AFTERWORD: HOW TO DRAFT A CHARGE

Traditionally, jury instructions have been lengthy and have repeated various elements of the charge several times and in different ways. That custom may have something to do with the fact that judges are former lawyers and therefore accustomed to using many words when one would do. More charitably, the practice may have instinctively reflected the concern that lay jurors could not easily absorb an oral charge on complicated legal issues and remember all such issues in the jury room unless the law was drummed into them.

These pattern charges are premised on the assumption that at the beginning of the 21st century there is no good reason to deny a lay juror a written set of instructions to guide deliberations in the jury room. If a written jury charge is provided, any given element need be stated only once, for the jury can use the written charge as a reference in the jury room. Furthermore, the various steps in deciding the case or the elements of the crime, as the case may be, should be laid out in a logical, sequential order so that the jury can easily follow them. If these premises are accepted, the result is a charge that the judge can deliver orally while the jurors simultaneously read the written document silently to themselves in approximately 30 minutes in most cases. The jurors will not become bored nor will they be frightened that they will be unable to remember or follow the law during their deliberations. Instead, they can retire to the jury room with confidence.

It is for these reasons that the language in these pattern instructions is succinct, if not terse. We have tried to use plain English, although others can undoubtedly suggest improvements. We have attempted to follow the spirit of the appellate caselaw without wholesale adoption of the language, which tends to be judges' and lawyers' language not easily comprehensible by a lay juror.

We have presented charges for the types of crimes and the types of issues that seem to arise most frequently in the First Circuit. We will be pleased to add to these as other judges provide proposed language or as experience demonstrates that others are needed.

Since instances will frequently come up, however, where there is no pattern charge for a particular crime, we offer the following suggested approach for writing a new charge. It is only a suggestion, but it may be a useful outline for a new judge confronted with a new crime. This should be done at the outset of the trial so that a draft charge is ready for the lawyers when the trial ends.

1. First, look at the statute in question. The specific elements of the offense usually will be obvious from a reading of the statute. They can then be listed as the separate numbered elements the government must prove beyond a reasonable doubt. There will commonly be a jurisdictional element (for example, interstate commerce or federal insurance of a financial institution); one or more "forbidden conduct" elements; and a "mens rea" (e.g., knowingly, willfully) element. One can generally begin an instruction as follows:

> [Defendant] is charged with [possession with intent to distribute, possession of a firearm by a convicted felon, etc.]. It is against

> federal law to [fill in the prohibition]. For you to find the defendant guilty of this offense the government must satisfy you beyond a reasonable doubt of the following elements:
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> [Proceed to number and describe the elements.]

Bear in mind that although some elements may be stipulated (for example, the jurisdictional element such as the insured status of a bank or the effect on interstate commerce), it is safest to list them for the jury's consideration nevertheless. See Comment to Instruction 2.01.

Dictate or write your first rough draft now.

2. Next, look at the pattern instructions from other circuits and the Federal Judicial Center. They often will suggest alternative language, and the comments may alert you to relevant caselaw. Those who drafted the pattern instructions—the Federal Judicial Center Pattern Instructions in particular—have made a conscious attempt to write in plain English and to keep the instructions simple. You may also want to consult the several academic writers on jury instructions, although sometimes their suggestions tend to depend more heavily on abstruse appellate caselaw language. Do your first rewrite now.

3. Next, consult the proposed jury instructions submitted by the prosecution lawyer and the defense lawyer to see whether their reading of the statute is different from yours. Do this with an open mind, for they frequently will pick out matters that you have missed. Make appropriate changes to your draft. Be careful, however, of the lawyers' tendency to use legalese that juries cannot understand, or to copy from a form book or a charge in a different case, without taking the time to ponder what is appropriate in this case.

4. Now read the cases cited in the lawyers' proposed jury instructions, the comments to the pattern instructions or the academic treatises and the annotations to the statute in question. Primarily, of course, you must search for U.S. Supreme Court and First Circuit precedent; if there is no such precedent on point, then you will have to assess other circuits' approaches. Make any necessary corrections to your charge.

5. Be careful of the thorny issue of "intent." In 1952, Justice Robert Jackson sketched out the dimensions of the problem in the landmark case of Morissette v. United States, 342 U.S. 246 (1952). He described the "variety, disparity and confusion of [the] definitions of the requisite but elusive mental element." Id. at 252. That year, the American Law Institute (ALI) began its ten-year quest to remedy the problem, culminating in the promulgation of the Model Penal Code in 1962. The ALI found that there were two reasons why the mental element was so elusive. The first was the reason given by Justice Jackson: There were just too many verbal formulas in circulation, none of which had precise meaning. The second reason was more subtle: The mental element might vary for the different elements of a crime.

The Model Penal Code remedied both problems. First, it reduced the number of mental states to four ("purposely," "knowingly," "recklessly" and "negligently") and gave relatively precise definitions of each. See Model Penal Code § 2.02(2). Second, it made clear that the state-of-mind analysis should apply *separately* to each element of the crime, and it drafted crimes accordingly. See id. § 2.02(1).

The Model Penal Code found favor with the vast majority of the states—around 40 of them—but not with Congress. Thus, federal judges still must struggle with pre-Model Penal Code statutory tools. Federal criminal statutes present a "variety, disparity and confusion" of numerous verbal formulas; even where meaning can be ascribed to the mental element, its application to other elements of the crime may remain unclear.

In 1989, then Attorney General Richard Thornburgh described the situation as follows:

> [W]ithin Title 18, in describing the general criminal intent or mens rea that must accompany conduct before it is considered criminal, the Congress, over the course of 200 years, has provided 78 different terms, ranging from "wantonly" to "without due . . . circumspection," to help clarify the subject. . . .
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> As a body of jurisprudence, our federal criminal law is thus not only stultifying but borders on the embarrassing. Far worse, it is seriously inefficient. . . .

Address at the 66th Annual Meeting (May 19, 1989), in A.L.I. Proc. 405, 408 (1989).

Thus, inspection of a federal statute for the state-of-mind requirement must be made with the understanding that issues of interpretation are likely to be lurking, that they are issues of "common law," and that case law must be consulted.

The trickiest issue of interpretation is that of which mental state applies to each element of the crime. This has remained at the heart of a long line of post-Morissette cases in the Supreme Court. See, e.g., United States v. X-Citement Video, Inc., 513 U.S. 64, 68-78 (1994); Ratzlaf v. United States, 510 U.S. 135, 140-49 (1994), superseded by statute, 31 U.S.C. §§ 5322(a), (b), 5324(c); Cheek v. United States, 498 U.S. 192, 199-204 (1991); Liparota v. United States, 471 U.S. 419, 423-33 (1985); United States v. International Minerals & Chem. Corp., 402 U.S. 558, 560-65 (1971); United States v. Freed, 401 U.S. 601, 607-10 (1971).

In cases where no appellate decision has helpfully interpreted the statute at hand, you will have to engage in the same kind of analysis the Supreme Court undertook in X-Citement Video, namely, carefully examine the statutory text and context; test each proffered interpretation against criminal law principles; examine cognate case law; search the legislative history; consider applicable canons of construction; finally, make an additional

overarching inquiry: which interpretation provides the jury with a more helpful test of the defendant's possible blameworthiness? X-Citement Video, 513 U.S. at 68-78.

6. When you have finished these steps, go back and re-work your charge to simplify the language. Use shorter words, avoid legalese, eliminate subordinate clauses and the passive voice where possible and speak in simple declarative sentences. Say it once, clearly and simply, rather than several times in a convoluted fashion. Now distribute it to the lawyers for their consideration— ideally before the trial is even over, and perhaps even at the outset.