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Comment

Plain English or Plain Confusing?

I. INTRODUCTION

A “presumption of perfection” attaches to the pattern instructions that Missouri judges read to jurors in every civil case.¹ Missouri law presumes that these instructions, as set forth in *Missouri Approved Jury Instructions* (“MAI”) Fifth Edition, are not only infallible statements of the law, but also perfectly comprehensible to the average juror.² Even if jurors in a given case complain that they do not understand a particular pattern instruction, the trial judge is without recourse, required to leave these instructions undisturbed even if a more understandable improvement might result.³

Before MAI, Missouri appellate courts had long held that legal accuracy, not general comprehensibility to the lay juror, was the primary goal of jury instructions.⁴ One amused commentator even identified a Missouri “152-word-

1. See, e.g., *Teaney v. City of St. Joseph*, 548 S.W.2d 254, 256-57 (Mo. Ct. App. 1977) (finding reversible error where the trial judge attempted to clarify the meaning of pattern jury instructions in response to written request from the jury foreperson) (citing *Houston v. Northup*, 460 S.W.2d 572 (Mo. 1970)). See Walter W. Steele & Elizabeth G. Thornburg, *Jury Instructions: A Persistent Failure to Communicate*, 67 N.C. L. REV. 77, 82 (1988) (summarizing the *Teaney* court’s decision as reliant upon a “legal fiction: these instructions are perfect, so the jury must understand them”).

2. Steele & Thornburg, *supra* note 1, at 82.

3. *How to Use This Book: Committee Comment (1996 Revision)*, MISSOURI SUPREME COURT COMMITTEE ON JURY INSTRUCTIONS, MISSOURI APPROVED JURY INSTRUCTIONS LIII, LV (5th ed. 1996) (“You may have the ability to improve an instruction in MAI but you do not have the authority to do it. Do not do it. The use of a provided MAI is mandatory. If you think the change of a word or phrase will make it a better instruction, do not do it. You are falling into error if you do.”). At least one commentator has criticized MAI’s approach as “rigid” and “inflexible.” See Graham Douthwaite, *Jury Instructions, Pattern and Otherwise*, 29 DEF. L.J. 335, 349 (1980) (“[C]ounsel are not permitted to ‘improve’ or modify MAI, and the number of jury verdicts that have been reversed for failure to follow the exact wording of an MAI instruction, or religiously to pay obeisance to the ‘Notes On Use,’ may well cause one seriously to doubt whether this mandatory approach does not engender more litigation that it is worth.”).

4. Robert P. Charrow, Book Review, 30 UCLA L. REV. 1094, 1097-98 (1983).

sentence” rule for jury instructions which sanctioned excess verbiage without requiring basic coherence.⁵ MAI’s drafting committee purports to depart from this approach. The committee, comprised entirely of attorneys, like the drafting committees of most states,⁶ claims to place equal emphasis upon legal accuracy and understandability.⁷

In contrast to the emphasis in many states upon legal accuracy,⁸ as well as the apparent equal emphasis of the MAI drafters upon both accuracy and

5. *Id.* Charrow cites *Tuttle v. Tomasino*, 336 S.W.2d 683, 692 (Mo. 1960), where the Missouri Supreme Court approved a trial court instruction containing a 152-word sentence, ruling that “unless the instruction is in fact misleading, it will not be held erroneous because of its inept composition.” *Id.* See also Phil H. Cook, *Instructionese: Legalistic Lingo of Contrived Confusion*, 7 J. of MO. BAR. 113, 114 (1951) (criticizing the emphasis of Missouri appellate courts upon legal “exactness” over “simplicity which can be understood by every juror”).

6. See Bruce D. Sales, Amiram Elwork & James J. Alfini, *Improving Comprehension for Jury Instructions*, in PERSPECTIVES IN LAW AND PSYCHOLOGY VOLUME 1: THE CRIMINAL JUSTICE SYSTEM 23, 28 (Bruce D. Sales ed., 1977) (“[M]ost jury instruction drafting committees continue to be composed solely of judges and lawyers.”).

7. *1963 Report to Missouri Supreme Court*, Missouri Supreme Court Committee on Jury Instructions, MISSOURI APPROVED JURY INSTRUCTIONS (5th ed. 1996) (noting that the “four tests” of a permissible pattern jury instructions include (1) whether the instruction is a “correct statement of law” and (4) whether it is “stated in language the average juror can understand”).

8. See Douthwaite, *supra* note 3, at 349. See also Amiram Elwork, Bruce D. Sales & James J. Alfini, *Juridic Decisions: In Ignorance of the Law or in Light of It?*, in 1 LAW & HUMAN BEHAVIOR 163, 164 (1977) (“Although [pattern instructions] have been prepared to be legally accurate, little attention has been given to making them understandable to the average juror. Most drafting committees are composed solely of judges and lawyers, and few committees have been willing to hire language experts.”); Hon. Gail Hagerty, *Instructing the Jury? Watch Your Language!*, 70 N.D. L. REV. 1007, 1008-09 (1994). Commentators have extensively noted and criticized appellate courts and drafting committees for their general sacrifice of understandability in the quest for legal precision. See, e.g., Robert G. Nieland, *Assessing the Impact of Pattern Jury Instructions*, 62 JUDICATURE 185, 188 (1978) (The author cites the JUDGES OF THE SUPERIOR COURT OF LOS ANGELES COUNTY, CALIFORNIA, BOOK OF APPROVED JURY INSTRUCTIONS (“BAJI”) (1938), in their notorious statement that “[t]he one thing an instruction must do above all else is correctly state the law. This is true regardless of who is capable of understanding it.”); Hon. Edward J. Devitt, *Ten Practical Suggestions About Federal Jury Instructions*, 38 F.R.D. 75, 76 (1965) (“It is the legal principle, not the words expressing it, which is pertinent and which will be helpful to the jury.”). But see George P. Smith, II, *Effective Instructions to the Federal Jury in Civil Cases—A Consideration in Microcosm*, 18 SYRACUSE L. REV. 559, 564-65 (1967) (noting the danger of “misconstruction” by a jury of a charge not carefully tailored with a view toward accuracy).

comprehensibility, a wealth of empirical research and scholarly commentaries over the past twenty years have indicated that simplicity and comprehensibility need far more attention.⁹ Numerous studies have identified an ongoing nationwide problem of juror miscomprehension of pattern instructions.¹⁰ Other research efforts have taken the next step: searching for ways to make currently incomprehensible instructions understandable to jurors. Most of these studies

9. See Amiram Elwork & Bruce D. Sales, *Jury Instructions*, in *THE PSYCHOLOGY OF EVIDENCE AND TRIAL PROCEDURE* 283 (S. Kassin & L. Wrightsman eds., 1985) (“[S]everal recent research projects have repeatedly demonstrated that pattern instructions are often incomprehensible to the average juror and that this is a nationwide problem.”); William H. Erickson, *Criminal Jury Instructions*, 1993 U. ILL. L. REV. 285, 290 (advocating a balance between the competing goals of legal accuracy and understandability); Robert F. Forston, *Sense and Non-sense: Jury Trial Communication*, 1975 B.Y.U. L. REV. 601, 617-18 (noting the twin aims of legal accuracy and comprehensibility can be impossible to reconcile); Harvey S. Perlman, *Pattern Jury Instructions: The Application of Social Science Research*, 65 NEB. L. REV. 520, 528 (1986) (“[A] series of empirical studies have documented first, that pattern jury instructions are not completely understood by the jurors to whom they are addressed. . . .”); Laurence J. Severance, Edith Greene & Elizabeth F. Loftus, *Toward Criminal Jury Instructions that Jurors Can Understand*, 75 J. CRIM. L. & CRIMINOLOGY 198, 202 (1984) (“Recent social science research suggests that jurors’ difficulties in understanding instructions on the law are considerable and widespread.”); Peter M. Tiersma, *Reforming the Language of Jury Instructions*, 22 HOFSTRA L. REV. 37, 42 (1993) (“Much research by linguists, psychologists and others has confirmed that jurors tend to have great difficulty understanding the instructions that are supposed to guide their decision making.”).

10. See, e.g., Raymond W. Buchanan, Bert Pryor, K. Phillip Taylor & David U. Strawn, *Legal Communication: An Investigation of Juror Comprehension of Pattern Instructions*, 26 COMM. Q. 31, 31, 34 (1978) (finding juror miscomprehension, at an average rate of thirty percent, of legal issues in Florida pattern instructions); Phoebe C. Ellsworth, *Are Twelve Heads Better Than One?*, LAW & CONTEMP. PROBS., Autumn 1989, at 205, 218 (juror performance on comprehension tests covering California pattern instructions found little better than random guessing); Robert F. Forston, *Justice, Jurors and Judge’s Instructions*, 12 JUDGES’ J. 68, 68 (1973) (finding juror comprehension of the legal issues involved in instructions in Iowa, Minnesota and Illinois to be less than fifty percent); Hagerty, *supra* note 8, at 1012-16 (using North Dakota pattern instruction regarding the meaning of the phrase “under the influence of intoxicating liquor” and finding low juror comprehension and high reliance upon the news media to define this phrase); Laurence J. Severance & Elizabeth F. Loftus, *Improving the Ability of Jurors to Comprehend and Apply Criminal Jury Instructions*, 17 L. & SOC’Y REV. 153, 171-73 (1982) (finding widespread juror miscomprehension of the basic legal issues involved in a criminal trial, as presented by Washington pattern criminal instructions); David U. Strawn & Raymond W. Buchanan, *Jury Confusion: A Threat to Justice*, 59 JUDICATURE 478, 480-82 (1976) (reporting findings of low juror comprehension of Florida pattern criminal instructions).

have found significant improvement in juror comprehension levels when traditional pattern instructions are rewritten based upon psycholinguistic principles of "simple English."¹¹

With these findings in mind, this Comment applies these same principles to each of the 105 "verdict directors"¹² contained in MAI (Civil) Fifth Edition.¹³ There are two purposes for such an undertaking. First, this Comment seeks to ascertain the general prevalence, or absence, among the MAI verdict directors of the sorts of problems that empirical researchers have identified as barriers to juror comprehension. Second, this Comment seeks to make suggestions for possible improvement.

This effort differs from other critical and empirical works that have focused upon comprehension problems with pattern jury instructions. First, while the pattern jury instructions of many states have garnered the special attention of commentators and researchers,¹⁴ no works exist containing a detailed treatment of MAI.¹⁵ In addition, most of these studies have focused upon the comprehensibility of only one or a few of the pattern instructions of a particular

11. These studies employ the comprehension-improvement methods of "psycholinguistics," which "appl[y] the techniques of experimental psychology to achieve improvements in language processing and comprehension." William W. Schwarzer, *Communicating with Juries: Problems and Remedies*, 69 CAL. L. REV. 731, 740 (1981). See, e.g., Robert P. Charrow & Veda R. Charrow, *Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions*, 79 COLUM. L. REV. 1306, 1328 (1979) (finding significantly better ability among subjects to paraphrase California pattern jury instructions rewritten based upon psycholinguistic principles); Elwork, Sales & Alfini, *supra* note 8, at 175-78 (finding higher memory and comprehension levels with respect to rewritten Michigan pattern instructions); Amiram Elwork, James J. Alfini & Bruce D. Sales, *Toward Understandable Jury Instructions*, 65 JUDICATURE 432, 436 (1982) (showing better juror comprehension of rewritten instructions than Florida pattern instructions and Nevada non-pattern instructions); Steele & Thornburg, *supra* note 1, at 90-91 (finding better comprehension of Texas pattern instructions following psycholinguistic revision).

12. MAI uses the term "verdict director" in reference to instructions that describe the affirmative elements a civil plaintiff must prove as a part of his or her cause of action.

13. MAI Fifth Edition chapters 17-31 provide the verdict directors. These chapters set forth more than 105 individual instructions, but this Comment analyzes only those instructions that embody affirmative claims for relief, excluding the special instructions in these chapters dealing with damages issues and the definition of terms. See, e.g., MAI 21.05 (defining categories of damages in actions against health care providers).

14. See *supra* note 10 and accompanying text.

15. Commentary on Missouri's civil jury instruction scheme has not gone beyond isolated general criticisms of the state's traditional emphasis upon legal accuracy in instructions and strict approach with respect to modifications of mandatory instructions by trial attorneys and judges. See, e.g., Douthwaite, *supra* note 3, at 349.

state.¹⁶ None have looked at the language contained in a state's entire set of verdict directors.

Finally, a critical evaluation of the general comprehensibility of the language of MAI pattern instructions remains significant even though Missouri jurors have access to those instructions, in written form, during deliberations.¹⁷ Though this allowance provides them with the opportunity to reread instructions, jurors most often receive their best understanding of the instructions from the initial oral charge of the judge.¹⁸ In any event, multiple "rereadings" do not ensure a juror's comprehension of an instruction.¹⁹ In addition, jurors often pay

16. See, e.g., Charrow & Charrow, *supra* note 11, at 1311-13 (psycholinguistic analysis limited to 14 California pattern jury instructions); Steele & Thornburg, *supra* note 1, at 88-90 (rewriting five Texas pattern criminal instructions based upon psycholinguistic principles); Hagerty, *supra* note 8, at 1012 (focusing on one definitional instruction).

17. MO. SUP. CT. R. 70.02(f) provides: "The final instructions on the law governing the case shall be read to the jury by the court and provided to the jury in writing." See VEDA R. CHARROW & MYRA K. ERHARDT, CLEAR & EFFECTIVE LEGAL WRITING 32 (1986) (discussing the importance of drafting jury instructions in a style appropriate for oral comprehension); DAVID MELLINKOFF, LEGAL WRITING: SENSE & NONSENSE 88-89 (1982) (same).

18. See Wylie A. Aitken, Comment, *The Jury Instruction Process—Apathy or Aggressive Reform?*, 49 MARQ. L. REV. 137, 139 (1965) ("[T]he primary factor toward meaningfulness [of jury instructions for jurors is the] oral presentation. . ."); Christopher N. May, "What Do We Do Now?": *Helping Juries Apply the Instructions*, 28 LOY. L.A. L. REV. 869, 881 (1995) (arguing jurors during deliberations garner little additional understanding of the applicable law from other jurors); ROBERT L. MCBRIDE, THE ART OF INSTRUCTING THE JURY § 5.09, at 200 (1969) (discussing the importance jurors place upon words coming directly from the trial judge); James W. McElhaney, *Jury Instructions: When Jurors' Eyes Glaze Over, They're Telling You Something*, 81 A.B.A. J. 91 (1995) (discussing the oral charge as the time when jurors most concentrate on understanding the jury instructions); 1959 *Institute for California Judges—Panel Discussion Part III: Instructing the Jury*, 47 CAL. L. REV. 888, 900 (1959) (Comments of Hon. William T. Sweigert) (noting the importance of the trial judge's initial oral charge to overall juror comprehension of the applicable law); Sales, Elwork & Alfini, *supra* note 6, at 68 ("Several experimenters have shown that vocalization of written material facilitates memory. Having the judge read the jury instructions assures that each juror pays attention to them at least once.").

19. See, e.g., Joseph J. O'Mara & Rolf von Eckartsberg, *Proposed Standard Jury Instructions—Evaluation of Usage and Understanding*, 48 PA. B. ASS'N. Q. 542, 549-50 (1977) (empirical study finding low comprehension levels of Pennsylvania pattern instructions despite opportunity for rereading). See also Bernard S. Meyer & Maurice Rosenberg, *Questions Juries Ask: Untapped Springs of Insight*, 55 JUDICATURE 105, 107 (1971) ("Of course, repeating *ad infinitum* an instruction that deals with an elusive concept will not remove the jurors' puzzlement if it is rooted in their inability to grasp the subtle meaning of the legal term . . ."); Elwork & Sales, *supra* note 9, at 290

little attention to the written instructions.²⁰ Other commentators have pointed out that even when jurors rely on written instructions, there may be a significant gap between their perceived and actual comprehension.²¹ It is obvious that, even with Missouri's provision for written instructions, a generally unintelligible pattern jury instruction can have a detrimental effect on juror comprehension from the initial oral charge until the conclusion of deliberations.

Part II of this Comment discusses the many problem areas that psycholinguistic researchers have identified as impediments to full juror comprehension of pattern jury instructions. Here, the author analyzes the criticism of pattern jury instructions that have come from both empirical researchers and general commentators. Part III explains the method by which the author detected the presence of such problem areas in the MAI verdict directors. This Comment discusses the results of this detection process in Part IV. Finally, Part V details the conclusions of the author, specifically the ways by which the Missouri Supreme Court Committee on Jury Instructions might improve the MAI verdict directors.

II. BARRIERS TO MAXIMUM JUROR COMPREHENSION OF PATTERN INSTRUCTIONS

A. *The Psycholinguistic Approach*

The work of psycholinguists involves inquiry into the ways by which the human mind processes and understands oral and written language, thus "provid[ing] a number of useful tools for assessing the comprehensibility of legal

(conceding the lack of empirical evidence that the increased exposure to instructions provided by written charges leads to any increase in juror comprehension).

20. See, e.g., Steele & Thornburg, *supra* note 1, at 9 (empirical finding that jurors reread the instructions aloud as a group during only two-thirds of jury deliberations). See also Hon. Norris Maloney, *Should Jurors Have Written Instructions?*, TRIAL JUDGES' J., April 1967, at 18 (arguing jurors are less likely to reread instructions during deliberations in a factually and legally less-complex case); Ronald M. Price, *Study of the North Carolina Jury Charge: Present Practice and Future Proposals*, 6 WAKE FOREST INTRAMURAL L. REV. 459, 461 (1970) (discussing how jurors often do not take advantage of the opportunity to read written instructions in a jurisdiction in which the provision of written instructions is permissive, rather than mandatory). Additionally, the jury foreperson may do all the reading of jury instructions for other jurors, possibly interjecting his or her own paraphrases of the written charge. See, e.g., Ben T. Head, *Confessions of a Juror*, 44 F.R.D. 330, 337 (1968) (complaining that such was a part of the author's personal experience as a juror).

21. See, e.g., Severance & Loftus, *supra* note 10, at 163 ("Jurors may sometimes think they have understood instructions when they have not."); Scott Slonim, *Juries Say Jury Instructions Hampered by Legalese*, 66 A.B.A. J. 132, 133 (1980).

language.²² Specifically, psycholinguistic study helps identify characteristics of the language in jury instructions that both foster and hinder juror comprehension.²³ The work of psycholinguists already has influenced the drafting of pattern jury instructions in several jurisdictions,²⁴ though it has not done so in Missouri.²⁵

Psycholinguistic researchers, as well as legal commentators in general, have consistently traced the causes of juror miscomprehension of pattern jury instructions to at least two sources:²⁶ problems with (1) vocabulary (*i.e.*, the particular words used) and (2) grammar/sentence structure (*i.e.*, the ways particular words are arranged into phrases, clauses and entire sentences).²⁷

22. Charrow & Charrow, *supra* note 11, at 1308 n.7. See also Schwarzer, *supra* note 11, at 740; Brenda Danet, *Language in the Legal Process*, 14 L. & SOC'Y REV. 445, 453 (1980) (defining psycholinguistics as "the study of the mental processes involved in the acquisition and use of language").

23. Edward J. Imwinkelreid & Lloyd R. Schwed, *Guidelines for Drafting Understandable Jury Instructions: An Introduction to the Use of Psycholinguistics*, 23 CRIM. L. BULL. 135, 138 (1987) ("[P]sycholinguistic research tends to show that [there] are techniques for making jury instructions appreciably more readable and understandable."). Psycholinguists define "comprehensibility," or comprehension, as "the extent to which a person understands another person's intended meaning." Sales, Elwork & Alfini, *supra* note 6, at 31.

24. See Meyer & Rosenberg, *supra* note 19, at 106 (discussing the involvement of psycholinguists with pattern jury instruction drafting committees in Oregon and Montana); J. Alexander Tanford, *Law Reform by Courts, Legislatures, and Commissions Following Empirical Research on Jury Instructions*, 25 L. & SOC'Y REV. 155, 165 (1991) (describing the efforts of drafting committees in Alaska, Florida and Pennsylvania to seek the input of psycholinguistic researchers with respect to the drafting of instructions).

25. Tanford, *supra* note 24, at 164-66 (noting states in which social scientific and psycholinguistic research has impacted the jury instruction policymaking of legislatures, appellate courts and drafting committees).

26. Many researchers and commentators also commonly identify a third major problem area: The *organization* of (1) sentences into entire instructions and (2) individual instructions into complete jury charges. See, e.g., Imwinkelreid & Schwed, *supra* note 23, at 146-50 (discussing the three psycholinguistic organizational techniques designed to produce the more comprehensible overall organization of jury instructions). Detailed treatment of this problem area is beyond the scope of this Comment due to its focus upon individual MAI verdict directors in isolation. See generally K. Phillip Taylor, Raymond W. Buchanan, Bert Pryor & David U. Strawn, *Avoiding the Legal Tower of Babel: A Case Study of Innovative Jury Instruction*, JUDGES' J., Summer 1980, at 10, 12 (detailing the need for clear, logical organization in a set of jury instructions).

27. See, e.g., Elwork & Sales, *supra* note 9, at 292-93 (speaking to the need for jury instructions to use simple sentences and common words); McBride, *supra* note 18, at 179, 190, 195 (detailing the importance of "ordinary, understandable language" and

Researchers have crafted entire studies around the intricacies of these two categories.²⁸ Applying their insights to the language in MAI verdict directors yields useful methods for evaluating and improving the comprehensibility of those instructions.

B. Vocabulary

Though one of the primary purposes of standardizing jury instructions is to increase juror comprehension through simplified vocabulary,²⁹ the most common

simple sentences); Perlman, *supra* note 9, at 529 (noting “vocabulary, grammar, and organization”); Schwarzer, *Communicating with Juries*, *supra* note 11, at 740 (focusing on “language, sentence structure and context”); Severance, Greene & Loftus, *supra* note 9, at 200 (“Misunderstanding can arise from the syntax of the instructions, the manner of presentation, or the general unfamiliarity of lay people with legal terminology.”); Severance & Loftus, *supra* note 10, at 157 (discussing how psycholinguists seek to revise the “vocabulary, grammar, and organization” of pattern instructions); Steele & Thornburg, *supra* note 1, at 83 (emphasizing “vocabulary, syntax, and organization”); Slonim, *supra* note 21, at 132 (noting the comprehension problems presented by “grammatical and semantic constructions”); David U. Strawn, Raymond W. Buchanan, Bert Pryor & K. Phillip Taylor, *Reaching a Verdict, Step by Step*, 60 JUDICATURE 383, 387 (1977) (discussing the importance of the “simplest possible language” and simple sentences in jury instructions); Jamison Wilcox, *The Craft of Drafting Plain-Language Jury Instructions: A Study of a Sample Pattern Instruction on Obscenity*, 59 TEMP. L.Q. 1159, 1178 n.69 (1986) (dividing the “plain language style” into the areas of vocabulary, grammar and organization).

28. See, e.g., Danet, *supra* note 22, at 484-86 (addressing the possible barrier to comprehension created by (1) uncommon and abstract words, and (2) sentence length, complexity and verb choice); Elwork, Sales & Alfini, *supra* note 8, at 165-69 (criticizing use in jury instructions of (1) uncommon words, homonyms and “negators”; and (2) complex sentences and passive constructions); Inwinkelreid & Schwed, *supra* note 23, at 138-46 (dividing analysis into (1) “choice of words,” advocating the avoidance of legalese, “nominalizations,” and abstract words; and (2) “use of phrases and clauses” and “sentence structure,” advocating a similar avoidance of passive voice, dependent clauses and oddly placed prepositional phrases); Allan Lind & Anthony Partridge, *Suggestions for Improving Juror Understanding of Instructions*, in PATTERN CRIMINAL JURY INSTRUCTIONS: REPORT OF THE FEDERAL JUDICIAL CENTER COMMITTEE TO STUDY CRIMINAL JURY INSTRUCTIONS (Appendix A) 69, 70-77 (1982) (suggesting that pattern jury instructions avoid (1) homonyms, legal terms, uncommon and negative words; and (2) sentences omitting relative pronouns and using multiple subordinate clauses); Sales, Elwork & Alfini, *supra* note 6, at 31-58 (breaking down criticism of jury instructions into (1) seven categories relating to vocabulary and (2) four categories relating to “grammatical constructions”).

29. See Sales, Elwork & Alfini, *supra* note 6, at 24 (describing the primary purpose of states’ adoption of pattern jury instructions as “[providing] the judge with a concise, error-free statement of the law which is intelligible to the average juror”); Smith, *supra*

criticism of pattern instructions remains the complexity of their diction.³⁰ Even without empirical evidence, commentators have credibly pointed out that pattern jury instructions are too full of “legalese.”³¹ One need take no more than a quick glance through the MAI verdict directors, with their references to such legal concepts as substantial performance and good faith, in order to formulate just such a general criticism.³²

note 8, at 573 (defining pattern jury instructions as “formulated or specimen copies of instructions which may be applied repeatedly in typical cases”). In general, one can identify at least four purposes common to the widespread adoption of pattern jury instruction schemes: (1) saving time at trial, (2) reducing the amount of argument that counsel can interject into instructions, (3) reducing the number of appeals based upon the trial instructions and (4) increasing juror comprehension. Schwarzer, *supra* note 11, at 737-39.

30. See, e.g., Robert L. Winslow, *The Instruction Ritual*, 13 HASTINGS L.J. 456, 461 (1962) (addressing the need for “simplified terminology” and “more commonly used” words in pattern jury instructions). A sampling of the wealth of literature in this area finds the same repeated criticism. See Devitt, *supra* note 8, at 76-77 (absence of “the common speech of man”); Ellsworth, *supra* note 10, at 224 (“convoluted, technical, language”); Forston, *supra* note 10, at 68 (“lengthy technical instructions”); Head, *supra* note 20, at 336 (need for “language of the man on the street”); Lind & Partridge, *supra* note 28, at 70 (“use of uncommon words”); 1959 *Institute for California Judges*, *supra* note 18, at 900 (need for “common, ordinary language”); Price, *supra* note 20, at 466 (lack of “simple everyday terms”); Strawn & Buchanan, *supra* note 10, at 482 (“uncommon words”).

31. See, e.g., Prentice H. Marshall, *Introduction, in PATTERN CRIMINAL JURY INSTRUCTIONS*, *supra* note 28, at vii (“It is all too easy for the lawyers and judges who engage in the drafting process to forget how much of their vocabulary and language style was acquired in law school.”); Charles L. Weltner, *Juror Perceptions: Why the Jury Doesn't Understand the Judge's Instructions*, 18 JUDGES' J. 18, 21 (1989) (citing “reasonableness of fears,” “cooling of passions,” and “constructive and actual notice” as examples). See also Elwork, Sales & Alfini, *supra* note 8, at 165 (“Two of the most important lexical variables that need to be controlled in the writing of jury instructions are the use of legal jargon and the use of uncommon words.”); Perlman, *supra* note 9, at 529-30 (advocating the replacement, in appropriate instances, of legal jargon with more commonly used words); Schwarzer, *supra* note 11, at 740 (criticizing use of “legal jargon”); Smith, *supra* note 8, at 571 (“The most effective instructions are those which are delivered in a clear, audible and, when possible, conversational tone; simple, non-technical language should be used over legalese.”); Steele & Thornburg, *supra* note 1, at 86 (advocating the elimination of legal jargon and unfamiliar words).

32. See, e.g., MAI 24.02 [1981 Revision], “F.E.L.A.—Boiler Act Violation” (“his employment in some way closely and substantially affected interstate commerce”); MAI 25.04 [1978 Revision], “Strict Liability—Product Defect” (“defective condition unreasonably dangerous when put to a reasonably anticipated use”); MAI 26.07 [1981 Revision], “Breach of Bilateral Contract—When Substantial Performance Sufficient” (“plaintiff substantially performed his agreement [in a workmanlike manner]”); MAI

For others, this criticism, as applied to pattern jury instructions, comprises just one part of an entire philosophy embracing simplified legal language, *i.e.* the “plain English” movement.³³ In the specific context of pattern jury instructions, plain English commentators and researchers have recommended the avoidance of “low-frequency” words, “nominalizations,” and negative words.³⁴

1. Low-frequency Words

A mass of psycholinguistic research supports the common-sense proposition that jurors understand and remember familiar terms more easily than uncommon words and phrases.³⁵ Commentators have referred to the most familiar words in the English language as “high-frequency” words, meaning words that appear repeatedly in plain English writings, such as newspapers.³⁶ Jurors who hear and read such words are able to recognize their meaning more quickly and remain undistracted when the oral or written instruction moves on

27.04, “Ejectment—Counterclaim for Value of Improvements” (“entered into possession of the premises under a good faith claim of title”); MAI 31.02(3) [1997 Revision], “Res Ipsa Loquitur—General” (“from the fact of such occurrence and the reasonable inferences therefrom”).

33. See, e.g., Richard C. Wydick, *Plain English for Lawyers*, 66 CAL. L. REV. 727, 728 (1978) (applying psycholinguistic principles to all forms of legal writing based upon the contention that “good legal writing is plain English”). See also August J. Goebel, *Defects in Jury Instructions: Can They be Eliminated?*, 54 CAL. ST. B.J. 290, 298 (1979) (discussing the need to draft jury instructions “in plain English instead of writing them in the language of the law”); Hagerty, *supra* note 8, at 1007 (advocating “plain-language instructions”); Patrick E. Higginbotham, *Helping the Jury Understand*, LITIG., Summer 1980, at 5, 6 (speaking to the need for “‘de-legalized,’ plain language” in jury instructions); *Proximate What? Only the Ph.D. Knew*, 64 A.B.A. J. 660 (1978) (advocating “ordinary” and “straightforward English”); William F. Schwarzer, *Jury Instructions: We Can Do Better*, LITIG., Winter 1982, at 5, 6 (arguing that psycholinguistic principles can help jury instructions written in “plain English”). The “plain English” movement traces its roots to the 1970’s, when professionals and participants in government agencies and many areas of the private business sector began looking for ways to reform the language of business and government documents. For a detailed discussion, see Danet, *supra* note 22, at 451-52; Wydick, *supra*, at 727-29.

34. See *supra* note 28 and accompanying text.

35. Elwork, Sales & Alfini, *supra* note 8, at 165 (“There are literally hundreds of psycholinguistic studies that have demonstrated that familiar words are more easily perceived, remembered, and comprehended.”); Danet, *supra* note 22, at 484 (“Psycholinguists find that uncommon words are more poorly perceived, remembered, and understood.”).

36. Elwork, Sales & Alfini, *supra* note 8, at 165 (stating that familiar are “those words in our language that are used most frequently in magazines and newspapers.”).

to subsequent words, phrases and sentences.³⁷ Even when the meaning of a “low-frequency” word is known to a juror, he or she may process that meaning somewhat slowly, neglecting fully to concentrate on the rest of the instruction.³⁸

To determine objectively which words are high-frequency and which are not, psycholinguists have turned to Edward L. Thorndike and Irving Lorge, authors of *The Teacher's Word Book of 30,000 Words*,³⁹ for guidance.⁴⁰ This work reports the number of times, per one million words, that a given word appears in common written English.⁴¹ Researchers refer to words appearing less than ten times per million words as low-frequency words—the kind of words that endanger maximum juror comprehension.⁴² Determining the prevalence of low-frequency words in MAI verdict directors is as simple as looking up “suspect” words in Thorndike and Lorge.⁴³

2. Nominalizations

Nominalizations are nouns created from verbs.⁴⁴ The common way to create a nominalization is to add an ending, such as “-ing,” “-tion,” or “-al,” to a verb stem.⁴⁵ Common examples that might crop up in a pattern jury instruction

37. Sales, Elwork & Alfini, *supra* note 6, at 33 (“[S]ince high frequency words are perceived more quickly, it is reasonable to predict that jury instructions will be processed more easily if common words are used The easier and more meaningful this decoding process becomes, the easier it should be to comprehend the entire message.”).

38. Lind & Partridge, *supra* note 28, at 70 (“Even if the meaning is known, it will generally require more effort to understand a passage containing one or more uncommon words than a passage whose vocabulary is more familiar.”).

39. This work, first published in 1944, continues in print and analyzes the frequency with which words appear in written samples from numerous magazines and 120 juvenile books. See Edward L. Thorndike & Irving Lorge, *Introduction, in THE TEACHER'S WORD BOOK OF 30,000 WORDS* (1944).

40. Sales, Elwork & Alfini, *supra* note 6, at 32 (“Since Thorndike and Lorge (1944) published their frequency counts of 30,000 English words, it [has become] easier for researchers to . . . test [the] hypothesis [that familiar words are more easily understood and remembered]. Indeed, the hypothesis is now generally supported by literally hundreds of psycholinguistic studies.”). See also Lind & Partridge, *supra* note 28, at 70-71 (citing Thorndike & Lorge as the most useful publication for determining word frequency).

41. See Thorndike & Lorge, *Introduction, supra* note 39.

42. Lind & Partridge, *supra* note 28, at 71 (“We suggest that . . . words be regarded as particularly suspect if they are reported in Thorndike and Lorge as appearing less frequently than ten times per million words of writing.”).

43. See *infra* note 117 and accompanying text.

44. Tiersma, *supra* note 9, at 48.

45. Imwinkelreid & Schwed, *supra* note 23, at 139.

include “failure,” “admission,” or “collision.”⁴⁶ Commentators have criticized legal writing in general for its overuse of nominalizations, which lend added abstraction to a written work.⁴⁷ As one writer stated in noting the abundance of these words: “[T]he law is not abstract; it is part of a real world full of people who live and move and do things to other people. Car drivers *collide*. Plaintiffs *complain*. Judges *decide*.”⁴⁸

Researchers of pattern jury instructions have concluded that nominalizations in instructions are barriers to juror comprehension.⁴⁹ Nominalizations dispense with simpler verb forms and in the process can complicate the mind’s comprehension of an entire sentence.⁵⁰ They can turn complex sentences into simple ones, but any anticipated benefits in overall comprehensibility are illusory: The replacement of an entire dependent clause⁵¹ with a nominalization eliminates the “doer” of an action from the sentence.⁵² This adds ambiguity and needlessly distracts the reader or hearer who is trying to grasp the meaning of the sentence as a whole.⁵³ MAI verdict directors are susceptible to “nominalization testing,” with “noun-from-verb” constructions being fairly easy to spot during a focused reading.⁵⁴

3. Negative Words

Commentators uniformly criticize pattern jury instructions for their abundant use of negatives words.⁵⁵ For purposes of these criticisms, negative

46. See Charrow & Charrow, *supra* note 11, at 1321-22.

47. See generally Rudolf Flesch, *Measuring the Level of Abstraction*, 34 J. APPLIED PSYCHOL. 384, 385-86 (1950) (discussing the difference between “abstract” and “concrete” words); James D. McCawley, *Where Do Noun Phrases Come From?*, in READINGS IN ENGLISH TRANSFORMATIONAL GRAMMAR 166 (1970) (describing the differences in level of abstraction between nouns and verbs).

48. Wydick, *supra* note 33, at 745.

49. See, e.g., Charrow & Charrow, *supra* note 11, at 1311, 1321, 1328 (finding subjects were better able to paraphrase California pattern civil instructions after the replacement of nominalizations).

50. Imwinkelreid & Schwed, *supra* note 23, at 139.

51. See *infra* note 71 and accompanying text.

52. Charrow & Charrow, *supra* note 11, at 1321 (citing, as an example, the replacement of the dependent clause “*when you are incorporating the material*” with the nominalization “*the incorporation of the material*”).

53. Charrow & Charrow, *supra* note 11, at 1321 (“The meaning of the sentence becomes less clear, and the mind must work harder to decode it.”).

54. See *infra* note 118 and accompanying text.

55. See, e.g., Higginbotham, *supra* note 33, at 6; Lind & Partridge, *supra* note 28, at 75; Schwarzer, *supra* note 33, at 6; Slonim, *supra* note 21, at 132-33; Wilcox, *supra* note 27, at 1167-68.

words include not only “no,” “not,” and “never,” but also any word connoting a negative meaning or serving a negative function in a sentence.⁵⁶ Thus, negative words also include conjunctions, such as “unless” or “except,” or adjectives and verbs having a negating prefix, such as “mis-,” “dis-,” or “un-.”⁵⁷ Empirical research involving pattern jury instructions has shown juror comprehension problems with negative sentences, problems which intensify as the number of negative words in a sentence increases.⁵⁸

Specifically, commentators and psycholinguistic researchers explain that negative words make the understanding of sentences more difficult by adding an extra step to the comprehension process: the hearer or reader must first process the sentence’s meaning in positive terms before then being able to digest the negative meaning.⁵⁹ Researchers recommend that drafters of pattern jury instructions (1) replace negative words with positive terms and (2) limit the use of negatives to expressing exceptions to foregoing propositions.⁶⁰ As with nominalizations, negative words are easily detected in MAI verdict directions.⁶¹

4. Other Word Choice Concerns

A critical perusal of MAI verdict directions can also detect the presence, or lack thereof, of other language problems that researchers have found in pattern jury instructions. First, the presence of “unique determiners,” common to legal writing in general, can be a barrier to comprehensibility.⁶² Unique determiners include words, like “such” and “said,” which are used to modify nouns even

56. Charrow & Charrow, *supra* note 11, at 1324 n.48.

57. See Elwork, Sales & Alfini, *supra* note 8, at 167 (citing “disregard” as a common example in pattern jury instructions).

58. See Charrow & Charrow, *supra* note 11, at 1324-25 (finding subjects less able to paraphrase pattern jury instructions correctly as the number of negative words increased). See also Tiersma, *supra* note 9, at 50 (addressing the cumulative effect of multiple negative words in a single sentence). See generally Elwork, Sales & Alfini, *supra* note 8, at 167 (discussing psycholinguistic study of negative words in general).

59. Elwork, Sales & Alfini, *supra* note 8, at 167 (“[Using ‘disregard’ as an example], this word requires the comprehension of the positive concept ‘regard’ and then a negation of it. . . . Such negators require two steps: (1) the comprehension of the positive version of a sentence, and (2) then denial of it.”). See also Charrow, *supra* note 4, at 1100 (“Humans tend to think in positive terms; therefore, each negative which is added to a sentence forces the reader (or listener) to add another mental step.”); Sales, Elwork & Alfini, *supra* note 6, at 43-44.

60. See Elwork, Sales & Alfini, *supra* note 8, at 167 (“The only time a negative sentence should be used is when an exception needs to be emphasized.”); Wilcox, *supra* note 27, at 1167-68.

61. See *infra* note 119 and accompanying text.

62. See, e.g., Danet, *supra* note 22, at 481.

when a simple “the” or “this” would suffice.⁶³ Other researchers have criticized the prevalence in jury instructions of the prepositional phrase “as to.”⁶⁴ Finally, the “word list,” or “doublet” (e.g., the phrase “give, bequeath, and devise”), is another common feature of legal writing that has garnered critical attention due to its use of unnecessary strings of verbs, adjectives or nouns.⁶⁵

C. Grammar and Sentence Structure

Using simple words in pattern jury instructions does not ensure juror comprehension, however, if drafters put those words together in an incomprehensible fashion. Thus, most critics employing a psycholinguistic approach have also scrutinized the grammar and sentence structure of pattern jury instructions.⁶⁶ The focus here is upon syntax, the way a writer or reader puts words together.⁶⁷

1. Complex Sentences

Although the “Missouri 152-word-sentence rule”⁶⁸ takes the proposition to its extreme, commentators generally agree that length alone is not an accurate gauge of the overall comprehensibility of a written or spoken sentence.⁶⁹ Rather,

63. *Id.* (citing, as an example, the replacement of “in *this* event” with “in any *such* event”). See generally CLARENCE STRATTON, HANDBOOK OF ENGLISH 285 (1940) (“The use of *said* to designate a person or thing already mentioned should be reserved for legal and contract phraseology.”). Stratton provides the following example: “The said firm, hereinafter designated as the first party, does agree to pay to said Charles Brown” *Id.* Due to the ambiguity of these words, some commentators discourage the use of “unique determiners” even in the drafting of *technical* legal documents. See, e.g., CHARLES R. CALLEROS, LEGAL METHOD AND WRITING 444-45 (2d ed. 1994).

64. See, e.g., Charrow & Charrow, *supra* note 11, at 1322-23 (finding the use of this phrase as barrier to comprehension due to its relatively ambiguous meaning as compared with other prepositions).

65. *Id.* at 1326, 1349. See generally RUDOLPH FLESCHE, HOW TO WRITE PLAIN ENGLISH: A BOOK FOR LAWYERS AND CONSUMERS 40 (1979) (listing “cease and desist,” “let or hindrance,” and “null and void” as examples).

66. See *supra* notes 27-29 and accompanying text.

67. Danet, *supra* note 22, at 477 (identifying the many “syntactic features” common to legal writing in general).

68. See *supra* note 5 and accompanying text.

69. See, e.g., Charrow & Charrow, *supra* note 11, at 1319 (“Linguistic research has shown that sentences of the same length may vary greatly in actual comprehensibility.”); Imwinkelreid & Schwed, *supra* note 23, at 145. See generally A.J. Wearing, *The Recall of Sentences of Varying Length*, 25 AUSTRAL. J. PSYCHOL. 155 (1973) (discussing the impact of sentence length upon understandability in general). But see Wydick, *supra*

the appropriate inquiry centers on the *complexity* of a sentence.⁷⁰ Commentators have criticized the use of a sentence containing a dependent clause,⁷¹ for example, in preference to two simple sentences expressing the same information.⁷² Psycholinguists refer to dependent clauses as “embeddings,”⁷³ and point out their adverse effect upon the ability of jurors to understand and remember jury instructions.⁷⁴ As with negative words, the damage to comprehension mounts as the number of dependent clauses within a sentence increases.⁷⁵

note 33, at 743 (recommending that legal writers keep their sentences shorter than 25 words).

70. See Elwork, Sales & Alfini, *supra* note 8, at 167 (“It is reasonable to assume that grammatical complexity should also have an effect on the comprehension and memory of language.”); Lind & Partridge, *supra* note 28, at 74 (“Long sentences are as easily understood as short sentences if they are simple in their grammatical structure.”); Sales, Elwork & Alfini, *supra* note 6, at 47 (“In writing jury instructions . . . length should only be a concern when it affects the grammatical complexity of a sentence.”).

71. See, e.g., Slonim, *supra* note 21, at 132-33; Tiersma, *supra* note 9, at 51. A complex sentence “is a sentence made up of one independent clause and one or more dependent clauses,” with (1) an independent clause being “a clause that could be used alone as a simple sentence (e.g., ‘three men left last night’) and (2) a dependent clause, i.e. subordinate clause, being a clause with “one subject and predicate which makes only a half-sentence when standing alone (e.g., ‘While we were sleeping, three men left last night’).” MICHAEL P. KAMMER & CHARLES W. MULLIGAN, WRITING HANDBOOK §§ B23, C400, C402, at 61, 178 (1953). Dependent clauses may begin with either (1) indefinite pronouns, such as “whose” and “which,” or (2) subordinating conjunctions, such as “after,” “although,” “because,” “when,” and “while.” *Id.* §§ A158, C408, at 50, 180.

72. See Tiersma, *supra* note 9, at 51 (“A . . . problem with many jury instructions is the large number of [complex sentences that] are often constructed by combining two or more simple sentences.”).

73. See, e.g., Charrow & Charrow, *supra* note 11, at 1327; Elwork, Sales & Alfini, *supra* note 8, at 168.

74. See, e.g., Sales, Elwork & Alfini, *supra* note 6, at 45 (“[The] more grammatically complex a sentence becomes, the greater the amount of information that will be contained in it and the greater the amount of logical complexity that will result.”). See generally V.M. Holmes, *Order of Main and Subordinate Clauses in Sentence Perception*, 12 J. VERBAL LEARNING & VERBAL BEHAV. 285, 287-90 (1973) (discussing the impact of dependent clauses on memory and understanding).

75. Charrow & Charrow, *supra* note 11, at 1327 (“[I]f a writer indiscriminately embeds subordinate clauses, the likelihood that a difficult to comprehend embedding will be used in a sentence should increase as the number of embeddings increases.”). Charrow & Charrow support their proposition with empirical data, finding a “high negative correlation” between the frequency of use of dependent clauses in California pattern jury instructions and the ability of subject jurors to paraphrase correctly the meaning of such instructions. Charrow & Charrow, *supra* note 11, at 1327. Simply, “as the number of embeddings increased, comprehension decreased.” Charrow & Charrow,

More significant than the mere frequency of dependent clauses is the *type* of dependent clause used by drafters in a particular sentence.⁷⁶ Researchers categorize dependent clauses by their location in a sentence. Such a clause at the beginning creates a “left-branching” sentence,⁷⁷ at the end, a “right-branching” sentence,⁷⁸ or when somewhere in the middle, a “center-branching” sentence.⁷⁹ The left-branching variety poses the greatest danger to juror comprehension⁸⁰ because it forces the mind of the juror to process one thought (*i.e.*, the dependent clause) before letting the juror know what the sentence “is all about” (*i.e.*, the independent clause).⁸¹ In analyzing the MAI verdict directors, this Comment evaluates the presence, quantity and type of dependent clauses in each instruction.⁸²

supra note 11, at 1327.

76. Charrow & Charrow, *supra* note 11, at 1327 (reporting “the types of embeddings used in the instructions probably affected performance [*i.e.*, ability of jurors to paraphrase meanings] more than the number of embeddings”).

77. See Sales, Elwork & Alfini, *supra* note 6, at 47 (defining “left-branching embedded sentences” as sentences having a dependent clause “appear[ing] first uninterrupted” and providing, as an example, “[w]hile the driver was repairing the truck he sang loudly”) (emphasis added).

78. See Sales, Elwork & Alfini, *supra* note 6, at 47 (defining “right-branching self-embedded sentences” as sentences in which the *independent* clause “appears first uninterrupted,” and providing, as an example, “[t]he boys listened to the radio while they were working”) (emphasis added).

79. See Sales, Elwork & Alfini, *supra* note 6, at 47 (describing “center-embedded sentences” as those in which the independent clause is “interrupted by [a] subordinate clause,” with an example being “[t]he truck that Bill was driving crashed into the post”) (emphasis added). See also Charrow & Charrow, *supra* note 11, at 1328 n.59 (discussing these same three types of uses of dependent clauses and providing examples).

80. Charrow & Charrow, *supra* note 11, at 1327 (providing empirical support for this proposition).

81. Lind & Partridge, *supra* note 28, at 74. See also Imwinkelreid & Schwed, *supra* note 23, at 146 (“[T]he presence of a subordinate clause forces the jury to engage in mental gymnastics to understand the entire sentence.”).

82. See *infra* note 122 and accompanying text.

2. Use of the Passive Voice

Like the use of dependent clauses,⁸³ the presence of the passive voice⁸⁴ in a pattern jury instruction can have a detrimental effect on the juror's ability to understand and remember the meaning of the instruction.⁸⁵ A verb in the passive voice interjects extra words into a sentence⁸⁶ and creates comprehension problems either by burying the "doer" of the action at the end of the sentence or by omitting the "doer" entirely.⁸⁷ Similar to low-frequency words,⁸⁸ verbs in the passive voice can lend ambiguity and distraction to an instruction by diverting the mind's attention from subsequent words and phrases, and shifting it towards a search for the identity of the "actor."⁸⁹

83. See *supra* note 74 and accompanying text.

84. "Passive voice" is the form of a verb "that shows that the subject is being acted upon" while "active voice" means the form of a verb showing "that the subject is acting," e.g., "Herbert *was teased* by the lion" (passive voice) as compared with "Herbert *teased* the lion" (active voice). Kammer & Mulligan, *supra* note 71, §§ C97-98, at 84. To dispel a common myth among law students and legal writers in general, mere use of a form of the infinitive "*to be*" does not necessarily, nor ordinarily, mean a writer is using the passive voice. For example, the phrase "is using" in this footnote's preceding sentence is not an example of passive voice. See, e.g., GEORGE D. GOPEN, WRITING FROM A LEGAL PERSPECTIVE 21-22 (1981) (drawing a dubious analogy between use of "to be" and "passive construction"). As well, one should "not confuse passive voice with past tense." Kammer & Mulligan, *supra* note 71, § C99, at 84.

85. Danet, *supra* note 22, at 485-86; Elwork, Sales & Alfini, *supra* note 8, at 168. See also Sales, Elwork & Alfini, *supra* note 6, at 52-53 ("[R]esearchers have suggested that the active form is the natural form in which the mind stores propositions, and they hypothesize that passive sentences should therefore take longer to decipher and store."). See generally Higginbotham, *supra* note 33, at 6; Schwarzer, *supra* note 33, at 6. However, many have pointed out that use of the passive voice can actually *benefit* juror comprehension when the "receiver" of the action demands the emphasis of the sentence. In such case, it is preferable for the "receiver" to appear first in the sentence. See Charrow & Charrow, *supra* note 11, at 1325 n.51; Wydick, *supra* note 33, at 746-47.

86. See *supra* note 84. See also Wydick, *supra* note 33, at 746.

87. See Charrow & Charrow, *supra* note 11, at 1325 n. 52 (distinguishing between "full passive" sentences, which do not omit the "doer" of action, and "truncated passive" sentences, which eliminate the "doer" from the sentence). See generally RENE J. CAPPON, THE WORD: AN ASSOCIATED PRESS GUIDE TO GOOD NEWS WRITING 26-27 (1982) ("In most cases, though, the passive is flabby, dropping the doer of a deed out of the picture. That's why officialese is addicted to the passive mode. *It is believed* or *it is estimated* allows the estimator and the believer to vanish in the fog.").

88. See *supra* notes 37-38 and accompanying text.

89. See WILLIAM ZINSSER, ON WRITING WELL: AN INFORMAL GUIDE TO WRITING NONFICTION 101 (1980) ("A style which consists mainly of passive constructions . . . saps the reader's energy. He is never quite certain of what is being perpetrated by whom

However, use of the passive voice in pattern jury instructions has drawn the ire of psycholinguistic researchers⁹⁰ only when it has appeared in dependent clauses.⁹¹ The work of Robert and Veda Charrow, a law school professor and psycholinguist, respectively, lends the most significant empirical support for this proposition.⁹² Studying California pattern instructions, they determined that the mere presence of the passive voice did not significantly hurt juror comprehension, but that the location of passive forms in dependent clauses did lower understanding levels.⁹³ Taking into account the conflicting findings of researchers, this Comment notes both the presence and location of the passive voice in the MAI verdict directions.⁹⁴

3. Other Grammatical Constructions

To a less significant extent, scholars have identified other problem areas in the sentence structure of pattern jury instructions. First, compound sentences,⁹⁵ though not receiving the same attention as their complex counterparts, have

and on whom.”) *See also* Imwinkelreid & Schwed, *supra* note 23, at 145 (“When the juror hears ‘It is said . . .’ the juror may wonder who said it. Or if the juror hears ‘It was done . . .’ the juror may wonder who did it.”); Wydick, *supra* note 33, at 746 (“With the active voice, the reader can usually see who is doing what to whom. But the passive voice often leaves that unclear.”).

90. *See* Charrow & Charrow, *supra* note 11, at 1325 (“[P]sycholinguistic research regarding the comprehensibility of passive constructions has produced equivocal results.”); Danet, *supra* note 22, at 485 (“Though some studies find passives more difficult to recall or comprehend, others fail to find a difference.”); Sales, Elwork & Alfini, *supra* note 6, at 52-53 (noting the conflicting findings of psycholinguistic researchers with respect to the comprehensibility of the passive voice in general).

91. VEDA L. CHARROW, WHAT IS “PLAIN ENGLISH”, ANYWAY? 9 (1979). *See* Danet, *supra* note 22, at 486 (describing studies finding that “[r]emoving passives improved comprehension significantly only in subordinate clauses”); Imwinkelreid & Schwed, *supra* note 23, at 145 (noting psycholinguistic research findings to the same effect); Tiersma, *supra* note 9, at 51 (“[T]he passive voice impedes comprehension primarily when used in subordinate clauses—in main clauses, the passive voice does not seem to cause any particular problems.”).

92. *See* Tiersma, *supra* note 9, at 51.

93. Charrow & Charrow, *supra* note 11, at 1326 (“Thus, there is some evidence that passive constructions, when properly used and not obscured in subordinate clauses, do not impede comprehension.”).

94. *See infra* note 123 and accompanying text.

95. Compound sentences are “sentence[s] made up of two or more independent clauses properly connected,” with the conjunctions “and,” “but,” and “or” most commonly providing the connection. Kammer & Mulligan, *supra* note 71, § B22, at 61. *See supra* notes 71-73 and accompanying text.

drawn some unfavorable reviews.⁹⁶ Compound sentences, like complex ones,⁹⁷ tend to burden the mind of the juror with a barrage of ideas at once.⁹⁸ Second, several commentators have noted the negative impact upon comprehension of the so-called “whiz”,⁹⁹ or complement, deletion.¹⁰⁰ This problem involves the omission, from the beginning of a dependent clause,¹⁰¹ of a relative pronoun¹⁰² and a form of the verb “to be” (e.g., “covenant [*that is*] contained,” “remedies [*that are*] available”).¹⁰³ While whiz deletions, like nominalizations,¹⁰⁴ serve to shorten sentences and may in fact be *more* conversational,¹⁰⁵ they also force the juror’s mind to make the extra effort “to fill in the missing words.”¹⁰⁶ They add to and complicate the juror’s task of ingesting the meaning of the entire instruction.¹⁰⁷ The presence of both compound sentences and whiz deletions in the MAI verdict directors received the attention of this Comment.¹⁰⁸

96. See, e.g., Perlman, *supra* note 9, at 529 (making equal criticism of compound and complex sentences); Severance, Greene & Loftus, *supra* note 9, at 208 (advocating drafters avoid compound sentences and limit sentences to the expression of one idea).

97. See *supra* note 72 and accompanying text.

98. Imwinkelreid & Schwed, *supra* note 23, at 146 (“[T]he draftsman should avoid using compound sentences. The jurors are more likely to understand two concepts if they are stated separately.”).

99. Charrow & Charrow, *supra* note 11, at 1323.

100. Imwinkelreid & Schwed, *supra* note 23, at 142-43.

101. See *supra* note 71.

102. Examples include “which,” “who,” and “that.” Specifically, relative pronouns are pronouns that “not only take the place of nouns but [also] join or relate a dependent clause to . . . another clause.” Kammer & Mulligan, *supra* note 71, § A44, at 11.

103. Danet, *supra* note 22, at 479.

104. See *supra* notes 50-52 and accompanying text.

105. Charrow & Charrow, *supra* note 11, at 1323 (noting the normal use of “whiz” deletions in everyday English).

106. Imwinkelreid & Schwed, *supra* note 23, at 143.

107. Charrow & Charrow, *supra* note 11, at 1323. Not surprisingly, Charrow & Charrow found subject jurors less able to paraphrase the meaning of California pattern jury instructions containing “whiz” deletions. Charrow & Charrow, *supra* note 11, at 1323.

108. See *infra* note 118-21 and accompanying text.

III. METHOD

With the foregoing ten common problem areas of pattern jury instructions providing a sort of checklist for guidance,¹⁰⁹ this Comment proceeded sequentially through all fifteen of the MAI “plaintiff verdict directing” chapters, encompassing 105 verdict directors in all.¹¹⁰ The author checked each instruction for the presence of the identified problems, making notations and keeping a running numerical tally of the presence of each type of problem.¹¹¹ In considering each instruction, this Comment ignored the standard MAI opening sentence for verdict directors¹¹² as well as each instruction’s standard affirmative defense “tail.”¹¹³ Within each instruction, the author did consider bracketed words¹¹⁴ but ignored the italicized language found in parentheses.¹¹⁵

109. These problem areas led to the author’s formation of an actual “checklist,” which included word frequency, nominalizations, negative words, “unique determiners,” word lists, “as to” phrases, dependent clauses, use of the passive voice, compound sentences and “whiz” deletions. *See* Charrow & Charrow, *supra* note 11, at 1336-37.

110. *See supra* notes 12-13 and accompanying text.

111. For example, if a particular verdict director contained four negative words, the author noted this number, which could later be added to the tallies of negative words from other instructions in that chapter.

112. This sentence reads as follows: “Your verdict must be for the plaintiff if you believe: . . .” As this sentence constitutes a “right-branching” sentence by virtue of its use of a dependent clause (“if you believe”), it seemed prudent not automatically to add to the “dependent clause” tally each time the author turned a page. Charrow & Charrow, *supra* note 11, at 1315.

113. The “tail” reads as follows: “[U]nless you believe plaintiff is not entitled to recover by reason of Instruction Number _____.” MAI 33.01 [1996 Revision], “Converse Instructions—General Comment.” Since this “tail” includes two negative words, one dependent clause, and one example of the passive voice, it again seemed advisable to omit it from repeated consideration.

114. MAI 27.03 [1978 New], “Ejectment—Damages Only,” for example, reads: “[P]laintiff had the right to [joint] possession of the premises . . .” The word “joint” may or may not be necessary based upon the facts of the case. The author considered bracketed words and phrases because of the possibility of their use and because they represent the approved, and sometimes mandatory, language of the Missouri Supreme Court Committee on Jury Instructions.

115. The parentheses most often merely contain instructions regarding the type of case-specific information that the judge or counsel should insert. However, they also often contain examples of appropriate language. This Comment did not consider such language because, within the MAI scheme, it serves as illustrative language only and does not carry the same directive of possible mandatory use that the bracketed language carries.

To identify the presence of each of the ten common types of problems,¹¹⁶ the author read each verdict director ten or more times, with each reading designed to detect a different problem area. The search for low-frequency words demanded use of the Thorndike & Lorge work in order to discover how frequently MAI words appear in common written English.¹¹⁷ The author identified nominalizations,¹¹⁸ negative words,¹¹⁹ “unique determiners,”¹²⁰ “as to” phrases, and word lists from the face of each instruction. The same method detected the presence of compound sentences and “whiz” deletions.¹²¹ The location of dependent clauses¹²² and the passive voice¹²³ within sentences received attention in addition to the mere presence of these two problems.

116. *See supra* note 109.

117. *See supra* notes 39-43 and accompanying text. The choice of which words within a verdict director to check in Thorndike & Lorge was an inherently subjective process. Because many seemingly common words turn out to be low-frequency words according to the calculations of Thorndike & Lorge, the author sought to check on all but the most common of words. For example, in the sentence “[D]efendant failed to keep a careful lookout,” as found in MAI 20.02, “Wrongful Death—Multiple Negligent Acts Submitted,” the author checked “failed,” “careful,” and “lookout.” MAI 20.02 [1983 Revision]. A running tally was kept of words that, according to Thorndike & Lorge, appear ten times or less per one million words of common written English. The numerical tally included multiple usages of the same word within an instruction. However, the repeatedly appearing words “plaintiff,” “defendant,” and “verdict” did not receive attention. Also, words with mandatory accompanying definitions did not receive attention, *e.g.*, “negligence.”

118. Nouns embodying the infinitive form of a verb, *e.g.*, “use” and “damage,” did not receive attention. Rather, the author only tallied nouns that added some sort of ending to a verb form, *e.g.*, “failure” or “agreement.” Again, when the same nominalizations appeared more than once in the same instruction, the author recorded the number of usages.

119. The author looked for any words having a negative meaning or having a negative function in a sentence, not merely “no” and “not.” *See supra* notes 56-57 and accompanying text. As with low-frequency words and nominalizations, the presence of the same negative word in multiple locations within an instruction received attention.

120. Since psycholinguistic researchers have not placed a great deal of emphasis on “unique determiners,” the author only noted the presence or absence of a “unique determiner” in each verdict director, not paying attention to instances of multiple use within an instruction. *See supra* notes 62-63 and accompanying text.

121. *See supra* notes 99-107 and accompanying text.

122. *See supra* notes 76-81 and accompanying text. The author noted both the presence of dependent clauses and whether each instance involved a right, left, or center “branching” complex sentence.

123. *See supra* notes 90-93 and accompanying text. The author recorded both the instances of use of the passive voice and whether each use appeared in a dependent clause.

Observers should not regard the presence of any of the ten problem areas in a MAI verdict director as trivial. For instance, while the presence of a negative word in an instruction may not, in itself, have much of an impact on juror comprehension, commentators and researchers have repeatedly emphasized the *cumulative* adverse effect these problems have on understandability.¹²⁴ Thus, in looking at the MAI verdict directors, the author was careful not to let any of these problems go undetected.

IV. RESULTS

A. Overall Problems with MAI

1. Presence of Vocabulary Problems

Among the 105 MAI verdict directors, this Comment detected the presence of 141 instances of the use of low-frequency words.¹²⁵ MAI 26.07, “Breach of Bilateral Contract—When Substantial Performance Sufficient,” contains the most distressing isolated example in its use of the word “workmanlike.”¹²⁶ This word is so obscure that it does not even appear in the “per million” tables of Thorndike & Lorge.¹²⁷ Rather, those authors report that “workmanlike” is used only seven times per *four* million words of common written English.¹²⁸ This word should not appear in an instruction that jurors will hear in many simple contracts cases.¹²⁹

Two MAI chapters emerged as particular areas of concern, containing low-frequency words at a rate of at least two per instruction. First, Chapter 22, “Owners and Occupiers of Land,” uses 18 low-frequency words in its eight instructions.¹³⁰ MAI 22.07, “Licensee,” made the biggest contribution,

124. See, e.g., Lind & Partridge, *supra* note 28, at 69-70. Lind & Partridge state: “The obstacles should be regarded as cumulative in their effect: A juror may be able to understand with ease a single instruction, standing alone, that contains one or a few of these features. But it may be much more difficult to understand a passage that contains several of them” Lind & Partridge, *supra* note 28, at 70. See also Charrow & Charrow, *supra* note 11, at 1349-50 (empirically noting the impact of various problem areas upon juror comprehension in both isolation and cumulative effect).

125. See *supra* note 117 and accompanying text.

126. MAI 26.07 [1981 Revision].

127. See Thorndike & Lorge, *supra* note 39.

128. See Thorndike & Lorge, *supra* note 39.

129. See *infra* note 222 and accompanying text.

130. Examples include “premises” (MAI 22.07 [1991 Revision], “Licensee”) (used only seven times per one million words of common written English), “excavation” (MAI 22.02 [1995 Revision], “Dangerous Condition Near Public Thoroughfare”) (used five

containing six low-frequency words.¹³¹ Meanwhile, Chapter 25, “Breach of Warranty and Product Liability,” contains 20 low-frequency words in ten instructions.¹³² MAI 25.04, the verdict director for a strict liability product defect claim, is the worst example, containing five low-frequency words.¹³³ Other problem chapters include Chapter 23, “Intentional Torts,”¹³⁴ and Chapter 31, “Miscellaneous.”¹³⁵

An even more recurring problem in the MAI verdict directors is the presence of nominalizations, with the 105 verdict directors containing 196 examples.¹³⁶ MAI Chapter 27, “Ejectment,” employs nominalizations to the greatest extent, at a rate of six per instruction.¹³⁷ Chapter 24, “Federal

times per one million words), and “barricade” (MAI 22.03 [1995 Revision], “Invitee Injured”) (three times per million). An explanation for the high rate of low-frequency words in Chapter 22 is the repeated use of the words “reasonably” (e.g., MAI 22.08 [1978 New], “Highway Danger Created by Highway Construction Contractor”) (used seven times per million) and “unreasonable” (e.g., MAI 22.01 [1996 Revision], “Trespassing Children”) (eight times per million).

131. These include “premises” (used twice in the instruction), “reasonably” (used three times), and “adequately.” MAI 22.07 [1991 Revision].

132. Examples here include “adequately” (MAI 25.10(A) [1990 New], “Negligently Supplying Dangerous Instrumentality”) (three times per million), “conform” (MAI 25.07 [1991 Revision], “Breach of Express Warranty Under Uniform Commercial Code”) (seven times per million), “defective” (MAI 25.04 [1978 Revision], “Strict Liability—Product Defect”) (six times per million), and “unfit” (MAI 25.03 [1980 Revision], “Breach of Common Law Implied—Warranty of Fitness for a Particular Purpose Under Uniform Commercial Code”) (ten times per million). As with Chapter 22, the frequent use of the words “reasonably” and “unreasonably” contributes to the high count of low-frequency words.

133. These include “defective” (used twice), “reasonably” (used twice), and “unreasonably.” MAI 25.04 [1978 Revision].

134. Chapter 23 contains 25 low-frequency words in its fourteen instructions. The most infrequently used word was “instigate” (one time per million), which appears in MAI 23.04 [1983 Revision], “False Imprisonment,” and MAI 23.07 [1980 Revision], “Malicious Prosecution—For Initiating Criminal or Civil Actions.”

135. Chapter 31 contains 20 instructions, which use 27 low-frequency words. The most noteworthy examples are “beneficiary” (MAI 31.08 [1978 Revision], “Life Insurance Policy”) (one time per million) and “assess” (MAI 31.04 [1991 Revision], “Loss of Consortium, Loss of Services or Medical Expenses—Spouse or Child Injured—For EITHER Comparative Fault or Non-Comparative Fault Submissions”) (one time per million).

136. See *supra* note 118 and accompanying text.

137. Chapter 27 contains 24 nominalizations in its four instructions. Examples include “knowledge” (MAI 27.03 [1978 New], “Ejectment—Damages Only”), “improvements” (MAI 27.04 [1981 Revision], “Ejectment—Counterclaim for Value of Improvements”), and “possession” (all four Chapter 27 instructions). The multiple usage

Employers' Liability Act," contains four nominalizations per instruction.¹³⁸ Chapters containing nominalizations at a rate of at least three per instruction include Chapter 18, "Agency in Issue,"¹³⁹ and Chapter 28, "Services Furnished Decedent."¹⁴⁰ Among the chapters containing more common types of verdict directors, both Chapter 23¹⁴¹ and Chapter 25¹⁴² include nominalizations at a rate of at least two per instruction.¹⁴³ In most instances, one can attribute a high nominalization count in a particular MAI chapter to the multiple usage of words peculiar to the chapter's underlying substantive subject matter.¹⁴⁴

of the word "possession" in these four verdict directors contributes to the high nominalization count. MAI 27.04 contains the most nominalizations, adding eight to the tally. MAI 27.04 [1981 Revision].

138. Chapter 24 has twelve nominalizations in its three verdict directors, including, *e.g.*, "appliances" (MAI 24.01 [1992 Revision], "F.E.L.A.—Failure to Provide Safe Place to Work"), "tender" (MAI 24.02 [1981 Revision], "F.E.L.A.—Boiler Act Violation"), and "injury" (MAI 24.03 [1981 Revision], "F.E.L.A. Safety Appliance Act Violation"). Like the word "possession" in Chapter 27, the multiple usage of the words "employee" and "employment" contributes to the high nominalization count in Chapter 24. MAI 24.02 contains the most nominalizations (five) among these three instructions. MAI 24.02 [1981 Revision].

139. Chapter 18 contains only one instruction (MAI 18.01 [1991 Revision], "Agency in Issue—Modification Required"), but includes alternatives for when a suit does not join a servant and for when a suit joins both a master and a servant. Between these two alternatives, MAI 18.01 uses three nominalizations, *i.e.* "employment" (used twice) and "collision." MAI 18.01 [1991 Revision].

140. Chapter 28 uses twelve nominalizations among its four verdict directors. Examples include the use in MAI 28.02, "Recovery for Services Furnished Decedent Under Implied Contract Where Family Relationship Is Admitted or an Issue," of the words "relationship," "agreement," and "payment." MAI 28.02 [1969 New]. Moreover, the repeated use of the word "services" contributes to the high count in this chapter. MAI 28.02 contains the most nominalizations (six) among Chapter 28's four instructions. MAI 28.02 [1969 New].

141. Chapter 23 includes 35 nominalizations among its 17 intentional tort instructions. MAI 23.06(1) [1980 New], "Libel—Plaintiff Not a Public Official or Public Figure," uses nominalizations the most prevalently, containing seven examples, *e.g.*, "statement" (used four times), "associations," and "reputation." MAI 23.05 [1996 Revision], "Fraudulent Misrepresentations," and MAI 23.10(1) [1980 New], "Slander—Plaintiff Not a Public Official or Public Figure," both contain six nominalizations, with MAI 23.05 using the word "representation" six times.

142. Chapter 25 utilizes 22 nominalizations in its ten breach of warranty and product liability instructions. MAI 25.07, "Breach of Express Warranty Under Uniform Commercial Code," adds the most to the tally, containing six nominalizations, *e.g.*, "decision," "failure" (used twice), and "representation" (used twice). MAI 25.07 [1991 Revision].

143. MAI 23.06(1) [1980 New].

144. *See supra* notes 134-35.

Negative words are less prevalent in the MAI, with the 105 verdict directors containing only 57 examples.¹⁴⁵ Only Chapter 22¹⁴⁶ and Chapter 25¹⁴⁷ use negative words at a rate greater than one per instruction. Several chapters contain no negative words or use negative words very infrequently.¹⁴⁸ More impressively, though many instructions contain multiple negative words, the author found only two instances where two or more negative words appear in the same sentence.¹⁴⁹

Results varied with respect to the problems of “unique determiners,” “as to” phrases, and word lists.¹⁵⁰ First, the use of the word “such” as a unique determiner¹⁵¹ seems to constitute a favored drafting technique of the Missouri Supreme Court Committee on Jury Instructions. This word, in its “unique determiner” form, appears in almost half of the MAI verdict directors, specifically in 50 of the 105 instructions.¹⁵² In contrast, the author found only

145. See *supra* notes 56-57, 119 and accompanying text.

146. Chapter 22 contains twelve negative words among its eight verdict directors dealing with the liability of owners and occupiers of land. Three of these eight instructions use more than one negative word, with MAI 22.07, “Licensee,” using the word “not” three times. MAI 22.07 [1991 Revision].

147. There are fifteen negative words among Chapter 25's ten breach of warranty and products liability instructions. Three of the ten instructions, MAI 25.03 [1980 Revision], 25.05 [1978 New], and 25.08 [1980 New], contain more than one negative word. MAI 25.05 [1978 New], “Strict Liability—Failure to Warn,” is the biggest contributor to the total tally (four negative words), placing two negative words in the same sentence: “[T]he [describe product] was then *unreasonably* dangerous when put to a reasonably anticipated use *without* knowledge of its characteristics . . .” (emphasis added). This repeated use of the word “unfit” in this chapter also contributed to the high count of negative words.

148. See, e.g., Chapter 17 (“Motor Vehicles”), which uses only two negative words in eighteen instructions.

149. A sentence in MAI 24.02, “F.E.L.A.—Boiler Act Violation,” actually contained *four* negative words in one sentence: “[D]efendant [used a locomotive] which was *not* in proper condition and which could *not* be safely operated *without unnecessary* peril of life and limb.” MAI 24.02 [1981 Revision]. MAI 25.05 contains the other example. MAI 25.05 [1978 New]. See *supra* note 143. As one commentator put it, “[f]rom so many negatives, nothing positive can develop.” MORTON S. FREEMAN, *THE GRAMMATICAL LAWYER* 225 (1979).

150. See *supra* notes 62-65, 120 and accompanying text.

151. See *supra* notes 62-63 and accompanying text.

152. See, e.g., MAI 31.02(1) [1997 Revision], “Res Ipsa Loquitur—Pedestrian” (“*such* occurrence was directly caused . . .”) (emphasis added); MAI 23.05 [1996 Revision], “Fraudulent Misrepresentations” (“[A]s a direct result of *such* representation the plaintiff was damaged.”).

three examples of the use of an “as to” phrase.¹⁵³ Similarly, the MAI verdict directors contain few examples of unnecessary word lists, or “doublets.”¹⁵⁴

2. Presence of Grammatical Problems

The 105 MAI verdict directors contain at least 86 dependent clauses.¹⁵⁵ Many instructions have multiple dependent clauses,¹⁵⁶ often with two or more in the same sentence.¹⁵⁷ Chapter 31 was the leading contributor, containing 27 dependent clauses among its 20 instructions.¹⁵⁸ Other chapters containing dependent clauses at a rate of more than one dependent clause per instruction included Chapters 18,¹⁵⁹ 23,¹⁶⁰ 25,¹⁶¹ 29,¹⁶² and 30.¹⁶³

153. These instructions included: MAI 23.06(2) [1980 New], “Libel—Plaintiff a Public Official or Public Figure” (“[D]efendant had serious doubt *as to* whether it was true . . .”); MAI 23.10(2) [1980 New], “Slander—Plaintiff a Public Official or Public Figure” (same); MAI 28.02 [1969 New], “Recovery for Services Furnished Decedent Under Implied Contract Where Family Relationship Is Admitted or an Issue” (“[T]he conduct and relationship of plaintiff and [decedent] was such *as to* imply an agreement . . .”).

154. *But see* MAI 29.01 [1978 Revision], “Real Estate Commission—Sale Not Consummated” (“*ready, willing and able*”); MAI 31.17 [1992 New], “Waiver of Sovereign Immunity—Dangerous Condition of Public Entity’s Property Created by Employee” (“*scope and course*”); MAI 31.21 [1995 New], “Partial Invalidity of Will Due to Fraud” (“*will and testament*”).

155. *See supra* note 122 and accompanying text.

156. *See, e.g.*, MAI 22.01 [1996 Revision], “Trespassing Children” (dependent clauses in the second and third sentence); MAI 25.10(A) [1990 New], “Negligently Supplying Dangerous Instrumentality” (fourth and fifth sentences); MAI 29.04 [1978 Revision], “Real Estate Commission—Sale Consummated—Exclusive Right to Sell” (second and third sentences).

157. *See, e.g.*, MAI 22.07 [1991 Revision], “Licensee” (“[D]efendant knew or had information from [1] *which defendant . . . should have known* [2] *that persons . . . would not discover such condition . . .*”); MAI 25.03 [1980 Revision], “Breach of Common Law Implied—Warranty of Fitness for a Particular Purpose Under Uniform Commercial Code” (“[W]ithin a reasonable time [1] *after plaintiff knew or should have known* [2] *the product was not fit for such use, plaintiff gave defendant notice thereof . . .*”).

158. MAI 31.04 [1991 Revision], “Loss of Consortium . . .” takes the prize for grammatical complexity, containing four dependent clauses in the instruction’s lone sentence: “[1] *If you find in favor of plaintiff . . . and* [2] *if you believe* [3] *that plaintiff sustained damage . . . then in your verdict you must find* [4] *that plaintiff did sustain such damage.*”

159. Chapter 18’s single instruction contained two dependent clauses, both found in the instruction’s second alternative for suits joining both master and servant.

160. Chapter 23 includes fourteen dependent clauses to match its seventeen intentional tort instructions. The third sentence of MAI 23.10(2) [1980 New],

More encouraging is the fact that among the 86 dependent clauses, only fourteen precede independent clauses as part of “left-branching” sentences.¹⁶⁴ The most prevalent use of this technique appears in Chapter 25, where almost half of the dependent clauses appear before the independent clause.¹⁶⁵ Other chapters using this technique on multiple occasions include Chapter 30 (three times)¹⁶⁶ and Chapter 31 (four times).¹⁶⁷

The passive voice is just as prevalent in the verdict directors as dependent clauses, with this Comment detecting 83 uses of the passive voice in the 105 instructions.¹⁶⁸ Chapter 25, in its breach of warranty and products liability instructions, employs the passive voice far more often than any of the other MAI chapters. Where none of the other chapters use the passive voice more often than once per instruction,¹⁶⁹ Chapter 25 uses the passive voice 26 times in its ten instructions,¹⁷⁰ with ten uses appearing in the two strict liability verdict

“Slander—Plaintiff a Public Official or Public Figure,” weaves four dependent clauses into a single sentence: “[D]efendant [published such statement] with knowledge [1] *that it was false*, or with reckless disregard for [2] *whether it was true or false* at a time [3] *when defendant had serious doubt* as to [4] *whether it was true . . .*”

161. One can find eleven dependent clauses in Chapter 25’s eleven breach of warranty and product liability instructions. MAI 25.03 [1980 Revision], dealing with the U.C.C. implied warranty of fitness, is the most complex example, using four dependent clauses among its sentences.

162. Chapter 29 actually contains dependent clauses at a rate of two per instruction, using eight of these clauses in four instructions. MAI 29.04 [1978 Revision], “Real Estate Commission—Sale Consummated—Exclusive Right to Sell,” contributes four dependent clauses. *See supra* note 152.

163. Chapter 30, “Third Party Plaintiff,” has three dependent clauses in its three verdict directors.

164. *See supra* notes 76-81, 122 and accompanying text.

165. Specifically, five of Chapter 25’s eleven dependent clauses appeared before the independent clause in “left-branching” sentences. Two of the verdict directors use *multiple* dependent clauses before the independent clause. The fourth sentence of MAI 25.08 [1980 New], “Breach of Implied Warranty of Merchantability Under Uniform Commercial Code,” provides one example: “[W]ithin a reasonable time [1] *after plaintiff knew or should have known* [2] *the product was not fit for such purpose*, plaintiff gave defendant notice thereof. . . .” MAI 25.03 [1980 Revision] provides the other example in its fifth sentence. *See supra* note 153.

166. All three verdict directors in this chapter place dependent clauses before the independent clause.

167. *See* MAI 31.12 [1978 New], “Uninsured Motor Vehicle—Insurer and Uninsured Driver Joined.” *See supra* note 158 with respect to MAI 31.04.

168. *See supra* note 123 and accompanying text.

169. *See infra* notes 168-70 and accompanying text.

170. *See, e.g.*, MAI 25.01 [1981 Revision], “Breach of Warranty of Title to Personalty” (fourth sentence); MAI 25.02 [1981 Revision], “Breach of Common Law

directors.¹⁷¹ The passive voice appears at an exact rate of one use per instruction in Chapters 26,¹⁷² 27,¹⁷³ and 29.¹⁷⁴

However, only fifteen of the 83 instances of passive voice appear in dependent clauses.¹⁷⁵ Interestingly, the most prevalent use of this technique did not appear in Chapter 25,¹⁷⁶ but rather in the intentional tort verdict directors of

Implied—Warranty of Fitness for Consumption” (third and fourth sentences); MAI 25.03 [1980 Revision], “Breach of Common Law Implied—Warranty of Fitness for a Particular Purpose Under Uniform Commercial Code” (breach of U.C.C. implied warranty of fitness) (second, fourth and sixth sentences); MAI 25.07 [1991 Revision], “Breach of Express Warranty Under Uniform Commercial Code,” (breach of U.C.C. express warranty) (same); MAI 25.08 [1980 New], “Breach of Implied Warranty of Merchantability Under Uniform Commercial Code,” (breach of U.C.C. implied warranty of merchantability) (second and fifth sentences); MAI 25.09 [1990 New], “Products Liability—Negligent Manufacture, Design, or Failure to Warn” (fourth sentence); MAI 25.10(A) [1990 New], “Negligently Supplying Dangerous Instrumentality” (third and fourth sentences); MAI 25.10(B) [1995 Revision], “Negligently Supplying Dangerous Instrumentality for Supplier’s Business Purposes” (second and third sentences).

171. See MAI 25.04 [1978 Revision], “Strict Liability—Product Defect” (“when put to,” “[product] was used,” “manner reasonably anticipated,” “plaintiff was damaged,” “[product] was sold”); MAI 25.05 [1978 New], “Strict Liability—Failure to Warn” (same).

172. The seven contract verdict directors of Chapter 26 contain seven uses of the passive voice. See, e.g., MAI 26.01 [1980 Revision], “Breach of Unilateral Contract” (“acts called for,” “plaintiff was thereby damaged”); MAI 26.02 [1980 Revision], “Breach of Bilateral Contract—Breach Sole Issue” (“obligations were not performed”); MAI 26.04 [1981 Revision], “Account Stated—Matured Debts” (“transaction mentioned”).

173. Chapter 27 uses the passive voice four times in its four ejection instructions. See, e.g., MAI 27.01 [1981 Revision], “Ejection Against a Stranger” (“premises claimed by plaintiff”); MAI 27.04 [1981 Revision], “Ejection—Counterclaim for Value of Improvements” (“improvements were made in good faith”).

174. Like Chapter 27, Chapter 29 contains four examples of the passive voice in its four real estate commission instructions. All four instances involve the phrase “*property was sold.*”

175. See *supra* notes 91-93, 123 and accompanying text.

176. Only two of the 24 instances of passive voice in Chapter 25 appeared in dependent clauses. See MAI 25.03 [1980 Revision], “Strict Liability—Failure to Warn” (“[D]efendant then knew or should have known of the use for which the [product] was purchased”); MAI 25.04 [1978 Revision], “Strict Liability—Product Defect” (“[P]laintiff was damaged as a direct result of such defective condition as existed when the [product] was sold.”).

Chapter 23.¹⁷⁷ The drafters used the technique on multiple occasions in Chapters 22,¹⁷⁸ 29,¹⁷⁹ and 31.¹⁸⁰

Compound sentences and whiz deletions appear less frequently in the MAI verdict directors than dependent clauses and the passive voice.¹⁸¹ The 105 instructions contain eighteen compound sentences, with the most prevalent use occurring in Chapter 22.¹⁸² Chapter 24 also deserves note for its use of compound sentences in each of its three verdict directors.¹⁸³ The MAI verdict directors also use at least 25 whiz deletions. Chapter 25 and its ten instructions use this device eight times, more than any of the other chapters.¹⁸⁴ Frequent use also appears in Chapters 21¹⁸⁵ and 27.¹⁸⁶

177. Chapter 23's fourteen instructions use the passive voice twelve times, with four of those instances occurring within dependent clauses. *See, e.g.*, MAI 23.05 [1996 Revision], "Fraudulent Misrepresentations" ("[D]efendant knew that it was false at the time the *representation was made . . .*") (emphasis added); MAI 23.08 [1990 Revision], "Service Letters" ("[D]efendant's letter did not correctly state the true cause for which *plaintiff was terminated . . .*") (emphasis added).

178. *See* MAI 22.01 [1996 Revision], "Trespassing Children" (second and third sentences); MAI 22.02 [1995 Revision], "Dangerous Condition Near Public Thoroughfare" (second sentence).

179. *See* MAI 29.02 [1978 Revision], "Real Estate Commission—Sale Consummated—Agreed Commission" (second sentence); MAI 29.04 [1978 Revision], "Real Estate Commission—Sale Consummated—Exclusive Right to Sell" (third and fourth sentences).

180. *See* MAI 31.05 [1981 Revision], "Eminent Domain" (first and second sentences); MAI 31.14 [1983 New], "Commitment for Mental Illness" (first sentence).

181. *See supra* notes 95-103, 121 and accompanying text.

182. Chapter 22's eight instructions relating to the liability of owners and occupiers of land contain five compound sentences. *See* the first sentences of MAI 22.03 [1995 Revision], "Invitee Injured"; MAI 22.05 [1981 Revision], "Tenant Injured on Premises Reserved for Common Use"; MAI 22.07 [1991 Revision], "Licensee"; MAI 22.08 [1978 New], "Highway Danger Created by Highway Construction Contractor"; MAI 22.09 [1993 New], "Sidewalk Defect—Dangerous Condition Created by Abutting Landowner."

183. The first sentences of each of these instructions contain compound sentences.

184. The two strict liability instructions are examples of multiple usage of "whiz" deletions in Chapter 25 within the same instruction. *See, e.g.*, MAI 25.04 [1978 Revision], "Strict Liability—Product Defect" ("when [*it was*] put," "manner [*that was*] reasonably anticipated").

185. Chapter 21 contains five "whiz" deletions in its six verdict directors. All five instances involve use of the phrase "respects [*that are*] submitted." *See, e.g.*, MAI 21.02 [1988 New], "Actions Against Health Care Providers—Single or Multiple Defendants With Comparative Fault—Multiple Negligent Acts" (second sentence).

186. Three of Chapter 27's four verdict directors contain "whiz" deletions. All three examples involve the phrase "premises [*that was*] claimed." *See, e.g.*, MAI 27.01 [1981 Revision], "Ejection Against a Stranger" (first sentence).

B. Problems in Specific Common Instructions

1. Negligence

MAI 17.01, "Single Negligent Act Submitted," and MAI 17.02, "Multiple Negligent Acts Submitted," provide the standard instructions for use in most simple negligence cases.¹⁸⁷ MAI 17.03 through 17.20 set forth possible negligent acts that one may insert into MAI 17.01 and MAI 17.02.¹⁸⁸ In their skeleton forms, these two instructions contain only a few problems: both needlessly use the word "such" as a "unique determiner" and MAI 17.02 creates needless confusion through use of the passive form "submitted."¹⁸⁹

However, many more problems emerge in the potpourri of possible insertions that one finds in MAI 17.03 through 17.20. MAI 17.17, "Per se Negligence—Improper Turn,"¹⁹⁰ for example, is virtually incomprehensible.¹⁹¹ Meanwhile, the confusing language of MAI 17.19,¹⁹² which the drafters lifted

187. MAI 17.01 [1980 Revision], for example, covers the common elements of breach of duty, causation and damages by providing: "Your verdict must be for the plaintiff if you believe: First, defendant [committed the alleged negligent act], and Second, defendant was thereby negligent, and Third, as a direct result of such negligence plaintiff sustained damage." MAI 17.01's "Notes on Use" point out the necessity of defining the words "negligent" and "negligence." MAI 17.01 [1980 Revision].

188. See, e.g., MAI 17.03 [1965 New], "Excessive Speed;" MAI 17.06 [1965 New], "Failure to Signal Intention to Turn;" MAI 17.08 [1965 New], "Failure to Yield Right-of-Way."

189. The presence of only two problems does not mean that these two instructions could not use some "cleaning up." The drafters should replace examples of legalese such as "thereby" and "respects" (used as plural noun) and should question their placement of the prepositional phrase "in any one or more of the respects submitted in paragraph First" in the middle of MAI 17.02's second clause. MAI 17.02 [1980 Revision].

190. In describing one possible negligent act of a defendant, this instruction states: "[D]efendant in approaching the intersection intending to turn left failed to drive his automobile in the portion of the right half of the roadway nearest the center line . . ." MAI 17.17 [1978 Revision].

191. The drafters weave two low-frequency words, "intersection" and "roadway," into an instruction that, the author suspects, refers to the act of turning left from the right lane of a four-lane road. MAI 17.17 [1978 Revision].

192. MAI 17.19 [1969 New], "Unable to Stop Within Range of Vision," provides: "Defendant drove at a speed which made it impossible for him to stop within the range of his visibility." This sentence contains one negative word, "impossible," and one low-frequency word, "visibility" (reported by Thorndike & Lorge as appearing one time per million words).

straight from an appellate opinion,¹⁹³ questions the contention that the drafters place equal emphasis on legal accuracy and juror comprehension.¹⁹⁴ MAI 17.04, “Failure to Act After Danger of Collision Apparent,” also presents many problems, containing one nominalization,¹⁹⁵ six low-frequency words¹⁹⁶ and one dependent clause.¹⁹⁷

2. Intentional Torts

Jurors in Missouri hear MAI 23.01 and MAI 23.02, respectively, in common cases involving assault and/or battery. MAI 23.01, “Assault,” may impede juror comprehension through its double use of the nominalization “apprehension” and its use of the low-frequency word “bodily.”¹⁹⁸ MAI 23.02, “Battery,” also uses the word “bodily,” throwing in the low-frequency word “intentional” for good measure.¹⁹⁹

Fraudulent misrepresentation is another intentional tort that one commonly expects to arise in Missouri trial courts, making MAI 23.05 and its many problems particularly onerous. This instruction’s vocabulary problems include use of the negative word “not,” the nominalization “representation” (seven times) and the word “such” as a unique determiner.²⁰⁰ MAI 23.05 also has numerous problems in its sentence structure, containing three dependent clauses,²⁰¹ one compound sentence²⁰² and two instances of the passive voice.²⁰³

193. The “[Drafting] Committee Comment” chalks up MAI 17.19 to the language of *Johnson v. Lee Way Motor Freight, Inc.*, 261 S.W.2d 95 (Mo. 1953).

194. See *supra* note 7 and accompanying text.

195. The instruction uses the common legal nominalization “collision.” MAI 17.04 [1978 Revision].

196. These include “likelihood,” “collision,” “swerve,” and “slacken” (used three times). The legalistic word “thereafter” is a little too common (appearing fourteen times per one million words of common written English) to qualify as a low-frequency word. MAI 17.04 [1978 Revision]. See Thorndike & Lorge, *supra* note 39.

197. MAI 17.04’s dependent clause makes this instruction a right-branching sentence: “Defendant knew or . . . could have known *that there was a reasonable likelihood of collision . . .*” MAI 17.04 [1978 Revision].

198. “Apprehension” does not exactly represent a *high*-frequency word, appearing only eleven times per million according to Thorndike & Lorge. See Thorndike & Lorge, *supra* note 39.

199. Thorndike & Lorge report that the word “intentional” appears only twice per one million words. MAI 23.02 [1990 Revision]. See Thorndike & Lorge, *supra* note 39.

200. In addition, the words “rely” (used twice in MAI 23.05), “representation” (used seven times), and “vehicle” (used twice) barely escape classification as low-frequency words, each appearing just thirteen times per one million words. See Thorndike & Lorge, *supra* note 39.

201. The instruction’s first element states: “[D]efendant . . . intending *that plaintiff*

The MAI's verdict directors for slander cases may also unnecessarily tax the minds of jurors. MAI 23.10(1), "Slander—Plaintiff Not a Public Official or Public Figure," is riddled with nominalizations²⁰⁴ and contains one low-frequency word ("ridicule") and two passive constructions.²⁰⁵ MAI 23.10(2), "Slander—Public Official or Public Figure," avoids nominalizations²⁰⁶ but adds the word "disregard" (both negative and low-frequency), an "as to" phrase, and four dependent clauses within one sentence.²⁰⁷

3. Warranty and Product Liability

The MAI's verdict directors for strict liability in tort, MAI 25.04 through 25.05, both give jurors five opportunities for distraction via the passive voice.²⁰⁸ Both instructions also bombard jurors with negative²⁰⁹ and low-frequency²¹⁰ words, nominalizations,²¹¹ whiz deletions,²¹² and unnecessary legalese.²¹³

rely upon such representation . . ." The third element sets forth two more dependent clauses: (1) "defendant knew *that it was false*" and (2) "defendant did not know *whether the representation was true or false*." MAI 23.05 [1996 Revision] (emphasis added).

202. The instruction's fifth element contains the compound sentence.

203. One finds the passive voice in the instruction's third element ("the representation *was made*") and sixth element ("the plaintiff *was damaged*").

204. These include "statement" (used three times), "hatred," "associations," and "reputation." MAI 23.10(1) [1980 New].

205. These include "statement *was heard*" (fourth element) and "reputation *was thereby damaged*" (fifth element). MAI 23.10(1) [1980 New] (emphasis added).

206. MAI 23.10(2) does contain the nominalization "knowledge." MAI 23.10(2) [1980 New].

207. MAI 23.10(2)'s third element provides: "Defendant either: with knowledge *that it was false*, or with reckless disregard for *whether it was true or false* at a time *when defendant had serious doubt* as to *whether it was true . . .*" MAI 23.10(2) [1980 New] (emphasis added).

208. These include "when put to," "[product] was used," "manner reasonably anticipated," "plaintiff was damaged" and "[product] was sold."

209. MAI 25.04 [1978 Revision], "Strict Liability—Product Defect," uses the negative word "unreasonably" while MAI 25.05 [1978 New], "Strict Liability—Failure to Warn," tosses out "unreasonably," "not," and "without" (twice).

210. Examples include "defective," "reasonably" and "unreasonably."

211. MAI 25.05 [1978 New] uses "knowledge," "characteristics" and "warning" (twice).

212. Both instructions make the two following deletions: "when [*it was*] put" and "manner [*that was*] reasonably anticipated."

213. Before (and—most likely—after) their first-year contracts and torts classes, few law students or attorneys converse in such phrases as "course of defendant's business" and "defective condition unreasonably dangerous when put to a reasonably

The MAI's warranty instructions, which jurors may often hear in the same case with the strict liability instructions, contain many of the same problems. MAI 25.07, "Breach of Express Warranty Under Uniform Commercial Code," among its many problems,²¹⁴ loads up on nominalizations²¹⁵ and passive constructions.²¹⁶ Meanwhile MAI 25.08, "Breach of Implied Warranty of Merchantability Under Uniform Commercial Code," is also likely to befuddle jurors by including three negative words²¹⁷ and by jamming two dependent clauses²¹⁸ into a left-branching sentence.²¹⁹

4. Breach of Contract

Jurors also will often face the task of trying to understand the several breach-of-contract instructions that one finds in MAI Chapter 26. MAI 26.01, "Breach of Unilateral Contract," makes this task difficult through overuse of dependent clauses²²⁰ and the passive voice.²²¹ Similarly, MAI 26.02, "Breach of Bilateral Contract—Breach Sole Issue," is teeming with negative words,²²² nominalizations²²³ and the passive voice.²²⁴ Meanwhile, MAI 26.06, "Breach of

anticipated use."

214. MAI 25.07 [1991 Revision] also uses the negative word "not," the low-frequency word "conform" (three times), "such" as a "unique determiner," one compound sentence (first element), one "whiz" deletion ("representation [*that was*] made"), and one dependent clause ("after plaintiff knew" in the fifth element).

215. This instruction uses "notice" and "decision," and twice includes "representation" and "failure." MAI 25.07 [1991 Revision].

216. The three examples include "representation was made" (third element), "representation made by defendant" (fourth element), and "plaintiff was damaged" (sixth element). MAI 25.07 [1991 Revision].

217. These include "not" (twice) and "unfit." MAI 25.08 [1980 New].

218. This instruction's fourth element states: "[W]ithin a reasonable time after plaintiff knew or should have known [that] the *product was not fit for such purpose*, plaintiff gave defendant notice thereof . . ." MAI 25.08 [1980 New] (emphasis added).

219. MAI 25.08's other problems include two nominalizations ("product" and "notice"), one low-frequency word ("unfit"), a "unique determiner," one "whiz" deletion ("[*that*] the product was not fit") and two passive constructions (second and fifth elements). MAI 25.08 [1980 New].

220. This instruction's first element ("if plaintiff would") and fourth element ("what he had so offered") are the culprits here. MAI 26.01 [1980 Revision].

221. See, e.g., "act *called for* in such offer," "plaintiff *was* thereby damaged." MAI 26.01 [1980 Revision] (emphasis added).

222. See, e.g., "not" (twice). MAI 26.02 [1980 Revision].

223. See, e.g., "failure" and "obligations." MAI 26.02 [1980 Revision].

224. See, e.g., "obligations *were not performed*," "plaintiff *was* thereby damaged." MAI 26.02 [1980 Revision] (emphasis added).

Bilateral Contract—Terms and Breach in Issue,” and MAI 26.07, “Breach of Bilateral Contract—When Substantial Performance Sufficient,” pack in nominalizations²²⁵ and low-frequency words.²²⁶ Finally, MAI 26.04, a common instruction in debt actions, also contains an assortment of problems, including the word “transaction,”²²⁷ a dose of legalese,²²⁸ and two dependent clauses in one sentence.²²⁹

V. CONCLUSION

The purpose of this Comment was not to single out the MAI verdict directors as any less comprehensible than the pattern jury instructions of other states, nor to argue that jurors in Missouri civil cases are generally in any sort of “fog” after hearing or reading the instructions in a given case. Rather, the purpose was to point out that, under a regime in which trial judges must use applicable MAI instructions without modification, the drafters must take steps to maximize the understandability of these instructions. The summary of the findings of this Comment, grounded in the criticisms of numerous commentators and empirical researchers, supports the proposition that the MAI verdict directors contain many barriers to maximum juror comprehension:

- The MAI verdict directors make routine use of words that rarely appear in everyday spoken and written English.
- To an even greater extent, these verdict directors replace common verbs with mechanical noun forms known as “nominalizations.”
- MAI uses negative words, which add an unnecessary layer to the comprehension process, at a rate of more than one negative word per every two verdict directors.
- The MAI verdict directors add unnecessary complexity to their sentences by frequent use of dependent clauses, often packing several into single sentences and instructions.

225. See, e.g., the use of “agreement” three times in each instruction. MAI 26.07 [1981 Revision].

226. See, e.g., MAI 26.07’s use of “substantially” and the obscure word “workmanlike.” MAI 26.07 [1981 Revision]. See *supra* note 126 and accompanying text.

227. “Transaction” is both a nominalization and low-frequency word. MAI 26.04 [1981 Revision].

228. The author hopes never to hear the phrase “transaction mentioned in evidence” outside a courtroom. This phrase is also responsible for injecting a passive construction and a “whiz” deletion into the mix. MAI 26.04 [1981 Revision].

229. This instruction’s first element states: “[P]laintiff and defendant agreed *that stated sum . . . was the amount [that] defendant owed plaintiff . . .*” MAI 26.04 [1981 Revision] (emphasis added).

- The MAI risks confusing jurors by repeatedly omitting the “doer” from its verdict director sentences by use of the passive voice.
- Frequent examples appear in the MAI verdict directors of other vocabulary and grammatical comprehension concerns, such as “unique determiners,” compound sentences and “whiz” deletions.
- All of these problems readily appear in the most commonly used verdict directors, such as those instructions addressing negligence and breach of contract.

These findings come as no real surprise: scholars have identified these problems in the pattern jury instructions of most states. What is disconcerting, however, is that while these problems exist, Missouri trial judges have no power to remedy juror confusion, even when jurors make their confusion known to a judge. If MAI instructions are to remain “untouchable” by trial judges and attorneys, the drafting committee must take measures to clean up the gobbledygook. It must not remain lost on the drafters that they are lawyers, specially trained to think and write in a professional language—a language of confusion and gibberish to most lay jurors. The author hopes that the findings of this Comment provide suggestions for improving the comprehensibility of the MAI verdict directors as the drafting committee engages in its perpetual task of modification and addition to the MAI.

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