

# The Texas Pattern Jury Charges— A Plain-Language Project

## The Writing Consultant's View

By Wayne Schiess

### Introduction

In 2005 and 2006, a plain-language task force prepared a revision to a set of Texas jury instructions, mainly the admonitory instructions, from the state bar's Pattern Jury Charges. The task force included a practicing lawyer, a law professor, a judge, a state-bar publishing director, and a legal-writing teacher. It produced a set of revised instructions that were tested alongside the original instructions on two groups of mock jurors.

The task force hired Wayne Schiess, director of legal writing at the University of Texas School of Law, as the legal-writing expert and drafter. This piece discusses the project and the drafting work.

### Concerns with the Original—Just a Few

The original admonitory instructions were in good shape; they were not filled with legalistic jargon or with hyperformal constructions. In the main, the original text was well written and clear. This is good news for the original instructions, for those who prepared them, and for the jurors who had to listen to and obey them.

But that good news made the job a challenge. To improve something that is already good is difficult. And the results of the juror testing might not show a dramatic improvement. Still, we made the effort.

### The Revision—Main Goals

To improve the instructions, the drafter focused on the following plain-language principles:

- Eliminate legal jargon, unnecessary legal terms, and unusual legal terms.<sup>1</sup>
- Make the text more immediate and vigorous by using "I" and "you" more consistently.<sup>2</sup>

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"Plain Language" is a regular feature of the *Michigan Bar Journal*, edited by Joseph Kimble for the Plain English Subcommittee of the Publications and Website Advisory Committee. Want to contribute a plain-English article? Contact Prof. Kimble at Thomas Cooley Law School, P.O. Box 13038, Lansing, MI 48901, or at kimblej@cooley.edu. For an index of past columns, visit [www.michbar.org/generalinfo/plainenglish/](http://www.michbar.org/generalinfo/plainenglish/).

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- Cut back on unnecessary formality in tone,<sup>3</sup> by reducing nominalizations, reducing passive voice, and simplifying complex vocabulary.<sup>4</sup>
- Provide consistency, and where consistency would lead to repetition, avoid unnecessary repetition.
- Shorten sentences.<sup>5</sup>
- Reorder the text for logic and comprehension.
- Provide examples or explanations in some places.

After the drafter prepared a draft revision, he tested it informally on several nonlawyers and received many suggestions. (In these informal surveys, the revised version was better received than the original.) After further revision, he circulated it to other legal-writing teachers and some former litigators. He then made more revisions and circulated that revision to members of the task force.

Task-force members, particularly the judge and a judicial colleague of the judge, were very helpful in making suggestions and in offering real-world scenarios that allowed the drafter to focus the language of the instructions. After another revision, a second round of comments from the task force, and more revisions, the draft was given to two members of the Texas Supreme Court, who made valuable recommendations. The draft was then laid aside for a time, and testing on the original began.

The first test of the original raised a few small matters, and the drafter made more changes to the revision. Finally, during further testing of the original instructions, we learned even more and made final changes to the revision. Thus, in all, the revision went through eight drafts.

### Comparing the Original and the Revision

Although numerical scores are of limited value and cannot be the main goal, the revision did improve upon the original as follows:

Original	Revision
Words per sentence: 22	Words per sentence: 15
Flesch score: 54	Flesch score: 66
Flesch-Kincaid grade level: 11	Flesch-Kincaid grade level: 8

Perhaps the best way to report on the kinds of changes made is to show several examples side by side:

Original	Revision
Do not conceal information or give answers which are not true. Listen to the questions and give full and complete answers.	Be honest when the lawyers ask you questions, and always give complete answers.
Do not make personal inspections, observations, investigations, or experiments nor personally view premises, things or articles not produced in court.	Do not view or inspect places or items from this case unless they are presented as evidence in court.
If you do not obey the instructions I am about to give you, it may become necessary for another jury to re-try this case with all of the attendant waste of your time here and the expense to the litigants and the taxpayers of this county for another trial.	If you do not follow these instructions, I may have to order a new trial and start this process over again. That would be a waste of time and money, so please listen carefully to these instructions.
We shall try the case as fast as possible consistent with justice, which requires a careful and correct trial.	I assure you we will handle this case as fast as we can, but we cannot rush things. We have to do it fairly and we have to follow the law.

One significant place in which the instructions were changed was in the definition of circumstantial evidence. Relying on ideas from the revised California instructions, we revised the instructions as shown on the right:

Original	Revision
A fact may be established by direct evidence or by circumstantial evidence or both.	During the trial, you will hear two kinds of evidence. They are direct evidence and indirect evidence.
A fact is established by direct evidence when proved by documentary evidence or by witnesses who saw the act done or heard the words spoken.	Direct evidence means a fact was proved by a document, by an item, or by testimony from a witness who heard or saw the fact directly. Indirect evidence means the circumstances reasonably suggest the fact. Indirect evidence means that based on the evidence, you can conclude the fact is true. Indirect evidence is also called "circumstantial evidence."
A fact is established by circumstantial evidence when it may be fairly and reasonably inferred from other facts proved.	For example, suppose a witness was outside and saw that it was raining. The witness could testify that it was raining, and this would be direct evidence. Now suppose the witness was inside a building, but the witness saw people walking into the building with wet umbrellas. The witness could testify that it was raining outside, and this would be indirect evidence. A fact may be proved by direct evidence or by indirect evidence or by both.

## Testing

A jury-consulting firm called Courtroom Sciences, Inc., in Dallas, Texas, handled the testing.

The original instructions were used in a mock mini-trial conducted in front of 48 eligible jurors from Dallas. An actor playing a judge read the admonitory instructions to the jurors, and they received copies. They listened to two lawyers argue a case, after which the judge read them a charge specific to the case; they then retired to deliberate in groups of 12.

The jurors deliberated, filled out a verdict form, and returned to the courtroom, where they completed a questionnaire that asked them about the instructions.

The revised instructions were then used for another 48 jurors. Courtroom Sciences created the same mock mini-trial, used the same judge and attorneys, and presented the same case. These 48 jurors completed the same steps as the first 48.

The results of the questionnaires were compiled and summarized in a report prepared by Courtroom Sciences. This proprietary document has not been released by the task force, but I summarize some of it here.

The questionnaires had two types of questions: (1) general, subjective questions (were the instructions simple, readable, understandable, etc.) and (2) specific, objective questions (what is indirect evidence) with multiple-choice options.

On the general, subjective questions, the revised instructions scored well, especially given that the original was already moderately clear and plain. The questionnaires asked 8 questions related to general comprehension for 3 separate sections of the instructions, for a total of 24 questions. The revised instructions scored better than the original on 22 of the 24 questions. Courtroom Sciences told us that only 6 of those higher scores were statistically significant. But it is significant that the revision scored better 22 out of 24 times.

On the specific, objective questions, which sought correct answers, the questionnaire asked a total of 32 questions about the 3 sections of admonitory instructions and about the verdict form. Jurors using the revised instructions got a higher number of correct answers on 23 of those 32 questions.

## Problems

Three minor problems made the project a challenge and probably limited the effectiveness of the revised instructions.

First, the judges on the task force resisted some changes; they wanted the revised instructions to be more formal. They would not allow the use of contractions, for example. One judge said—

This is an instruction from a judicial officer to lay persons under his/her control. (Only one step below an order). The tone needs more formality and seriousness. It should not take on the character of a discussion among equals.

Second, the judges on the task force prevented the drafter from dropping the word *preponderance* from the revised instructions

and also from creating a new definition for the term *preponderance of the evidence*. This was despite evidence from the drafter's informal testing that nonlawyers often do not understand the term. One nonlawyer volunteer who read an early draft of the instructions was particularly confused by the word *preponderance*:

Why would I pre-ponder the evidence? I thought I was supposed to wait until I got into the jury room to ponder the evidence.

Third, because we believed that testing the revised instructions on jurors who had already read and used the original instructions would skew the results, we tested the revised instructions on a different set of jurors. We needed to do it this way, but it would have been meaningful to have been able to ask jurors to compare the two versions directly.

## Conclusion

The project was expensive and time-consuming (the jury consultant and the mock-jury arrangements were costly), and the results were modest. The task force chairs do not even want to release the report. Plain-language reform for the Texas Pattern Jury Charges was put on hold.

**Update:** In 2009, the task force went back to work. Although slightly bogged down with work on new provisions for the admonitory instructions (concerning the Internet, cell phones, note-taking, and foreign-language interpretation), the task force is continuing to revise the admonitory instructions. We are closer than ever to having the improved instructions come before the Texas Supreme Court's Advisory Committee.

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*Wayne Schiess is the director of legal writing at the University of Texas School of Law in Austin. He is the author of more than two dozen articles on practical legal-writing skills, plus four books, and he served as the drafting consultant for the Texas Pattern Jury Charges Plain-Language Task Force. Find him at <http://legalwriting.net>.*

## FOOTNOTES

1. See Tiersma, *Communicating with juries: How to draft more understandable jury instructions*, 10 *Scribes J Legal Writing* 1, 9 (2005–2006).
2. Flesch, *How to Write Plain English: A Book for Lawyers and Consumers* (Harper & Row, 1979).
3. Kimble, *Lifting the Fog of Legalese* (Carolina Academic Press, 2006), p 132.
4. Tiersma, *supra*, p 12.
5. Wydick, *Plain English for Lawyers* (5th ed, Carolina Academic Press, 2005), p 33.