

History of the Wisconsin Criminal Jury Instructions

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The Wisconsin Criminal Jury Instructions are the uniform jury instructions used in criminal cases throughout the State. They are produced by a committee of trial judges, advised and assisted by two members of the law faculty. The staff work and publishing is done by the Law School. This close collaboration between the Law School and the state trial judges has continued for over thirty years. Several aspects of the project make it unique among similar efforts in the country. The first is its longevity; the second its continuity; the third its orientation toward the trial judge; and the fourth, its partnership with the University of Wisconsin. Each of these is illustrated by the project's history.

I. The Early Years 1959-1962

A. *The Jury Instructions Institutes of 1959*

The criminal jury instructions project began as an "institute" on jury instructions. It appears that what was then called the Extension Law Department of the University of Wisconsin was cooperating with what was then called the Board of Criminal Court Judges on the presentation of institutes for trial judges in the late 1950's. An Extension Law-organized traffic court conference was scheduled for the Board's June 1959 meeting. However, early in that year the traffic court topic was postponed because of then-pending changes in the motor vehicle code. As a substitute, Circuit Judge Gerald Boileau of Wausau suggested that an institute on criminal jury instructions be held.

Judge Boileau's suggestion stemmed in part from his involvement in the drafting of the Criminal Code that took effect in 1956. The arduous development of the Criminal Code is a story in itself. It is sufficient to note here that many of the early contributors to the criminal jury instructions effort had also been important participants in the development of the Criminal Code.

In pursuing the suggestion for a jury instructions institute, Judge Boileau asked for advice from several people, including two criminal law experts with whom he had worked on the Criminal Code project, Bill Platz and Frank Remington. Bill Platz served Wisconsin

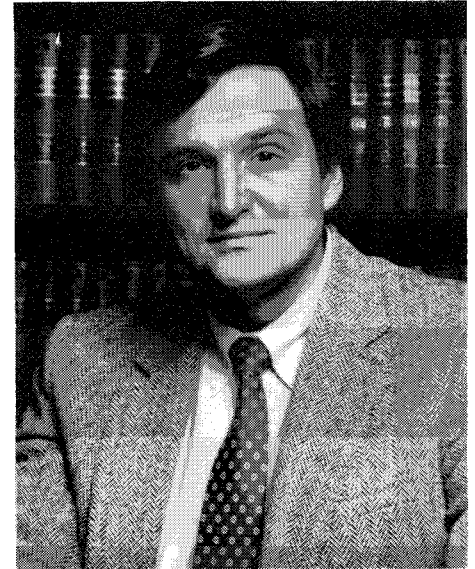
as an Assistant Attorney General for almost 40 years and was, for many of those years, the primary source of legal advice for prosecutors, police officers and judges in the state. Frank Remington was then, as he is today, a member of the law faculty at the University of Wisconsin and had supervised the staff work that developed the 1956 Criminal Code.

Frank Remington took the lead in responding to Judge Boileau's request and made specific suggestions about the format and content of the proposed jury instructions institute. In a March 6, 1959, letter to Judge Boileau, Frank Remington made some general comments about the institute that apply equally well to the project throughout its 30 years.

The proposal assumes that it is desirable for judges to take primary responsibility for the program. I think this is right because the giving of instructions is uniquely a judicial function and one about which the judiciary has the most knowledge and experience. The institute would be designed to afford the judges an opportunity to discuss their individual instruction practices and policies. The objective is to agree upon the most effective set of instructions for important offense categories. Ways and means can be worked out to record the consensus of the institute participants, and it is reasonable to assume that formulated "model instructions" can thus be made available.

Four offense categories were suggested: theft; burglary and robbery; criminal damage to property and arson; and homicide. Judge Boileau replied that under the revised criminal code it would probably be sufficient simply to read the jury the new statutes. Therefore, instructions on substantive offenses would not be very difficult to draft. Rather, he suggested looking at other topics, such as instructions on the burden of proof, entrapment, the use of confessions, credibility of witnesses, and other similar matters.

The content and format for the meeting was agreed on and an institute was scheduled for June 10 and 11, 1959. Individual judges were asked to send in copies of instructions they regularly used. Foremost among these was Judge Herbert Steffes of Milwaukee, another true scholar of the criminal law. Judge Steffes had served as an informal "instruction



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bank" for many years, and much of his work product can be found in the instructions today. Quite a few other judges also sent in samples that were discussed at the institute. Professors Gordon Baldwin and William Bradford Smith assisted with the development and presentation of the institute.

The Wisconsin Board of Criminal Court Judges Institute on Jury Instructions in Criminal Cases was held at Lake Lawn Lodge on June 10-11, 1959. A registration fee of \$12 was charged, which did not include meals or lodging. Correspondence in the University files indicates that despite the fee, the University was subsidizing the institute "heavily." Judge Boileau presided over the four-session institute. Each session was led by a discussion leader: Judge Herbert Steffes; Judge Donald Gleason (Green Bay); Judge Milton Meister (West Bend); and, Judge Richard Bardwell (Madison). The idea was that individual judges would lead discussions on the various topics and that comments from the floor would allow the refinement of the drafts. It appears that many believed the instructions could be finished off at this conference and made available to the judges statewide.

After the June Institute, the Extension Law Department sent out a mailing to criminal court judges that included several instructions discussed and tentatively approved at that institute. A second jury instructions institute was scheduled for the next meeting of the Board of Criminal Court Judges on February 18-19, 1960. On the agenda were some of the instructions discussed in June: insanity; prima facie evidence; intent; and, various issues relating to evidence and witness credibility. Judge Boileau again presided. Discussion leaders were Judge Bardwell, Judge Bruce Beilfuss (Neillsville), Judge Howard DuRocher (Racine) and Judge Meister.

B. The Original Criminal Jury Instructions Committee

Apparently, at that February 1960 meeting, it was generally agreed that there was a need for a regular committee to work through a full set of criminal jury instructions. The Board of Criminal Court of Judges adopted a resolution that called for the appointment of a five-member committee to collaborate with the University of Wisconsin Extension in preparing model jury instructions for criminal cases. The judges serving on the original committee were:

Hon. Gerald J. Boileau (Chairman), Hon. Herbert J. Steffes, Hon. William E. Gramling (Waukesha), Hon. Milton L. Meister, Hon. Clarence F. Whiffen (Sheboygan), Hon. Charles Larson (Port

Washington) (ex officio), Hon. Howard DuRocher (ex officio)

The nonvoting advisors were: Mr. William Platz, Prof. Frank Remington, Prof. Gordon Baldwin, Prof. William B. Smith.

Meetings of this group were held in Milwaukee in April and May. The meeting on May 21, 1960, was scheduled for 8 a.m. to 1 p.m., the early start based on the plan to "conclude our work around 1 p.m. and adjourn to Milwaukee County Stadium."

C. The 1960 Institute

The next significant step in the Committee's development was another institute, this one held June 16 & 17, 1960, at Uphoff's Dining Room, Lake Delton. The brochure announcing the institute included the following:

All judges of Courts of Record who have any jurisdiction in criminal cases are invited to attend and participate in each session, in order to develop the most appropriate jury instructions for ultimate use in future criminal cases. . . .

At the request of your Executive Committee, organization and preparation for this Institute have been undertaken (and the discussions will be led) by the Jury Instructions Committee of the Board and by Assistant Attorney General William A. Platz and Professors Frank J. Remington, Gordon B. Baldwin, William Bradford Smith, and Arnon R. Allen.

Instructions to be discussed are those which have been tentatively approved by the Jury Instructions Committee of the Board, including: Circumstantial Evidence, Expert Testimony, Statements of Co-Defendants, Credibility of Witnesses, Falsus in Uno, and Entrapment. The organization and sequence of criminal instructions will also be considered.

Each Judge in attendance will receive a mimeographed packet of instructions which have been approved by the Board or the Jury Instructions Committee. Distribution of these mimeographed instructions will be limited to those who attend the Lake Delton Institute. They will later be published and sold in a loose-leaf binder like the State Bar Fee Schedule.

The institute was again presented as a cooperative effort between the Board of Criminal Court Judges, the University of Wisconsin Law School, and the Extension Department of Law. The University dropped the \$12 registration fee that had been charged in 1959, but cautioned potential attendees that they would have to cover the cost of their lunch \$2.50, including tip.

D. Development of the Original Material

The pattern then emerged that would

continue until the first material was published in 1962. The Committee met on a regular basis and reported to the Board of Criminal Court Judges at its meetings in February and June of 1961, and February and June of 1962. The Committee's existence was continued by resolution at each of those meetings. During this important period, two changes were made in the composition of the Committee. Judge Henry Gergen from Dodge County replaced Judge Clarence Whiffen, and Attorney John Bowers began to serve as editor. Judge Gergen continues to advise the Committee today. John Bowers did yeoman service as editor until 1976 and continues to serve the Committee as an advisory member.

E. The 1962 Edition of Wis JI-Criminal

The Committee reported on its progress at the February 15, 1962, meeting of the Board of Criminal Court Judges. Publication of the first material was imminent. The Board unanimously adopted the following resolution:

RESOLVED, that the jury instructions in criminal cases, which have been prepared by the committee appointed for that purpose, are hereby approved, but without certification of said instructions' freedom from error; be it further

RESOLVED, that the said committee is hereby made a permanent committee to prepare additional instructions for use in criminal cases and to amend or correct any previously approved instructions whenever such committee deems such action to be appropriate.

The 1962 edition was published in the summer of 1962 in one volume. As chairman of the committee, Judge Boileau wrote an introduction that explained the background and objectives of the Wis JI-Criminal.

INTRODUCTION TO THE 1962 EDITION

The Wisconsin Board of Criminal Court Judges, realizing that no ready reference work was available to assist the bench and bar of the State of Wisconsin in the preparation of jury instructions in criminal cases, authorized and directed our committee, consisting of five trial judges, to study the problem and submit to the Board such suggested instructions as, in the committee's opinion, would assist judges and trial lawyers in the submission of criminal cases to juries.

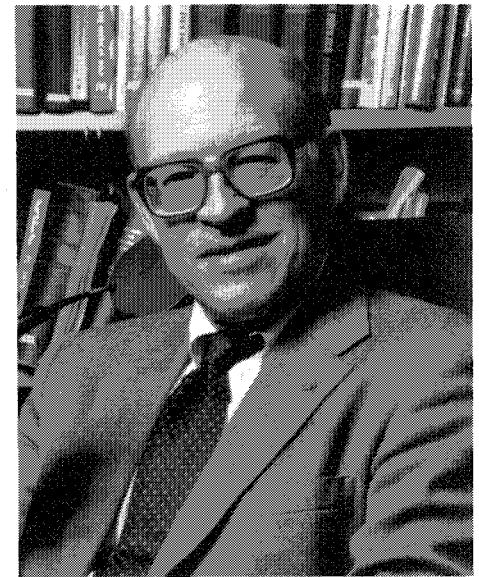
Prof. Frank J. Remington, of The University of Wisconsin Law School, and Mr. William Platz, Assistant Attorney General of Wisconsin, graciously accepted our invitation to become unofficial

members of the committee and have made substantial contributions to what success we may have achieved. The University of Wisconsin Extension Law Department, under the direction of Prof. William Bradford Smith, has provided research assistants and has paid all expenses necessarily incurred in the preparation of these instructions.

The committee has met on an average of once a month for the past three years, such meetings lasting from one to three days. All members, both official and unofficial, have been most regular in their attendance at meetings. These were the committee's principal objectives:

1. To prepare instructions that would accurately and concisely state the law in a way that would be meaningful and helpful to a jury.
2. To make readily available such instructions as a trial judge would likely need in the trial of a criminal case to a jury.
3. To revise instructions that had been in general use prior to the enactment of the Criminal Code of Wisconsin, which became effective July 1, 1956, and to make such changes therein as seemed advisable as a result of such enactment; and generally, to relate the instructions to the new Criminal Code.
4. To make certain that all such instructions were in conformity with the decisions of the Wisconsin Supreme Court.

In the progress of our work the research staff presented proposed drafts. These drafts were prepared after a study of all available material. At our meetings, the committee analyzed every instruction minutely, giving thorough consideration to every word and phrase in the prepared draft and to all available authorities and precedents which seemed to be pertinent. Many instructions were corrected and rewritten many times. Finally, each instruction had the unanimous approval of the committee. Certainly, we make no claim that these instructions are free from error. We proposed to continue our work as a permanent committee, adding new instructions from time to time, and correcting previously approved instructions when errors are called to our attention. We invite suggestions from the bench and bar. We hope this work will, to



Prof. Gordon B. Baldwin

some extent at least, achieve its objectives.

Gerald J. Boileau, Chairman
Committee on Jury Instructions
Criminal

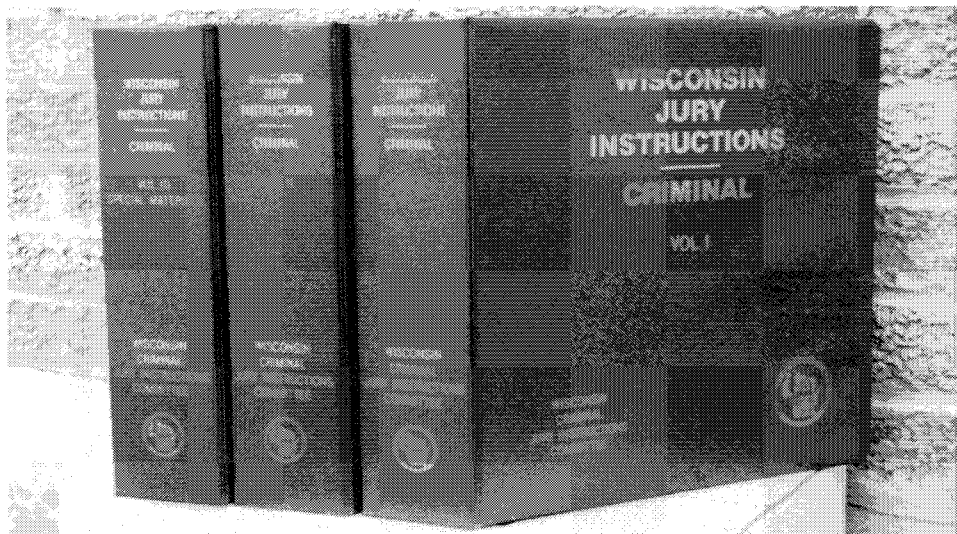
As editor, John Bowers added a preface, which included the following advice on how to use the new uniform instructions: Unlike instructions drafted for the purpose of a particular case, each instruction was, necessarily, drafted to cover the particular rule of law involved without reference to a specific fact situation. While the general instructions and the instructions on defenses and defensive matters may frequently be used without change, instructions on the substantive offenses may often have to be modified to fit the needs of the particular case. The user, therefore, should consider each instruction a model to be examined carefully before use for the purpose of determining what modifications are necessitated by the facts of the particular case. In addition, the effect of the instructions upon each other must be considered. When, for example, conspiracy or solicitation is submitted, or where separate included offenses are submitted, it may be necessary to modify the instructions.

It is suggested that the comment and the footnotes to the instructions be read fully and carefully before the instruction is used, in order that the user be informed of any conditions prerequisite to its use, alternative material for particular cases, and of other cautionary information. Words and phrases which are to be used alternatively appear in parentheses and italics. Words and phrases which are not appropriate to every case, but which should be given in some fact situations, are in brackets. Editorial directions which alert the user to alternatives or to the need to insert material or other instructions are found in brackets in the body of the instructions or in the comment.

II. The Growth of the Project 1962-1979

A. Supplements to the 1962 Edition

The first material was published in 1962 in a single looseleaf binder. The first supplement expanded the work to two volumes and was published in March 1967 (though it bore a 1966 copyright). Three installments of what was referred to as the "Supplement Service" followed: "Edition A" in July 1967; "Edition B" in 1969; and, "Edition C" in 1971, which expanded the work to three volumes. Two additional supplements, published in 1974 and 1976, completed the development of the first edition.



B. Changes in Committee Membership

At the time of the publication of the 1962 material, the Committee consisted of Judges Boileau, Gramling, Steffes, Meister, and Gergen, advisors Platz and Remington, and editor John Bowers. All had been involved from the very beginning, except Judge Gergen, who replaced Judge Clarence Whiffen very early on. Likewise, John Bowers became the editor in 1961, well before the first material was published. Two important additions were made in 1965 when Judges Ervin Zastrow of Walworth County and James Levi of Portage County were appointed. Judge Zastrow served until 1976, including the last two years as chairman. Judge Levi served until 1984 and was chairman from 1976 to 1984.

The pace of publication slowed somewhat in early 1970's, reflecting in part difficulties in funding. A needed infusion of money and energy came in the early 1970's when federal funding, passed through by the Wisconsin Council on Criminal Justice, was obtained to support a substantial revision effort. The funding provided staff support (in the person of attorney Donald Bruns, a recent law graduate) and led to the publication of substantial supplements in 1974 and 1976.

The publication of these supplements coincided with the first significant changes in the Committee's membership. In the mid-1970's deaths (Judge Steffes and Bill Platz) and retirement (Judges Boileau, Meister and Gramling) created vacancies in the Committee. A number of judges were appointed to the Committee between 1974 and 1977. Their years of service were as follows:

John Buchen (Sheboygan Co.) 1974-1989*, James Seering (Sauk Co.) 1974-1989*, Edwin Dahlberg (Rock Co.) 1975-

Hugh O'Connell (Milwaukee Co.) 1976-1983, John Bartholomew (St. Croix Co.) 1976-1989*, Robert Stoltz (Washington Co.) 1977-1978, *continue to serve as emeritus members.

William Gansner, Assistant Attorney General, replaced Bill Platz as an advisory member and served from 1976 to 1979.

In 1976, the increasing demands of private law practice led John Bowers to step down as editor, though he continued to serve as an advisory member. David Schultz, then of the Extension Law Department, took over staff duties in 1976, using the title of "reporter."

C. Court Reorganization - 1978

In 1978, court reorganization took effect in Wisconsin. Among the many changes was the abolition of the Board of Criminal Court Judges, the parent body of the Criminal Jury Instructions Committee. The Committee was reconstituted as part of the Criminal and Traffic Section of the Wisconsin Judicial Conference. The reconstituted committee was to have eleven members, so three new members were appointed in 1979: Judge Ronald Keberle (Marathon Co.); Judge Robert Landry (Milwaukee Co.); and, Judge Michael Torphy (Dane Co.). Then Judge Donald Steinmetz (Milwaukee Co.) was also appointed in 1979 but resigned in 1980 upon his election to the Wisconsin Supreme Court. Judge Fred Fink (Wood Co.) replaced Justice Steinmetz and served until 1985.

D. The 1980 Edition

In 1980, a new edition was published. In addition to a great deal of new and revised material, the 1980 edition changed the format to the more convenient, standard, 8+ x 11 inch size. Supple-

mentation continued on a more frequent basis, each one designated "Release No. _____." With Release No. 15, in September 1986, the work expanded to four volumes. Through May 1990, 24 supplements have been published for the 1980 edition. Release No. 25 is scheduled for June 1990.

The 1980's saw the addition of more new members for the Committee. They have been the following: Patrick Madden (Milwaukee Co.) 1983, Richard Becker (Washington Co.) 1984, Fred Fleishauer (Portage Co.) 1986, Ray Gieringer (Adams Co.) 1988, Mark Gempeler (Waukesha Co.) 1988, Gregory Peterson (Eau Claire Co.) 1990

Valued advice was provided by several assistants attorney general: Edward Marion, 1979-1982; Marguerite Moeller, 1982-1983; Kirbie Knutson, 1983-1986; and, David Becker, 1986-present.

III. Characteristics of the Wisconsin-Criminal

This historical review of the Wisconsin Jury Instructions-Criminal illustrates several characteristics of the project that the Committee believes have added greatly to its strength and value. The most obvious of these is its longevity, now extending beyond thirty years. Without making any unwarranted or argumentative claims about being "a national model," it is clear that Wisconsin's jury instructions efforts, both the civil and the criminal, were among the first in the country. And despite the plan in 1959 and 1960 to finish the work during an institute or two, it appears that the appellate courts and the legislature will assure a steady supply of work for the future.

A second key characteristic of the project has been its continuity, in terms of both Committee membership and regularity of publications. As to Committee membership, the project was blessed at the beginning with a unique group possessing not only knowledge of the criminal law but the elusive quality of good judgment. Any stature or prestige the effort enjoys today is due to the extraordinary ability and dedication of that original group: Boileau, Steffes, Gramling, Meister, Gergen, Platz, Remington, and Bowers. Gergen, Remington, and Bowers continue to advise the project today. The others remained active members until the mid-1970's.

Continuity in terms of publication has also been a trademark of the project. Many publications on state law have come and gone since 1960, but the criminal jury instructions have maintained a regular record of supplementation and

updating. Given the scope of the undertaking, it is one that is never completed, but the general goal of keeping the material reliable and useful is constantly strived for, if not achieved.

A third characteristic of the Wisconsin project, and probably the most important of all, is its reliance upon and orientation to the trial judge. Only the trial judge members of the Committee vote and approve the instructions. This appears to be unusual if not unique among the jury instructions projects across the country. Many are bar association projects with a varied committee membership including, but not limited to, judges. Even those produced more directly by judicial organizations have non-judicial members. The non-judges serving the Wisconsin committee have an opportunity for substantial input, but it is an advisory, non-voting capacity.

The orientation of the Wisconsin project is also directed toward the trial judge. Frank Remington's statement in 1959 that "the giving of instructions is uniquely a judicial function and one about which the judiciary has the most knowledge and experience" has proved to be the informal guide for the Committee for 30 years. The point of reference used time and again when an instruction is discussed is the hypothetical judge facing a problem for the first time, perhaps shortly after being rotated to criminal cases from a civil or a family law caseload. The Committee refers to this hypothetical colleague as the judge from "Flodge County" the term being one of the Committee's coinage. It is derived from "Florence" and "Dodge" counties. "Florence" was used because it seemed to symbolize the isolated judge handling a wide variety of cases with little opportunity for consultation with colleagues. "Dodge" was used because it had become known to the Committee that the Circuit Judge there (Judge Gergen) was thorough and fair almost to a fault. If an instruction would pass muster in Dodge County, it would do so anywhere. Rather than make references to either one of these actual counties and risk offending the incumbent judges, the Committee began to employ "Flodge County" as a shortcut reminder of the Committee's focus: helping a colleague on the trial bench.

Another important aspect of the project's trial judge orientation is that the instructions are not approved by anyone other than the committee of trial judges. The historical material indicates that the original publication was "approved, but without certification of said instructions' freedom from error" by the Board of Criminal Court Judges. [Does this indi-

cate that the Board had the authority to declare its approved material free from error? That might be an attractive proposition for the trial judges, if not a popular one with the appellate courts.] At some point between 1962 and 1978, the practice of formal approval by the Board stopped. The instructions are approved by the Committee and published without additional endorsement by the Judicial Conference. The only situation where any kind of official approval occurs is when the Wisconsin Supreme Court or Court of Appeals approves a specific instruction as a correct statement of the law in deciding an appeal.

It seems that the Wisconsin system is better than one where a higher authority approves the instructions and requires their use without change. In Missouri, for example, instructions are approved from time to time by order of the state supreme court. Where an approved instruction applies, it must be given. See Missouri Supreme Court Rule 20.02(b). The certainty that such a system provides seems to be outweighed by its inflexibility. The Wisconsin system allows the trial judge to use a uniform instruction as a guide, departing from it where it does not fit the facts of the case or where the judge can improve upon the model.

The final characteristic of the Wisconsin criminal jury instructions is the partnership it represents between the state judiciary and the University of Wisconsin. One of the goals of the University is the pursuit of the "Wisconsin Idea," the idea that a public university ought to reach out to the people of the state and assist state government in serving the people. The concept is often stated as "the boundaries of the university are the boundaries of the state."

The Wisconsin Jury Instructions-Criminal is a model of attempting to implement the Wisconsin Idea. It evidences contributions made over a 30-year period by members of the faculty and staff of the University of Wisconsin Law School and University of Wisconsin-Extension. Those efforts are reflected in the product itself and also in the publication and distribution of the work, which has been the University's responsibility from the carbon paper and mimeograph material for the June 1959 institute to the computer-generated, laser-printed supplements of the 1990's. The technology has changed, but the University's pride in being able to work with and serve the trial judges and lawyers of Wisconsin has not.