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Maryland Criminal Pattern Jury Instructions

by Byron L. Warnken

Jury instructions have two audiences. One audience is composed of petit jurors, who must listen to, understand and apply jury instructions in reaching a verdict. The other audience is composed of appellate judges, who must rule upon the applicability and correctness of jury instructions.

Historically, jury instructions have been drafted for the second audience. If the first audience was able to benefit from the instructions, so much the better, but the audience that *had* to be satisfied was the second. Even when writing for the appellate court audience, the instructions were not necessarily good. Frequently, they were modeled after those instructions previously reviewed by an appellate court and found not bad enough to constitute reversible error.

In recent decades, jury instructions have been changing. An ever increasing number of jurisdictions have created pattern jury instructions. Pattern jury instructions typically differ from other instructions in two ways—one is the drafter and one is the audience. Pattern jury instructions are not drafted by a busy litigator, who, in the heat

of battle, must hastily draft instructions, which are naturally slanted to his or her position. Nor are they drafted by a busy trial judge, who, likewise in the heat of battle, must hastily reconcile the “slant” of each side. Hastily drafted instructions “once removed” occur when both counsel say, “Your Honor, just give your usual instructions,” and the trial judge pulls out the “reconciliation” from a prior case and hastily modifies it to the present case.

Obviously, the bleak picture portrayed above does not happen all of the time and perhaps not even a majority of the time. Many counsel and many trial judges use thoroughly researched, carefully drafted and properly tailored instructions. Many of these quality instructions are subsequently adopted, in whole or in part, as pattern jury instructions. However, the point is that the scenario previously described has been too frequent to be ignored.

Pattern jury instructions are usually drafted by a committee of attorneys and judges, selected because of their demonstrated expertise and interest. Committee membership usually reflects a balance be-

tween plaintiff and defense perspective for civil instructions and between prosecution and defense perspective for criminal instructions. Instructions are typically accompanied by some or all of the following: text with supporting case, enacted and secondary authority; reasons why the committee took or failed to take a certain approach; recommendations as to when, how and why to use or not use a particular instruction.

In Maryland, a committee of the State Bar Association drafted civil jury instructions beginning in 1975, publishing the Maryland Civil Pattern Jury Instructions in 1978. Following annual supplements, a second edition was published in 1984.

A similar committee process began in December 1981 for criminal jury instructions. The first portion of the Maryland Criminal Pattern Jury Instructions was published in February 1986. This portion contains the introductory, cautionary, general and evidentiary instructions. The second portion, covering offenses, defenses and verdict sheets is scheduled for publication by the end of 1986.

Most of the instructions have been worked and reworked numerous times before final approval. Every word and phrase has been carefully analyzed to determine whether the instruction properly and unambiguously conveys the law and its application, explained in a manner that is readily understandable to an individual who has no legal training and perhaps even relatively little formal education. At the same time, every word and phrase has been carefully analyzed to determine whether the instruction can withstand the scrutiny of multiple levels of appellate review.

Occasionally, the task of satisfying both audiences at the same time has entailed painstaking effort in drafting, followed by discussion and debate, followed by redrafting and further discussion. For example, "malice" is a term of art of utmost significance in the law of homicide. It has one meaning in the law and a quite different meaning in everyday usage. This problem combines with the need to convey numerous concepts in the "negative" within the meaning of malice. These problems combine with the need to develop a "configuration" of multiple instructions for a homicide case involving murder, degrees thereof, manslaughter, imperfect defenses, perfect defenses, lesser included offenses, etc. The committee has invested five or six meetings of three plus hours just on homicide, which does not count the time devoted to the death penalty.

The committee's work has involved the

following steps. After preliminary approval by the full committee, all instructions are referred to the subcommittee on style for uniformity in style, language, approach, etc. All instructions are reviewed for style at least twice. Following that, the instructions return to the full committee for approval. Following full committee approval, the instructions go to about a dozen "outside readers" among the bench and bar, as well as an English professor. Following that, the instructions go back to the committee for final approval.

Once published, the instructions do not eliminate all of the work of the trial counsel and trial judge. Each case requires careful determination of which instructions apply and which are not applicable. Of those instructions applicable, a determination must be made as to whether the instruction, as drafted, satisfies the need. Obviously, an instruction drafted outside the context of a given case cannot satisfy, without modification, the needs of every case. Also, it must be decided what, if any, instructions are needed for a given case for which no "pattern" instruction has been provided.

Suffice to say that the work of the committee can provide a substantial portion of the final package of instructions for most cases. This tool, when properly used, can be of great service to the trial counsel, the trial judge, the appellate judges and—yes—the lay jurors.

Byron Warnken is the Reporter for the *Maryland Criminal Pattern Jury Instructions*. He is an Assistant Professor of Law at the University of Baltimore School of Law, where he has taught since 1977. His courses include, among others, *Criminal Law and Constitutional Criminal Procedure*. He has lectured on these subjects in seven states.

The current membership of the *Maryland Criminal Pattern Jury Instructions Committee* is the Honorable Irma S. Raker, Chair, Circuit Court for Montgomery County; Fred Warren Bennett, Esq., Federal Public Defender for Maryland; Deborah K. Chasanow, Esq., Chief of the Criminal Appeals Division of the Maryland Attorney General's Office; the Honorable Howard S. Chasanow, Circuit Court for Prince George's County; M. Michael Cramer, Esq., private practitioner; Karl G. Feissner, Esq., private practitioner; Alan J. Goldstein, Esq., private practitioner; Deborah E. Jennings, Esq., private practitioner; the Honorable Jacob S. Levin, Circuit Court for Prince George's County; the Honorable Charles E. Moylan, Jr., Court of Special Appeals of Maryland; the Honorable Joseph F. Murphy, Jr., Circuit Court for Baltimore County; Andrew L. Sonner, Esq., State's Attorney for Montgomery County; and the Honorable Raymond G. Thieme, Circuit Court for Anne Arundel County.





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