Foreword

Maurice Rosenberg†

I

It is now a tired truth that in this country litigation has become a major occupation of the bar and a major preoccupation of the public. Devising new measures, approaches, or changes that promise improvement in the litigation system and its procedures is worth our best efforts. The editors of this special issue are clearly on the right track in presenting the thoughtful articles that fill these pages. This brief Foreword will focus on three of the papers, two dealing with the before-trial phase of civil suits and the other with a set of issues that arise during trial and that mainly concern the problem of improving the jurors' understanding of the law they are sworn to apply.

Judge William Schwarzer's Article urges that in order to improve the quality of jury trials by communicating more clearly the rules of law to the jurors, we need to pay more attention to the teachings of psycholinguistics and not simply repeat the language in which appellate judges cast the rules. That thesis is not new, but Judge Schwarzer develops it with an unusually rich and sensitive reliance on the experimental work that lawyers and social scientists such as Robert and Veda Charrow have been doing to advance our knowledge of the jurors' cognitive processes.

Chief Judge Robert Peckham's Article deals with a side of the modern-day trial judge's work that was hardly known a half century ago: pretrial case management. The growing interest of judges in tighter management of their dockets is a direct effect of the great river of lawsuits that flows inexorably into American courts. The past

† Assistant Attorney General, Office for Improvements in the Administration of Justice; Harold R. Medina Professor of Procedural Jurisprudence, Columbia University School of Law. A.B. 1940, Syracuse University; L.L.B. 1947, Columbia University School of Law.

2. Id. at 740-41.

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twenty years have seen the number of civil filings in the federal district courts increase by 185%. In their court, the Northern District of California, Judges Peckham and Schwarzer know how the sorcerer's apprentice must have felt as they sweep one stream of cases after another toward termination, only to see each one quickly replaced by a larger stream. The sheer volume of case filings has focused the judges' attention on the systemic elements of court work and has elevated judicial administration from an exotic pursuit like orchidology to an essential vocation like counting calories. Besides providing thoughtful and practical suggestions on case management for trial judges, Judge Peckham's Article treats with sensitivity one of the great dilemmas of judicial administration—whether, in the interests of procedural regularity, the judge should penalize a party's failure to comply with a pretrial order or forgive the departure in the interests of substantive justice.

Professor Jack Friedenthal's Article deals with the perplexing problem of taming the runaway tendencies of pretrial discovery without crushing its spirit and destroying its effectiveness. His discussion is placed in the context of a close examination of Justice Lewis E. Powell's dissent from the Supreme Court's adoption in 1980 of several amendments to the discovery provisions of the Federal Rules of Civil Procedure. Professor Friedenthal attacks Justice Powell's claim that the Court's amendments were mere "tinkering" that deserved to be rejected lest they delay for years the development of effective measures to counter abuse in discovery practice. While I agree with the action taken by the majority of the Court, the attack on the dissent for allegedly harboring ulterior motives seems to me to be unfounded.

The remainder of this Foreword presents additional comments on these three articles.

II

It is clear from Judge Schwarzer's Article that his underlying premise is that the quality of jury justice is a function of the jurors' ability to apply the governing legal principles correctly. That is also a premise of the nationwide movement to adopt standardized or pattern instructions. Do pattern instructions in fact improve the juries' comprehension of the law? Judge Schwarzer reviews a group of studies and experiments showing that they do not. Officially compiled instructions have not been found to lower the rate of reversals on appeal or to be particularly well understood by jurors. Judge Schwarzer maintains

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that this is because the pattern instructions tend to be drawn mainly from appellate opinions, which are hardly written for nonprofessionals and which ignore principles of communication and psycholinguistics.\(^7\) Not surprisingly, the experts' research has confirmed that brevity, clarity, and simplicity in expressing the law help jurors to comprehend it.

Judge Schwarzer sets forth several of the major linguistic principles found in the literature (some of them couched in astonishingly opaque terms), and then converts these axioms into a half dozen brief guidelines. The contrast between the linguists' formulations and his translations helps explain why he is regarded as an outstanding jury trial judge. In substance, he advocates that instructions to the jurors should be clear and concise: he urges judges to avoid unneeded words, negative constructions, and the passive voice; and to use simple, concrete terms, short sentences, and a logical sequence of material.\(^8\)

Why do standard instructions not conform to those eminently sensible rules of thumb? The reason apparently is that the instructions are written by committees of judges and lawyers who are serious about producing statements of law that will stand up under appellate review, but casual about whether the words they use are meaningful to jurors. This may explain why standardizing instructions does not necessarily advance their intelligibility.

The empirical evidence shows that many legal terms in common use in instructions baffle jurors. Judge Schwarzer notes that nearly half the jurors in one study defined "preponderance of the evidence" to mean "a slow and careful pondering of the evidence."\(^9\) The instruction process would undoubtedly be improved if a selected group of the most common and most essential instructions were translated into terms that jurors can recall, understand, and apply better than they can the current phrases.

But before legal concepts can be clarified for laymen, they need to be clarified in the minds of judges and lawyers. Empirical research into the jury instruction problem has focused on the task of translating common legal concepts into easily understood language. It has not inquired whether the law itself has a clear conception of the idea that needs to be communicated.

A good example is the phrase "proof beyond a reasonable doubt," which appears in the set of instructions Judge Schwarzer appends to his Article. Any assumption that the law—or the federal courts—has a clear conception of what that term denotes is quickly refuted by reading the welter of decisions that try to state the meaning of the phrase.

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7. Schwarzer, supra note 1, at 740-42.
8. Id. at 744.
9. Id. at 741.
Obviously, we cannot hope to explain to lay jurors what we lawyers ourselves do not understand.

III

Chief Judge Peckham’s comprehensive paper on the trial judge’s case management functions offers many helpful insights and raises many provocative issues. Proposals to impose more and sterner sanctions against delinquent lawyers seem at first glance to be a perfect way to make pretrial procedures effective, but trouble spots soon appear. For example, some of Judge Peckham’s colleagues fear that the side effects of stepped-up sanctioning will be to decrease the chance that the lawyers will thereafter reach a settlement and to increase the likelihood that follow-up litigation will be generated concerning the propriety and extent of the sanction. Furthermore, federal appellate decisions in some circuits leave the district judges uncertain as to the scope of their sanctioning powers. The Peckham guidelines for the exercise of those powers should be a useful starting point for district judges.

Judge Peckham calls for a set of amendments to Rule 16, which governs pretrial conferences. These proposed amendments would include the explicit requirement of an early status conference, recognition that promoting settlement is a proper function of the judge at pretrial, and explicit authority to impose sanctions for violating Rule 16 requirements. His discussion refers to a working draft of the Advisory Committee on the Federal Rules of Civil Procedure with regard to proposed amendments to Rule 16. The major changes in Rule 16 now being considered by the advisory committee deserve careful study and comment by the profession. Judge Peckham’s Article is an excellent example of what we need.

IV

An important part of Professor Friedenthal’s Article is devoted to what he terms several “disturbing aspects” of Justice Powell’s dissent from the 1980 discovery rules amendments. He chiefly disagrees with the assertion that discovery is being pervasively abused. He points out that one form of abuse consists of outright violation of the rules, for which the antidote is to sanction offending lawyers more vigorously, not to rewrite the rules. The second form of abuse is zealous overuse of the discovery rules by attorneys in order “to leave no stone unturned” in preparing the case. It is this latter type of alleged abuse that Professor Friedenthal considers to be the real target of present at-
tacks on discovery, with the critics seeking to limit the scope of discovery in order to benefit institutional or corporate clients who often are cast as defendants in giant cases. He argues that these attacks raise a fundamental policy question—whether a plaintiff should be entitled to bring an action solely on the good faith belief that a valid cause exists. He asserts that the rules allow pleadings based “primarily on speculation,” or “good faith speculation.”

Professor Friedenthal thus poses a very clear and very basic policy issue concerning the relationship of pleadings to discovery in federal practice: Is the “hope of discovering a claim” a proper purpose of discovery, as Professor Friedenthal forthrightly argues? That issue needs to be debated and resolved. The rules themselves refer only to getting “evidence” and “leads to evidence” as purposes of discovery; they say nothing about using discovery to get an idea or a theory for developing a legal claim. That does not by itself prove that the Friedenthal thesis should be rejected, for the liberal amendment policy embodied in Rule 15 assures a litigant an opportunity to expand the scope of his claims or defenses without much restraint. In practice, this may mean that discovery can be conducted with a hopeful eye for clues to hitherto unsuspected claims or defenses, which can then be brought in by amendment.

If Professor Friedenthal is right in his perception that discovery may be conducted for the purpose of “discovering a claim,” or if amendments are as freely available as I have suggested, there is very little purpose in reshuffling the words of Rule 26(b) to substitute one word or phrase for another in defining the scope of permitted discovery.

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Procedural reform tends to produce rules that are increasingly long, detailed, and stern, and penalties that are more attractive for adversaries to invoke. These are tendencies of doubtful promise. We have more than enough litigation in this country without encouraging “chapter two” or follow-up litigation over sanctions, malpractice, or other collateral claims. If we are to make progress in inducing lawyers to act in line with systemic ends, we will do better to find positive incentives rather than to rely on escalating sanctions. We shall also make more progress in improving the administration of justice through the courts if we devote more attention to improving the way we communicate the law’s rules—to the jury through instructions, to the trial judges through appellate opinions, and to the lawyers through thoughtful and productive judicial rulings. The Articles in this issue are fine contributions to the profession’s efforts to meet this challenge.

14. Id. at 815.
15. Id. at 815, 816.