

## **Contemporary Pattern Jury Instruction Committees: A Snapshot of Current Operations and Possible Future Directions**

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The jury is an indispensable part of the American legal justice system. The federal Constitution and all state constitutions provide criminal defendants and many civil litigants the right to trial by jury. Yet this right has little meaning if jurors do not properly understand the law that governs their decisions. Jury instructions must therefore communicate the law to jurors clearly and accurately.

In the past, jury instructions were drafted on a case-by-case basis. The attorneys for each side would submit a version of an instruction they wanted read to the jury. The judge would then choose from those instructions or write an instruction of his or her own. This was a time-consuming process, and often resulted in instructions that were argumentative, confusing, or did not accurately state the law. To deal with these problems and avoid reversals due to legally inaccurate instructions, judges began accumulating instructions, taken verbatim from appellate court decisions, for use in future trials.

In 1938, California went one step further, when a committee of the Los Angeles Superior Court drafted a set of pattern jury instructions recommended for use in California courts. Today, many states and the federal courts have some form of pattern jury instructions. Responsibility for developing these instructions has been assumed by a variety of groups, including state bar associations, judicial conferences, state supreme courts, judges' associations, administrative offices, law schools, and trial lawyers' associations.

The primary goals of pattern jury instructions are to increase the legal accuracy of instructions and thereby avoid reversals, eliminate argumentative language, save time, and, finally, improve juror comprehension of instructions. Pattern instruction committees have been, for the most part, successful in achieving some of these goals, particularly a reduction in the number of appeals and reversals based on inaccurate instructions.

Juries and jury trials have received unprecedented attention in recent years. Much of the focus has been on pretrial jury management issues and in-court trial procedures. In the process, judicial and bar leaders have become increasingly aware of the importance of pattern jury instructions. Of much importance is the credibility of instructions to trial judges, lawyers, and reviewing courts in terms of legal accuracy and clarity to jurors. To meet increased expectations, many PJI committees are considering new internal procedures to address organizational and technical issues such as the optimal committee composition, membership qualifications, and publication and dissemination strategies. To provide PJI members with an opportunity to exchange information about these issues and to learn about effective practices, the National Center for State Courts conducted a survey in anticipation of the National Conference on Pattern Jury Instructions on April 17-18, 2008 in Columbus, Ohio.

The survey gathered information about state and federal PJI committees. It consisted of 45 questions drafted to provide information pertaining to committee composition and scope, institutional support and sponsorship, committee operations, pattern jury instruction publication and distribution, and operational and procedural challenges.

There are 88 known state pattern jury instruction committees across the nation and nine known federal committees. The vast majority of states with PJI committees have completely separate civil and criminal committees, although it is rare that a state has only one PJI committee focused exclusively on civil or criminal instructions. Oklahoma, Texas and Wisconsin have PJI committees that focus on even more discrete areas of law, such as Juvenile Law (Oklahoma and Wisconsin) and Business, Consumer, Insurance and Employment Law, Family Law, Malpractice, Premises Liability and Products Liability Law, and General Negligence and Intentional Torts Law (Texas). In a handful of these states, the separate PJI committees are sponsored or supported by different organizational entities. In Michigan, for example, members of the Criminal PJI Committee are appointed by the Michigan State Bar Association while the Civil Jury Instruction Committee members are appointed by the Michigan Supreme Court. Eight states maintain unified PJI committees responsible for drafting both civil and criminal jury instructions. Seven states have no formal committee, but several of these have some form of pattern jury instructions, which usually have been developed or compiled by a single person.

Of the known PJI committees organized by the federal courts, the Eighth and Eleventh Circuits maintain unified committees. The Third, Fifth, and Ninth Circuits maintain separate civil and criminal PJI committees. The First, Sixth, and 10th Circuit PJI committees focus only on criminal instructions while the Seventh Circuit PJI Committee focuses only on civil instructions. The Second, Fourth and D.C. Circuits do not appear to have any functioning PJI Committee. Of these 89 known PJI committees, a

total of 31 were represented in the NCSC survey results, including 20 different states and one federal committee.

Surveys of this type, directed to largely autonomous and often quite fluid organizations, are notoriously difficult to administer. A 32 percent response rate is actually quite reasonable under the circumstances. The findings from this survey reveal a great deal of variation in institutional sponsorship and support, committee composition, and procedural operations, at least for those committees that responded to the NCSC survey. But as we discuss shortly, the committees that responded to the survey may reflect the most active, most well organized, and most well supported PJI committees. Those that did not respond may, in fact, reflect a more ad hoc and less formal organizational structure and operations. This possibility should be kept in mind as readers peruse the following findings.

### **Scope of Committee Authority**

Of the thirty-one Committees that responded to the NCSC survey, thirteen committees oversee civil jury instructions; twelve committees oversee criminal instructions and the remaining six committees oversee all jury instructions. These committees represent 20 different states and one of the federal circuit committees.

| <b>COMMITTEE OVERSIGHT</b>   |    |
|------------------------------|----|
| <b>All Jury Instructions</b> | 6  |
| <b>Civil Instructions</b>    | 13 |
| <b>Criminal Instructions</b> | 12 |

The majority of the committees had more than fifteen members. The most densely populated committee was the federal Eighth Circuit Committee, a unified

committee comprised of thirty-eight members. The majority of unified committees were comprised of mostly of judges. The Virginia PJI Committee was the only unified committee with a perfect balance of judge and attorney members.

Those committees that focus exclusively on civil instructions were comprised mostly of attorneys, and most of those are sponsored and funded by their respective state bar associations. The same is true of the committees that focus exclusively on criminal instructions, however, the margin between committees comprised mostly of lawyers, as opposed to judges, is smaller. The resources of the committees varied greatly and were dependant upon several factors, such as institutional sponsorship and publication method.

| <b>COMMITTEE COMPOSITION</b>                  |                               |  |                                       |  |                                  |
|---|-------------------------------|--|---------------------------------------|--|----------------------------------|
| <b>Committee Type</b>                         | Exclusively Judges            | Primarily Judges                       | Fairly Balanced                       | Primarily Attorneys                      | Exclusively Attorneys            |
| <b>Number</b>                                 | 5                             | 4                                      | 10                                    | 11                                       | 0                                |
| <b>Correlation with Institutional Sponsor</b> |                               |  |                                       |  |                                  |
| <b>Committee Type</b>                         | Exclusively Judge Sponsorship | Primarily Judge Committees Sponsorship | Fairly Balanced Committee Sponsorship | Primarily Attorney Committee Sponsorship | Exclusively Attorney Sponsorship |
| <b>Judicial Sponsorship</b>                   | 4                             | 3                                      | 5                                     | 4  | 0                                |
| <b>Bar Sponsorship</b>                        | 1                             | 1                                      | 4                                     | 7  | 0                                |
| <b>No Sponsorship</b>                         | 0                             | 0                                      | 1                                     | 0  | 0                                |

Twenty-nine of the thirty-one committees indicated that they were sponsored by some institutional entity, the majority (16) by courts or judicial conferences. Thirteen committees were sponsored by the respective bar associations. Three committee indicated sponsorship by universities. One committee did not specify whether it had an institutional sponsor, and the last committee indicated that it does not have an institutional sponsor.

Overall, the committees were fairly well balanced with respect to the number of judges and attorneys on each committee. Only five committees of the committees were

comprised exclusively of judges and none were comprised exclusively of attorneys. Four committees are comprised primarily of judges. Eleven committees are comprised primarily of attorneys. Ten committees are fairly balanced, indicating a difference of five or less. The Virginia committee is the only committee that was perfectly balanced.<sup>1</sup>

For nearly all of the committees, the chairs and members are appointed, generally by the head of the institutional sponsor (e.g., Chief Justice, President of the State Bar). Only the North Carolina and Pennsylvania PJI Committees indicated that their members are elected – by their judicial peers in North Carolina and by a two-thirds vote of the existing PJI members in Pennsylvania. There were very few additional qualifications in terms of subject matter expertise beyond the basic qualification that members be judges or licensed attorneys in their respective states. More than one-third of the committees (12) reported that members served without a set term. Even those with established terms (typically 2 to 4 years for general members and 1 to 2 years for chairs) generally permitted reappointment without limitation as the number of terms any member could serve. Only the Indiana Judges Association Criminal Instruction Committee, the Michigan Criminal Jury Instructions Committee, and the Wisconsin Criminal and Civil Jury Instructions Committees limited the number of terms that members could serve.<sup>2</sup>

## **Overview of Meeting Practices and Requirements**

The committees represented in the survey all responded to questions pertaining to committee meeting practices, with some committees meeting frequently and others quite

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<sup>1</sup> The Virginia committee has rules regarding committee makeup. The committee is required to have five judge members, five attorney members, two law professors (one criminal and one civil,) one Assistant Attorney General, one editor and one assistant reporter.

rarely. Nearly half of the committees meet four or less times each year, but a surprisingly large minority of committees indicated extremely vigorous schedules. Five of the committees meet in person at least monthly and another seven committees meet at least eight times each year. All of the committees but one indicated that meetings are carried out in person. One committee indicated that it meets exclusively by teleconference and three of the committees meet both in person and by teleconference. The committees also provided information as to how long meetings typically last, which ranged from as little as one hour to as long as forty-eight hours.

Twelve of the 31 committees do not require a quorum, however, the majority of the committees require the presence of a quorum at all meetings. The committees that require a quorum differ as to what is deemed a quorum. Of those committees, the majority consider a quorum either two thirds of the membership or a majority of the membership.

The Alabama and the Oklahoma Civil Committees reflected the two extremes in terms of frequency of meetings. The Oklahoma Civil Committee on Uniform Jury Instruction was the only committee that reported meeting once every few years. The committee meets in person for five hours and requires a quorum of the majority of the members. During these meetings, the Reporter identifies areas and requests input from committee members, which are submitted to the Oklahoma Supreme Court for review and approval. Use of the committee's instructions is mandatory. The Oklahoma committee is the only committee represented in the survey whose instructions are mandatory.

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<sup>2</sup> The Indiana and Michigan committees both limit general membership to 3 years terms with no more than 2 terms per member. The Wisconsin committee limits membership to 5 year terms with no more than 2

The Alabama Civil Pattern Jury Instruction Committee, in contrast, is the committee that reported meeting most frequently. The committee meets once per month in person and nearly constantly by phone. When the committee meets in person, the meetings are scheduled to last for the entire day, but usually end by early afternoon. The committee requires a quorum of half for the adoption of charges, but if the member attendance is close to that number any work is provisional and subject to review by the balance of the committee. The committee identifies emerging areas of law for which new jury instructions are needed by input from lawyers, judges, appellate courts and interested organizations-with the caveat that the committee is reflective of the law as it exists and does not undertake to write instructions on subjects which the committee thinks might arise in some hypothetical case. Use of the committee's instructions is advisory.

### **Funding and Institutional Support for PJI Committee Operations**

Of the 31 committees, responses regarding budget and institutional support varied greatly. The majority of committees did not indicate a set amount of money dedicated to an individual committee budget. When asked what the current annual committee budget is, twelve committee representatives indicated that they did not know, that the question was inapplicable, or they did not specify an amount at all. On the other hand, nine committee representatives indicated that their committees were not funded individually, that there is no formal budget or that there is no set amount. Three committees indicated that there is no committee budget. The remaining seven committees indicated amounts

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terms per member.



ranging from \$5,000 to \$80,000 per year.<sup>3</sup> Six of these are self-funding organizations based on sales receipts or royalties from publication of their jury instructions.

The limited, or at least unspecified, budgets for most PJI committees appear to dictate the degree of access to professional expertise or staffing support. Two-thirds of the committees reported that they provide no monetary compensation for committee participation, regardless of the members' respective roles (e.g., as chair, reporter, staff), although approximately half indicated that they at least reimburse members' travel expenses. Only nine committees indicated that they compensate the committee reporter or other professional staff for their increased responsibilities. Several committees indicated access to professional or administrative support staff through an institutional sponsor such as an academic institution or the state AOC.

Some of the committees face technology issues. For example, the Illinois Civil Committee reported that it has no access to modern meeting technology. The committee indicated that it would be greatly benefited by conferencing software and document publishing software where changes could be made at the meetings rather than having them returned in following months with editing changes made. The committee's meeting facility has no computer access, no Internet access, no editing ability, and no computer facilities. The committee did not even have a speakerphone by which members could attend by phone.

Obviously, those committees with more limited financial resources would have greater difficulty undertaking substantial revisions or upgrades to their existing jury

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<sup>3</sup> The Oklahoma Civil Committee on Uniform Jury instructions has no funding, budget or Institutional Sponsor. Both the Ohio Jury Instructions committee and the New York Civil Pattern Jury Instruction committee have budgets of \$80,000. Both of these committees are sponsored by a Judicial Conference or Association and require their members to be active or retired judges.

instructions, such as translating instructions into “plain English.” The California Civil and Criminal PJI Committees have garnered the most national attention for their efforts in this regard, but the Wisconsin Criminal Instruction Committee, the Vermont Civil Plain English Jury Charge Committee, the Alabama Civil Instruction Committee, and the Pennsylvania Civil Instruction Committee also reported similar efforts. Only the Maryland Criminal Instruction Committee and the California Criminal Instruction Committee reported having routine access to a professional linguist for this purpose.

### **PJI Publication Methods and Issues**

Sixteen of the committees publish their jury instructions through a commercial vendor. Thomson/West and Lexis/Nexis were the two most popular commercial vendors, used by 11 of the committees,<sup>4</sup> and another five committees reported contracts with other commercial vendors including state CLE providers. Fourteen of the committees publish their instructions through their institutional sponsor.

Most of published jury instructions are distributed through some combination of print media, electronic media and online. Nearly half of the committees did not report the purchase cost for a collection of pattern jury instructions, a surprisingly large number responding that they actually didn’t know the cost. Of those that did report the cost, only two indicated a full collection of jury instructions was less than \$100, six reported the cost between \$100 and \$249, five reported the cost between \$250 and \$499, and two

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<sup>4</sup> The Ohio Jury Instructions Committee publishes its print version exclusively through LEXIS/Nexis, but also has contracts with Casemaker and Westlaw to publish its instructions in electronic format.

reported the cost at \$500 or more.<sup>5</sup> Only the New York Committee on Criminal Jury Instructions reported that its instructions are freely available online.

### **National Conference on Pattern Jury Instructions**

The National Conference on Pattern Jury Instructions was organized with three goals in mind. The first goal was to provide PJI chairs, reporters, and members with the latest research and information on improving the comprehensibility of pattern jury instructions. The next goal was to provide an opportunity for PJI chairs, reporters, and members to exchange information about internal PJI operations and management techniques. The final goal was to explore the possibility of future collaborative relationships among PJI members and the development of pooled expertise and resources (e.g., website, listserv, blog) from which PJI committees might draw.

The Conference took place in April of 2008. There were approximately ninety-six representatives from state and federal PJI committees from across the country, who participated in the conference. The conference was structured with many different sessions, formatted specifically to best address whatever topic was at hand. There were ten concurrent sessions, in which conference attendees were able to participate. The concurrent sessions involved a variety of issues, including, the civil drafting of plain English jury instructions<sup>6</sup>, difficult concepts and issues in PJI<sup>7</sup>, juror comprehension and

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<sup>5</sup> These values reflect the total cost of a collection of instructions plus the cost of one annual update, if applicable.

<sup>6</sup> **Concurrent 1: Drafting Plain English Jury Instructions (Civil)**

Professor Peter Tiersma, author of *Communicating with Juries: How to Draft Understandable Jury Instructions*, will teach key strategies for drafting plain English civil jury instructions using examples provided by conference registrants. The session is directed to chairs, reporters, and members of civil PJI committees who wish to strengthen their drafting skills.

<sup>7</sup> **Concurrent 2: Difficult Issues and Concepts in PJI**

use of jury instructions<sup>8</sup>, different approaches to drafting rules and procedures<sup>9</sup>, the criminal drafting of plain English jury instructions<sup>10</sup>, evaluating the comprehensibility of PJIs<sup>11</sup>, judge and lawyer use of PJIs<sup>12</sup>, PJI management forum<sup>13</sup>, creative preparation and communication methods<sup>14</sup>, and publication copyright and vendor contracts<sup>15</sup>.

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A panel of experts will address the problem of drafting instructions to communicate difficult legal concepts, such as those involving subtle legal nuances and abstractions, in a language that jurors can understand. This session differs from Concurrent Session 1 in that it focuses communicating difficult concepts, rather than addressing stylistic and linguistic complexity. The session is directed to criminal and civil PJI members, as well as PJI chairs and reporters.

<sup>8</sup> **Concurrent 3: Juror Comprehension and Use of Jury Instructions**

Professor Joel Lieberman provides an overview of the empirical literature concerning juror comprehension of jury instructions, how jurors typically use the instructions during deliberations, and what obstacles (besides just incomprehensible language) prevent jurors from fully understanding the instructions.

<sup>9</sup> **Concurrent 4: Different Approaches to Drafting Rules and Procedures**

A panel of PJI chairs will compare and examine different approaches to drafting and approving criminal and civil pattern instructions. The session will examine how PJI committees identify new/emerging legal areas requiring instructions and committee procedures for reviewing and updating current instructions; how PJI committees determine priorities for drafting and approving new instructions and updating current instructions including establishing schedules for drafting and approval; and whether committees draft instructions internally, use outside resources, or a combination approach. The session is directed to PJI chairs and reporters.

<sup>10</sup> **Concurrent 5: Drafting Plain English Jury Instructions (Criminal)**

This session repeats Concurrent Session 1, but with a focus on criminal jury instructions. Professor Peter Tiersma, author of *Communicating with Juries: How to Draft Understandable Jury Instructions*, will teach key strategies for drafting plain English criminal jury instructions using examples provided by conference registrants. The session is directed to chairs, reporters, and members of criminal PJI committees who wish to strengthen their drafting skills.

<sup>11</sup> **Concurrent 6: Evaluating the Comprehensibility of PJIs**

Professor Shari S. Diamond and Dean Bradley Saxton discuss effective techniques and their respective advantages and disadvantages to evaluate jurors' comprehension of and the impact of improved jury instructions.

<sup>12</sup> **Concurrent 7: Judge and Lawyer Use of PJIs**

A panel of experienced lawyers and trial judges describe how they use pattern jury instructions and what they would like (expect) from pattern jury instructions. They will consider and react to such things as format, indexing, the contents and use of comments, citation to authority, and the tension between the use of "common language" and the statutory language in drafting jury instruction. This panel is directed to PJI criminal and civil members and PJI chairs.

<sup>13</sup> **Concurrent 8: PJI Management Forum**

This session, directed toward PJI chairs and reporters, will concentrate on the management and organization of committees and subcommittees. The goal is to explore and exchange ideas involving the

The conference participants also attended two plenary sessions. The first session was the conference opener, which gave a snapshot of the current operations and possible future directions of the contemporary pattern jury instruction committee. The second plenary session was entitled “What’s Buggin’ Me.” The “What’s Buggin’ Me” plenary was a small group exercise designed to provide an opportunity for conference participants to reflect on some of the issues and problems raised in the first plenary session. It was also an opportunity for conference participants to raise additional issues or problems they had encountered in their own experiences as PJI chairs, reporters, and members. The plenary also encouraged the committee representatives to exchange ideas and suggestions for addressing those issues with their peers in other jurisdictions.

The committee representatives who attended the conference also had the opportunity to express their opinions about the conference. A majority of the participants enjoyed the opportunity to network and interact with other PJI committee members and judges from around the country. They also felt that the opportunity to share ideas and

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best practices of organization and management of PJI committees. The panel members will also discuss their own experiences and encourage discussion from the audience regarding how to identify and recruit potential new members, how to identify topics for new instructions, and how to identify potential modifications of existing instructions.

<sup>14</sup> **Concurrent 9: Creative Preparation & Communication Methods**

This session will be set up as a combined panel discussion and hands-on workshop in which persons experienced with the process of remote learning processes and remote document management will explain how an organization interested in long-distance document management and dissemination can establish such capacities. The panel of experienced communications managers will demonstrate remote drafting methods and technological ways to enhance the effectiveness of written word instructions to juries. The session is directed to criminal and civil PJI members and PJI chairs and reporters.

<sup>15</sup> **Concurrent 10: Publication Copyright and Vendor Contracts**

This session, directed to the general audience, will concentrate on issues common to PJI committees that publish their work as a means of distributing it to judges and practitioners. Panel members will include a major publisher who will discuss the benefits and limitations of publishing PJIs and an intellectual property attorney who will discuss applicable legal considerations where the product is a collaborative one, copyright issues, and possible contract provisions. Other panel members will discuss how to manage the publishing relationship, quality control, and alternatives to publishing.

resources would prove very beneficial. Also, many of the conference participants appreciated the opportunity to learn about how other committees function. Based on the results of the exit surveys it is appropriate to conclude that the Conference met its goals.

## **Conclusion**

We can see from just this brief snapshot of PJI committee organization that many of these committees share a great deal in common. The vast majority focus exclusively on either civil or criminal jury instructions. Although a few committees restrict membership to judicial officers, most of them are composed of some mixture of judges and lawyers. Most meet in person several times each year. Typically, committee reporters are tasked with identifying new or modified statutes or newly released appellate opinions for which jury instructions might be developed, while the members actually draft the instructions for review and approval by the full committee. The work of the committee members was universally reported as pro bono efforts, although a few committees provide some compensation to the committee reporters, ostensibly due to the greater responsibility involved in the work.

But we also see a great deal of variation in the degree of institutional support that these committees receive. Very few of the committees had a formal budget on which to be able to secure outside expertise or resources, or even, in some cases, sufficient funding to cover the expenses associated with regular meetings of the committee. A small handful of committees were self-funded through the product sales or royalties on jury instructions, however, most of the committees responding to the survey were unable to report the cost of the instructions, much less the annual revenue generated by those sales.

It is important to note that these findings are based on the responses from those 31 committees that answered the NCSC survey. There are at least another 66 known PJI committees in existence. We do not know the extent to which these findings reflect their organizations and experience. But it is not unreasonable to assume that those committees that did not respond to the NCSC survey operate on a more ad hoc basis and with less institutional support.

These findings raise a number of questions concerning the continued evolution of PJI committees and their efforts to improve the quantity and quality of pattern jury instructions. For example, given that various areas of the law are becoming more specialized, is it the better policy for PJI committees to use their usually limited resources to concentrate on basic jury instructions, leaving highly specialized situations to the trial judges and attorneys to develop instructions appropriate for each case? Or is it the better policy to expand the size and expertise of PJI committees, or even to create completely separate PJI committees as the Texas State Bar has done, to be able to develop instructions for high specialized areas of law?

How important is the cohesiveness and long term stability of PJI committee membership? Do they contribute to or interfere with getting the work done? Would restrictions on the amount of time that any given member could serve improve committee productivity by introducing “new blood” and new perspectives? What procedures are most efficient and effective for constructive committee work? Are shorter, more frequent meetings (e.g., by teleconference) or longer, more intensive, but less frequent, meetings more productive overall? What kind of assistance might committees receive from some of the emerging communication technologies?

What is the most effective combination of expertise and institutional credibility with PJI users – namely trial judges and attorneys? How much does the answer to this question depend on local legal culture with respect to who (judges or attorneys) is primarily responsible for preparing jury instructions?

What are the basic requirements to initiate and maintain a viable PJI committee in terms of expertise and resources such as member time and commitment, meeting space or teleconferencing capabilities, printing and dissemination resources, paid managerial, editorial or linguistic expertise, or even travel expenses and amenities for members? Assuming for the sake of argument that it is possible to express all legal concepts in language that is understandable to individuals of average intelligence and education (that is, jurors), how do PJI committees prioritize the revision process? How do they secure access to linguistic expertise? How do they evaluate their own work?

And finally, what are the potential benefits and conflicts involved in engaging commercial vendors for PJI publication and marketing? Are efforts to secure at least some access to the profits from product sales and royalties likely to provoke disputes with the various institutional sponsors? And if so, how should PJI committee leaders broach this topic to maximize the likelihood of sufficient resources for their work?

These and other questions will be the subject of debate and discussion at the National Conference on Pattern Jury Instructions on April 17-18, 2008 in Columbus, Ohio. Although it is unlikely that the attendees will arrive at definitive answers to all of these questions, we hope that the conference will provide an unique opportunity for PJI committee members from across the country to exchange information and perspectives about effective PJI practices that they can consider as they continue their important work



in communicating the law to jurors in an understandable language. We also hope that the conference will provide a basis for future discussions about how PJI committees might pool their collective resources, making it possible for even greater improvements in jury instructions in the future.