suit against A and D, A's purported employer, for damages resulting from the collision. There is some question as to whether there is an agency relationship between A and D, and if so, whether A was acting within his scope of employment.

This factual pattern is not very complicated but it does involve legal concepts that can be very difficult for the jury to grasp. Midtrial charges would help resolve these problems.

At the pretrial conference the course of the trial is meticulously orchestrated. The parties by this time should have planned their trial strategy, identified their witnesses and generally be prepared for trial on the issues still in dispute. The judge should have prepared his charges and should at this time permit the attorneys an opportunity to examine and to enter any objections or suggestions they might have. After the opening charges by the trial judge and the attorneys' opening statements, the plaintiff will put on evidence for the jury. The first evidence to be presented (agreed upon at a pretrial conference) is whether an agency relationship existed. At this point, the judge charges the jury with the applicable law on agency. For example: Ladies and gentlemen of the jury, the plaintiff is about to present his evidence pertaining to the existence of an agency relationship between the defendants. To establish the existence of an agency there must be. . . . This takes one to two minutes at the most and enables the jury to focus upon the evidence with the applicable law in mind (intentional learning). Following the presentation of agency, the court will repeat the same procedure for the evidence presented by the plaintiff concerning negligence and comparative negligence.

After the plaintiff rests his case, it is the defendant's turn to present evidence. The judge has a decision at this point which is entirely within his discretion but may be requested by the counsel. The trial judge then determines whether to repeat the charges, which were given before the plaintiff presented his evidence, or refer to the previous charge indicating to the jury that the following evidence will be directed to that area, or say nothing. If the judge feels it is necessary to help the jury to follow the evidence, or that it might prejudice one of the parties then he should take a minute or two and repeat the charge. This proce-

ture is repeated for each issue presented.

During the defendant's presentation of evidence on the negligence issue, the defendant seeks to introduce the deposition of C under Rule 32 of the West Virginia Rules of Civil Procedure. The trial judge should instruct the jury as to why the deposition is being introduced, what it may be used for, and its possible effect. As part of the defendant's presentation of damages, the defendant calls P, a physician, to the stand and attempts to establish his credentials as an expert. The judge should instruct the jury on the significance of an expert witness and the effect of his testimony.

Before the closing arguments, the judge should always give his charge on the issues that are still within the province of the jury. These are only a few examples of midtrial charges.⁴⁵ They are not needed for every trial and should be left to the judge's discretion.

Trial judges in West Virginia rarely use midtrial charges for several reasons.⁴⁶ In West Virginia the circuit judges are not permitted to comment on the evidence. Some judges see midtrial instructions as a fine line between commenting on the evidence and instructing the jury. Another area of concern is that the instructions are thought to constitute unwarranted judicial domination and interference which result in prejudice to the parties by overemphasizing particular bits of evidence and testimony. Two final objections to midtrial charges are the possibility of redundancy and the likelihood of a piecemeal approach. These objections are unwarranted. Midtrial charges should not be construed as an attempt to comment on the evidence; they merely state the applicable law in an unbiased manner or explain a procedural rule. The concern over judicial domination is legitimate but should not be a deterrent to using midtrial charges.⁴⁷ The judge is not only permitted to participate in the trial but it is his duty to direct its orderly progress. Part of this duty is to keep the jury informed and it should not constitute error for the judge to explain various

⁴⁵ Other suggested uses: to explain affidavits and depositions used to impeach witnesses, cautionary instructions, and explanation of rulings.

⁴⁶ See survey question three in text accompanying notes 56-57 *infra*.

⁴⁷ See survey question five in text accompanying notes 62-65 *infra*—which outlines guidelines for the use of midtrial instructions.

aspects of the trial as long as the participants are not prejudiced. The judge is hardly insensitive to the courtroom atmosphere and the flow of the case; therefore, he should be able to neutralize any possible hint of prejudice. The final objections need to be weighed against the values of using midtrial charges in a complex case or factual situation. By utilizing pretrial conferences, any potential difficulties or questionable areas may be smoothed over. Once the trial judge becomes accustomed to using midtrial charges and adept at handling problems, the benefits will far outweigh any objections to their use.

SURVEY — THE USE OF JURY CHARGES IN WEST VIRGINIA

Charges are already used in a few West Virginia circuit courts. A survey was sent to each circuit court judge in West Virginia to determine to what extent charges were used and the judges' opinions concerning the timing and use of charges.⁴⁸ The survey was not intended to prove which method of "instructing" the jury was best, but rather to elicit responses concerning which method was used, what problems were encountered, and which guidelines were used for "instructing" the jury.⁴⁹ Seventy percent of the judges⁵⁰ responded to the survey.

Question 1:

- (A) *Do you employ the use of jury charges?*
*If no, what method do you employ?*⁵¹

- (B) *Would you be opposed to the mandatory use of jury*

⁴⁸ The entire survey is set out in Appendix A. The survey was designed to elicit a yes/no response, but space was given to permit the judges to comment or qualify their answers. Most judges did choose to spend some time commenting on the use of charges. The quality of their responses were excellent and reflected a concern for the fallacies of both jury charges and jury instructions and their effect upon both the judge and jury.

⁴⁹ Just as some are strongly opposed to the use of jury instructions, some are equally opposed to the use of jury charges. This survey tried to establish the areas of differences and concerns.

⁵⁰ Surveys were sent to all judges sitting during the 1978 term. Thirty-eight of the fifty-six judges answered the survey which was conducted within a three week period.

⁵¹ If the answer was no, the judges were asked to list what method was employed. As expected, it was answered "jury instructions submitted by counsel."

charges? (As opposed to the use of jury instructions)

The use of charges was almost equally divided, 55% of those responding did not use charges, while 45% answered that they did use charges. This last figure could tend to be misleading because very few judges who employed jury charges did so 100% of the time.⁵² Several responses indicated that although the particular judge employs jury instructions, these instructions are frequently amended, modified and rearranged to resemble a connected and coherent charge. Some judges give their own charges to supplement the jury instructions submitted by counsel.

The second part of the first question on mandatory charges was designed to probe the judiciary's attitude towards abolishing the use of jury instructions and replacing them with charges.⁵³ Fifty-five percent of those judges responding to the question were opposed to the use of mandatory charges while 45% did not object. The judges who answered that they used jury instructions only were equally split on whether the use of charges should be mandatory. Of the judges who actually used charges, 65% said they would not favor a mandatory requirement of charges. It was felt that mandatory charges would place too great a burden on the judge and court to cover every phase of the case because without adequate staff and clerks to assist the judge in preparing a jury charge for each trial, an inadequate administration of justice

⁵² See Appendix B for a compilation of the responses. Close scrutiny of the returns revealed an interesting trend. Of the judges who employed charges, 80% were from the judicial circuits in the northern part of the state, while 70% of the judges who used instructions sit in the southern circuits of the state. The pattern was clear enough to conclude that the practice of the southern part of the state utilizes jury instructions, while the practice of the northern part utilizes a mixture of charges and instructions. The southern judicial circuits are the circuits in Charleston and south thereof. The reason for the discrepancies in percentages is the slight variation in responses from the two parts. Fifty-five percent of the responses were from the northern circuits while 45% were from the southern circuits. The southern part of the state appears to be a little more traditional than the northern part of the state; the author does not know the reason for this division. One judge made the following observation of differences in jurisdictions: either the judicial circuit had always traditionally employed the charge/instruction method or the judge had considerable federal court practice.

⁵³ See, note 23 *supra*. This does not preclude attorneys from submitting instructions to the court to either give the court guidance or serve as a foundation for the charge. However, the court would be under a duty to give applicable instructions on all salient points of law the jury needs to make its decision.

would result. A second concern was the role of the opposing counsel. The use of charges would reduce the right or opportunity of the attorneys to fully participate at this critical stage. It was also observed that counsel was better prepared to submit law covering their theory of the case. However, some judges expressed a concern that the attorneys would depend too greatly upon the court to research the law of each case; time for which the court did not have. Several judges said that development, promulgation, and acceptance by the West Virginia Supreme Court of Appeals of stock pattern jury instructions would solve some of these problems.⁵⁴ Another criticism was that in simple cases lengthy charges would not be appropriate.⁵⁵

The judges who were not opposed to mandatory charges commented that a jury charge was more intelligible than a jury instruction, and was usually fairer for litigants in that it did not depend upon the diligence of attorneys to prepare proper instructions.

Question 2:

- (A) *Do you give general charges to the jury prior to trial?
—as to the nature of the case —standard charges*
- (B) *Would you be opposed to mandatory opening general charges?*

In response to (A), 65% replied that they gave pretrial charges/instructions, but most qualified their answer. Nearly one-half of those who commented said that they gave charges only to the nature of the case, the functions of the judge, jury and attorneys, and the rules of conduct during the trial of the case. Very few gave charges as to the standard presumptions and particular law applicable to the trial. The second part of the question asked for the judge's attitude on mandatory opening charges. The same percentage of judges who indicated that they used opening charges were not opposed to mandatory opening charges, but they were not necessarily the same judges who responded that they used opening charges.

Both views were defended in the judges' comments. Some

⁵⁴ One such set in 1963 were refused by the West Virginia Supreme Court of Appeals.

⁵⁵ However, neither would they be needed.

judges believed that opening charges were necessary to inform the jurors what to look for in the presentation of evidence and how to weigh the evidence. It was felt that the length of the final charge would be reduced, making it easier to follow and less confusing, if an opening charge was given. On the other hand, some judges felt that any mandatory requirements were a burden and that the use of charges would be better left to the discretion of the judge, depending upon the type of case. Finally some judges considered opening charges to be prejudicial, duplicative and a waste of time since many of the same charges were required to be repeated at the close of trial before final arguments of counsel.

Question 3: (A) *Do you employ the use of midtrial instructions?*

(B) *If no, are you steadfastly opposed to the use of midtrial instructions?*

(C) *Do you perceive any problems utilizing this practice as far as the rights of a criminal defendant?*

The judges were generally in agreement in the area of midtrial instructions. Only 18% answered that they used midtrial instructions. Those judges employing midtrial instructions did so only when necessary to explain the use of depositions, affidavits or expert witnesses or to explain rulings of the court. The judges who did not use midtrial instructions were asked whether they would be steadfastly opposed to their use.⁵⁶ Less than 25% replied that they would consider the use of midtrial instructions.⁵⁷ Those who were steadfastly opposed to midtrial instructions believed the charges would overemphasize particular parts of the evidence and testimony and would cause too much judicial domination and influence during a trial. Some judges felt that they were simply not needed and would create another problem area in a trial which was already complicated enough.

The last part of the third question focused upon a particular

⁵⁶ Note that the question did not suggest mandatory use of instructions, but asked rather would the judge in his discretion consider using midtrial charges if they proved to be helpful.

⁵⁷ About 35% of the judges who responded to this survey, use or would consider using midtrial charges.

area of concern, prejudice to a defendant in a criminal trial. The question asked the judges if they perceived any problems utilizing midtrial instructions as far as the rights of a criminal defendant. A substantial majority answered that they felt the defendant's rights would be effected. They believed that prejudice might result from undue emphasis on a particular testimony or presentation of evidence where a judge had given an instruction and then no evidence had been presented covering the instruction. Once again it was felt that prejudice could result from undue influence of the court becoming too involved in the trial and from giving piecemeal instructions. It was believed that the jury should be left free to make their own decision in evaluating the weight of the evidence. Some judges thought that there would be no problems if one was careful. Errors could be minimized by holding in-chamber discussions on questionable areas prior to the giving of the instruction.

Question 4:

- (A) *Do you utilize any type of pattern jury instructions?*
- (B) *If yes, do you feel that they are satisfactory in terms of:*
 - jury comprehension*
 - correct application of law*
 - time efficiency*

Nearly half of those who responded said they utilized different pattern instructions in some manner to formulate their charge.⁵⁸ Some used the criminal instructions prepared by the West Virginia Supreme Court Committee,⁵⁹ some used the "Federal Jury Practice and Instructions" and a few adopted instructions from other states.⁶⁰ Some judges felt that the instructions were satisfactory in terms of correct application of law and time efficiency, but a few judges did not feel that the pattern instructions increased jury comprehension.⁶¹

⁵⁸ Many judges had developed and used their charges over a period of time.

⁵⁹ But as noted before, they were not subsequently approved by the West Virginia Supreme Court of Appeals.

⁶⁰ Quite a few judges commented that they would like for the West Virginia Supreme Court of Appeals to promulgate and approve a set of pattern jury instructions because most attorneys mechanically copy many of the pattern instructions anyway and then offer them as instructions.

⁶¹ Pattern instructions do not necessarily resolve the problems with vocabu-

Question 5: *What guidelines do you use or suggest for the timing or method of communication of the charges to the jury?*

The resulting guidelines are developed from the responses to the survey and other sources. These guidelines are suggested for the development and use of charges. 1) The charge should be worded and structured in a manner designed for maximum comprehension by jurors.⁶² The judge is in the best position to receive feedback from the jurors and a stock charge should eventually evolve from his efforts to develop a charge that is understood and applied by the jurors. 2) The charge should be presented in an unbiased manner. 3) The judge should arrange the order of the charges so they are connected and coherent. 4) The lawyers should have an opportunity in the pretrial conference to submit suggestions for changes to the charges developed by the court, or to enter their objections to those charges. Both parties and the judge should be far beyond the stage of preparation in determining the applicable law.⁶³ 5) The charge should not be of excessive length and should be as concise as possible. 6) The final charge should at minimum contain the pertinent elements of substantive law.

Guidelines for the timing of charges have also been developed. For opening charges, the jurors should be instructed at several different stages prior to the opening arguments.⁶⁴ When the

lary, grammar, and sentence structure. In developing pattern instructions this should be as great a concern as discerning correct law.

⁶² See note 17, *supra*.

⁶³ The attorneys should be permitted to present instructions if they wish to go through this formality. The judge who already has the correct determination of law embodied in his charge should merely note his refusal of the accepted instructions. Since the judge has correctly covered the law in an unbiased manner it should be difficult for an appeal for reversal to be sustained for where is the prejudice to the party. Should the judge be incorrect in his assessment of the law the traditional use of instructions would not in any way affect his beliefs. It is doubtful that the judge would permit an instruction contrary to what he believes is the status of the law and which would subject the entire trial to reversal. While it may be argued instructions call this to the judge's attention, the use of charges permit counsel to suggest changes the charges and objections and thus fulfilling the same function. If the judge is mistaken, then he is mistaken regardless of the type of instruction given.

⁶⁴ Pope, *The Judge-Jury Relationship*, 18 Sw. L.J. 46 (1964).

entire panel is sworn in, the judge should speak to the jurors concerning their roles as jurors and the standards of jury conduct which they are expected to follow.⁶⁵ Before voir dire the judge should charge the jurors as to the general nature of the case, what the following proceeding entails and the rules of conduct to follow. After a jury is sworn in, the judge should go over the above charges if he has not done so, and may repeat them if he feels it is necessary. At this stage most of the opening charges should be given. The trial procedure should be given as well as a general statement of applicable law concerning this case. Any standard charges pertinent to the case should be given. Included is a definition of terms that might be used; charges covering presumption of innocence, burden of reasonable doubt, how to weigh the evidence and other charges of this nature should be given. By giving the charges in stages the jurors are not given a tremendous amount of materials to digest at once. The charges are short, and should reduce the final charge to the point that only applicable substantive law need be stated. It is more important that the charges be given at a stage where the jury needs to be instructed.

Several guidelines were suggested for the use of opening charges after the jury was sworn in. 1) Counsel should be present and have an opportunity to suggest opening charges. 2) The opening charges should be short, brief, and not too detailed with specifics of the case, but rather in general terms. 3) The basic requirements for the plaintiff and defendant should be stated; in criminal cases the state's and defendant's requirements. 4) The charges should take no longer than five to fifteen minutes. 5) The judge should use his discretion in giving opening charges, for not all cases need them. This is especially true where it is a simple case and the jury has previous jury experience. The court may not want to separate the opening charges into three stages, but if it does not, the jury should at least be charged after it is sworn in for the trial.

The following guidelines for midtrial charges are offered. 1) Use midtrial charges only when absolutely necessary to insure jury comprehension. 2) The charge given should be very specific.

⁶⁵ *Id.* at 47. Judge Pope also lists several other explanations that would be helpful as well, for example; physical arrangement of courthouse, hours of work, where to report and probable length of service.

3) The judge must be careful not to emphasize any personal views on the weight of the evidence, credibility of the witnesses, or in any way invade the province of the jury. 4) The judge must be very careful of timing, and the charge must be given at the appropriate place just prior to the introduction or raising of the issue. 5) The attorneys should be consulted before use. 6) Pretrial conferences or in-chamber discussions should be utilized to smooth over any difficult or questionable areas. Reversible errors concerning midtrial charges could be minimized if the preceding guidelines are kept in perspective.

CONCLUSION

Jury instructions are ineffective in giving the laymen of the jury a sufficient grasp of the legal criteria to be used in evaluating the facts of the case. The continued use of instructions only perpetrates reversible errors generated by technically incorrect instructions or instructions improperly tendered by the trial judge. Instructions to the jury should perform their intended communicative function, not merely serve as a trial tactic for opposing attorneys.

The use of a charge gives the trial judge the opportunity to phrase instructions in a manner that can easily be understood by the jury. The preconceived notions underlying the traditional giving of instructions at the close of evidence and the potentially harmful effect of repetition of instruction are no longer valid concepts. As long as the charges given are consistent, repetition can only enhance jury comprehension. The use of opening and mid-trial charges gives the jury an opportunity to view the evidence and testimony in light of the applicable law and enables the jury to evaluate the facts of the case by the appropriate legal criteria. The utilization of a charge also educates the jurors as to the trial process, thus fostering a more favorable attitude toward the judicial system.

The concern expressed by some of the judiciary as to the use and timing of certain charges is, no doubt, legitimate, but these reservations should not deter the utilization of jury charges. A proper charge does no more than state the applicable law or explain a procedural rule in an unbiased manner. The existing statutory preference favoring instructions should be shifted to favor the use of charges. Regardless of change, however, the discretion

rests with the trial judges on whether or not to use charges. The trial judge has a duty to assist the jury in reaching a just and proper verdict. The time has come to fulfill this obligation.

J. Patrick Jones

APPENDIX A

SURVEY—USE OF JURY CHARGES

Since the term jury charges and instructions are used somewhat interchangeably in both practice and the survey below, the term charge is meant to be taken in the following context: a direction or address of the law formulated by the judge and given to the jury. (This does not preclude the modification of submitted instructions.) (A charge is normally less biased than jury instructions.)

1. (A) Do you employ the use of jury charges?

No_____ Yes_____ Approx. %_____ (of cases)

If no, what method do you employ?—

- (B) Would you be opposed to the mandatory use of jury charges? (As opposed to the use of jury instructions)

No_____ Yes_____

Comment—

The next question pertains to the practice of addressing the jury at the beginning of the trial in terms of a) the nature of the case b) standard charges (for example: burden of reasonable doubt.)

2. (A) Do you give general charges to the jury prior to trial?

No_____ Yes_____ — as to the nature of the case
— standard charges

- (B) Would you be opposed to mandatory opening general charges?

No_____ Yes_____

Comment—

The term midtrial instructions is used to describe the practice of charging the jury with the applicable law in anticipation of the use of forthcoming evidence. (For example: in anticipation of the use of expert testimony, in anticipation of proof of elements of the law, i.e. duty, premeditation)

3. (A) Do you employ the use of midtrial instructions?

No_____ Yes_____

- (B) If no, are you steadfastly opposed to the use of midtrial instructions? _____ Comment—

- (C) Do you perceive any problems utilizing this practice

as far as the rights of a criminal defendant? _____
Comment—

4. (A) Do you utilize any type of pattern jury instructions?

No_____ Yes_____

Comment—

- (B) If yes, do you feel that they are satisfactory in terms of:

—jury comprehension

—correct application of law

—time efficiency

5. What guidelines do you use or suggest for the timing or method of communication of the charges to the jury? (in terms of employing opening and midtrial charges)

APPENDIX B

Appendix B categorizes the survey responses. Thirty-three of the responses were included in this computation. Five responses were returned after the responses were tallied and were not included in these results, however they closely parallel the overall results.

1(a)	Uses Charges		Uses Instructions	
	North	South	North	South
	12	3*	6	12

Mandatory Charges				
(b)	Opposed	Not Opposed	Opposed	Not Opposed
	10	5	8	10

*One judge used charges for criminal cases only, and another only charged the panel at the first of the term.

2(a)	Do Not Give General Opening Charges/ Instructions	Give General Opening Charges/Instructions
	13	20*
	Mandatory Opening Charges	

(b)	Opposed	Not Opposed
	20	13

*Eight of the charges/instructions were just for the nature of the case.

3(a)	Do Not Use Midtrial Instructions	Use Midtrial Instructions
	27	6*
(b)	Would Consider Using Midtrial Instructions	Steadfastly Opposed To Midtrial Instructions
	12**	15
(c)	Would Not Prejudice Criminal Defendant	Would Prejudice Criminal Defendant
	10	17

*Only to explanation of expert witnesses, depositions, affidavits, and rulings of the court.

**Includes the six judges who already use midtrial instructions. Several judges did not answer subdivisions (b) and (c).