IN THE SUPREME COURT OF FLORIDA
Case No. SC06-___

In the matter of Standard Jury Instructions 1.0, 1.1, & *Preliminary And Closing Instructions*.
_____/

REPORT (NO. 06-01) OF THE COMMITTEE ON STANDARD JURY INSTRUCTIONS (CIVIL)

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REPORT (NO. 06-01) OF THE COMMITTEE ON STANDARD JURY INSTRUCTIONS (CIVIL)

To the Chief Justice and Justices of the Supreme Court of Florida:

The Committee on Standard Jury Instructions in Civil Cases recommends that The Florida Bar be authorized to publish: (i) revisions to Florida Standard Jury Instructions (Civil) – I. INSTRUCTIONS BEFORE AND DURING TRIAL, 1.0 *Preliminary Instruction [Prior To Voir Dire]* & 1.1 *Preliminary Instruction [After Jury Selection]*, and (ii) a new instruction, Florida Standard Jury Instructions (Civil) – VII. CLOSING INSTRUCTIONS, 7.0 *Closing Argument*. This Report is filed pursuant to article V, section 2(a), of the Florida Constitution.

I. INTRODUCTION AND DESCRIPTION OF APPENDICES

The two proposed revisions and the one new instruction mark the Committee's ongoing efforts to simplify and clarify existing standard instructions. First, the Committee recommends revisions to two of its standard preliminary instructions, 1.0 and 1.1. The Committee's Plain English subcommittee contributed numerous hours over many years and meetings to get these two proposed revisions ready for final submission. The result is a set of revised preliminary instructions that provide a simpler and clearer understanding of voir dire and trial procedures.

Second, the Committee recommends a new instruction 7.0, which is intended to be used prior to closing arguments. This new instruction, which explains the function

of the closing arguments a jury is about to hear, is also written in simple and clear language.

The two proposed revisions and the new instruction received Committee approval after consideration at meetings held between November 2001 and July 2005.

The following appendices are attached to this Report:

Appendix A: Proposed revisions.
Appendix B: June 1, 2005 Florida Bar News notice.
Appendix C: Relevant excerpts from the Committee's minutes.
Appendix D: Materials the Committee considered.

II. THE PROPOSED INSTRUCTIONS

The two proposed revisions and the new instruction are intended to more fully and plainly explain the processes of voir dire and a trial to the venire and eventual jurors. Specifically, the proposed revisions to instruction 1.0 *Preliminary Instruction [Prior To Voir Dire]* address topics that all members of the venire need to know before voir dire takes place. The revisions to proposed instruction 1.1 *Preliminary Instruction [After Jury Selection]* addresses topics that all seated jurors need to know before opening statements are presented. Proposed instruction 7.0 *Closing Argument* briefly and clearly explains closing arguments to jurors before those arguments commence.

As mentioned, each of these proposals was crafted over a number of years and multiple meetings. Indeed, the Committee submitted earlier drafts of the proposed revised instructions in its *Response by the Supreme Court Committee on Standard*

Jury Instructions in Civil Cases filed on August 6, 2004 (Appendix A-3 thereto).[1] In that Response, the Committee explained that

> [t]he draft standard instructions in Appendix A have not been published for comment--as is typically done prior to the SJI-Civil's submission of proposed instructions to the Court. Some of these draft instructions are probably in need of additional work. If the Court decides to adopt a recommendation from the Jury Innovations Committee that would require the use of one or more of these draft standard instructions, the SJI-Civil suggests, at a minimum, that the Court publish the relevant draft instructions and obtain public comment prior to the adoption of any draft instruction as a standard instruction. Alternatively, it may be prudent to require the SJI-Civil to obtain public comment and submit proposed standard instructions pursuant to its usual procedures.

Response, at 6-7.

After filing the Response, the Committee continued working on these proposed revisions and also worked on the new instruction, 7.0 *Closing Argument*. In doing so, the Committee kept firmly in mind that the Jury Innovations Committee recommended that "[a]ll instructions should be as simple and clear as possible." *See* Recommendation 25, Case No. SC01-1226, *In re: Final Report of Jury Innovations Committee*. Indeed, as stated in its Response, the Committee "has always strived to make its instructions understandable and clear." Response, at 13. Likewise, the

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[1] This Response was filed to provide the Court with the information it requested pursuant to Administrative Order AOSC03-40 as well as the letter of the Chief Justice dated October 17, 2003 (letter appears in the docket of Case No. SC01-1226, *In re: Final Report of Jury Innovations Committee). The* Committee's Response has been docketed in Case No. SC05-1091, *In re: Amendments to Florida Rules of Civil Procedure, et al.*

proposed revisions and new instruction in this Report are intended to make the jury process more understandable to venirepersons and actual jurors alike.

In this regard, social science research confirms the common sense notion that people who understand an assigned task are more likely to perform it better. For potential jurors, many of whom are in a courthouse for the first time, the environment may be unfamiliar or even daunting. These Plain English instructions provide a simple explanation at the outset of their experience to help them make sense of the judicial process thereby increasing their understanding and reducing their anxiety. Research reflects that people treated in this way will feel more comfortable, generally be more motivated, and ultimately perform at a higher level.

Moreover, in drafting these proposed instructions, the Committee was aware that many trial judges have developed personalized ways of delivering preliminary and closing instructions. The Committee does not intend to eliminate those localized practices. Indeed, the Committee considered proposing an amendment to Form 1.985 (Standard Jury Instructions), Florida Rules of Civil Procedure, which is in essence a rule requiring trial judges to provide written explanations for diverging from standard instructions. The Committee, however, determined that a note on use was a superior approach versus attempts to (i) amend the Form, through the Rules of Civil Procedure Committee; or (ii) completely exempt certain instructions from the dictates of the Form. In this regard, the first Note on Use to the current version of Instruction 1.1 reads as follows:

1. The publication of this recommended instruction is not intended to intrude upon the trial judge's own style and manner of delivery. It may be useful in cataloging the subjects to be covered in an introductory instruction.

(Emphasis supplied.) The Committee recommends that this Note on Use accompany both of the proposed revisions, 1.0 *Preliminary Instruction [Prior To Voir Dire],* and 1.1 *Preliminary Instruction [After Jury Selection]*. The inclusion of these identical Notes on Use should maintain the flexibility that trial judges have enjoyed under the current instructions.

III. PUBLIC COMMENTS FOLLOWING PUBLICATION.

The proposed instructions were published in the June 1, 2005 edition of the Florida Bar News. See Appendix B. Four comments were received. See Appendix D at pages 49 through 54. All comments were fully considered by the Plain English subcommittee, which subsequently reported the comments and its responses to the entire Committee. The Committee approved the following proposals after fully considering the comments submitted.

IV. CONCLUSION

The Committee recommends that proposed Instructions 1.0, 1.1, and 7.0 be approved for publication and use as proposed herein. Should the Court conclude that oral argument would be beneficial, the undersigned would be pleased to appear.

Respectfully submitted,

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APPENDIX A: PROPOSED REVISIONS.

PRELIMINARY INSTRUCTION 1.0
[Prior to Voir Dire]

Welcome. [I] [The clerk] will now administer your oath.

Now that you have been sworn, I'd like to give you an idea about what we are here to do.

What is this proceeding?

This is a civil trial. A civil trial is different from a criminal case, where a defendant is charged by the state prosecutor with committing a crime. The subject of a civil trial is a disagreement between people or companies [or others, as appropriate], where the claims of one or more of these parties has been brought to court to be resolved. It is called "a trial of a lawsuit."

(Insert brief description of claim(s) brought to trial in this case)

Who are the people here and what do they do?

Judge/Court: **I am the Judge. You may hear people occasionally refer to me as "The Court." That is the formal name for my role. My job is to maintain order and decide how to apply the rules of the law to the trial. I will also explain various rules to you that you will need to know in order to do your job as the jury. It is my job to remain neutral on the issues of this lawsuit.**

Attorneys: **The attorneys to whom I will introduce you have the job of representing their clients. That is, they speak for their client here at the trial. They have taken oaths as attorneys to do their best and to follow the rules for their profession.**

Plaintiff's Counsel: **The attorney on this side of the courtroom,** (introduce by name), **represents** (client name) **and is the person who filed the lawsuit here at the courthouse. [His] [Her] job is to present [his] [her] client's side of things to you. [He] [She] and [his] [her] client will be referred to most of the time as "the plaintiff."**

Defendant's Counsel: **The attorney on this side of the courtroom,** (introduce by name), **represents** (client name)**, the one who has been sued. [His] [Her] job is**

to present [his] [her] client's side of things to you. [He] [She] and [his] [her] client will usually be referred to here as "the defendant."

Court Clerk: **This person sitting in front of me,** (name), **is the court clerk. [He] [She] is here to assist me with some of the mechanics of the trial process, including the numbering and collection of the exhibits that are introduced in the course of the trial.**

Court Reporter: **The person sitting at the stenographic machine,** (name)**, is the court reporter. [His] [Her] job is to keep an accurate legal record of everything we say and do during this trial.**

Bailiff: **The person over there,** (name), **is the bailiff. [His] [Her] job is to maintain order and security in the courtroom. The bailiff is also my representative to the jury. Anything you need or any problems that come up for you during the course of the trial should be brought to [him] [her]. However, the bailiff cannot answer any of your questions about the case. Only I can do that.**

Jury: **Last, but not least, is the jury, which we will begin to select in a few moments from among all of you. The jury's job will be to decide what the facts are and what the facts mean. Jurors should be as neutral as possible at this point and have no fixed opinion about the lawsuit. At the end of the trial the jury will give me a written verdict. A verdict is simply the jury's answer to my questions about the case.**

Voir Dire:

The last thing I want to do, before we begin to select the jury, is to explain to you how the selection process works.

Questions/Challenges. **This is the part of the case where the parties and their lawyers have the opportunity to get to know a little bit about you, in order to help them come to their own conclusions about your ability to be fair and impartial, so they can decide who they think should be the jurors in this case.**

How we go about that is as follows: First, I'll ask some general questions of you. Then, each of the lawyers will have more specific questions that they will ask of you. After they have asked all of their questions, I will meet with them and they will tell me their choices for jurors. Each side can ask that I exclude a person from serving on a jury if they can give me a reason to believe that he or

she might be unable to be fair and impartial. That is what is called a challenge for cause. The lawyers also have a certain number of what are called peremptory challenges, by which they may exclude a person from the jury without giving a reason. By this process of elimination, the remaining persons are selected as the jury. It may take more than one conference among the parties, their attorneys, and me before the final selections are made.

Purpose of Questioning. **The questions that you will be asked during this process are not intended to embarrass you or unnecessarily pry into your personal affairs, but it is important that the parties and their attorneys know enough about you to make this important decision. If a question is asked that you would prefer not to answer in front of the whole courtroom, just let me know and you can come up here and give your answer just in front of the attorneys and me. If you have a question of either the attorneys or me, don't hesitate to let me know.**

Response to Questioning. **There are no right or wrong answers to the questions that will be asked of you. The only thing that I ask is that you answer the questions as frankly and as honestly and as completely as you can. You [will take] [have taken] an oath to answer all questions truthfully and completely and you must do so. Remaining silent when you have information you should disclose is a violation of that oath as well. If a juror violates this oath, it not only may result in having to try the case all over again but also can result in civil and criminal penalties against a juror personally. So, again, it is very important that you be as honest and complete with your answers as you possibly can. If you don't understand the question, please raise your hand and ask for an explanation or clarification.**

In sum, this is a process to assist the parties and their attorneys to select a fair and impartial jury. All of the questions they ask you are for this purpose. If, for any reason, you do not think you can be a fair and impartial juror, you must tell us.

PRELIMINARY INSTRUCTION 1.1
[After Jury Selection]

(Administer oath)

What will be happening?

You have now taken an oath to serve as jurors in this trial. Before we begin, I want to let you know what you can expect.

Opening Statements: **In a few moments, the attorneys will each have a chance to make what are called opening statements. In an opening statement, an attorney is allowed to give you [his] [her] views about what the evidence will be in the trial and what you are likely to see and hear in the testimony.**

Evidentiary Phase: **After the attorneys' opening statements the plaintiffs will bring their witnesses and evidence to you.**

Evidence. **Evidence is the information that the law allows you to see or hear in deciding this case. Evidence includes the testimony of the witnesses, documents, and anything else that I instruct you to consider.**

Witnesses. **A witness is a person who takes an oath to tell the truth and then answers attorneys' questions for the jury. The answering of attorneys' questions by witnesses is called "giving testimony." Testimony means statements that are made when someone has sworn an oath to tell the truth.**

The plaintiff's lawyer will normally ask a witness the questions first so as to provide you the testimony that the plaintiff's lawyer believes is helpful to [his] [her] case. That is called direct examination. Then the defense lawyer may ask the same witness additional questions about whatever the witness has testified to. That is called cross-examination. Certain documents or other evidence may also be shown to you during direct or cross-examination. After the plaintiff's witnesses have testified, the defendant will have the opportunity to put witnesses on the stand and go through the same process. Then the plaintiff's lawyer gets to do cross-examination. The process is designed to be fair to both sides.

It is important that you remember that testimony comes from witnesses. The attorneys do not give testimony and they are not themselves witnesses.

Objections: **Sometimes the attorneys will disagree about the rules for trial**

procedure when a question is asked of a witness. When that happens, one of the lawyers may make what is called an "objection." The rules for a trial can be complicated, and there are many reasons for attorneys to object. You should simply wait for me to decide how to proceed. If I say that an objection is "sustained," that means the witness may not answer the question. If I say that the objection is "overruled," that means the witness may answer the question.

When there is an objection and I make a decision, you must not assume from that decision that I have any particular opinion other than that the rules for conducting a trial are being correctly followed. If I say a question may not be asked or answered, you must not try to guess what the answer would have been. That is against the rules, too.

Side Bar Conferences: **Sometimes I will need to speak to the attorneys about legal elements of the case that are not appropriate for the jury to hear. The attorneys and I will try to have as few of these conferences as possible while you are giving us your valuable time in the courtroom. But, if we do have to have such a conference during testimony, we will try to hold the conference at the side of my desk so that we do not have to take a break and ask you to leave the courtroom.**

Recesses: **Breaks in an ongoing trial are usually called "recesses." During a recess you still have your duties as a juror and must follow the rules, even while having coffee, at lunch, or at home.**

Instructions Before Closing Arguments: **After all the evidence has been presented to you, I will instruct you in the law that you must follow. It is important that you remember these instructions to assist you in evaluating the final attorney presentations, which come next, and, later, during your deliberations, to help you correctly sort through the evidence to reach your decision.**

Closing Arguments: **The attorneys will then have the opportunity to make their final presentations to you, which are called closing arguments.**

Final Instructions: **After you have heard the closing arguments, I will instruct you further in the law as well as explain to you the procedures you must follow to decide the case.**

Deliberations: **After you hear the final jury instructions, you will go to the jury room and discuss and decide the questions I have put on your verdict form.**

[You will have a copy of the jury instructions to use during your discussions.] The discussions you have and the decisions you make are usually called "jury deliberations." Your deliberations are absolutely private and neither I nor anyone else will be with you in the jury room.

Verdict: **When you have finished answering the questions, you will give the verdict form to the bailiff, and we will all return to the courtroom where your verdict will be read. When that is completed, you will be released from your assignment as a juror.**

What are the rules?

Before we begin the trial, I want to give you just a brief explanation of the applicable rules.

Keeping an Open Mind. **You must pay close attention to the testimony and other evidence as it comes into the trial. However, you must avoid forming any final opinion or telling anyone else your views on the case until you begin your deliberations. This rule requires you to keep an open mind until you have heard all of the evidence and is designed to prevent you from influencing how your fellow jurors think until they have heard all of the evidence and had an opportunity to form their own opinions. The time and place for coming to your final opinions and speaking about them with your fellow jurors is during deliberations in the jury room, after all of the evidence has been presented, closing arguments have been made, and I have instructed you on the law. It is important that you hear all of the facts and that you hear the law and how to apply it before you start deciding anything.**

Consider Only the Evidence. **It is the things you hear and see in this courtroom that matter in this trial. The law tells us that a juror can consider only the testimony and other evidence that all the other jurors have also heard and seen in the presence of the judge and the lawyers. Doing anything else is wrong and is against the law. That means that you cannot do any homework or investigation of your own. You cannot obtain on your own any information about the case or about anyone involved in the case, from any source whatsoever, including the internet, and you cannot visit places mentioned in the trial.**

The law also tells us that jurors cannot have discussions of any sort with friends or family members about the case or its subject. So, do not let even the closest family members make comments to you or ask questions about the trial. Similarly, it is important that you avoid reading any newspaper accounts or

watching or listening to television or radio comments that have anything to do with this case or its subject.

No Mid-Trial Discussions. **When we are in a recess, do not discuss anything about the trial or the case with each other or with anyone else. If attorneys approach you, don't speak with them. The law says they are to avoid contact with you. If an attorney will not look at you or speak to you, do not be offended or form a conclusion about that behavior. The attorney is not supposed to interact with jurors outside of the courtroom and is only following the rules. The attorney is not being impolite. If an attorney or anyone else does try to speak with you or says something about the case in your presence, please inform the bailiff immediately.**

Only the Jury Decides. **Only you get to deliberate and answer the verdict questions at the end of the trial. I will not intrude into your deliberations at all. I am required to be neutral. You should not assume that I prefer one decision over another. You should not try to guess what my opinion is about any part of the case. It would be wrong for you to conclude that anything I say or do means that I am for one side or another in the trial. Discussing and deciding the facts is your job alone.**

7.0 CLOSING ARGUMENT

Members of the jury, you have now heard all of the evidence in this case. The attorneys will now make their final arguments. What the attorneys say is not evidence. The arguments are a final opportunity for the attorneys to discuss the case and to persuade you to reach a verdict in favor of their clients.

Each side has equal time. (Plaintiff's attorney) **will go first.** (Defendant's attorney) **will then make [his] [her] [its] argument. Finally,** (plaintiff's attorney) **may make a rebuttal argument.**

Please give the attorneys your close attention.

APPENDIX B:
FLORIDA BAR NEWS PUBLICATION.

Notice

Proposed new voir dire instruction

The Supreme Court Committee on Standard Jury Instructions in Civil Cases is presently considering a revised Preliminary Instruction 1.0 (prior to voir dire) and a revised Preliminary Instruction 1.1 (after jury selection). The committee's intent is to provide a format for the trial court to explain to lay jurors – in plain English – the main elements of a civil trial and the roles played by the various actors in a courtroom so that jurors might better and more fully understand the duties they have undertaken. The goal is three-fold: (1) say it in plain English, (2) answer basic juror questions about the process; (3) make jurors more comfortable. For many potential jurors, the courthouse environment is entirely alien. These preliminary instructions provide a simple explanation, at the beginning of the experience, that will help jurors make sense of the process and thus reduce any anxiety. Research tells us that people treated in this way will not only feel more comfortable but will generally perform at a higher level. The committee proposes a new instruction 7.0 entitled "Closing Argument." After reviewing the comments received in response to this notice, the committee may submit its proposal to the Supreme Court. Send all comments to the chair of the committee, Scott Maker, Office of General Counsel, City of Jacksonville, 117 West Duval Street, Suite 480, Jacksonville 32202. You may e-mail your comments to him at smaker@coj.net or fax them to (904) 630-1316. Your comments must be received by July 1 to ensure that they are considered by the committee.

PRELIMINARY INSTRUCTION 1.0
[Prior to Voir Dire]

Welcome. [I] [The clerk] will now administer your oath.

Now that you have been sworn, I'd like to give you an idea about what we are here to do.

What is this proceeding?

This is a civil trial. A civil trial is different from a criminal case, where a defendant is charged by the state prosecutor with committing a crime. The subject of a civil trial is a disagreement between people or companies [or others, as appropriate], where the claims of one or more of these parties has been brought to court to be resolved. It is called "a *trial of a* lawsuit".

(insert brief description of claim(s) brought to trial in this case)

Who are the people here and what do they do?

Judge/Court: **I am the Judge. You may hear people occasionally refer to me as "The Court". That is the formal name for my role. My job is to maintain order and decide how to apply the rules of the law to the trial. I will also explain various rules to you that you will need to know in order to do your job as the jury. *It is my job to remain neutral on the issues of this lawsuit.***

Attorneys: **The attorneys to whom I will introduce you have the job of representing their clients. That is, they *speak* for their client here at the trial. They have taken oaths as attorneys to do their best and to follow the rules for their profession.**

Plaintiff's Counsel: **The attorney on this side of the courtroom, (introduce by name), represents (client name) and is the person who filed the lawsuit here at the courthouse. [His] [Her] job is to present [his] [her] client's side of things to you. [He] [She] and [his] [her] client will be referred to most of the time as "the plaintiff."**

Defendant's Counsel: **The attorney on this side of the courtroom, (introduce by name), represents (client name), the one who has been sued. [His] [Her] job is to present [his] [her] client's side of things to you. [He] [She] and [his] [her] client will usually be referred to here as "the defendant."**

Court Clerk: **This person sitting in front of me, (name), is the court clerk. [He] [She] is here to assist me with some of the mechanics of the trial process, including the numbering and collection of the exhibits that are introduced in the course of the trial.**

Court Reporter: **The person sitting at the stenographic machine, (name), is the court reporter. [His] [Her] job is to keep an accurate legal record of everything we say and do during this trial.**

Bailiff: **The person over there (name) is the bailiff. [His] [Her] job is to maintain order and security in the courtroom. The bailiff is also my representative to the jury. Anything you need or any problems that come up for you during the course of the trial should be brought to [him] [her]. However, the bailiff cannot answer any of your questions about the case. Only I can do that.**

Jury: **Last, but not least, is the jury, which we will begin to select in a few moments from among all of you. The jury's job will be to decide what the facts are and what the facts mean. *Jurors should be as neutral as possible at this point and have no fixed opinion about the lawsuit. At the end of the trial the jury will give me a written verdict. A verdict is simply the jury's answer to my questions about the case.***

Voir Dire:

The last thing I want to do, before we begin to select the jury, is to explain to you how the selection process works.

Questions/Challenges. **This is the part of the case where the parties and their lawyers have the opportunity to get to know a little bit about you, in order to help them come to their own conclusions about your ability to be fair and impartial, so they can decide who they think should be the jurors in this case.**

How we go about that is as follows: First, I'll ask some *general* questions of you. Then, each of the lawyers will have more specific questions that they will ask of you. After they have asked all of their questions, I will meet with them and they will tell me their choices for jurors. Each side can ask that I exclude a person from serving on a jury if they can give me a reason to believe that he or she might be unable to be fair and impartial. That is what is called a challenge for cause. The lawyers also have a certain number of what are called peremptory challenges, by which they may exclude a person from the jury without giving a reason. By this process of elimination, the *remaining* persons are *selected* as the *jury*. It may take more than one conference among the parties, their attorneys, and me before the final selections are made.

Purpose of Questioning. **The questions that you will be asked during this process are not intended to embarrass you or unnecessarily pry into your personal affairs, but it is important that the parties and their attorneys know enough about you to make this important decision. If a question is asked that you would prefer not to answer in front of the whole courtroom, just let me know and you can come up here and give your answer *just* in front of the attorneys and me. If you have a question of either the attorneys or me, don't hesitate to let us know.**

Response to Questioning. ***There are no right or wrong answers to the questions that will be asked of you. The only thing that I ask is that you answer the questions as frankly and as honestly and as completely as you can. You [will take] [have taken] an oath to answer all questions truthfully and completely and you must do so. Remaining silent when you have information you should disclose is a violation of that oath as well. If a juror violates this oath, it may result not only in having to try the case all over again but also can result in civil and criminal penalties against a juror personally. So, again, it is very important that you be as honest and complete with your answers as you possibly can. If you don't understand the question, please raise your hand and ask for an explanation or clarification.***

In sum, this is a process to assist the parties and their attorneys to select a *fair and impartial jury. All of* the questions they ask you are for this purpose. If, for any reason, you do not think you can be a fair and impartial juror, you must tell us.

PRELIMINARY INSTRUCTION 1.1b PROPOSAL
[After Jury Selection]

[Administer oath]

What will be Happening?

You have now taken an oath to serve as jurors in this trial. Before we begin, I want to let you know what you can expect.

Opening Statements. **In a few moments, the attorneys will each have a chance to make what are called opening statements. In an opening statement, an attorney is allowed to give you [his] [her] views about what the evidence will be in the trial and what you are likely to see and hear in the testimony.**

Evidentiary Phase: **After the attorneys' opening statements the plaintiffs will bring their witnesses and evidence to you.**

Evidence. **Evidence is the information that the law allows you to see or hear in *deciding this case. Evidence includes the testimony of the witnesses, documents, and anything else that I instruct you to consider.***

Witnesses. **A witness is a person who takes an oath to tell the truth and then answers attorneys' questions for the jury. The answering of attorneys' questions by witnesses is called "giving testimony." Testimony means statements that are made when someone has sworn an oath to tell the truth.**

The plaintiff's lawyer will normally ask a witness the questions first so as to provide you the *testimony that the plaintiff's lawyer believes is helpful to [his] [her] case. That is called* direct examination. Then the defense lawyer will get to ask the same witness additional questions about whatever the witness has testified to. That *is* called cross-examination. Certain documents or other evidence may also be shown to you during direct or cross-examination. After the plaintiff has presented [his] [her] witnesses, the defendant will have the opportunity to put witnesses on the stand and go through the same process. Then the plaintiff's lawyer gets to do cross-examination. The process is designed to be fair to both sides.

It is important that you remember that testimony comes from witnesses. The attorneys do not give testimony and they are not themselves witnesses.

Objections: **Sometimes the attorneys will disagree about the rules for trial procedure when a question is asked of a witness. When that happens, one of the lawyers may make what is called an "objection." The rules for a trial can be complicated, and there are many reasons for attorneys to object. You should simply wait for me to decide how to proceed. If I say that an objection is "sustained", that means the witness may not answer the question. If I say that the objection is "overruled," that means the witness may answer the question. When there is an objection and I make a decision, you must not assume from that decision that I have any particular opinion other than that the rules for conducting a trial are being correctly followed. If I say a question may not be asked or answered, you must not *try* to guess what the answer would have been. That is against the rules, too.**

Side Bar Conference: **Sometimes I will need to speak to the attorneys about legal elements of the case that are not appropriate for the *jury to hear.* The attorneys and I will try to have as few of these conferences as possible while you are giving us your valuable time in the courtroom. But, if we do have to have such a conference during testimony, we will try to hold the conference at the side of my desk so that we do not have to take a break and ask you to leave the courtroom.**

Recesses: **Breaks in an ongoing trial are usually called "recesses". During a recess you still have your duties as a juror and must follow the rules, even while having coffee, at lunch, or at home.**

Instructions Before Closing Arguments: **After all the evidence has been presented to you, I will instruct you in certain elements of the law that you must follow. It is important that you remember these instructions to assist you in evaluating the final attorney presentations, which come next, and, later, during your deliberations, to help you correctly sort through the evidence to reach your decision.**

Closing Arguments: **The attorneys will then have the opportunity to make their final presentations to you, which are called closing arguments.**

Final Instructions: **After you have heard the closing arguments, I will instruct you further in the law as well as explain to you the procedures you must follow to decide the case.**

Deliberations: **After you hear the final jury instructions, you will go to the jury room and discuss and decide the questions I have put on your verdict form. [You will have a copy of the jury instructions to use during your discussions.] The discussions you have and the decisions you make are usually called "jury deliberations". Your deliberations are absolutely private and neither I nor anyone else *will be* with you in the *jury room.***

Verdict: **When you have finished answering the questions, you will give the verdict form to the bailiff, and we will all return to the courtroom where your verdict will be read. When that is completed, you will be released from your assignment as a juror.**

What are the rules?

***Before* we begin the trial, I want to give you just a brief explanation of the applicable rules.**

Keeping an Open Mind. ***You must pay close attention to the testimony and other evidence as it comes into the trial. However, you must avoid forming any final opinion or telling anyone else your views on the case until you begin your deliberations. This rule requires you to keep an open mind until you have heard all of the evidence and is designed to prevent you from influencing how your fellow jurors think until they have heard all of the evidence and had an opportunity to form their own opinions. The time and place for coming to your final opinions and speaking about them with your fellow jurors is during deliberations in the jury room, after all of the evidence has been presented, closing arguments have been made, and I have instructed you on the law. It is important that you hear all of the facts and that you hear the law and how to apply it before you start deciding anything.***

Only Consider the Evidence. **It is the things you hear and see in this courtroom that matter in this trial. The law tells us that a juror can only consider testimony and other evidence that all the other jurors have also heard and seen in the presence of the judge and the lawyers. Doing anything else is wrong and is against the law. That means that you cannot do any homework or investigation of your own. You cannot obtain on your own any information about the case or about anyone involved in the case, from any source whatsoever, including the internet, and you cannot visit places mentioned in the trial.**

The law also tells us that jurors cannot have discussions of any sort with friends or family members about the case or its subject. So, do not let even the closest family members make comments to you or ask questions about the trial. Similarly, it is important that you avoid reading any newspaper accounts or watching or listening to television or radio comments that have anything to do with this case or its subject.

No Mid-Trial Discussions. **When we are in a recess, do not discuss anything about the trial or the case with each other or with anyone else. If attorneys approach you, don't speak with them. The law says they are to avoid contact with you. If an attorney will not look at you or speak to you, do not be offended or form a conclusion about that behavior. The attorney is not supposed to interact with jurors outside of the courtroom and is only following the rules. She is not being impolite. If an attorney or anyone else does try to speak with you or says something about the case in your presence, please inform the bailiff immediately.**

Only the Jury Decides. **Only you get to deliberate and answer the verdict questions at the end of the trial. I will not intrude into your deliberations at all. I am required to be neutral. You should not assume that I prefer one decision over another. You should not try to guess what my opinion is about any part of the case. It would be wrong for you to conclude that anything I say or do means that I am for one side or another in the trial. Discussing and deciding the facts is your job alone.**

7.0 CLOSING ARGUMENT

Members of the jury, you have now heard all of the evidence in this case. The attorneys will now make their final arguments. What the attorneys say is not evidence. The arguments are a final opportunity for the attorneys to discuss the case and to persuade you to reach a verdict in favor of their clients.

Each side has equal time. (Plaintiff's attorney) will go first. (Defendant's attorney) will then make [his/her/its] argument. Finally, (Plaintiff's attorney) may make a rebuttal argument.

Please give the attorneys your close attention.

APPENDIX C:
RELEVANT EXCERPTS FROM THE COMMITTEE'S MINUTES.

SUPREME COURT COMMITTEE ON STANDARD JURY INSTRUCTIONS (CIVIL)

Adams Mark Hotel
Jacksonville
November 9-10, 2001

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(D) Report on Response to Jury Innovations Committee Report.

Altenbernd reported. The committee has submitted its report to the supreme court. [Reporter's Note: On November 30, 2001, Judge Shevin served a reply to the committee's report].

In conjunction with the effort to see whether the committee could draft even simpler instructions than it already does, Pillans agreed to undertake the leadership of a subcommittee that will attempt to draft some sample instructions as an example for the committee and maybe for the supreme court argument.

The subcommittee led by Pillans will consist of Walsh. Gerald, Mitchell, Gunn, Lewis, and Wagner. They will report back at the February 2002 meeting.

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SUPREME COURT COMMITTEE ON STANDARD JURY INSTRUCTIONS (CIVIL)

Judicial Meeting Room
Supreme Court of Florida
Tallahassee
February 22-23, 2002

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8. PLAIN ENGLISH SUBCOMMITTEE (Tab 3).

In Singer's absence, Pillans reported for the Ad Hoc Subcommittee on Drafting Plain English Instructions, a separate subcommittee that was appointed at the November 2001 meeting of the committee, and which was charged with redrafting a set of the current instructions for a simple negligence case for possible use in the committee's presentation to the Florida Supreme Court during the oral argument regarding the report of the Jury Innovations Committee.

Pillans directed the committee's attention to pages 3-44 through 3-46 of the materials. He explained that the subcommittee undertook to redraft Model Charge No. 1 for an automobile collision with a single claimant and defendant and the issue of comparative negligence, focusing upon the substantive issues in Instructions 3.5b, 3.7, 3.8, 3.9, 4.1, 5.1a, and 5.1b.

Pillans explained that the results of the endeavor were not good enough to submit to the committee. The subcommittee did not feel that the results were an improvement upon the current instructions. Further, the subcommittee was concerned that efforts in this regard may actually alter legal concepts that have been long settled. Moreover, Pillans reported that there is no quick fix. Efforts such as these to redraft the current instructions promise to take as long or longer than the committee's current process of drafting instructions.

Lewis, T. commented that he had compiled a simple survey of, among others, bailiffs, clerks, and real life jurors. He asked that cross-section of people the following three questions about a standard instruction: (i) does this seem clear and understandable?; (ii) if somebody asked what it means, how would you explain it?; and (iii) how would you improve it? Based on the answers he received, he would recommend making the standard instructions more understandable, if possible. Many people in his sample survey would have liked to have been given the definitions up front.

Walbolt commented, however, that the standard instructions may make more sense in the context of an entire case, whereas standing alone they may seem complicated. Webster was concerned that making the standard instructions too simplistic runs the risk of misstating the law. Gunn commented that the committee generally takes essential terms in its standard instructions from statutes or case law. It is hard to make those terms better or more understandable without departing from the meaning of those essential terms. Berman agreed that there is a fundamental problem in reformulating the language that the courts actually use. But he suggested having a social scientist take the committee's standard instructions and examine them. He stated that he knew of a Ph.D. who would volunteer to do so. Caldwell observed that making the standard instructions clear is part of the committee's job.

Wagner added that ALI is in the process of developing "Basic Principles." One of the basic principles being developed is the concept of legal cause. Altenbernd observed that causation instructions are the most difficult to draft. He suggested that the committee should attempt to capture the spirit of the law in drafting such instructions.

Wagner moved that the subcommittee be suspended until the Florida Supreme Court issues its opinion on the report of the Jury Innovations Committee.

In the end, it was decided that the full committee would invite a social science/communications expert to the July 2002 meeting to discuss standard instructions at that meeting. Prior to the meeting, the committee would submit to the expert a full model charge for review in advance. Other than that, the subcommittee will suspend activity until the July 2002 meeting or an opinion from the Florida Supreme Court on the report of the Jury Innovations Committee.

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SUPREME COURT COMMITTEE ON STANDARD JURY INSTRUCTIONS (CIVIL)

The Breakers
Palm Beach
July 11-13, 2002

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10. PLAIN ENGLISH (Tab 3).

Berman introduced Allan Campo to the committee. Campo made a presentation as to the value a social science resource could add to the committee's work. Among other observations, he told the committee that research indicates greater consistency among jury verdicts when jurors talk amongst themselves about the jury instructions. He also stated that there should be no argument that juries are better served when they are given both oral and written instructions. He further observed that research has proven that people tend to learn better when they understand the framework of what they are going to learn before the learning begins.

Beckham asked whether it was a good idea to give each juror a copy of the

written instructions. Campo replied that it was a good idea, because jurors read at different paces.

Singer asked whether the use of PowerPoint presentations during the reading of the charges was a good idea. Campo thought it was a good idea and suggested that the use of selected key words in the presentation could be one successful approach.

The committee thanked Campo for taking the time to speak.

Singer then reported on the subcommittee's work.

The subcommittee will work on a Plain English preliminary instruction in order to be prepared if the Florida Supreme Court adopts some form of Plain English standard when it rules on the Jury Innovations Committee's report.

The subcommittee will also be examining the use of PowerPoint presentations during the reading of charges. Some jurors like to be able to read along because they learn better that way. But some trial judges like to have eye contact with the jurors while the charges are read.

The subcommittee will also examine the Eleventh Circuit Pattern Instruction 7.1 on deliberations. Singer said he thought it was a good instruction and one the subcommittee might be able to emulate.

A discussion ensued about how the committee could best utilize a social science resource like Campo. Singer stated that he would open the application process to as broad an audience as practicable. Lumish agreed.

Stewart raised the concern about using non-lawyer consultants as voting members of a committee drafting law-based instructions. He suggested naming any such person as an ad hoc or consulting member of the committee. Brown agreed that it gives the committee more flexibility to have consultants in this respect rather than actual voting members. But Cobb observed that the committee has no money to pay a consultant. Berman observed that social science professionals were unlikely to exceed their expertise by commenting on legal issues.

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SUPREME COURT COMMITTEE ON STANDARD JURY INSTRUCTIONS (CIVIL)

Marriott Waterside
Tampa
November 14-15, 2002

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8. PRELIMINARY INSTRUCTION (Tab 15).

Lewis reported for the subcommittee. He directed the committee's attention to pages 15-13 through 15-15. The subcommittee has submitted three proposed instructions: (i) Use of Interpreters; (ii) Questioning By Jurors; and (iii) Preliminary Instructions.

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Lewis then turned to discussing the proposed preliminary instruction on pages 15-15. He explained that the genesis of this proposal was a concern that jurors might not realize that they wee not to consult the internet about the case because the internet is not specifically mentioned in current instruction 1.1. This proposed instruction is more general than the current standard.

Altonaga stated that, if the committee were going to tinker with the current standard, it should look to the federal pattern instruction to see if it offers any guidance.

The subcommittee will continue its work on this instruction and will report back to the February 2003 meeting.

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SUPREME COURT COMMITTEE ON STANDARD JURY INSTRUCTIONS (CIVIL)

Casa Monica Hotel
St. Augustine
February 20-21, 2003

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3. PLAIN ENGLISH (Tab 3).

Berman led the discussion. He said that the subcommittee was going to associate a non-lawyer member to work with the subcommittee. The committee had no objection to this plan.

The subcommittee will report back at the July 2003 meeting.

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SUPREME COURT COMMITTEE ON STANDARD JURY INSTRUCTIONS (CIVIL)

The Breakers
Palm Beach
July 10-11, 2003

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3. PLAIN ENGLISH (Tab 3).

Berman led the discussion. He introduced Allan Campo to the full committee again, as Campo will be working closely with this subcommittee in its plain English issues. Berman also directed the committee's attention to pages 3-67 through 3-75 of the materials.

Berman reported that the subcommittee will focus exclusively on re-writing instruction 1.1 as its first project. Altenbernd agrees that instruction 1.1 is a great place for the subcommittee to start its work. Berman also reported that the subcommittee plans on submitting its proposals to focus groups to gauge how the proposed instructions are received. Caldwell commented that the subcommittee has a comprehensive task ahead of it, but that it hopes to get actual feedback as to how focus groups really comprehend the proposed instructions.

Berman asked that comments from the committee be sent to him. He said the subcommittee will submit a revised proposal for instruction 1.1 at the November 2003 meeting.

Wagner suggested that the subcommittee may require funding to complete its work. He suggested that the Florida Supreme Court should ask for funds to assist in this ongoing project. Altenbernd said that he would investigate the possibility of a line

item in the Office of State Court Administrator's budget in this regard.

It was also suggested that Stetson Law School might be willing to take on an assistance role as an academic task.

Wagner further suggested that foundation funding might be available. Lewis suggested that the State Justice Institute might be a possible source of resources for the subcommittee. Mitchell mentioned that ABOTA also might be a possible source of resources.

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SUPREME COURT COMMITTEE ON STANDARD JURY INSTRUCTIONS (CIVIL)

The Biltmore Hotel
Coral Gables
November 13-14, 2003

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3. PLAIN ENGLISH (Tab 3).

Berman led the discussion. He stated that the subcommittee feels that revising the entire set of jury instructions at once would be too large of a project. Instead, the subcommittee has been developing plain English preliminary instructions (standard instruction 1.1).

The subcommittee will propose an amendment to the preliminary instructions at the February 2004 meeting.

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SUPREME COURT COMMITTEE ON STANDARD JURY INSTRUCTIONS (CIVIL)
Stetson Law Center
Tampa
February 19-20, 2004

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4. JURY INNOVATIONS (Tab 10).

Altenbernd reported that the Supreme Court granted the committee's request to extend the deadline for filing the report in response to the Jury Innovations Committee's recommendations until August 6,2004. Altenbernd would like the report to include the committee's position on each recommendation and an appendix with draft amendments for all instructions requiring revisions.

Altenbernd encouraged all subcommittees to submit any materials regarding the report by early May. This will allow the materials to be circulated to the Civil Rules and Criminal Jury Instructions Committees before their June 2004 meetings. The committee discussed its responses to the following the recommendations of the Jury Innovations Committee:

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(D) **Recommendation 25: Simple and Clear Instructions** (Tab ***3).***

Berman led the discussion and directed the committee's attention to pages 3-93 to 3-102. The subcommittee is in the process of revising preliminary instruction 1.1 to address plain English concerns. In addition, the revision attempts to answer common questions from jurors and to enhance juror performance by making them more comfortable with the procedure.

Stewart expressed concern that the proposed note on use allows judges to alter the language of the standard instruction. If given incorrectly, preliminary instructions can create reversible error. Encouraging deviations from the standard instructions is contrary to their purpose, which is to attempt to eliminate foreseeable errors in instructions. Altenbernd agreed that the note should not encourage modifications to the standard instructions contrary to Rule of Civil Procedure. 1.985. Caldwell pointed out that the current note on use has similar language that allows modifications to rule 1.1. Artigliere believes that some flexibility in the standard instruction is needed to tailor the instruction to the individual case. Artigliere suggested incorporating some of the proposed revisions in instruction 1.0 (voir dire) rather than 1.1 if the jurors will need the information earlier in the proceedings, for example, information on breaks, civil versus criminal cases, and the type of dispute involved. Lumish added that the instruction advising jurors that attorneys cannot talk to them should be moved to 1.0.

The subcommittee will reconsider both 1.0 and 1.1 and circulate the revised proposal with line numbers to the full committee by e-mail. All members will e-mail the subcommittee any comments, which will be incorporated into the proposal submitted at the July 2004 meeting.

(E) **Recommendation 27: Preliminary Jury Instructions** (Tab 3).

Lewis led the discussion. Altenbernd explained that the end of existing instruction 1.1 gives judges the discretion to give the jurors case-specific 1-9 February 19-20, 2004 instructions. The issue posed by the Jury Innovations Committee is whether the judge should be required to give case-specific instructions if requested to do so by the attorneys.

Brown stated that she does not favor giving detailed instructions in the beginning of the case because the issues often change during trial. When the parties agree, she gives preliminary general instructions on negligence, expert witnesses, and causation. Brown further suggested that any case-specific instructions be given after opening statements and before the presentation of evidence. Artigliere stated that when the parties agree, he gives case-specific instructions before the presentation of evidence.

Cacciatore, Cobb and Altenbemd all expressed the concern that if preliminary instructions are too case-specific, there is a risk that the preliminary instruction will inject an issue or affirmative defense that is not ultimately supported by the evidence. As a result, the court will have to try to reverse the harm caused by the unfounded preliminary instruction, possibly resulting in an increased number of mistrials. Lurnish feels that whether to give a substantive preliminary instruction should remain discretionary with the judge. Some substantive instructions, such as in products liability cases, are very difficult to formulate before hearing the evidence.

The report to the Supreme Court will stated that the committee endorses the concept of giving substantive preliminary instructions, but that whether to give substantive preliminary instructions remain discretionary with the trial court.

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SUPREME COURT COMMITTEE ON
STANDARD JURY INSTRUCTIONS (CIVIL)

The Breakers
Palm Beach
July 8-9, 2004

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4. **JURY INNOVATIONS** (Tab 10): Altenbernd directed the committee's attention to pages 10-33 to 10-52, the draft report to the Supreme Court in response to the Final

Report of the Jury Innovations Committee. The draft report will contain an appendix with proposed amendments to the standard instructions. The draft report explains that none of the proposed instructions have been published for comment. It suggests that before adopting any of the proposed amendments they be published on an expedited basis. The committee discussed publishing the proposed amendments at this time instead. However, the committee determined that publication is premature because the Supreme Court may reject the proposals. Stewart suggested revising page 10-36, to state that where the committee recommends a revision, it is attached in an appendix and the committee will publish those revisions accepted by the court in accord with the normal process. **Altenbernd will work on finalizing the report with Makar and Gunn. Altenbernd will e-mail the revised draft report to the committee for detailed editing.**

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(C) **Recommendation 25--Simple and Clear Instructions** (tab 3): Altenbernd recommended including the proposed amendments to instructions 1.0 and 1.1 drafted by the Plain English subcommittee and noting in the report that the proposal is still in draft form.

(D) **Recommendation 27--Preliminary Jury Instructions:** Altenbernd explained that the current preliminary instruction 1.1 already gives trial judges the discretion to give substantive instructions in the beginning of the trial. The draft report points out an inconsistency between rule 1.1, which gives trial judges discretion to vary the preliminary instruction, and Florida Rule of Civil Procedure Form 1.985, which only allows deviations from the standard instructions upon a finding that they are erroneous or inadequate. Several members voiced concern with the breath of the draft report. Stewart felt that the draft language was over-broad and would encourage judges to change substantive instructions. Berman agreed and proposed amending rule 1.985 so that it defers to the notes on use in each instruction regarding whether deviations are permissible. Lumish and Lewis both felt that while there is no problem when a judge modifies a preliminary instruction, some substantive instructions should not be varied absent a finding that they are erroneous. **Altenbernd suggested revising the report to advise the Supreme Court of the discrepancy and state that there is considerable debate regarding whether an amendment is needed, and if so, the substance of the amendment. The report will ask the Supreme Court to direct both this committee and the Rules of Civil Procedure Committee to consider the question.'**

(E) **Recommendation 31--Final Instruction Before Closing Argument:** Brown directed the committee's attention to the proposed

amendments to instruction 1.1 on pages 10(B)-5 to 7. Brown stated that at the last meeting, the committee was divided regarding whether judges should give final instructions before closing arguments. Many members at the last meeting felt that the instructions will be simpler if trial judges are required to give instructions before closing arguments. Also, at the last meeting, many members expressed concern that if it is discretionary to give instructions before closing arguments, many judges will not. The draft instruction 1.1 mandates that instructions be given before closing arguments. The committee remained evenly split (10 to 10) regarding whether it should be discretionary or mandatory to give instructions before closing argument. All of the trial judges in attendance except one felt that judges should have the discretion to determine when to give instructions. Altenbernd determined that the consensus of the committee regarding the discretion of the judge remains as stated in the draft report.

The draft note on use 5 to instruction 1.1 states that judges are "strongly encouraged" to give jurors written instructions. Currently, Florida Rule of Civil Procedure 1.470 states that written instructions should be given to the jury when practicable. Cacciatore and Lumish suggested making the language in note on use 5 stronger than "strongly encourage."

The committee also discussed when the written instructions should be given to the jurors if the oral instructions precede closing arguments. Brown suggested giving the jurors instructions when they are read, collecting the instructions before closing arguments, and redistributing them before deliberations begin. Austin agreed that the jury may be distracted during closing arguments if they have a copy of written instructions. Berman and Lewis disagreed that it is necessary to retrieve the instructions before closing arguments because the written instructions will be helpful to the jury and counsel during closing arguments. Altenbernd and Stewart both remarked that written instructions will assist jurors because a significant number of people comprehend better when they are able to read as well as listen. Campo explained that all the research to date supports the proposition that providing written material improves juror comprehension. No research supports the position that written instructions are distracting to jurors. Campo does not know of any research on whether having the written instructions during closing arguments assists jurors. Campo has seen jurors circle relevant parts of the written instructions during closing arguments, but has not seen jurors get distracted by the written instructions.

The subcommittee also proposed a new instruction 7.0 on closing arguments, which incorporates standard criminal instruction 2.7. Altenbernd pointed out that this is really a new instruction, unrelated to the Jury Innovations report. **Altenbernd will format proposed rule 7.0 for publication, circulate it by e-mail and publish it for comment.**

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Friday, July 9, 2004
Joint Meeting with
Criminal Jury Instructions Committee

1. **JURY INNOVATIONS** (Tab 10).

At the joint meeting of the Civil and Criminal Standard Jury Instruction Committees, both committees discussed the differences in their proposed recommendations to the Florida Supreme Court:

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(C) **Recommendation 25--Simple and Clear Instructions**: Both committees agree with this recommendation.

(D) **Recommendation 27--Preliminary instructions**: Costello reported that the criminal committee has recommended that the trial court be given the discretion whether to give substantive preliminary instructions. The criminal committee rejected mandatory substantive instructions because often the issues change as the trial progresses. For example, it is not always clear at the beginning of the trial which lesser included offenses will be requested by the defendant or proved by the State. In addition, the State should be required to prove its case before the jury is instructed on the elements. Lewis countered that the jury is already told the charges at the beginning of the trial and it should not cause problems to also tell them the elements of the crime. Altenbernd reported that the civil committee recommended that the court retain the discretion to give instructions on general, legal concepts. However, the civil committee discourages the use of non-standard, case-specific instructions, which may lead to error.

(E) **Recommendation 31--Final Instruction Before Closing Arguments**: The criminal committee is opposed to giving final instructions before closing arguments. Altenbernd explained that the civil committee is evenly split regarding whether giving final instructions before closing arguments should be mandatory or permissive.

Caldwell relayed that his colleagues in other states report that giving final instructions before closing argument is very helpful to the attorneys during the argument. Berman agreed that giving the instructions first avoids the confusion that results when attorneys use the arguments to tell jurors what the instructions will say.

Weatherby countered that he begins trials by educating jurors and prefers to end the trial with the instruction on the law rather than impassioned closing arguments. Altenbernd suggested that this concern could be met if after closing arguments, the trial judge instructs the jury on how to deliberate or gives the jury a short recess.

Brown reported that she has given final instructions before closing arguments in approximately 15 criminal and civil cases. She found the civil attorneys unanimously preferred giving the instructions before closing arguments. Brown feels that the criminal instructions should, at a minimum, give the trial judge the discretion to instruct the jury before closing arguments. Graham stated he routinely gives substantive instructions before closing argument. In criminal cases, Graham repeats the substantive charges after closing argument. Skye agreed that this approach of reading the elements before and after closing arguments might meet the criminal committee's concerns.

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2. **PLAIN ENGLISH SUBCOMMITTEE** (Tab 3).

Berman led the discussion and directed the committee's attention to the draft revision of instruction 1.1 that on pages 3-115 to 3-120. Many of the comments the subcommittee received urged simplicity and non-repetition. However, the subcommittee based the draft on research that repetition may help jurors to feel more comfortable and involved in the process.

Lewis stated that he routinely gives some of the information found in the draft before beginning voir dire. Stewart suggested giving the first two pages and a brief description of the case before voir dire. Altenbernd agreed that the first part of the instruction should be given before voir dire.

Strelec questioned whether line 11 strained credulity by suggesting that the judge has no opinion about the case. The committee rephrased the second sentence on line 11 to read "It is my job to be neutral."

Altenbernd suggested that the instruction should also define the role of the clerk of court.

Brown proposed revising the instruction to make clear that jurors can tell others about the case schedule.

Caldwell suggested that the instruction should be revised to emphasize the importance of the jurors' role--deciding the case rather than giving opinions. The committee revised line 17 to read "At the end of the trial you will decide the case ~~tell me what you think about the case~~ by giving me a written verdict." Similarly, line 130 was revised to read, "You are the jury, and your decision ~~opinion~~ is the only one that matters."

Gunn observed that the instruction tells jurors to pay attention to closing arguments, but does not inform them that the jury instructions are the law that controls the decision.

Mitchell stated that he prefers the existing instruction's explanation of opening statements. It is inaccurate to tell jurors that attorneys are giving their own opinions during opening. Altenbernd suggested stating that the attorney is giving the client's perspective during opening statements. Caldwell countered that the instruction could state that the attorney is explaining what he or she expects the evidence will show. Graham pointed out that the statement in lines 48-49 that all attorneys do is ask questions belittles the attorney's role. The committee revised lines 48-49 to delete that sentence: "~~It is important that you remember that all the attorneys are allowed to do during a trial is give their opinions and ask questions. They~~ Attorneys do not give testimony and they are not witnesses."

The committee also discussed the length of the draft instruction. Brown thought it may be necessary to break up the instruction to avoid losing the jurors. Lewis and Gunn suggested giving the jurors a written copy of the instruction to help their comprehension. Berman stated that due to the length, the headings may help judges make the presentation and jurors to follow the instruction. The note on use may need to state whether the committee intends the headings to be read. Altenbernd agreed that the headings give an important structure to the instruction.

Lewis suggested writing a note on use explaining that the topics in the instruction are the issues that the court should address in the preliminary instruction and that this is the language the committee suggests. However, the judge has the discretion to deviate from the standard instruction. Altenbernd and Brown agreed. Stewart added that the note on use should state that the instruction is intended to address these topics in plain and simple language in accordance with the recommendations of the Jury Innovations committee.

Berman asked committee members to submit their comments in two categories: language that is wrong and language that merely sounds better. Lewis added that the comments should address when in the trial each part of the instruction should be given. **Altenbernd asked all committee members to send any comments to Berman and Altenbernd by Monday, July 19, 2004. Altenbernd directed the subcommittee to analyze and consolidate the comments by August 3, 2004. The draft instruction will**

be attached as an appendix to the report to the Jury Innovations report to the Florida Supreme Court. The report will state that the draft is not intended to be a final product and that the committee will go through the formal publication process if the Supreme Court wants to adopt the revision. Altenbernd anticipates having draft instruction 1.1 in publishable form by the end of the October meeting.

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SUPREME COURT COMMITTEE ON
STANDARD JURY INSTRUCTIONS (CIVIL)

Amelia Island Plantation
Amelia Island
October 21-22, 2004

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(C) **Old Business**:

(1) **Altenbernd will write Chief Justice Pariente a letter pointing out the possible need for an evidentiary rule to address translation as discussed at the last meeting.**

(2) **Altenbernd will revise criminal instruction 2.7 to create a proposed new instruction 7.0 to be given immediately before closing arguments.**

(D) **Status of Proposed Instructions**:

(1) The committee submitted a report to the Florida Supreme Court in response to the Final Report of the Jury Innovations Committee. The Civil Rules Committee received an extension for its response, which has not been submitted yet.

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SUPREME COURT COMMITTEE ON STANDARD JURY INSTRUCTIONS (CIVIL)

Stetson University College of Law
Tampa
February 17-18, 2005

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4. CLOSING ARGUMENT (Handout). Altenbernd gave committee members a draft instruction 7.0 that compared all the comments received and suggested a "plausible compromise" attempting to resolve the concerns. Altenbernd explained that he tried to phrase the instruction in the positive. Berman added that the instruction attempts to track the way that the concepts would be explained in conversation.

Griffin stated that she preferred the Kahn version over the "plausible compromise." Altenbernd agreed that the Kahn version is acceptable. The committee then revised the Kahn version. Lumish suggested adding a first sentence stating, "Members of the jury, you have now heard all the evidence in this case."

Lumish also suggested deleting the sentence directing jurors to listen closely. Artigliere suggested revising the sentence to tell jurors, "Please give the lawyers your close attention." In the preliminary instructions, the jurors are told to listen carefully to both opening statements and the evidence. Artigliere believes that jurors should also be told to pay attention to closing arguments. Altenbernd agreed that it could be a good transitional sentence at the end of the instruction. Lumish proposed revising the last sentence to state, "If (Plaintiff) has saved time, then (Plaintiff) may make a rebuttal argument." **Altenbernd will revise the instruction for further consideration at the Friday meeting.**

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Friday, February 18, 2005

Makar called the meeting to order at 8:40 A.M. Makar thanked Gunn and all the firms who sponsored the reception Thursday evening. Makar thanked Altenbernd for his service as chair and presented him with a gift in appreciation.

5. CLOSING ARGUMENT (Handout): Altenbernd revised instruction 7.0 in accord with the committee's comments on Thursday. Altenbernd read the committee the revised instruction. The committee discussed whether the jury should be told that the attorneys are attempting to persuade them to "reach a verdict" or to "decide this case." The committee also discussed whether the instruction should reference the "plaintiff" or the "plaintiff's attorney" and decided that the instruction should reflect that the attorney will be making the argument. The committee also discussed whether the jury should be told that the attorneys will be discussing "the evidence," the "law and the evidence" or the "case." **The following instruction will be published for comment:**

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7.0 CLOSING ARGUMENT

Members of the jury, you have now heard all of the evidence in this case. The attorneys will now make their final arguments. What the attorneys say is not evidence. The arguments are a final opportunity for the attorneys to discuss the case and to persuade you to reach a verdict in favor of their clients.

Each side has equal time. (Plaintiff's attorney) **will go first.** (Defendant's attorney) **will then make [his/her/its] argument. Finally,** (Plaintiff's attorney) **may make a rebuttal argument.**

Please give the attorneys your close attention.

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6. **PLAIN ENGLISH** (Tab 3)

(A) **Preliminary instruction 1.1(a)**: Berman directed the committee's attention to the draft on pages 3-147 to 150. Preliminary instruction 1.1(a) will be given before voir dire. Graham questioned the wording of the first sentence. Although it is colloquial, the writing is poor. Altenbernd suggested that the

instruction could begin with a brief introduction, such as "As we begin this trial, I'm certain that you will have a number of questions that I can help answer." Then judge would read each heading ("what is this proceeding"), rather than the first sentence written in the draft. However, a possible problem with this approach is that it may invite the jurors to ask questions. Cacciatore responded that the instruction could use the word "outline" or an "idea of what the jurors will be doing," rather than inviting them to ask questions.

Artigliere commented that many jurors will have seen a video explaining these concepts before they hear this instruction. The video, however, varies by county. Barton stated that he believes a state-wide group is working on a uniform video to be shown to all jurors. Lewis pointed out that small counties may not use a jury pool.

Stewart responded that the introduction could include optional language that "you may have already seen a video in the jury room, and now I am going to emphasize important information." Stewart observed that it is likely that few people pay attention to the initial video. Even if jurors have seen a video, a standard preliminary instruction is needed that allows tells the jurors that the jury instructions are the information they will need in this case. Austin added that the judge needs to tell jurors in the preliminary instruction that "no matter what you have heard before now, please follow the instructions you have heard in the courtroom."

Lewis suggested a note on use telling the judge to tailor the preliminary instruction so that it fits the experience of the jurors in that courtroom. Altenbernd responded that when the instruction is submitted to the Court, the committee may want to exempt this instruction from rule 1.985 so that the trial court does not have to give reasons to vary from this instruction.

Cacciatore responded that if the committee allows trial courts to deviate from the instruction, there should be a strong note that the committee carefully considered the elements that should be included. Lewis added that while experienced judges will put the instruction in their own language to avoid sounding stilted, it is important to include a note on use informing the judges not to vary too much from the substance of the instruction. Lumish countered that making the language of the preliminary instruction mandatory would change the law and invite appeals on whether the failure to give it is reversible error. **Berman will revise the existing**

note on use to emphasize that the preliminary instructions convey important concepts and the trial judges should not abandon the substantive elements of the instruction.

Altenbernd suggested adding language at the beginning or end of the instruction to swear in the jurors. The failure to swear in the jury is one of the few errors that could result in reversible error in the preliminary instruction. Lumish related that when she was recently called for jury duty, she and several other potential jurors were never sworn.

Campo proposed adding the oath at the beginning of the preliminary instruction. When the oath is taken in the courtroom, all potential jurors will understand that the proceedings are beginning. The oath will result in increased solemnity for the proceedings and increased attention and personal accountability from the jurors. Even if the jurors have already been sworn as part of a large jury pool, repeating the oath in the courtroom will establish the judge's authority and emphasize that jurors must take their responsibilities seriously. Graham added that the instruction could recognize that although the jurors may have already been sworn, they are being sworn again because it is important.

Lumish commented that the last sentence in the "Response to Questioning" section should have strong language, such as "you must tell us if you don't think that you can be a fair and impartial juror." Artigliere and Lewis suggested that the last sentence be expanded beyond directing the jurors telling whether they cannot be "fair and impartial." Cacciatore suggested revising the last sentence to "you must tell us if for any reason you do not think you can be fair and impartial."

The committee also discussed when the judge should ask jurors if they know anyone present and give a description of the case. The consensus of the committee is that it helps the jurors understand the preliminary instructions when they hear a brief description of the case early.

Artigliere pointed out that a problem arises when a second set of jurors arrives and they have not heard the preliminary instruction.

The instruction will be posted on the committee web site and published for comment. Berman will revise the existing note on use to emphasize that the preliminary instructions convey important

concepts and the trial judges should not abandon the substantive elements of the instruction.

(B) **Preliminary instruction 1.1(b):** Berman directed the committee's attention to the draft on pages 3-151 to 155. Preliminary instruction 1.1(b) will be given after the jury is selected. The draft was revised to make clear that a new oath is given when the jurors are selected. Berman read the draft to the committee.

Stewart questioned whether the language "the law tells us" is superfluous and gives too much importance the three times it is used. Campo responded that while the language may give extra emphasis to certain portions of the instructions, it is important because it gives extra gravity to the proceedings. It is intended to alleviate jurors' concerns that although parts of the instruction may seem counter-intuitive or arbitrary, the instructions are required by the law.

Artigliere suggested editing the instruction to let the jurors know that the judge will be ruling on the law throughout the trial. Lewis added that he typically informs the jurors that these are preliminary instructions and that they will be given final instructions later in the trial.

The committee then discussed the final section, "Only the Jury Decides." Altenbernd questioned whether the last two sentences should be eliminated. Campo responded that it is important to emphasize the judge's neutrality. Many jurors believe that the case is going to trial because the judge has a position on the case or that the plaintiff cannot bring the defendant to judgment. Artigliere believed that the draft goes beyond that purpose and downplays the role of the judge. He suggested revising the instruction to tell jurors that "each of us has a job; the jurors decide facts and I do not get involved in the jury's deliberations." Barton suggested the instruction should include a disclaimer that the jurors should not think the judge is favoring one side, but that the jurors have to follow the law. Altenbernd suggested revising the instruction to "you are the jury, and the jury alone will decide the facts in this case." Stewart proposed moving the sentence, "I am required to be neutral" earlier in the draft to follow the sentence "I will not intrude into your deliberations." Cacciatore noted that telling jurors that only "your opinion" matters might reduce collegiality.

In the "Objection" section, Lumish felt the language inappropriately places a value judgment on an overruled objection. The language may lead

the jury to believe that an attorney did something wrong if an objection is overruled. Altenbernd agreed that this language is not an improvement over the existing instruction.

Regarding the "Opening Statement" section, Graham questioned whether opening statements should be called "short" or a "speech." In addition, the instruction should not state that the "principal job" of an attorney is to bring in evidence because some attorneys do not introduce evidence. Gunn responded that the instruction could be rephrased to tell jurors that evidence will be introduced and that it comes from witnesses and other sources. Lewis added that the section could be shortened by telling jurors that an opening statement is not evidence, and then defining evidence.

Altenbernd suggested that the instruction should make a recommendation as to where the jury should be instructed on note-taking. Barton explained that there is a disagreement on when the pads should be given to jurors. Artigliere added that he only gives jurors notepads after opening statements and instructs the jury at that time on how to take notes.

Makar asked Rose to post the revised Instruction 1.1 on the committee web site for additional comments from committee members. Rose will e-mail the committee the link to the web site and the password to access the working pages.

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SUPREME COURT COMMITTEE ON STANDARD JURY INSTRUCTIONS (CIVIL)

The Breakers
West Palm Beach, Florida
July 14-15, 2005

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3. ADMINISTRATIVE MATTERS (Tab 1).

A. Status of proposed instructions:

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3. Preliminary Instructions: The proposed preliminary instructions were published in June 2005. The committee discussed the comments received.

Berman explained the committee received two comments that the instructions are not simple enough and contain too much information. He feels that no change is required in response to these comments because judges can omit language they feel is not relevant to the case. The instruction is in sufficiently plain English.

The committee adopted two suggestions to revise instruction 1.1b. The committee adopted the suggestion on page 3-164 to add a sentence to the Keeping an Open Mind section, to state "It is only natural to want to discuss what is happening in the trial with your fellow jurors as the trial goes on." The new sentence will follow the sentence that begins "However, you must avoid forming…" and precede the sentence beginning "This rule…."

The committee also revised the Instructions Before Closing Arguments Section to change the words "elements of the law" to "rules of the law," as suggested on page 3-165.

Artigliere explained that he circulated the draft to the chief judge in each circuit with a request to forward it to every judge in the circuit. Artigliere also advised the committee that he has been testing this instruction in trials. It has been working well and gives the jury the information that they need to begin the trial. The instruction is especially helpful for new judges.

Artigliere also tested the instruction at a medical malpractice conference. Several attorneys criticized the language that threatens jurors with jail if they give incomplete answers during voir dire. Artigliere agreed and prefers a friendlier approach. The instruction could tell jurors that if they give incomplete answers, a miscarriage of justice might result or the case may have to be tried again.

Graham disagreed because he often sees jurors take the proceedings more seriously after the possibility of jail is mentioned. Altenbernd also advocated leaving the language threatening criminal charges. Gunn agreed that the criminal penalty language will remain in the instruction.

Altenbernd suggested that the committee's report to the Supreme Court might request that the Supreme Court require circuit judges to use the instruction for six months, which might spur additional comments before the instruction is formally adopted.

Gunn suggested adding a note on use stating that the committee does not contemplate that the instruction be given verbatim. The note could be modeled on the last paragraph on page 3-93. Brown and Lewis agreed that, in practice, judges put the preliminary instruction in their own words.

Artigliere and Altenbernd observed that the committee cannot include a note authorizing variation from the standard instruction unless the Supreme Court amends rule 1.985. Altenbernd commented that the Supreme Court could amend rule 1.985 to provide that judges can only vary from a standard instruction upon a finding that it is incomplete or erroneous, unless a note on use authorizes variation.

Berman will circulate a revised draft of the instruction. The draft report to the Supreme Court will be posted on the website. After receiving comments from the committee, the report will be submitted to the Supreme Court before the next meeting.

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SUPREME COURT COMMITTEE ON STANDARD JURY INSTRUCTIONS (CIVIL)

Supreme Court of Florida
Tallahassee, Florida

November 3-4, 2005

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D. Status of Proposed Instructions:

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iv. Jury Innovations Report: A few months ago, the Supreme Court published a notice in the Bar News with the proposals. A few comments were filed, which the Court is considering. No one commented on the committee's plain English proposals.

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6. PLAIN ENGLISH (Tab 3): Berman recapped the history of the subcommittee, which has been working for six years to revise the instructions in plain English. The committee appointed Campo, a jury consultant, as an ex officio member to receive input on how actual jurors react to instructions. Campo's access to empirical data regarding jury instructions has been invaluable. He is an active participant at meetings and is often called upon for an opinion on how actual jurors will respond to the instructions. The committee has learned that using plain English to increase jurors' ability to understand the instructions results in increased juror satisfaction and effectiveness.

The subcommittee began by revising the preliminary instructions. Artigliere and other trial judges have been testing the revised instructions in actual trials with great success. Unfortunately, revising the substantive jury instructions is a much harder task than revising the preliminary instructions. Most instructions use language taken directly from cases or statutes, which is difficult to put into plain English. The plain English subcommittee has also been working as a drafting subcommittee to assist the other subcommittees.

Makar added that the revised preliminary instructions were published for comment. The deadline for submitting comments expired on November 1, 2005, with few comments received. The revised preliminary instructions have also been submitted to the Supreme Court with the jury innovations report.

Berman clarified that the jury innovations report did not formally ask the Court to adopt the revised preliminary instructions. The preliminary instructions have now been published for comment and the committee can formally submit a report to the Court.

Justice Lewis agreed that the committee should submit a formal report requesting that the Court adopt the revised preliminary instructions. Any requests for amendments to

instructions that had been included in the jury innovations report should also be submitted as a formal report requesting a specific amendment. Makar will forward to Justice Lewis courtesy copies of the recently submitted jury innovations report and the translator instruction report.

Artigliere observed that the committee still needs to address the fact that it intends for judges to have the discretion to deviate from the standard preliminary instruction. Florida Rule of Civil Procedure 1.985 will have to be amended to allow for situations where judges do not have to put on the record why they are varying from the standard instruction. Terry Lewis suggested resolving this problem by submitting alternative instructions to the Court.

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SUPREME COURT COMMITTEE ON
STANDARD JURY INSTRUCTIONS (CIVIL)

DRAFT
(To Be Approved at July 13-14, 2006 Meeting)

Stetson Law School
Tampa, Florida
February 23-24, 2006

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C. Status of Proposed Instructions:

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iv. Jury Innovations Report: At the November 2005 meeting, Justice Lewis suggested that it might be necessary to file an additional report in response to comments received. However, Makar reviewed the comments and does not believe that any changes to the report are needed. Barton suggested writing a letter to the Court reporting that the committee has considered the comments and asking if any further work is needed. Brown added that the letter should include a copy of the previously filed report. **Makar will write a letter to the Court advising that the committee has no additional response to the comments received and enclosing a copy of the previously filed report.**

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APPENDIX D:
MATERIALS THE COMMITTEE CONSIDERED.

(Relevant materials from Tab 3 attached