Report of the
Supreme Court Criminal Practice Committee
on
Distribution of Written Instructions to the Jury
State v. O'Brien, 200 N.J. 520 (2009)

Submitted by Supreme Court Criminal Practice Committee
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Appendix A

Proposed Revisions to Rule 1:8-7 and Rule 1:8-8

I. SUMMARY OF RECOMMENDATIONS

For the reasons stated in this report, the Criminal Practice Committee is making the following recommendations, each of which will be more fully discussed in the text:

RECOMMENDATION 1: The Committee is recommending revisions to Rule 1:8-7 and Rule 1:8-8 to provide that written jury charges must be provided to the jury in all criminal cases, unless the preparation of the instructions will cause an undue delay in the trial.

RECOMMENDATION 2: To allow for appropriate training and transition for judges and practitioners, the Committee recommends that, if adopted, the rule revisions be phased-in for at least one Judicial College cycle, but no less than six months, after the rule is approved. If necessary, standard procedures to implement the rule should be promulgated by the Administrative Director of the Courts.

RECOMMENDATION 3: To assist judges and parties in preparing and tailoring the written instructions to the circumstances in a specific case, the Committee recommends that the Model Criminal Jury Charge Committee post on the judiciary internet and infonet webpages two additional versions of each model criminal jury charge omitting the corresponding footnotes and annotations and one using male pronouns and the other female pronouns.

RECOMMENDATION 4: The Committee recommends that the Model Criminal Jury Charge Committee consider developing a standard instruction addressing the distribution of written charges to the jury and the use of those charges during deliberations.

II. INTRODUCTION

In State v. O'Brien, 200 N.J. 520, 524 (2009), the New Jersey Supreme Court asked the Civil and Criminal Practice Committees to consider developing standards to guide judges in exercising their discretion to provide written instructions to the jury. State v. O'Brien, 200 N.J. at 541. The Court asked the Committees to consider "whether, if there is a request, there should be a presumption that instructions that are immediately available will be provided; whether there should be a contrary presumption that instructions that are not immediately available will not be provided; whether a definition of 'immediately available' should be adopted; and what kinds of considerations regarding the nature of the case should factor into the judge's Rule 1:8-8 calculus." State v. O'Brien, 200 N.J. at 541.[1]

This report contains the Criminal Practice Committee's proposed recommendations governing procedures for the distribution of written charges to the jury. After thoroughly considering a variety of options, the Committee is recommending that Rules 1:8-7 and 1:8-8 be revised to provide that written jury charges must be provided to the jury in all criminal cases, unless the preparation of the instructions will cause undue delay in the trial. Furthermore, the Committee is recommending that when written jury charges are distributed for the jury's consideration during deliberations, the entire final charge should be provided. If a party makes a request to charge, the requesting party may be required to provide specific language, in writing, in a format suitable for ready preparation and submission to the jury, at a time fixed by the trial judge.

[1] The Civil Practice Committee has filed separate proposed amendments to Rule 1:8-8 governing the distribution of written jury charges for civil cases.

The Committee recognizes that the proposed rule revisions go beyond the Court's interpretation of Rule 1:8-8 in the O'Brien opinion, that the decision to provide written instructions to the jury lies within the discretion of the trial judge. For the reasons set forth in this report, the Committee respectfully submits that the benefits gained from having more informed and knowledgeable jurors favor requiring this practice at least in all criminal cases.

Acknowledging that requiring the issuance of written jury charges is a change in practice for many judges and attorneys, the Committee is recommending that the rule be phased-in over a period of time, to allow for appropriate training aimed at ensuring meaningful participation by trial judges and practitioners. Additionally, to assist in preparation of the charges, the Committee is recommending that the Model Criminal Jury Charge Committee post a "clean" version of the model criminal charges, without footnotes or annotations, on the judiciary Infonet and Internet webpages, for ease of access by judges and attorneys. Having a clean version of the model criminal charges readily available online will greatly assist judges and attorneys in making appropriate modifications to tailor the instructions to the facts and circumstances of the individual case that is proceeding to trial in a format suitable for distribution. The Committee is also recommending that the Model Criminal Jury Charge Committee consider developing a standard instruction to be given when written charges are distributed to jurors, which will instruct the jury on the use of the written charges during deliberations.

III. CASE - STATE V. O'BRIEN

In State v. O'Brien, 200 N.J. at 524, the defendant was charged with murder, theft and weapons offenses. At trial, the defendant did not contest that he killed the

victims, but rather advanced a diminished capacity defense based on drug intoxication and depression. Id. at 525. At the close of trial, the jury requested that it be provided with the judge's instructions in writing. The judge denied that request and explained the reasons for doing so, as follows:

> THE COURT: You can't have it. That's the simple answer. That's not part of our process. That's not part of our procedure. I can speculate on why we don't do it that way, but it's not really important, because I'm not going to give it to you. All right.
>
> . . . .
>
> [I]t probably seems a little silly that we require lay jurors to take the instruction as to the law, apply it to the facts, and not give you the benefit of being able to read it and understand it and digest it . . . but our rules don't provide for me to send the charge to you in there. There are some judges that have done it in other cases that I'm aware of around the state. It's not a practice that I think is a good practice.
>
> . . . .
>
> [I]f I were to send you all of these words in there, you would be distracted from your task. Your task is not to become lawyers. Your task is not to get lost in these words. Your task is to be the judges of the facts, of the evidence presented in this case.
>
> . . . .
>
> I'll tell you the elements as many times as you want. I'll review the burden of proof as many times as you would like. I will answer as many questions as you have, as often as you ask them, but I will not send you the charge complete in the jury room.
>
> [State v. O'Brien, 200 N.J. at 533].

The jury returned a guilty verdict and the defendant was sentenced to an aggregate minimum custodial term of 130 years. Id. at 533. On appeal, the defendant urged that "the trial judge erred in refusing to provide the jury with the written instruction

it had requested."[2] Id. at 534. Although the Court held that the trial judge's refusal to provide the jury with written instructions did not rise to the level of plain error, the Court asked the Criminal and Civil Practice Committees to consider revisions to Rule 1:8-8 regarding the submission of written charges to the jury.[3] Id. at 540-41.

Discussing Rule 1:8-8(a), the Court stated that the rule provides that "[t]he court, in its discretion, may submit a copy of all or part of its instructions to the jury for its consideration in the jury room." State v. O'Brien, 200 N.J. at 540. Citing State v. Lindsey, 245 N.J. Super. 466, 474-75 (App. Div. 1991), the Court explained that "to ensure that verdicts are the result of each juror's equal understanding of the facts and the law as it applies to those facts," judges have discretion to consider if the issuance of written instructions would be helpful or harmful, on a case-by-case basis. State v. O'Brien, 200 N.J. at 540. As set forth in O'Brien, the underlying purpose of Rule 1:8-8 is to authorize judges to exercise discretion to provide the jury with written instructions where it would be helpful for consideration of the particular facts of the case. The Court stated that such consideration "does not include the adoption of a blanket rule regarding the provision of written instructions." State v. O'Brien, 200 N.J. at 541. Rather, at trial, judges should make individualized decisions regarding the submission of written instructions to the jury based upon the matter at hand and not on a preconceived policy rationale. Ibid.

The Court asked the Civil and Criminal Practice Committees to consider developing standards to guide judges in exercising their discretion to provide written

[2] The defendant also urged that the trial judge improperly questioned the witnesses and that the sentence that was imposed was excessive. State v. O'Brien, 200 N.J. at 533-34.

[3] The Court held that the judge's questioning of the witnesses resulted in reversible error. Id. at 533-40.

instructions to the jury. Ibid. The Court asked the Committees to consider "whether, if there is a request, there should be a presumption that instructions that are immediately available will be provided; whether there should be a contrary presumption that instructions that are not immediately available will not be provided; whether a definition of 'immediately available' should be adopted; and what kinds of considerations regarding the nature of the case should factor into the judge's Rule 1:8-8 calculus." Ibid.

In response to the Court's referral, the Criminal Practice Committee formed a subcommittee in 2010 to consider a rule proposal. The subcommittee drafted proposed rule amendments in accordance with the Court's instructions in O'Brien. At several meetings of the full Committee, lengthy discussions were conducted addressing objections and concerns pertaining to written jury instructions expressed in informal surveys of judges and lawyers and through anecdotal information from Committee members. A consensus developed in the Committee that no good reason had been presented to forego written jury instructions except delay in a trial where judges and staff do not have the technical and logistical ability to prepare written instructions promptly that are suitable for the jury's use. In June 2010, the Committee voted to draft a rule proposing that a presumption in favor of written jury charges would apply but that the rule would take effect and be implemented only after a sufficient period of training for judges and staff.

In the meantime, the Civil Practice Committee formed its own subcommittee to address the Court's instructions in O'Brien. The Criminal Practice Committee obtained the Court's permission to delay its recommendations and report so that it might

coordinate them with the Civil Practice Committee. The two subcommittees met in an effort to develop uniform procedures to be used in both criminal and civil cases. The subcommittees' discussions revealed that the Civil Practice Committee did not favor a presumption in favor of written instructions. As a result of their divergent views, the Civil Practice Committee and the Criminal Practice Committee have filed separate reports on the issue and their recommendations differ significantly.

IV. SURVEY OF NEW JERSEY CRIMINAL DIVISION JUDGES AND PRACTITIONERS

To understand the practical issues that criminal judges and practitioners face in New Jersey upon receiving a request for a written copy of the jury charges either from the jurors or from a party, the Committee conducted an informal survey of criminal judges. In addition, some practitioners were informally surveyed. The results from the surveys revealed that a majority of criminal judges have never provided written instructions to the jury. Of the remaining judges, the number of times that instructions were provided varied from under 5 times to over 50 times. Of the judges who provided written instructions most did not provide an entire copy of the instructions to the jury. Rather, judges provided the requested portion, or specific charges, such as the elements of the offense, reasonable doubt or other substantive law. Factors taken into consideration in deciding to provide written instructions include, the nature and severity of the offense, the complexity of the case, and if a request is made.

A. Benefits of Providing Written Instructions to the Jury

The surveys revealed that several judges routinely provide written instructions to the jury and that this practice has many benefits. Judges who have provided written instructions to jurors commented that they believed that jurors are unable to absorb the

vast amount of information provided in the final charge that is given orally. They expressed the view that a written version of the final charge helps with jury comprehension. Another benefit is the reduction in the number of questions and requests for re-instruction from the jury. Moreover, if the jury has questions, the inquiries tend to be more focused and less repetitive than if a written charge was not provided. From a policy standpoint, many judges felt that with the availability of written instructions, the jury will have a better understanding of the law that, in turn, saves valuable time for deliberations. Fourteen judges indicated that they have written instructions immediately available for distribution. Of those fourteen judges, thirteen indicated that they provide written instructions in all cases.

In addition, the availability of written instructions enhances the quality of the required charge conference under Rule 1:8-7(b) in criminal cases. It provides counsel with a better understanding of the court's intended charge and the ability to review the actual language that the court intends to use, rather than only generally the topics to be included in the charge. The court and the attorneys can work together in eliminating potential disputes about the charge and hence appellate issues.

In sum, the benefits of providing written charges to the jury, include, the view that written instructions assist with jury comprehension and lead to better informed jurors. Frequently, there is a noticeable reduction in the number of juror questions and request for read-backs of the charge. Overall, there was a view that it is unrealistic to think that jurors can remember all of the charges that are provided orally and digest them in one reading. Written charges lead to better juror understanding and learning by hearing the oral charge and seeing the written charge. Taking steps to ensure that jurors are better

informed and have the best possible understanding of the law is a favorable way to achieve a fair and appropriate result for the trial.

B. Opposition to Providing Written Instructions to the Jury

As noted above, the majority of criminal judges have never provided written instructions to the jury. Several judges who distribute written charges typically provide portions of the charge. The survey revealed concern that if partial instructions are provided in writing, jurors may isolate or over-emphasize certain instructions. It was also suggested that providing partial instructions in writing to the jury may cause jurors to focus on technical aspects of charge, as opposed to the applying the relevant law to their factual findings. Some individuals expressed that the complete charge can be very long, depending on the complexity of the case, and supplying the entire charge may be daunting or may risk confusing the jurors. Some practitioners echoed these views and preferred a practice encouraging the jurors to ask questions about the charge so that the court and counsel are made aware of any problems related to the orally presented charge and have an opportunity to address it.

Although the survey revealed that most judges and practitioners perceived no significant delay in preparing written charges, the survey also revealed a minority view that the delay in the trial is prohibitive to providing written instructions to the jury. As a practical matter, judges often edit the final charge through summation and, therefore, a "clean" version of the final instructions may not be readily available for distribution when the jury begins deliberations. It was also expressed that even if a written version of the charge is prepared, there may be possible inconsistencies between the oral charge and written charge if the judge orally provides an example illustrating the law that may not

be contained in the written charge. A small percentage of judges expressed that they have encountered technical difficulties in preparing written charges in a format suitable for the jury, or that they use (or would prefer to use) a power point presentation instead.

Overall, the primary reason expressed against providing the jury with written instructions was a general view that it is not a good practice, highlighting the possibility that the jury will overly-focus on certain language or that a written charge would lead to juror confusion.

C. Attorney Involvement in the Preparation of Written Instructions

As far as attorney involvement in preparing jury charges, almost all of the judges surveyed indicated that the attorneys provide language for the jury instructions. However, the extent of the attorneys' involvement varied based upon the difficulty of the case. Recognizing that the responsibility to charge the jury rests with the court, party participation may range from minimal contribution to actively reviewing the judge-prepared charges. Some judges expressed that, in practice, lawyers have objected to the judge providing written instructions to the jury.

Practitioners expressed that written instructions should not be provided if there is no request by the parties, nor should they be provided over a party's objection. It was suggested that the Committee should consider rule revisions to require that the court submit written instructions to the jury at the parties' request; make it mandatory that court to submit written instructions to the jury, or require that the court submit written instructions to the jury unless either party objects.

D. Delay in Preparing Written Charges

Regarding the delay in preparing written charges, most judges and practitioners indicated that there would not be a significant delay in preparing the written charges. This response was generally consistent from both judges and attorneys who were presently distributing written charges to the jury, as well as those who have not engaged in this practice. The estimated time to prepare the instructions ranged from 1-2 hours to up to 3-4 days, depending upon the complexity of the case. Most judges who currently provide written instructions to the jury indicated, however, that preparation of the final charges is an ongoing process, as the lesser included offenses are developed during the trial. In other words, a complex jury charge that may take several days to prepare does not require a lengthy delay after presentations are completed but is prepared as the trial progresses.

V. STANDARDS FOR DISTRIBUTING WRITTEN JURY INSTRUCTIONS

A. American Bar Association (ABA) - Criminal Justice Standards on Written Jury Instructions

1. Provision of Written Instructions to the Jury

The American Bar Association, Criminal Justice Section has developed standards addressing jury charges, which includes guidance on the distribution of written instructions to the jury in criminal cases. See American Bar Association, ABA Standards for Criminal Justice Discovery and Trial by Jury (3rd Ed. 1996) ("ABA Standards"). The ABA has also issued 19 Principles designed to "express the best of current-day jury practice in light of existing legal and practical constraints." Preamble, Principles for Juries and Jury Trials (2005) ("ABA Principals").

ABA Standards 15-4.4(a) and 15-5.1 specifically focus on jury instructions and the material that goes into the jury room during deliberations. Standard 15-4.4(a) provides that "[a] written copy or audio version of the instructions should be given to the jury when it retires to deliberate." ABA Standard 15-4.4(a), at 231. Similarly, Standard 15-5.1(a) states that "the court in its discretion may permit the jury, upon retiring for deliberation, to take to the jury room a copy of the charges against the defendant." ABA Standard 15-5.1(a), at 241. Likewise, the ABA Principal 14(B) endorses as a best practice that "[e]ach juror should be provided with a written copy of instructions for use while the jury is being instructed and during deliberations." See ABA Principals, Principal 14(B), at page 21.

The Commentary to the ABA standards reveals that proponents of the view that written instructions should be furnished to the jurors and taken to the jury room maintain that "it is simply impossible for jurors to remember instructions in any detail, having heard them only once." ABA Standards, Comment to Standard 15-5.1(a) at 243. The ABA has recognized that providing written instructions to the jury can improve the quality of deliberations by increasing the jurors' understanding of the law and factual issues and by aiding the jurors' memories. ABA Standards, Comment to Standard 15-5.1(a) at 243. Moreover, research has shown that "jurors who have the opportunity to view written instructions spent more than twice as much deliberation time specifically applying the rules of law as did the juries who only heard oral instructions." ABA Standards, Comment to Standard 15-5.1(a) at 243. Having copies of the final charge in the jury room leads to greater efficiency as well, by reducing the need for jurors to be re-instructed if questions arise about the instructions. ABA Standards, Comment to

Standard 15-5.1(a) at 243. Additionally, it has been recognized that some jurors may not be able to absorb information adequately by aural acquisition alone, but may need to read a document several times to comprehend its meaning. The combination of oral and written charges gives jurors the opportunity to read and fully understand the jury instructions, with the goal to ameliorate the danger that an erroneous conviction or acquittal will result from the jurors lack of understanding of the instructions. ABA Standards, Comment to Standard 15-5.1(a) at 243.

The Commentary to paragraph (a) of ABA Standard 15-4.4 states: "[t]he practice of judges reading written instructions verbatim without extemporaneous explanation, however, has been criticized by some commentators who suggest that the mere oral recitation of instructions does not provide adequate opportunity for jurors to understand or remember details of the instructions." ABA Standards, Comment to Standard 15-4.4(a) at 234. The ABA Standards recognized this concern and therefore recommended that the "jurors be given a written copy or audio version of the instructions when they retire to deliberate." ABA Standards, Comment to Standard 15-4.4(a) at 234.

2. Requests by Parties to Charge the Jury

ABA Standard 15-4.4(d) provides that "[a]t the close of the evidence or at such earlier time as the court reasonably directs, the court should allow any party to tender written instructions and may direct counsel to prepare designated instructions in writing." This language reflects the procedure in Rule 30 of the Federal Rules of Criminal Procedure[4] that requests for instructions should be made in writing to assist in

[4] Fed. R. Crim Proc. 30. Jury Instructions

creating a good record for purposes of appeal. ABA Standards, Comment to Standard 15-4.4(d) at 238. Section (d) of ABA Standard 15-4.4 also provides that a court may direct the preparation of certain instructions. This provision is particularly appropriate in criminal cases because of the responsibility of a trial judge to ensure that certain essential instructions are given whether requested or not. ABA Standards, Comment to Standard 15-4.4(d) at 238. The provision in ABA Standard 15-4.4(d) requiring the parties to serve copies of the proposed instructions on all counsel is similar to language in Rule 30 of the federal rules of criminal procedure. It seeks to ensure that there will be an adequate opportunity for the counsel to review and object to the proposed instructions. ABA Standards, Comment to Standard 15-4.4(d) at 238.

3. Preservation of Charges

Pursuant to ABA Standard 15-4.4(e) at the charge conference "the court should advise counsel what instructions will be given by providing the instructions in writing prior to their delivery and before arguments to the jury" and counsel should be afforded an opportunity to object to any instruction. The ABA also recommends that all

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> (a) In General. Any party may request in writing that the court instruct the jury on the law as specified in the request. The request must be made at the close of the evidence or at any earlier time that the court reasonably sets. When the request is made, the requesting party must furnish a copy to every other party.
>
> (b) Ruling on a Request. The court must inform the parties before closing arguments how it intends to rule on the requested instructions.
>
> (c) Time for Giving Instructions. The court may instruct the jury before or after the arguments are completed, or at both times.
>
> (d) Objections to Instructions. A party who objects to any portion of the instructions or to a failure to give a requested instruction must inform the court of the specific objection and the grounds for the objection before the jury retires to deliberate. An opportunity must be given to object out of the jury's hearing and, on request, out of the jury's presence. Failure to object in accordance with this rule precludes appellate review, except as permitted under Rule 52(b).

instructions, both given and refused, as well as all objections and rulings, should become a part of the record. ABA Standard 15-4.4(g).

B. Standards for Written Jury Instructions – States

1. States that Require the Provision of Written Charges to the Jury in Criminal Cases

Many states require that the court distribute written instructions to the jury during deliberations, particularly in criminal cases. For instance, in Ohio "[t]he court shall reduce its final instructions to writing or make an audio, electronic, or other recording of those instructions**,** provide at least one written copy or recording of those instructions to the jury for use during deliberations, and preserve those instructions for the record." The Ohio rule reflects a recommendation made in 2004 by the Supreme Court of Ohio Task Force on Jury Service. See Report and Recommendations of the Supreme Court of Ohio Task Force on Jury Service at 1 and 12-13 (February 2004). The practices set forth in the Ohio rule are designed to (1) increase juror comprehension of the instructions that are given, (2) reduce juror questions of the court during deliberations, and (3) help juries structure their deliberations. Id. at 13.

Similarly, in Arizona "[u]pon retiring for deliberation the jurors shall take with them: . . . All jurors' copies of written and recorded instructions; . . ." Ariz. R. Crim. Proc. 22.2. Likewise, in Missouri, "[t]he original of all numbered instructions and all verdict forms shall be handed to the jury for its use during its deliberation . . ." Mo. Sup. Ct. R. 28.02. In New Mexico, "[w]ritten instructions of the court shall go to the jury room, but no instruction which goes to the jury room shall contain any notation." N.M. Dist. Ct. R. Cr. P. 5-608E.

Procedures adopted in Tennessee and Virginia specifically refer to felony cases.

In Tennessee, for all felonies, except where a guilty plea is entered "every word of the judge's instructions shall be reduced to writing before being given to the jury. The written charge shall be read to the jury and taken to the jury room by the jury when it retires to deliberate. The jury shall have possession of the written charge during its deliberations. . . ." Tenn. R. Crim. P. 30. In Virginia, "[i]n a felony case, the instructions shall be reduced to writing." Va. Sup. Ct. R. 3A:16. In a slight variation, California requires the court to advise the jury that written instructions are available; the court may supply the charge to the jury in its discretion; but must provide the charge if the jury requests it. Cal. Pen Code. § 1093(f).[5] See also, Susan R. Schwaiger, Note, The Submission Of Written Instructions And Statutory Language To New York Criminal Juries, 56 Brooklyn L. Rev. 1353, 1362 n.36 (Winter 1991) (noting that in 1991 thirty states required or permitted in judge's discretion written instructions), and Propriety and Prejudicial Effect of Sending Written Instructions With Retiring Jury in Criminal Case, 91 A.L.R. 3d 382 (1978-1980) (collecting and analyzing cases involving the distribution of written jury instructions to the jury during deliberations in a criminal case).

2. States Where the Provision of Written Charges to the Jury is Discretionary in Criminal Cases

Other states have found that the distribution of written charges to the jury lies within the discretion of the trial judge. For instance, in Texas, Mississippi, Minnesota, Montana and Oklahoma, the jury may take the charges given by the court to the jury room. Minn. R. Crim. P. 26.03(5) ("The court may instruct the jury before or after argument. Preliminary instructions need not be repeated. The instructions may be in

[5] Cal. Pen. Code § 1093(f) states, in relevant part, "[u]pon the jury retiring for deliberation, the court shall advise the jury of the availability of a written copy of the jury instructions. The court may, at its discretion, provide the jury with a copy of the written instructions given. However, if the jury requests the court to supply a copy of the written instructions, the court shall supply the jury with a copy."

writing and may be taken into the jury room during deliberations."); Miss. Code Ann. § 99-17-35 ("All instructions asked by either party must be in writing, and all alterations or modifications of instructions given by the court or refused shall be in writing, and those given may be taken out by the jury on its retirement."); Mont. Code Anno. § 46-16-504 ("Upon retiring for deliberation**,** the jurors may take with them the written jury instructions read by the court."); 22 Okl. St. § 893 ("On retiring for deliberation the jury may take with them the written instructions given by the court"); Tex. Code Crim. Proc. art. 36.18 ("The jury may take to their jury room the charges given by the court after the same have been filed. They shall not be permitted to take with them any charge or part thereof which the court has refused to give.").

At least one state conditions the distribution of written instructions on the consent of the parties. In Maryland, the court may give written instructions, so long as the parties do not object. Maryland Court Rule 4-325 provides: "[t]he court may give its instructions orally or, with the consent of the parties, in writing instead of orally." Md. Rule 4-325. In another state, there is a presumption that the instructions are in writing unless the parties reach a different agreement. In North Dakota, "[t]he court's instructions must be in writing unless the parties otherwise agree. If written instructions are given, they must be signed by the court and provided to the jury for use during deliberations." The North Dakota rule further provides that if "oral instructions are given, they may be provided to the jury for use during deliberations only if they are transcribed and the court orders them provided." N.D. Crim. P. Rule 30(b)(4).

In Pennsylvania, judges are permitted to provide each member of the jury with written copies of only the portion of the judge's charge on the elements of offenses, the

lesser included offenses, and the elements of any potential defenses" for use. Specifically, Pa. R. Crim. P. 646 states, in relevant part:

> (A) Upon retiring, the jury may take with it such exhibits as the trial judge deems proper, except as provided in paragraph (C).
>
> (B) The trial judge may permit the members of the jury to have for use during deliberations written copies of the portion of the judge's charge on the elements of the offenses, lesser included offenses, and any defense upon which the jury has been instructed.
>
> (1) If the judge permits the jury to have written copies of the portion of the judge's charge on the elements of the offenses, lesser included offenses, and any defense upon which the jury has been instructed, the judge shall provide that portion of the charge in its entirety.

3. Standards for Requests to Charge Made By the Parties

Most jurisdictions provide that the parties may make requests to charge at the close of the evidence or at an earlier time that is fixed by the court. Generally, a request to charge must be provided in writing. See Md. Rule 4-325(b) ("The parties may file written requests for instructions at or before the close of the evidence and shall do so at any time fixed by the court."); Minn. R. Crim. P. 26.03 ("Any party may request specific jury instructions at or before the close of evidence. The request must be provided to all parties."); Miss. Code Ann. § 99-17-35 ("All instructions asked by either party must be in writing, and all alterations or modifications of instructions given by the court or refused shall be in writing, and those given may be taken out by the jury on its retirement."); Mo. Sup. Ct. R. 28.02 ("At the close of the evidence, or at such earlier time as the court may direct, counsel shall submit to the court instructions and verdict forms that the party requests be given. Instructions and verdict forms that a party requests shall be

submitted in writing with an original and one copy for the court and one copy for each party."); N.M. Dist. Ct. R.Cr.P. 5-608 ("At the close of the defendant's case, or earlier if ordered by the court, the parties shall tender requested instructions in writing. The original and such copies as may be required by the court shall be given the court, and a copy shall be served on opposing counsel."); N.D.R. Crim. P. 30 ("(1) A party may, at the close of the evidence or at an earlier reasonable time that the court directs, file and furnish to every other party written requests that the court instruct the jury on the law as set forth in the requests. (2) After the close of the evidence, a party may: (A) file requests for instructions on issues that could not reasonably have been anticipated at an earlier time for requests set under Rule 30(a)(1), and, (B) with the court's permission file untimely requests for instructions on any issue."); Tenn. R. Crim. P. 30 ("At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The court may also entertain requests for instructions at any time before the jury retires to consider its verdict."); Va. Sup. Ct. R. 3A:16 ("If directed by the court the parties shall submit proposed instructions to the court at such reasonable time before or during the trial as the court may specify and, whether or not proposed instructions have been submitted earlier, the parties may submit proposed instructions at the conclusion of all the evidence."); Ohio Crim. R. 30 ("At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. Copies shall be furnished to all other parties at the time of making the requests.").

In many jurisdictions, the court is required to share with the parties what instructions will be given to the jury and inform the parties on its ruling on any proposed instructions that have been submitted. See Minn. R. Crim. P. 26.03 ("The court may, and on request must, tell the parties on the record before the arguments to the jury what instructions will be given to the jury including a ruling on the requests made by any party."); N.M. Dist. Ct. R.Cr.P. 5-608 ("[T]he court shall advise the parties of the instructions to be given and: (1) number the originals of the instructions to be given; (2) mark one (1) copy of each instruction tendered as either given or refused and initial the copies; (3) file such marked copies with the district court clerk."); N.D.R. Crim. P. 30 ("The court: (A) must inform the parties of its proposed instructions and proposed action on the requests before instructing the jury and before final jury arguments; (B) must give the parties an opportunity to object on the record and out of the jury's hearing to the proposed instructions and actions on requests before the instructions and arguments are delivered."); Tenn. R. Crim. P. 30 ("Prior to counsels' closing jury arguments, the court shall inform counsel of its proposed action on: (A) the requests for jury instructions; and (B) any other portion of the instructions concerning which inquiries are made"); Va. Sup. Ct. R. 3A:16 ("Before instructing the jury, the court shall advise counsel of the instructions to be given and shall give counsel the opportunity to make objections thereto. Objections shall be made out of the presence of the jury, and before the court instructs the jury unless the court grants leave to make objections at a later time."); Ohio Crim. R. 30 ("The court shall inform counsel of its proposed action on the requests prior to counsel's arguments to the jury and shall give the jury complete instructions after the arguments are completed.").

VI. PROPOSED AMENDMENTS – RULE 1:8-7 AND RULE 1:8-8

RECOMMENDATION 1: The Committee is recommending revisions to Rule 1:8-7 and Rule 1:8-8 to provide that written jury charges must be provided to the jury in all criminal cases, unless the preparation of the instructions would result in undue delay in the trial.

In drafting the rule revisions, the Criminal Practice Committee discussed several issues surrounding the issuance of written charges to the jury. Because the Committee delayed its report in an effort to coordinate with the Civil Practice Committee, two succeeding cycles of the Criminal Practice Committee, with some changing of its membership from 2010 through 2012, considered the issues. The Committee considered questions including: (1) whether there should be presumption in favor of providing written charges to the jury or whether the provision of charges should be within the discretion of the trial judge; (2) whether written charges should be provided in all cases or some cases; (3) whether the entire final charge or portions of the charge should be provided; (4) when a party requests to charge, what is the proper format for the request and the proper time frame for a request to be made; and (5) what is the level of involvement of the parties in drafting the jury charges.

In meetings in January and February 2012, the Committee reached a consensus, as it had in June 2010, that no good reason appeared not to provide written instructions to the jury except to avoid undue delay in the trial. Although there were some dissenting points of view expressed, as the discussion progressed to the full set of recommendations contained in this report, the Committee's vote became unanimous in support of amendments to Rule 1:8-7 and Rule 1:8-8 to provide that written jury charges must be provided to the jury in all criminal cases, unless the preparation of the

instructions would result in undue delay in the trial. The Committee recognizes that this proposal goes further than the Court's decision in O'Brien, which interpreted Rule 1:8-8 as giving judge's discretion to consider if the issuance of written instructions would be appropriate on a case-by-case basis. The Committee believes that the benefits gained from the provision of written instructions far outweigh any disadvantages, so long as it does not delay the trial.

A. Proposed Amendments to Rule 1:8-8 - Providing Written Instructions to the Jury

1. Written Jury Charges Should Be Provided In All Criminal Cases, Unless The Preparation Of The Instructions Would Cause Undue Delay In The Trial

For over a quarter of a century, social science researchers have expressed concern about the juror's ability to understand the law they must apply to the facts of the case in reaching its verdict. Phoebe C. Ellsworth, Juror Comprehension and Public Policy: Perceived Problems and Proposed Solutions, 6 Psych. Pub. Pol. And L. 788 (Sept. 2000). While more research needs to be conducted, over time, studies have shown that "jurors do not remember, understand or apply the judge's instructions correctly, that this is a serious threat to the fairness of jury trials, that deliberation does not solve the problem, and that remedies that can substantially improve jury comprehension are available." Id. Several jury reforms have been examined, one of which is providing a written copy of instructions to the jury. Id. at 803-804. Researchers have concluded that the distribution of written instructions "appeared to increase juror comprehension" and that, as a matter of policy, the issuance of written instructions "should be seriously considered, especially since there is no evidence of the suggested disadvantages of the technique (e.g., increasing jury deliberation time)." Id. at 804.

Over forty years ago, federal courts recognized that litigation is growing increasingly complex and oral jury instructions can last up to an hour. As such, "the jury often may be helped in their deliberations by having a copy of the instructions before them rather than asking that the instructions on a certain point be repeated." United States v. Standard Oil Co., 316 F.2d 884, 896 (7th Cir. 1963). Moreover, ABA research has shown that the distribution of charges tends to reduce the number of questions and read-back of instructions requested during deliberations. Significantly, the jury will save valuable time to focus on its deliberations. Likewise, involvement of the parties in the process can lead to a better overall practice, more efficiency in the trial, and fewer appellate issues.

Thus, the Committee is recommending revisions to Rule 1:8-8(a) to require that the court provide the jury with two or more copies of the entire final charge in all criminal cases, unless the preparation of the instructions would cause an undue delay in the trial. This approach is aligned with the jurisdictions that require the issuance of written instructions to the jury in criminal cases, as discussed in section V of this report. The proposed rule revisions are also consistent with standards and best practices developed by the American Bar Association that "[a] written copy or audio version of the instructions should be given to the jury when it retires to deliberate," (see ABA Standard 15-4.4(a)), and ABA Principal 14(B) that "[e]ach juror should be provided with a written copy of instructions for use while the jury is being instructed and during deliberations." Furthermore, this approach largely avoids the problem, as in O'Brien, of the jury itself asking for written instructions, either at the beginning of or during its deliberations. Only in those cases where written instructions are not provided because of undue delay

might a court have to make a ruling during deliberations in response to a jury request for written instructions.

In favoring a presumption that written instructions be provided to the jury in all criminal cases, the Committee thoroughly considered the various reasons in support of and in opposition to this practice. In particular, the Committee was mindful of arguments that the jury may overly-focus on certain language or that a written charge may lead to juror confusion. Weighing the various viewpoints, the Committee reached the consensus that most of the reasons expressed in opposition to providing written instructions amounted to a general view that it is not a good practice, which the Court seemingly disapproved of in O'Brien.[6]

The Committee concluded that the objections voiced by some judges and the bar to jurors focusing on particular words or phrases in a written charge are as likely to apply where written instructions are not given to the jury, that is, where jurors might have a more precise or vivid recollection of some parts of an oral charge than others. The objection that some more formally educated or articulate jurors may use written instructions to dominate other jurors also seems not to be confined to written instructions but may occur as well in the jury's discussion of oral instructions.

The Committee rejected the objection made by a few judges and attorneys that the jury may neglect its primary function of finding the facts from the evidence if it is given written instructions on the law. Just as a judge conducting a bench trial in a criminal or quasi-criminal matter, such as juvenile adjudications or municipal court trials, is expected to understand and follow the law, our system of justice expects jurors to

[6] In O'Brien, in part of the reasoning to deny the jury's request for a copy of the written instructions, the judge stated "[t]here are some judges that have done it in other cases that I'm aware of around the state. It's not a practice that I think is a good practice." State v. O'Brien, 200 N.J. at 533.

understand and follow the law rather than relying on generalized impressions or personal feelings about what is right or wrong in a particular case. The Supreme Court has repeatedly held that correct instructions are crucial to maintaining confidence in the outcome of a trial. Case law is also replete with the pronouncement that the jury is expected and presumed to follow the law as instructed by the court. The Committee expressed the view that if we employ a system of justice that relies on the jury's correct understanding of the applicable law, we cannot at the same time reject a method of instructing the jury that enhances its understanding of the law. Just as it would be inappropriate to expect judges to make decisions based on their generalized impressions and feelings about the evidence and the facts, jurors should not be handicapped by depriving them of a better understanding of the applicable law.

The Committee determined that other than the delay in trial, the concerns raised did not outweigh the benefits gained from providing charges in writing for the jury's use during deliberations. The Committee was persuaded by the recognized benefits, in particular, that written charges promote juror understanding to further fairness in criminal trials.

In O'Brien, the Court recognized that judges have discretion to determine when to distribute charges and should make individualized decisions regarding the submission of written instructions based upon the matter at hand, rather than a preconceived policy rationale. State v. O'Brien, 200 N.J. at 541. However, to ensure consistency statewide, the Committee felt that it was important to develop a uniform standard to be used by judges in assessing whether or not to distribute jury instructions. Specifically, the Committee wanted to craft language that would prevent judges from

declining to provide written instructions to the jury because a judge was not in favor of this practice. It discussed whether to include language that upon a finding of "good cause" the judge could decide not to provide written instructions to the jury. Because the Committee was satisfied that the only compelling reason not to provide written instructions to the jury would arise if the preparation of written instructions would cause undue delay in the trial, it agreed that "good cause" language was unnecessary. It is recommending that the rule provide that the court "may dispense with the submission of the jury instructions in writing if it finds that preparation of written instructions will cause undue delay in the trial."

2. Number of Copies

The Committee discussed how many copies of the charge should be provided to the jury during deliberations. It considered the following options: one copy, one copy per juror, or two or more copies. In Ohio, the Task Force on Jury Service recommended that each individual juror be given a copy of written instructions, but in the event of budgetary constraints, one copy of the written instructions be provided for the jury's use during deliberations. Report and Recommendations of the Supreme Court of Ohio Task Force on Jury Service, at 1 (February 2004). The Committee reached the consensus that Rule 1:8-8 should reflect that two or more copies shall be provided to the jury, leaving the judge with discretion to decide the actual number of copies that will be distributed.

3. Distribution of the Entire Final Jury Charge

The Committee discussed whether the entire charge or only portions of the charge should be provided to the jury in writing. Initially, the Committee considered whether partial instructions should be provided, if part of the instructions can be prepared without undue delay. The Committee concluded that the entire charge should be provided to the jurors when they retire to deliberate. In reaching that conclusion, the Committee considered the experience of judges who routinely have provided an entire set of instructions in all cases. Those judges explained that the bulk of the work in preparing written instructions involves the parts that are unique to a case. The other parts are generally copied from one case to another, or are copied from the model jury charges with minimal revision and adjustment for a particular case. Therefore, preparing the entire set of charges does not entail substantial additional time beyond preparing the portions of the charge that would be provided as central to a particular case. Furthermore, both prosecutors and defense counsel on the Committee expressed the view that partial written instructions may create issues on appeal or on motions for a new trial regarding the absence of parts of the charge in writing for the jury's use during deliberations. As a result of the Committee's discussions, the rule proposal does not allow for the submission of partial written jury charges.

The rule proposal does not address circumstances where a written charge is not provided but the jury requests a portion of the instructions in writing during its deliberations. The Committee left those circumstances to be addressed by trial judges in individual cases depending on the court's ability to prepare written charges without undue delay in the deliberations.

4. Use of Charges in The Jury Room During Deliberations – State v. Morgan

In State v. Morgan, 423 N.J. Super. 453, 468 (App. Div. 2011), the trial judge authorized the jurors to take home certain sections of the final jury charge that was given to them before the start of deliberations. The Appellate Division explained that a strict reading of Rule 1:8-8 would not permit the jury to take home the jury charges. It recognized that the rule "only permits the jury to take the court's written instructions into the jury room, not home with them over a weekend." State v. Morgan, 423 N.J. Super. at 471.

While the Appellate Division did not find a "*per se* impediment to permitting the jury to take all or parts of the jury charge outside the jury room," it recognized several concerns with doing so, such as, increasing the likelihood that jurors will discuss the case with family members or that they will improperly conduct legal research on issues involved in the case. State v. Morgan, 423 N.J. Super. at 473. It referred this matter to the Civil and Criminal Practice Committees to "develop recommendations to the Supreme Court to either explicitly forbid the practice, or permit it under specific guidelines" that were discussed in the opinion. State v. Morgan, 423 N.J. Super. at 473-74. The Committee considered Morgan and unanimously agreed that written jury instructions should not be taken home. The Committee is recommending revisions to R. 1:8-8(a) that would specifically provide that written jury instructions are given to the jury for its use in the jury room during deliberations.

B. Proposed Amendments to Rule 1:8-7 – Requests by Parties, Contents of Requests to Charge and Preservation of Written Instructions

The Committee is recommending revisions to Rule 1:8-7 to govern situations where a party submits a request to charge the jury. The proposed revisions to paragraph (b) of Rule 1:8-7 give the court discretion to require that "a party making requests to charge provide its requests in a format suitable for ready preparation and submission to the jury at a time directed by the court." Read together, the trial court's "undue delay" determination under the proposed amendments to Rule 1:8-8(a) could be based, in part, upon the parties' failure to provide their requests to charge within the "time directed by the court" in accordance with the proposed revisions to Rule 1:8-7(b).

This recommendation is consistent with the ABA Standards and the federal rules of criminal procedure. ABA Standard 15-4.4(d) provides that "[a]t the close of the evidence or at such earlier time as the court reasonably directs, the court should allow any party to tender written instructions and may direct counsel to prepare designated instructions in writing," and to distribute copies of the instructions to the other parties." See ABA Standard 15-4.4(d) and Fed. R. Crim. Proc. 30.[7] The proposed revisions to

[7] Fed. R. Crim. Proc. 30. Jury Instructions

> (a) In General. Any party may request in writing that the court instruct the jury on the law as specified in the request. The request must be made at the close of the evidence or at any earlier time that the court reasonably sets. When the request is made, the requesting party must furnish a copy to every other party.
>
> (b) Ruling on a Request. The court must inform the parties before closing arguments how it intends to rule on the requested instructions.
>
> (c) Time for Giving Instructions. The court may instruct the jury before or after the arguments are completed, or at both times.
>
> (d) Objections to Instructions. A party who objects to any portion of the instructions or to a failure to give a requested instruction must inform the

Rule 1:8-7 also provide that whenever practicable, the court shall provide a copy of the proposed jury instructions to the parties prior to the charge conference.

1. Timing for a Party to Make a Request to Charge the Jury

The Committee discussed several time frames for a party to request to charge, ranging from the pretrial conference, or 10 days before trial, or at the charge conference. The focus of the discussion was to establish a meaningful timeframe when the case is actually going to trial to encourage active involvement by the parties. One proposal was to revise Rule 3:9-1(e) to provide that a request by a party that the court submit final instructions to the jury in writing shall be made no later than the pretrial conference and that this request shall be noted in the pretrial memorandum. The goal of this revision was to provide an alert, early in the case, for the judge and parties to prepare the instructions. Recognizing that many cases are resolved by a guilty plea, the Committee reached a consensus that the time to make a request to charge should be fixed when there is a real possibility that the case will proceed to trial. The Committee questioned whether a deadline at the pretrial conference was too early. Some members also were unsure how a judge would enforce the deadline, if a party filed a "late" request after the pretrial conference.

After a lengthy discussion, the Committee agreed that the trial judge is in the best position to know how the case is proceeding and the complexity of any issues that are involved and therefore should have the discretion determine the appropriate time frame for a party to file requests to charge. In proposing that Rule 1:8-7 should be revised

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court of the specific objection and the grounds for the objection before the jury retires to deliberate. An opportunity must be given to object out of the jury's hearing and, on request, out of the jury's presence. Failure to object in accordance with this rule precludes appellate review, except as permitted under Rule 52(b).

accordingly, the Committee unanimously concluded that Rule 3:9-1 need not be amended. The Committee was satisfied that the proposed revisions to Rule 1:8-7 would provide sufficient guidance and flexibility based upon unique circumstances or complexities that may arise on a case-by-case basis. It was suggested that if a party submits a request to charge and provides proposed language in a format suitable for distribution, there may be less of a reason for a finding of undue delay in the trial pursuant to the proposed revisions to Rule 1:8-8.

2. Content of Requests to Charge

The Committee discussed the parties' involvement in the preparation of proposed jury charges in a format ready for submission the jury. The members recognized that the court is ultimately responsible for the jury charges. Nonetheless, ideally, the preparation of final charges should be a joint effort between the court and the parties, which is particularly important if a party requests that specific charges should be given.

The Committee discussed whether the rule should list the acceptable formats for requests to charge. The Committee decided that the rule need not set forth a specific format for the charges; rather the acceptable format should be determined by the judge. The Committee is recommending that Rule 1:8-7 provide that the court may require that a party making a request to charge provide its request in a format suitable for ready preparation and submission to the jury. The Committee also considered whether under the proposed revisions, it would be sufficient for the parties to submit a letter explaining what they want to be included in the charge or if the parties must submit their suggested language for the instruction. The Committee agreed that a party that requests to charge the jury should provide the actual suggested language for the jury instructions in writing.

3. Preservation of Written Instructions for the Court Record

ABA Standard 15-4.4(g) provides that "[a]ll instructions, whether given or refused, should become a part of the record. All objections made to instructions and the rulings thereon should be included in the record."[8] The Commentary to ABA Standard 15-4.4(g) provides that the record should include the party who requested the instructions and whether or not the instruction was given. ABA Standards, Comment to Standard 15-4.4(g) at 240. The reason for the ABA standard is to preserve an accurate record of the jury instructions to enable the appellate court fairly to consider alleged errors in instructions. The ABA also recommends that the record should identify the sponsor of each instruction and whether or not the instruction was actually given or if it was denied. ABA Standards, Comment to Standard 15-4.4(g) at 240. Missouri has a similar practice, which involves marking into evidence all versions of the charges that are submitted by the parties and the court. Mo. Sup. Ct. R. 28.02. [9]

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[8] See Minn. R. Crim. Proc. 26.03(e) ("All instructions, given or refused, must be made a part of the record.").

[9] Mo. Sup. Ct. R. 28.02 provides as follows:

> Use of Instructions and Verdict Forms
>
> (a) Duty of Court. In every trial for a criminal offense the court shall instruct the jury in writing upon all questions of law arising in the case that are necessary for their information in giving the verdict.
>
> (b) Request for Instructions and Verdict Forms. At the close of the evidence, or at such earlier time as the court may direct, counsel shall submit to the court instructions and verdict forms that the party requests be given. Instructions and verdict forms that a party requests shall be submitted in writing with an original and one copy for the court and one copy for each party. Each copy shall contain a notation at the end of the instruction as follows: "MAI-CR ___", "MAI-CR ___, Modified", or "Not in MAI-CR ___", as the case may be.
>
> (c) MAI-CR Excludes Use of Other Forms. Whenever there is an MAI-CR instruction or verdict form applicable under the law and Notes On Use, the MAI-CR instruction or verdict form shall be given or used to the exclusion of any other instruction or verdict form.

The Committee discussed whether all proposed instructions prepared by the court and the parties, both given in the final charge and refused, should be marked as exhibits and preserved as part of the court record. First, the Committee considered whether both the original charge discussed at the charge conference and the final charge should be preserved to create a complete record for purposes of appeal. The Committee then discussed whether the proposed jury instructions that are submitted by the parties should also be preserved as part of the court record. Some members of the Committee were of the view that it was not necessary to preserve versions of the charge that were submitted by the parties, because a party may abandon its position at the charge conference. Also, pursuant to Rule 1:7-2, if language is omitted from the charge a party can file an objection. See Rule 1:8-7(a).

(d) Guide for Form of Instruction Where MAI-CR Not Applicable. If an MAI-CR form must be modified or if there is no applicable MAI-CR form, the modified form or the form not in MAI-CR, if given, shall be simple, brief, impartial, and free from argument. It shall not submit detailed evidentiary facts. All instructions, where possible, shall follow the format of MAI-CR instructions, including the skeleton forms therein.

(e) Procedure for Marking Instructions. At the close of the evidence the court shall call a conference of counsel for the purpose of considering instructions and verdict forms. All instructions to be given to the jury at the close of all the evidence shall be numbered consecutively and in such order as the court shall determine unless otherwise instructed in approved Notes On Use. All written requests for instructions and verdict forms that are refused shall be so marked by the court, identified alphabetically, filed, and shall be kept as a part of the record of the case. The court shall dictate into the record which party requested each instruction and verdict form given or refused and which instructions and verdict forms were given on the court's own motion. The original of all numbered instructions and all verdict forms shall be handed to the jury for its use during its deliberation and shall be returned to the court and filed at the conclusion of the jury's deliberation.

(f) Violation of Rule--Effect. The giving or failure to give an instruction or verdict form in violation of this Rule 28.02 or any applicable Notes On Use shall constitute error, the error's prejudicial effect to be judicially determined, provided that objection has been timely made pursuant to Rule 28.03.

The Committee agreed that both the judge's charge provided at the charge conference and the final charge needed to be preserved and marked as a court exhibit. It decided that requests to charge submitted by the parties need not be preserved because a transcript of the required charge conference would better reflect the record of proceedings before the trial court and because the retention of numerous exhibits would not be a useful record for appeal. In sum, while some members expressed that the rule revisions should require that every written submission to the court should be preserved as part of the record, the Committee reached the consensus that Rule 1:8-7 should be amended to provide that a copy of the proposed jury charge that was considered at the charge conference and the final charge shall be marked as court exhibits, and the record would otherwise be comprised of the relevant transcripts of the proceedings.

Recognizing the importance of ensuring that the parties' views are reflected in the record, the Committee agreed that the rule should further provide that "[w]henever practicable, the court shall provide to counsel in advance of the charge conference a copy of its proposed jury charge, which shall be marked as a court exhibit, for counsel's review." This proposed language is designed to allow the parties to review the charge and lodge any objections, without the need to preserve specific versions of the charge that are submitted by the parties.

VII. PHASE-IN OF RULE REQUIREMENTS

RECOMMENDATION 2: To allow for appropriate training and transition for judges and practitioners, the Committee recommends that, if adopted, the rule requirement be phased-in for at least one Judicial College cycle, but no less than six months, after the rule is approved. If necessary, standard procedures to implement the rule should be promulgated by the Administrative Director of the Courts.

The results from the informal surveys of practitioners and judges revealed that many criminal judges do not currently provide copies of written instructions to the jury, and of the judges who do, some only provide portions of the charge as opposed to the final charge in its entirety. Recognizing that the providing written instructions to the jury will be a change in practice for many judges, the Committee is recommending that, if adopted, the rule requirement should be phased-in for at least one judicial college cycle, but not less than six months, after the rule is approved. This timeframe will allow for appropriate training and transition for judges and the parties to implement this practice in a meaningful way. If necessary, standard procedures to implement the rule should be promulgated by the Administrative Director, which could be issued by Directive to Criminal Judges to include an effective date and to address training issues.

VIII. UNANNOTATED VERSIONS OF MODEL CRIMINAL JURY CHARGES SHOULD BE MADE AVAILABLE ON THE JUDICIARY WEBSITE

RECOMMENDATION 3: To assist judges and parties in preparing and tailoring the written instructions to the circumstances in a specific case, the Committee recommends that the Model Criminal Jury Charge Committee post on the judiciary internet and infonet webpages two additional versions of each model criminal jury charge omitting the corresponding footnotes and annotations and one using male pronouns and the other female pronouns.

Model jury charges provide the starting point for judges to mold the instructions to fit the facts of the case. The Committee was in agreement that having a “clean” version of the model criminal jury charges readily available, without footnotes or annotations, would help assist in preparation of the final instructions. The Committee is recommending that the Model Criminal Jury Charge Committee post a “clean” version of the model criminal charges, without footnotes or annotations, on the judiciary Infonet and Internet webpages, for ease of access by judges and attorneys. Having a clean version of the model criminal charges readily available online will greatly assist judges and attorneys in making appropriate modifications to tailor the instructions to the facts and circumstances of the individual case that is proceeding to trial.

In accordance with Supreme Court policy, the current model charges are gender neutral. Where appropriate, each charge refers to “he/she and “him/her” when referencing a defendant or witness. The Committee unanimously agreed that it would be useful if the clean version of the charges dispensed with the use of alternative male/female pronouns. It is recommending that the Model Jury Charge Committee prepare two "clean" versions of the model charges to be posted on the judiciary website; one with male and one with female pronouns. Having the two clean versions available would reduce the number of revisions of the standard charges in judges' chambers and would facilitate the prompt preparation of a version of the instructions suitable to be submitted to the jury for its use.

IX. A MODEL JURY CHARGE SHOULD BE DEVELOPED INFORMING JURIES ABOUT THE USE OF WRITTEN INSTRUCTIONS DURING DELIBERATIONS

RECOMMENDATION 4: The Committee recommends that the Model Criminal Jury Charge Committee consider developing a standard instruction addressing the distribution of written charges to the jury and the use of those charges during deliberations.

The Committee recommends that the Model Criminal Jury Charge Committee consider developing a charge addressing the distribution of written charges and the use of those charges during deliberations. This approach was taken in Pennsylvania. In Pennsylvania, the court rules provide that the trial judge has discretion to distribute written copies of the portion of the judge's charge on the elements of the offenses, lesser included offenses, and any defense upon which the jury has been instructed. However, if the judge decides to provide written copies of the instructions to the jury, the judge must provide that portion of the charge in its entirety and the judge also shall instruct the jury about the use of the written charge.[10] If written instructions are

[10] For consideration by the Model Criminal Jury Charge Committee, the Commentary to Pa. R. Crim. P. 646 provides the following sample language for a Pennsylvania judge to instruct the jurors:

> Members of the jury, I will now instruct you on the law that applies to this case including the elements of each offense as well as the elements of the lesser included offenses and defenses upon which evidence has been provided during this trial. To assist you in your deliberations I will give you a written list of the elements of these offenses, lesser included offenses, and defenses to use in the jury room.
>
> If any matter is repeated or stated in different ways in my instructions, no emphasis is intended. Do not draw any inference because of a repetition. Do not single out any individual rule or instruction and ignore the others. Do not place greater emphasis on the elements of the offenses, lesser included offenses and defenses simply because I have provided them to you in writing and other instructions are not provided in writing. Consider all the instructions as a whole and each in the light of the others.
>
> If, during your deliberations, you have a question or feel that you need further assistance or instructions from me, write your question on a sheet of paper and give it to the court officer who will be standing at the jury room door, and who, in turn, will give it to me. You may ask questions

provided, "[a]t a minimum, the judge shall instruct the jurors that (a) the entire charge, written and oral, shall be given equal weight; and, (b) the jury may submit questions regarding any portion of the charge." The Committee recommends that a similar jury charge be drafted to be used when written charges are distributed to the jury in criminal trials in New Jersey.

X. CONCLUSION

In conclusion, the Criminal Practice Committee is recommending that the Court adopt this package of rule proposals and recommendations to require that written instructions be provided to the jury in criminal cases, unless doing so would cause an undue delay in the trial. In making its recommendations, the Committee recognizes that this proposal goes beyond the Court's decision in State v. O'Brien. The Committee respectfully submits that the benefits of having more informed and knowledgeable jurors favor requiring this practice in all criminal cases.

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about any of the instructions that I have given to you whether they were given to you orally or in writing.

APPENDIX A

Proposed Revisions to
Rule 1:8-7 and Rule 1:8-8

Rule 1:8-7. Requests to charge the jury

(a) . . . no change.

(b) In Criminal Cases. Prior to closing arguments, the court shall hold a charge conference on the record in all criminal cases. The court may require that a party making requests to charge provide its requests in a format suitable for ready preparation and submission to the jury at a time directed by the court. Whenever practicable, the court shall provide to counsel in advance of the charge conference a copy of its proposed jury charge, which shall be marked as a court exhibit, for counsel's review. At the conference the court shall advise counsel of the offenses, defenses and other legal issues to be charged and shall rule on requests made by counsel.

History**:** Source-R.R. 3:7-7(a), 4:52-1 (first and second sentences); amended July 21, 1980 to be effective September 8, 1980; paragraph (a) caption and new paragraph (b) added July 13, 1994 to be effective September 1, 1994; paragraph (a) amended July 10, 1998 to be effective September 1, 1998; paragraph (a) amended July 5, 2000 to be effective September 5, 2000[.]; paragraph (b) amended to be effective .

Rule 1:8-8. Materials to be Submitted to the Jury; Note-Taking; Juror Questions

(a) Materials. The jury may take into the jury room the exhibits received in evidence, and if the court so directs in a civil action, a list of the claims made by the parties and of the defenses to such claims, a list of the various items of damage upon which proof was submitted at the trial and a list of the verdicts that may be properly found by the jury. Any such list may be prepared by an attorney or the court, but before delivery to the jury, it shall be submitted to all parties. In criminal cases, [T]the court [, in its discretion, may] shall submit [a copy of all or part] two or more copies of its final instructions to the jury for the jury's use [its consideration] in the jury room during deliberations. The court may, however, dispense with the submission of the jury instructions in writing if it finds that preparation of written instructions will cause undue delay in the trial. The court may also, in its discretion and at such time and in such format as it shall determine, permit the submission to the jury of individual copies of any exhibit provided an appropriate request to employ that technique was made prior to trial on notice to all parties and provided further that the court finds that no party will be unduly prejudiced by the procedure.

(b) . . . no change.

(c) . . . no change.

History**:** Source-R.R. 4:52-2; caption and text amended July 15, 1982 to be effective September 13, 1982; amended and paragraphs (a) and (b) designated July 10, 1998 to be effective September 1, 1998; new paragraph (c) added July 12, 2002 to be effective September 3, 2002; caption amended July 28, 2004 to be effective September 1, 2004; paragraph (c) amended July 27, 2006 to be effective September 1, 2006[.]; paragraph (a) amended to be effective .