IN THE SUPREME COURT OF FLORIDA

In the matter of Standard Jury Instructions (Civil),

Committee Report 09-02

Greater Weight of the Evidence, Negligence, Believability of Witnesses and Closing Instructions

_____/

REPORT (NO. 09-02) OF THE COMMITTEE ON STANDARD JURY INSTRUCTIONS (CIVIL)

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

The Committee on Standard Jury Instructions in Civil Cases requests that this Court approve for publication and use revised Florida Standard Jury Instructions (Civil) for Greater Weight of the Evidence, Negligence, Believability of Witnesses, and Closing Instructions, as set forth below, and as set forth in Appendix A. This Report is filed pursuant to article V, section 2(a), of the Florida Constitution.

I. INTRODUCTION AND PROCEDURAL NOTE

The Committee has submitted simultaneously herewith a proposal for reorganization of the Standard Jury Instructions in Civil Cases, which includes a renumbering of the instructions. The "book reorganization" proposal was separately filed as this Committee's report number 09-01.

This report, number 09-02, proposes changes for the instructions for *Greater Weight of the Evidence* (currently 3.9), *Negligence* (currently 4.1), *Believability of Witnesses* (currently 2.2) and *Closing Instructions* (currently 7.1 and 7.2). For ease of reference, this report uses the new proposed numbering system. Additionally, the appendix to report number 09-01 includes these proposed instructions as they would appear in the reorganized book if adopted by the Court.

The instructions proposed herein can be adopted prior to a ruling on the book reorganization. Should this Court elect to rule on this proposal first, the Committee would simply use its current numbering system for the new instruction.

The Committee does not intend any of these changes to substantively change the law. These changes were noticed for public comment on April 15, 2008, separately from the general book reorganization.

Comments were received on only the *Greater Weight of the Evidence* instruction. As a result of the comments on the *Greater Weight of the Evidence* instruction, the Committee decided to change the language and re-published that instruction for comment on August 1, 2008. As a result of the comments received on re-publication, the Committee made an additional change and now recommends approval of all of these charges for publication.

II. DESCRIPTION OF APPENDICES

The following appendices are attached to this Report:

Appendix A:	Proposed instructions
Appendix B:	April 15, 2008 and August 1, 2008 Florida Bar News notices.
Appendix C:	Comments received by the Committee in response to the publications.
Appendix D:	Relevant excerpts from the Committee's minutes.
Appendix E:	Committee materials relevant to this proposal.[1]
Appendix F:	Text of California instructions for comparison.

[1] The Committee materials for this Report are found in Appendix E of Report 09-01 and are simply adopted by reference here.

III. THE PROPOSED REVISIONS

As part of its overall reorganization and revisions to the standard jury instructions for civil cases, the Committee proposes changes to *Greater Weight of the Evidence, Negligence, Believability of Witnesses* and *Closing Instructions.* These changes result from the Committee's effort to improve juror communication, better inform jurors about the law they must follow and, in the case of the *Closing Instructions,* to also more fully inform the jurors about the deliberative process.

The proposed changes to the *Greater Weight of the Evidence* and *Closing Instructions* were modeled after the new California instructions.[2] These instructions are not intended to change substantive law.

The proposed revisions to these four instructions[3] are as follows:

401.3 GREATER WEIGHT OF THE EVIDENCE

"Greater weight of the evidence" means the more persuasive and convincing force and effect of the entire evidence in the case. A claim [or defense] is proven by the greater weight of the evidence if you find, from the evidence presented in court, that the claim [or defense] is more likely true than not true.

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[2] See Appendix F.

[3] The numbering proposed in the reorganized book, report 09-01, is used herein for reference. The Committee contemplates that the same changes to the Greater Weight of the Evidence and Negligence instructions will be made in each instance those instructions appear in the book.

401.4 NEGLIGENCE

Negligence is the failure to use reasonable care, which is the care that a reasonably careful person would use under like circumstances. Negligence is doing something that a reasonably careful person would not do under like circumstances or failing to do something that a reasonably careful person would do under like circumstances.

601.2 BELIEVABILITY OF WITNESSES

a. General considerations

Let me speak briefly about witnesses, In evaluating the believability of any witness and the weight to be given the testimony of any witness, you may properly consider the demeanor of the witness while testifying; the frankness or lack of frankness of the witness; the intelligence of the witness; any interest the witness may have in the outcome of the case; the means and opportunity the witness had to know the facts about which the witness testified; the ability of the witness to remember the matters about which the witness testified; and the reasonableness of the testimony of the witness, considered in the light of all the evidence in the case and in the light of your own experience and common sense.

b. Expert witnesses:

[You have heard opinion testimony [on certain technical subjects] from [a person] [persons] referred to as [an] expert witness[es].] [Some of the testimony before you was in the form of opinions about certain technical subjects.]

You may accept such opinion testimony, reject it, or give it the weight you think it deserves, considering the knowledge, skill, experience, training, or education of the witness, the reasons given

by the witness for the opinion expressed, and all the other evidence in the case.

700 CLOSING INSTRUCTIONS

Members of the jury, you have now heard all the evidence, my instructions on the law that you must apply in reaching your verdict and the closing arguments of the attorneys. You will shortly retire to the jury room to decide this case. [Before you do so, I have a few last instructions for you.]

You will have in the jury room all of the evidence that was received during the trial. In reaching your decision, do not do any research on your own or as a group. Do not use dictionaries, the Internet, or other reference materials. Do not investigate the case or conduct any experiments. Do not contact anyone to assist you, such as a family accountant, doctor, or lawyer. Do not visit or view the scene of any event involved in this case. If you happen to pass by the scene, do not stop or investigate. All jurors must see or hear the same evidence at the same time. Do not read, listen to, or watch any news accounts of this trial.

Any notes you have taken during the trial may be taken to the jury room for use during your discussions. Your notes are simply an aid to your own memory, and neither your notes nor those of any other juror are binding or conclusive. Your notes are not a substitute for your own memory or that of other jurors. Instead, your verdict must result from the collective memory and judgment of all jurors based on the evidence and testimony presented during the trial.

At the conclusion of the trial, the bailiff will collect all of your notes and immediately destroy them. No one will ever read your notes.

In reaching your verdict, do not let bias, sympathy, prejudice, public opinion, or any other sentiment for or against any party to influence your decision. Your verdict must be based on the

evidence that has been received and the law on which I have instructed you.

Reaching a verdict is exclusively your job. I cannot participate in that decision in any way, and you should not guess what I think your verdict should be from something I may have said or done. You should not think that I prefer one verdict over another. Therefore, in reaching your verdict, you should not consider anything that I have said or done, except for my specific instructions to you.

Pay careful attention to all the instructions that I gave you, for that is the law that you must follow. You will have a copy of my instructions with you when you go to the jury room to deliberate. All the instructions are important, and you must consider all of them together. There are no other laws that apply to this case, and even if you do not agree with these laws, you must use them in reaching your decision in this case.

After you have decided what the facts are, you may find that some instructions do not apply. In that case, follow the instructions that do apply and use them together with the facts to reach your verdict.

When you go to the jury room, the first thing you should do is choose a presiding juror to act as foreperson during your deliberations. The foreperson should see to it that your discussions are orderly and that everyone has a fair chance to be heard.

It is your duty to talk with one another in the jury room and to consider the views of all the jurors. Each of you must decide the case for yourself, but only after you have considered the evidence with the other members of the jury. Feel free to change your mind if you are convinced that your position should be different. You should all try to agree. But do not give up your honest beliefs just because the others think differently. Keep an open mind so that you and your fellow jurors can easily share ideas about the case.

[I will give you a verdict form with questions you must answer. I have already instructed you on the law that you are to use in answering these questions. You must follow my instructions and the form carefully. You must consider each question separately. Please answer the questions in the order they appear. After you answer a question, the form tells you what to do next. I will now read the form to you: (read form of verdict)]

[You will be given (state number) forms of verdict, which I shall now read to you: (read form of verdict(s))]

[If you find for (claimant(s)), your verdict will be in the following form: (read form of verdict)]

[If you find for (defendant(s)), your verdict will be in the following form: (read form of verdict)]

Your verdict[s] must be unanimous, that is, your verdict must be agreed to by each of you. When you have [agreed on your verdict[s]] [finished filling out the form[s]], your foreperson must write the date and sign it at the bottom and return the verdict[s] to the bailiff.

If any of you need to communicate with me for any reason, write me a note and give it to the bailiff. In your note, do not disclose any vote or split or the reason for the communication.

You may now retire to decide your verdict[s].

IV. DISSENTING VIEWS FROM THE COMMITTEE

There are no dissenting views from the Committee. The Committee believes that these instructions will greatly improve the process of jury instruction and unanimously recommends their publication.

V. COMMENTS RECEIVED AND ACTION TAKEN IN RESPONSE

The proposed new instructions were published for comment and no comments were received on the *Negligence* (401.4), *Believability of Witnesses* (601.2) and *Closing Instructions* (700).

A number of comments were, however, received concerning *Greater Weight of the Evidence* (401.3). As originally published for comment on April 15, 2008, this instruction read as follows:

> **"Greater weight of the evidence" means the more persuasive and convincing force and effect of the entire evidence in the case. To prove a claim [or defense] by the greater weight of the evidence, the party must convince you, by the evidence presented in court, that what [he] [she] [it] is trying to prove is probably true.**

Six comments were received concerning this version of the instruction. One objected to the new language. The other five comments suggested replacing "probably" in the last line with "more likely than not' or "more likely than not true." The subcommittee recommended that the last phrase be changed to "more probably true than not true." The Committee decided to substitute "likely" for "probably" so that the last phrase would read "more likely true than not true." The Committee also directed that the amended instruction be re-published for comment.

On August 1, 2008 the following version of this instruction was published for comment:

> **"Greater weight of the evidence" means the more persuasive and convincing force and effect of the entire evidence in the case. To prove a claim [or defense] by the greater weight of the evidence, the party must convince you, by the evidence presented in court, that what [he] [she] [it] is trying to prove is more likely true than not true.**

Twenty comments were received, all essentially the same. These comments objected to the phrase "must convince you," on the basis that the word "convince" would raise the burden of proof. Suggestions for replacement words were "persuade," "believe" and "prove."

The Committee did not intend to change the burden of proof and did not believe that the proposal had that effect. In deference to the concerns expressed in the comments, however, the subcommittee recommended that the phrase "must convince you" be replaced with the neutral term "find," so that the second sentence would read:

> **A claim [or defense] is proven by the greater weight of the evidence if you find, from the evidence presented in court, that the claim [or defense] is more likely true than not true.**

The Committee agreed with the subcommittee's recommendation, and now submits the revised Greater Weight instruction, together with the instructions on Negligence, Believability of Witnesses and the Closing Instructions to the Court.

VI. CONCLUSION

WHEREFORE, for the above reasons, the Committee respectfully requests that the Court approved these instructions for publication and their inclusion in the reorganized book as new standard jury instructions for civil cases.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this report complies with the font standards set forth in Florida Rule of Appellate Procedure 9.210 by using Times New Roman 14-point font.

By:_____
Joseph H. Lang, Jr.

TAB A

APPENDIX A

401.3 GREATER WEIGHT OF THE EVIDENCE

"Greater weight of the evidence" means the more persuasive and convincing force and effect of the entire evidence in the case. A claim [or defense] is proven by the greater weight of the evidence if you find, from the evidence presented in court, that the claim [or defense] is more likely true than not true.

NOTES ON USE FOR 401.3

1. *Greater or lesser number of witnesses.* The committee recommends that no charge be given regarding the relationship (or lack of relationship) between the greater weight of the evidence and the greater or lesser number of witnesses.

2. *Circumstantial evidence.* The committee recommends that no charge generally be given distinguishing circumstantial from direct evidence. *See Nielsen v. City of Sarasota*, 117 So. 2d 731 (Fla. 1960).

3. *"Preponderance of evidence"* and *"burden of proof."* The committee recommends that no charge be given using these terms, which are considered not helpful to a jury and not necessary in a charge that otherwise defines "greater weight of the evidence" and instructs the jury on the consequences of its determining that the greater weight of the evidence supports or does not support the claim or defense of a party.

401.4 NEGLIGENCE

Negligence is the failure to use reasonable care, which is the care that a reasonably careful person would use under like circumstances. Negligence is doing something that a reasonably careful person would not do under like circumstances or failing to do something that a reasonably careful person would do under like circumstances.

NOTES ON USE FOR 401.4

1. *No inference of negligence from mere fact of accident.* The committee recommends that no charge be given to the effect that "negligence may not be inferred from the mere happening of an accident alone" [*Belden v. Lynch*, 126 So. 2d 578, 581 (Fla. 2d DCA 1961)]. Such a charge is argumentative and

negative.

2. *Unavoidable accident.* The committee recommends that no charge be given on the subject of "unavoidable accident," this being a more appropriate subject for argument by counsel.

3. *Presumption of reasonable care; right to assume others will exercise.* The committee recommends that no charge be given to the effect that one is presumed to have exercised reasonable care for one's own safety or for the safety of others or that one has the right to assume others will exercise reasonable care. Whether a person is entitled so to assume and to act on that assumption ultimately depends on whether a reasonably careful person in the same circumstances would so assume and act. *See* 3 Fla. Jur. *Automobiles* §93 at 562; 23 Fla. Jur. *Negligence* §79 at 319, also §§77 and 78; 65A C.J.S. *Negligence* §15 at 592, §118 at 30; 60 C.J.S. *Motor Vehicles* §249 at 610; 61 C.J.S. *Motor Vehicles* §459 at 13.

4. *Sudden Emergency.* The committee recommends that no charge be given on the subject of sudden emergency. In the circumstances of an emergency, as in "ordinary circumstances," the applicable standard of care is reasonable care under the circumstances.

5. *Traffic.* The committee recommends that no charge be given on the following subjects: (a) Duty to keep lookout; (b) Duty to inspect vehicle or to maintain vehicle in safe condition; or (c) the supposed "Range of vision" rule. Negligence is properly and completely defined as the failure to use that degree of care, which a reasonable person would use under like circumstances.

6. *Railroads.* The committee recommends that no charge be given on the following subjects: (a) the supposed duty of a pedestrian or motorist to "yield the right of way" to an approaching train; (b) reciprocal duties at railroad crossings; or the "standing train" doctrine. Negligence is properly and completely defined as the failure to use that degree of care, which a reasonable person would use under like circumstances.

601.2 BELIEVABILITY OF WITNESSES

a. General considerations

Let me speak briefly about witnesses. In evaluating the believability of any witness and the weight to be given the testimony of any witness, you may properly consider the demeanor of the witness while testifying; the frankness or lack of frankness of the witness; the intelligence of the witness; any interest the witness may have in the outcome of the case; the means and opportunity the witness had to know the facts about which the witness testified; the ability

of the witness to remember the matters about which the witness testified; and the reasonableness of the testimony of the witness, considered in the light of all the evidence in the case and in the light of your own experience and common sense.

b. Expert witnesses:

[You have heard opinion testimony [on certain technical subjects] from [a person] [persons] referred to as [an] expert witness[es].] [Some of the testimony before you was in the form of opinions about certain technical subjects.]

You may accept such opinion testimony, reject it, or give it the weight you think it deserves, considering the knowledge, skill, experience, training, or education of the witness, the reasons given by the witness for the opinion expressed, and all the other evidence in the case.

NOTES ON USE FOR 601.2

1. *Expert witness.* See section 90.702, Florida Statutes (1985), and *Shaw v. Puleo*, 159 So. 2d 641 (Fla. 1964). The court will select one or the other introductory sentence in keeping with the court's practice and preference in announcing before the jury, or acceding to counsel's characterization, that a tendered witness is an "expert."

2. *Common knowledge and everyday experience.* Except to the extent indicated in instruction 601.2, the committee recommends that the jury not be instructed that the jurors may bring to bear their "common knowledge and everyday experience."

3. *Failure to Produce Witness.* The committee recommends that no charge be given. While it may be permissible in some circumstances to instruct the jury regarding inferences arising from a party's failure to produce a witness [compare *Weeks v. Atl. Coast Line R.R. Co.*, 132 So. 2d 315 (Fla. 1st DCA 1961), with *Ga. S. & Fla. Ry. Co. v. Perry*, 326 F. 2d 921 (5th Cir. 1964)], the committee believes that generally such inferences are more properly referred to in counsel's argument.

700 CLOSING INSTRUCTIONS

Members of the jury, you have now heard all the evidence, my instructions on the law that you must apply in reaching

your verdict and the closing arguments of the attorneys. You will shortly retire to the jury room to decide this case. [Before you do so, I have a few last instructions for you.]

You will have in the jury room all of the evidence that was received during the trial. In reaching your decision, do not do any research on your own or as a group. Do not use dictionaries, the Internet, or other reference materials. Do not investigate the case or conduct any experiments. Do not contact anyone to assist you, such as a family accountant, doctor, or lawyer. Do not visit or view the scene of any event involved in this case. If you happen to pass by the scene, do not stop or investigate. All jurors must see or hear the same evidence at the same time. Do not read, listen to, or watch any news accounts of this trial.

Any notes you have taken during the trial may be taken to the jury room for use during your discussions. Your notes are simply an aid to your own memory, and neither your notes nor those of any other juror are binding or conclusive. Your notes are not a substitute for your own memory or that of other jurors. Instead, your verdict must result from the collective memory and judgment of all jurors based on the evidence and testimony presented during the trial.

At the conclusion of the trial, the bailiff will collect all of your notes and immediately destroy them. No one will ever read your notes.

In reaching your verdict, do not let bias, sympathy, prejudice, public opinion, or any other sentiment for or against any party to influence your decision. Your verdict must be based on the evidence that has been received and the law on which I have instructed you.

Reaching a verdict is exclusively your job. I cannot participate in that decision in any way, and you should not guess what I think your verdict should be from something I may have said or done. You should not think that I prefer one verdict over another. Therefore, in reaching your

verdict, you should not consider anything that I have said or done, except for my specific instructions to you.

Pay careful attention to all the instructions that I gave you, for that is the law that you must follow. You will have a copy of my instructions with you when you go to the jury room to deliberate. All the instructions are important, and you must consider all of them together. There are no other laws that apply to this case, and even if you do not agree with these laws, you must use them in reaching your decision in this case.

After you have decided what the facts are, you may find that some instructions do not apply. In that case, follow the instructions that do apply and use them together with the facts to reach your verdict.

When you go to the jury room, the first thing you should do is choose a presiding juror to act as foreperson during your deliberations]. The foreperson should see to it that your discussions are orderly and that everyone has a fair chance to be heard.

It is your duty to talk with one another in the jury room and to consider the views of all the jurors. Each of you must decide the case for yourself, but only after you have considered the evidence with the other members of the jury. Feel free to change your mind if you are convinced that your position should be different. You should all try to agree. But do not give up your honest beliefs just because the others think differently. Keep an open mind so that you and your fellow jurors can easily share ideas about the case.

[I will give you a verdict form with questions you must answer. I have already instructed you on the law that you are to use in answering these questions. You must follow my instructions and the form carefully. You must consider each question separately. Please answer the questions in the order they appear. After you answer a question, the form

tells you what to do next. I will now read the form to you: (read form of verdict)]

[You will be given (state number) forms of verdict, which I shall now read to you: (read form of verdict(s))]

[If you find for (claimant(s)), your verdict will be in the following form: (read form of verdict)]

[If you find for (defendant(s)), your verdict will be in the following form: (read form of verdict)]

Your verdict[s] must be unanimous, that is, your verdict must be agreed to by each of you. When you have [agreed on your verdict[s]] [finished filling out the form[s]], your foreperson must write the date and sign it at the bottom and return the verdict[s] to the bailiff.

If any of you need to communicate with me for any reason, write me a note and give it to the bailiff. In your note, do not disclose any vote or split or the reason for the communication.

You may now retire to decide your verdict[s].

NOTES ON USE FOR 700

1. When final instructions are read to the jury before the attorneys' closing arguments, this instruction should not be given at that time. It should be given following closing arguments, just before the jury retires to deliberate. If, however, the entire instruction is given after final arguments, omit the bracketed sentence in the first paragraph.

2. Rule 2.430(l), Florida Rules of Judicial Administration, provides that at the conclusion of the trial, the court shall collect and immediately destroy all juror notes.

3. *Quotient verdict.* The committee recommends that no instruction generally be given to admonish the jury against returning a "quotient verdict." When it is impracticable to take all of the evidence into the jury room, this instruction should be modified accordingly.

TAB B

Notices

Proposed reorganization of jury instructions for civil cases

The Supreme Court Committee on Standard Jury Instructions in Civil Cases proposes to reorganize the jury instructions for civil cases to improve juror understanding of the instructions and the jury's role in the proceedings. This reorganization is a substantial reordering of the instructions, the first since the inception of the instructions in 1967, although the committee did adhere to the theory and technique adopted by the original committee.

The reorganization has grouped together all instructions for a particular cause of action, and all instructions which are used at a particular time in trial. The committee believes that this new organization will make it easier for the bench and Bar to use the book and to find the instructions needed for a given case. To improve juror understanding, the sequence in which the instructions are to be given has been reordered so that the jury is first informed of the basic definitions that they must apply, followed by the issues that they must decide. As part of the reorganization, the committee also has substituted "plain English" language wherever possible without altering the substantive meaning of the instructions.

The reorganized book contains all instructions recently approved by the Florida Supreme Court, including the instructions and rules approved in the Jury Innovations Report. For a more complete description of the reorganization, see the Committee Summary contained at the beginning of the book. The Table of Contents for the new, reorganized materials appears below. Due to size limitations, the materials themselves are not included in this publication but are available to be viewed at www.floridabar.org by clicking on *Publications*, then click *The Florida Bar CLE Publications*. Comments are invited. After reviewing all comments, the committee may submit its proposal to the Florida Supreme Court.

The committee also plans to offer substantive changes to various instructions in the near future. The Table of Contents for the reorganized jury instructions indicate where those proposed changes will be inserted. Look for Notices concerning those changes in future editions of The Florida Bar *News*. Provide comments on substantive changes separately from comments on the reorganization.

Send all comments concerning the proposed reorganization to Tracy Raffles Gunn, Committee Chair, Fowler White Boggs Banker, P.A., 501 East Kennedy Blvd. Suite 1700, Tampa 33602. You may e-mail your comments to her at tgunn@fowlerwhite.com or fax them to her at (813) 229-8313. Comments must be received by May 15 to ensure that they are considered by the committee.

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Proposed 'Plain English' changes to jury instructions for civil cases

The Supreme Court Committee on Standard Jury Instructions in Civil Cases proposes to amend its instructions on Greater Weight of the Evidence (currently 3.9), Negligence (currently 4.1), Introductory Instruction (currently 2.1) (renamed "Weighing the Evidence" in the proposal) and the Closing Instructions (currently 7.1 and 7.2) (combined into a single instruction in the proposal).

These amendments are "Plain English" changes that are not intended to affect the substantive meaning of the instructions. The committee believes these changes will improve the jury's understanding of the instructions and its role in the proceedings.

These proposed changes are part of the overall reorganization of the jury instructions for civil cases and would apply throughout the new reorganized instructions. The proposed amendments are shown below, along with the current instructions for comparison. The new instructions are renumbered to show where they would fit within the proposed new organization system for the civil jury instructions book.

Comments are invited. After reviewing all comments, the committee may submit its proposal to the Florida Supreme Court.

Send all comments concerning these proposed changes to Tracy Raffles Gunn, Committee Chair, Fowler White Boggs Banker, P.A., 501 East Kennedy Blvd. Suite 1700, Tampa 33602. You can e-mail comments to her at tgunn@fowlerwhite.com or fax them to her at (813) 229-8313. Comments must be received by May 15 to ensure that they are considered by the committee.

CURRENT INSTRUCTION
3.9
GREATER WEIGHT (PREPONDERANCE) OF THE EVIDENCE DEFINED

"Greater weight of the evidence" means the more persuasive and convincing force and effect of the entire evidence in the case.

PROPOSED INSTRUCTION
401.3 GREATER WEIGHT OF THE EVIDENCE

"Greater weight of the evidence" means the more persuasive and convincing force and effect of the entire evidence in the case. To prove a claim [or defense] by the greater weight of the evidence, the party must convince you, by the evidence presented in court, that what [he] [she] [it] is trying to prove is probably true.

CURRENT INSTRUCTION
4.1
NEGLIGENCE

Negligence is the failure to use reasonable care. Reasonable care is that degree of care which a reasonably careful person would use under like circumstances. Negligence may consist either in doing something that a reasonably careful person would not do under like circumstances or in failing to do something that a reasonable careful person would do under like circumstances.

PROPOSED INSTRUCTION
401.4 NEGLIGENCE

Negligence is the failure to use reasonable care, which is the care that a reasonably careful person would use under like circumstances. Negligence is doing something that a reasonably careful person would not do under like circumstances or failing to do something that a reasonably careful person would do under like circumstances.

CURRENT INSTRUCTION
2.1
INTRODUCTORY INSTRUCTION

Members of the jury, I shall now instruct you on the law that you must follow in reaching your verdict[s]. It is your duty as jurors to decide the issues, and only those issues, that I submit for determination by your verdict. In reaching your verdict, you should consider and weigh the evidence, decide the disputed issues of fact, and apply the law on which I shall instruct you, to facts as you find them from the evidence.

The evidence in this case consists of the sworn testimony of the witnesses, all exhibits received in evidence, [and] all facts that may be admitted or agreed to by the parties [, and any fact of which the court has taken judicial notice (explain as necessary)].

In determining the facts, you may draw reasonable inferences from the evidence. You may make deductions and reach conclusions which reason and common sense lead you to draw from the facts shown by the evidence in this case. But you should not speculate on any matters outside the evidence.

PROPOSED INSTRUCTION
601.1 WEIGHING THE EVIDENCE

In deciding this case, it is your duty as jurors [to decide the issues, and only those issues, that I submit for your determination] [to answer certain questions I ask you to answer on a special form, called a verdict form]. You must come to an agreement about [your verdict] [what your answers will be. Your agreed-upon answers to my questions are called your jury verdict].

The evidence in this case consists of the sworn testimony of the witnesses, all exhibits received in evidence [and] all facts that were admitted or agreed to by the parties [, and any fact of which the court has taken judicial notice (explain as necessary)].

In reaching your verdict, you must think about and weigh the testimony and any documents, photographs, or other material that has been received in evidence. You may also consider any facts that were admitted or agreed to by the lawyers. Your job is to determine what the facts are. You may use reason and common sense to reach conclusions. You may draw reasonable inferences from the evidence. But you should not guess about things that were not covered here. And, you must always apply the law as I have explained it to you.

CURRENT INSTRUCTION
7.1
PREJUDICE AND SYMPATHY
JUDGE NOT INVOLVED

In reaching your verdict[s], you are not to be swayed from the performance of your duty by prejudice, sympathy or any other sentiment for or against any party. Your verdict[s] must be based on the evidence that has been received and the law on which I have instructed you.

Reaching a verdict is exclusively your job. I cannot participate in that decision in any way. You should not speculate about how I might evaluate the testimony of any witness or any other evidence in this case, and you should not think that I prefer one verdict over another. Therefore, in reaching your verdict, you should not consider anything that I have said or done, except for my specific instructions to you.

CURRENT INSTRUCTION
7.2
USE OF NOTES DURING DELIBERATIONS;
ELECTION OF FOREMAN; VERDICT FORMS

Any notes you have taken during the trial may be taken to the jury room for use during your discussions. Your notes are simply an aid to your own memory, and neither your notes nor those of any other juror are binding or conclusive. For this reason, you should not be unduly influenced by anyone's notes, including your own, and you should not give greater weight to a particular piece of evidence or testimony merely because it is mentioned in a juror's notes.

Your notes are not a substitute for your own memory or that of other jurors. Instead, your verdict must result from the collective memory and judgment of all jurors based on the evidence and testimony presented during the trial. You should consider the recollections of other jurors, but you need not abandon your own recollection of the evidence and testimony merely because your recollection differs from the written notes of another juror. At the conclusion of the trial, the bailiff will collect all of your notes and immediately destroy them. No one will ever read your notes.

When you retire to the jury room, you should select one of your number to act as the foreperson to preside over your deliberations and sign your verdict[s]. Your verdict[s] must be unanimous, that is, your verdict[s] must be agreed to by each of you.

You will be given (state the number) forms of verdict, which I shall now read to you:

[If you find for the plaintiff[s], your verdict will be in the following form: (read form of verdict).]

[If you find for the defendant[s], your verdict will be in the following form: (read form of verdict).]

When you have agreed on your verdict[s], the foreperson, acting for the jury, should date and sign the appropriate form[s] of verdict. You may now retire to consider your verdict[s].

If any of you need to communicate with me for any reason, write me a note and give it to the bailiff. In your note, do not disclose any vote or split or the reason for the communication.

PROPOSED INSTRUCTION
700 CLOSING INSTRUCTIONS

Members of the jury, you have now heard all the evidence, my instructions on the law that you must apply in reaching your verdict and the closing arguments of the attorneys. You will shortly retire to the jury room to decide this case. [Before you do so, I have a few last instructions for you.]

You will have in the jury room all of the evidence that was received during the trial. In reaching your decision, do not do any research on your own or as a group. Do not use dictionaries, the Internet, or other reference materials. Do not investigate the case or conduct any experiments. Do not contact anyone to assist you, such as a family accountant, doctor, or lawyer. Do not visit or view the scene of any event involved in this case. If you happen to pass by the scene, do not stop or investigate. All jurors must see or hear the same evidence at the same time. Do not read, listen to, or watch any news accounts of this trial.

Any notes you have taken during the trial may be taken to the jury room for use during your discussions. Your notes are simply an aid to your own memory, and neither your notes nor those of any other juror are binding or conclusive. Your notes are not a substitute for your own memory or that of other jurors. Instead, your verdict must result from the collective memory and judgment of all jurors based on the evidence and testimony presented during the trial.

At the conclusion of the trial, the bailiff will collect all of your notes and immediately destroy them. No one will ever read your notes.

In reaching your verdict, do not let bias, sympathy, prejudice, public opinion or any other sentiment for or against any party to influence your decision. Your verdict must be based on the evidence that has been received and the law on which I have instructed you.

Reaching a verdict is exclusively your job. I cannot participate in that decision in any way and you should not guess what I think your verdict should be from something I may have said or done. You should not think that I prefer one verdict over another. Therefore, in reaching your verdict, you should not consider anything that I have said or done, except for my specific instructions to you.

Pay careful attention to all the instructions that I gave you for that is the law that you must follow. You will have a copy of my instructions with you when you go to the jury room to deliberate. All the instructions are important and you must consider all of them together. There are no other laws that apply to this case and even if you do not agree with these laws, you must use them in reaching your decision in this case.

After you have decided what the facts are, you may find that some instructions do not apply. In that case, follow the instructions that do apply and use them together with the facts to reach your verdict.

When you go to the jury room, the first thing you should do is choose a presiding juror to act as foreperson during your deliberations. The presiding juror should see to it that your discussions are orderly and that everyone has a fair chance to be heard.

It is your duty to talk with one another in the jury room and to consider the views of all the jurors. Each of you must decide the case for yourself, but only after you have considered the evidence with the other members of the jury. Feel free to change your mind if you are convinced that your position should be different. You should all try to agree. But do not give up your honest beliefs just because the others think differently. Keep an open mind so that you and your fellow jurors can easily share ideas about the case.

[I will give you a verdict form with questions you must answer. I have already instructed you on the law that you are to use in answering these questions. You must follow my instructions and the form carefully. You must consider each question separately. Please answer the questions in the order they appear. After you answer a question, the form tells you what to do next. I will now read the form to you: (read form of verdict)]

[You will be given (state number) forms of verdict, which I shall now read to you: (read form of verdict(s))]

[If you find for (Claimant(s)), your verdict will be in the following form: (read form of verdict)]

[If you find for (Defendant(s)), your verdict will be in the following form: (read form of verdict)]

Your verdict[s] must be unanimous, that is, your verdict must be agreed to by each of you. When you have [agreed on your verdict[s]] [finished filling out the form[s]], your foreperson must write the date and sign it at the bottom and return the verdict[s] to the bailiff.

If any of you need to communicate with me for any reason, write me a note and give it to the bailiff. In your note, do not disclose any vote or split or the reason for the communication.

You may now retire to decide your verdict[s].

Notice

Proposed changes to civil jury instructions concerning the definition of 'probable cause'

The Supreme Court Committee on Standard Jury Instructions in Civil Cases proposes to amend the definition of "probable cause" as it applies to Malicious Prosecution and False Imprisonment cases (currently MI 5.1b and MI 6.1g).

These are "Plain English" changes that are not intended to affect the substantive meaning of the instructions, but which the committee believes will improve juror understanding of the term. The proposed changes make the term consistent in the two instructions. The term is now stated in the positive, defining what is, rather than what is not, probable cause.

These proposed changes are part of the overall reorganization of the jury instructions for civil cases. The proposed amendments are shown below, along with the current instructions for comparison.

Comments are invited. After reviewing all comments, the committee may submit its proposal to the Florida Supreme Court.

Send all comments concerning these changes to Tracy Raffles Gunn, Committee Chair, Fowler White Boggs Banker, P.A., 501 East Kennedy Blvd. Suite 1700, Tampa 33602. You can e-mail your comments to her at tgunn@fowlerwhite.com or fax them to her at (813) 229-8313. Comments must be received by May 15, to ensure that they are considered by the committee.

CURRENT INSTRUCTION
MI 5.1b

Lack of probable cause:

One acts without probable cause in [instituting] [or] [continuing] a [criminal] [civil] proceeding against another if the circumstances are not sufficient to cause a reasonably cautious person to believe that [the person accused is guilty of the offense charged] [the claim is justified].

PROPOSED INSTRUCTION
406.4 PROBABLE CAUSE

Probable cause means that at the time of [instituting] [or] [continuing] a [criminal] [civil] proceeding against another, the facts and circumstances known to [(Defendant)] [(other person)] were sufficiently strong to support a reasonable belief that (Claimant) [had committed a criminal offense] [the [claim] [proceeding] was supported by existing facts].

CURRENT INSTRUCTION
MI 6.1g

Merchant's defense (§ 812.015(3), F.S.)

On the defense, the issues for your determination are whether (name), a [merchant] [merchant's employee], had probable cause to believe that goods held for sale by the merchant were unlawfully taken by (claimant) and could be recovered by restraining (claimant); and whether (name) restrained (claimant) only in a reasonable manner and for a reasonable time. One has probable cause to believe something when, under all the circumstances, a reasonably cautious person would believe it.

PROPOSED INSTRUCTION
407.8 DEFENSE ISSUES

On the [first] defense, the issue[s] you must decide are whether (Defendant) (Defendant's employee) had probable cause to believe that goods held for sale by (Defendant) had been unlawfully taken by (Claimant) and could be recovered by restraining (Claimant) for a reasonable time and in a reasonable manner.

"Probable cause" means that at the time of the [incident] [restraint] [arrest] the facts and circumstances known to (Defendant) (other person) were sufficiently strong to support a reasonable belief that (Claimant) had committed a criminal offense.

Task Force on Judicial Branch Planning extends its online court system survey deadline

There is still time to participate in an online survey to help the Task Force on Judicial Branch Planning identify emerging issues and trends.

"In planning for the court system for the next 20 years, it's important to gather input from those who work with the courts day-in and day-out," said 11th Circuit Chief Judge Joseph P. Farina, chair of the Task Force on Judicial Branch Planning. "Each participant, whether a judge, attorney, litigant, juror, or court staff member, will have a different perspective and different areas of concern."

Farina said the task force believes all those perspectives are important and should be taken into consideration as it plans for the future of the courts.

The Supreme Court has charged the task force with developing and updating the judicial branch's long-range plan.

"We would appreciate it if attorneys also would encourage their clients who are currently involved with the courts or have been to court within the past year to take the court user survey," said Joanne Snair, senior court operations consultant with the Strategic Planning Unit of the Office of the State Courts Administrator. "We are really trying to get as many perspectives as we can and lawyers are a great pipeline to let clients know about the survey."

The survey is online now at http://www.flcourts.org and will be accessible through August 31.

Center for Professionalism sets Career Satisfaction Workshop

The Henry Latimer Center for Professionalism and Florida Lawyers Assistance, Inc., will host a two-day career satisfaction workshop September 5–6 in Tallahassee.

Shari R. Gregory, the assistant director/attorney counselor with the Oregon Attorney Assistance Program, and Mike Long, attorney-counselor with the Oregon Attorney Assistance Program, will assist participants in exploring their current and potentially alternative career choices.

Each participant will have the opportunity to conduct a self-assessment and explore the types of work that best suit them. Alternatives to legal practice and changing the legal environment will all be discussed.

The workshops are set for 5–9 p.m. on Friday, September 5 and then 8:30 a.m.–4:30 p.m. on Saturday, September 6.

Participants will receive five CLE credits, including three hours of professionalism and two hours of substance abuse credit.

Registration forms are available on the Bar's Web site at www.floridabar.org. Once there, click "Professional Practice" on the left-hand side of the page, then "Henry Latimer Center for Professionalism." The registration fee will include a book, self-assessment instruments, and a boxed lunch. For more information call (850) 561-5747.

Hersch elected FACDL president

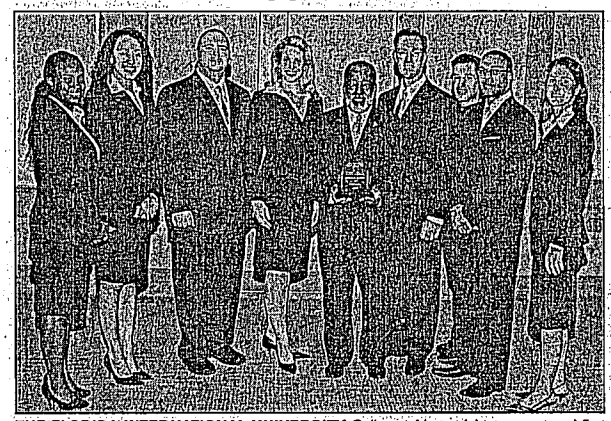
Richard Hersch of Miami was recently elected president of the Florida Association of Criminal Defense Lawyers at its recent Annual Meeting in Key West.

Other new FACDL officers include Paula Saunders of Tallahassee, president-elect; Brian Tannebaum of Miami, vice president; Nellie King of West Palm Beach, treasurer; and Derek Byrd of Sarasota, secretary.

Also at the meeting, Lt. Cdr. Charles D. Swift (Ret.) received the Steven M. Goldstein Criminal Justice Award, the highest honor awarded by the Florida Association of Criminal Defense Lawyers, for his appointed representation of Salim Hamdan. Lt. Cdr. Swift represented Hamdan, purported to be Osama Bin Laden's chauffeur, challenging the constitutionality of the Detainee Treatment Act of 2005 before the United States Supreme Court, and ultimately prevailing.

"He zealously represented his client despite incredible pressure from his command, and with the knowledge that it would likely cost him his military career," said A. Russell Smith, FACDL's immediate past president.

D. Todd Doss of Lake City and Sonya Rudenstine of Gainesville also were awarded the FACDL President's Award, for their pro bono representation of FACDL in its quo warranto action, which sought to have legislation changing the method of delivering representation to indigent Floridians charged with crimes declared unconstitutional.



THE FLORIDA INTERNATIONAL UNIVERSITY College of Law trial team captured first place in the Southeast Region of the American Association for Justice National Student Trial Advocacy Competition. Held in Atlanta, the competition featured 16 teams from 10 law schools and was FIU's first time participating in the event. Coached by Professors H.T. Smith and H. Scott Fingerhut, and led by students David Baroff, Victoria Bechtold Kush, Jamie Gurtov, and Alexander A. Williams, FIU then joined the winners from 13 other regions across the country to compete in the national finals in West Palm Beach. Pictured from the left are V. Danielle Morris, Loressa Felix, Thomas Bellinder, Kush, Smith, Baroff, Scott Strauss, Williams, and Gurtov.

Notices

Proposed civil jury instructions

The Supreme Court Committee on Standard Jury Instructions in Civil Cases noticed proposed changes and new instructions for public comment on April 15 and May 1. As a result of comments received, the committee proposes the following changes in the proposed instructions. Comments are again invited. After reviewing all comments, the committee may submit these proposals to the Florida Supreme Court. Send all comments concerning these proposed changes to Tracy Raffles Gunn, Committee Chair, Gunn Appellate Practice P.A., 777 S. Harbour Island Blvd. Suite 770, Tampa 33602 or e-mail comments to her at tgunn@gunnappeals.com. Comments must be received by August 15 to ensure that they are considered by the committee.

The changes are as follows:

401.3 GREATER WEIGHT OF THE EVIDENCE

"Greater weight of the evidence" means the more persuasive and convincing force and effect of the entire evidence in the case. To prove a claim [or defense] by the greater weight of the evidence, the party must convince you, by the evidence presented in court, that what [he] [she] [it] is trying to prove is more likely true than not true.

402.4(c) FOREIGN BODIES:

[Negligence is the failure to use reasonable care]. The presence of (name foreign object) in (patient's) body proves negligence unless (defendant(s)) prove(s) otherwise by the greater weight of the evidence.

NOTE ON USE FOR 402.4(c)

Derived from Fla. Stat. 766.102(3). The statute uses the term "prima facie evidence of negligence." The committee recommends that this term not be used in the instruction, as it is not helpful to a jury. See, e.g., State v. Kahler, 232 So. 2d 166, 168 (Fla. 1970) ("prima facie" means "evidence sufficient to establish a fact unless and until rebutted.").

402.4(d) FAILURE TO MAINTAIN RECORDS:

[Negligence is the failure to use reasonable care]. The law requires (defendant) as a licensed health care provider to prepare and maintain health care records.

[Because (defendant) did not [make] or [maintain] (describe missing record(s)),]

or

[If you find that a person who was responsible for [making] [or] [maintaining] (describe the missing record(s)) failed to [make] [or][maintain] such record(s),]

you should presume that the missing record(s) contained evidence of negligence unless (defendant) proves otherwise by the greater weight of the evidence. You may consider this presumption, together with the other facts and circumstances in evidence, in determining whether (defendant) was negligent.

NOTE ON USE FOR 402.4(d)

The first indented bracket should be used if there is no issue about whether the defendant failed to make or maintain records. If there is an issue about the failure to make or maintain records, then the second indented bracket should be used.

402.4(f) RISK MANAGEMENT AND COMPETENCE OF STAFF:

[Negligence is the failure to use reasonable care]. Healthcare facilities have a duty to assure comprehensive risk management and the competence of their medical staff and personnel, including but not limited to:

1. [Adopting written procedures for the selection of staff members and a periodic review of the medical care and treatment rendered to patients by each member of the medical staff];
2. [Adopting a comprehensive risk management that includes (list applicable provisions from section 395.0197, Florida Statutes)];
3. Initiating and diligently administering [such medical reviews] [and] [risk management process] including the supervision of the medical staff and personnel to the extent necessary to ensure that [the medical reviews] [and] [risk management processes] are being diligently carried out.

Failure to use reasonable care to [create] or [administer] such procedures is negligence.

Proposed amendments to the juvenile procedures rules deal with foster kids

The Steering Committee on Families and Children in the Court has submitted to the Florida Supreme Court a petition seeking to amend Florida Rule of Juvenile Procedure 8.255, General Provision for Hearing, to require a child who is in licensed foster care or foster care with "another planned permanent living arrangement" goal who is at least 16 years old to attend all court hearings, unless the child's presence is excused based on a showing of good cause.The court invites all interested persons to comment on the steering committee's proposed amendments, which are reproduced in full below, as well as online at http://www.floridasupremecourt.org/decisions/proposed.shtml. The court specifically seeks comments from the Juvenile Court Rules Committee. An original and nine paper copies of all comments must be filed with the Court on or before October 1, with a certificate of service verifying that a copy has been served on Judge Nikki Ann Clark, Steering Committee Chair, Leon County Courthouse, 301 South Monroe Street, Tallahassee 32302, as well as a separate request for oral argument if the person filing the comment wishes to participate in oral argument, which may be scheduled in this case. The steering committee chair has until October 21 to file a response to any comments filed with the court. Electronic copies of all comments also must be filed in accordance with the court's administrative order *In re Mandatory Submission of Electronic Copies of Documents*, Fla. Admin. Order No. AOSC04-84 (Sept. 13, 2004).

IN THE SUPREME COURT OF FLORIDA

IN RE: AMENDMENTS TO FLORIDA RULE OF JUVENILE PROCEDURE 8.255, CASE NO. SC08-1236

RULE 8.255. General Provisions for Hearings

(a) [No Change]

(b) Presence of Child.

(1) The child has a right to be present at the hearing unless the court finds that the child's mental or physical condition or age is such that a court appearance is not in the best interest of the child. Any party may file a motion to require or excuse the presence of the child. A motion to excuse the presence of a child filed under this subsection shall be subject to the provisions in subdivision (2), if applicable.

(2) any child who is placed in licensed foster care or who is in foster care with "another planned permanent living arrangement" goal and who is at least 16 years of age must attend all court hearings unless the child's presence is excused by the court upon a showing of good cause why the child should not attend. Prior to the hearing, any party with good cause may file a motion to excuse the presence of a child.

(c) – (h) [No Change]

Committee Notes

[No Change]

TAB C

** INBOUND NOTIFICATION ** FAX RECEIVED SUCCESSFULLY **

TIME RECEIVED	REMOTE CSID	DURATION	PAGES	STATUS
April 22, 2008 5:27:25 PM EDT	561 391 1193	40	1	Received

Apr. 22. 2008 5:25PM HOWARD S. GROSSMAN, P.A. No. 9081 P. 1

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HOWARD S. GROSSMAN, ESQUIRE
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TIMOTHY C. NIES, ESQUIRE
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April 22, 2008

VIA FACSIMILE (813) 229-8313
Tracey Raffles Gunn
Committee Chair
Fowler White Boggs Banker, P.A.
501 East Kennedy Boulevard
Suite 1700
Tampa, FL 33602

Dear Ms. Gunn:

I have reviewed the proposed "plain English" changes to Standard Jury Instructions and Civil Cases on the greater weight of the evidence and believe that the additional sentence added to the current instruction is not helpful.

In particular, the addition of the following language causes me concern; "...is trying to prove is probably true." The word true has twenty five recognized meanings in the Oxford Dictionary. The first recognized definition is "being in accordance, actual state or conditions; conforming to reality, not false: a true story."

A juror is likely to believe that when faced with determining whether a claim or defense has been proven to be true, that the party with the burden has to prove (the claim or defense) beyond a reasonable doubt; or, to a lower standard-that the claim or defense is not false. A more easily defined method of proving a claim or defense has been shown by the greater weight of the evidence would be the following: "to prove a claim [or defense] by the greater weight of the evidence, the party must convince you by the evidence presented in court, that what [he] [she] is trying to prove is more likely than not."

Thank you for your consideration.

Sincerely,

Howard S. Grossman
HSG/lem

R. LAYTON MANK
Attorney at Law
9417 Northwest 59 Lane
Gainesville, Florida 32653

352.374-9600
Attylaytonmank@bellsouth.net

April 18, 2008

Tracy Raffles Gunn, Esq
Fowler White Boggs Banker, P.A.
501 East Kennedy Blvd
Tampa FL 33602
via email: tgunn@fowlerwhite.com

Re :Proposed Jury Instructions

Dear Ms. Gunn:

It is a good and necessary task that you and your committee have undertaken. Jury instructions are the very backbone of the jury system and they can never be too clear for the lay jurors who hear them usually at the end of a long day. I found the changes under consideration to be excellent with the sole exception of the proposed change to Standard Instruction 401.3, the greater weight instruction.

In particular, I object to the ending phrase "...what {he] [she] [it] is trying to prove is probably true". I believe it would be clearer, more precise and easier to understand if the words "more likely than not" replaced the word "probably". The final phrase would then read "more likely than not true."

The word "probably" is in widespread and general usage and has a different meaning for different people. Commonly it is a substitute for "maybe" or "possibly", which is quite different from the greater weight intended. On th other hand, "more likely than not" is quite specific and consistent with the legal meaning of greater weight. The word "probably" if used cries out for a definition which is simply "more likely than not". In order to avoid having to define "probably" simply substitute the precise definition of that word. It avoids confusion, eliminates another definition, and does not protract the instruction.

I greatly appreciate your consideration of this matter.

Sincerely yours,

R. LAYTON MANK
FBN 050050

Rumberger
KIRK & CALDWELL

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April 21, 2008

Via E-Mail: tgunn@fowlerwhite.com

Tracy Raffles Gunn, Esq.
Fowler White Boggs Banker, P.A.
501 East Kennedy Blvd
Tampa, FL 33602

Re: Proposed Jury Instructions

Dear Ms. Gunn:

I am writing you to express my objection to the proposed change to Standard Instruction 401.3, the greater weight instruction.

In particular, I object to the ending phrase "...what [he] [she] [it] is trying to prove is probably true". I believe it would be clearer, more precise and easier to understand if the words "more likely than not" replaced the word "probably". The final phrase would then read "more likely than not true."

The word "probably" is in widespread and general usage and has a different meaning for different people. Commonly it is a substitute for "maybe" or "possibly", which is quite different from the greater weight intended. On the other hand, "more likely than not" is quite specific and consistent with the legal meaning of greater weight. The word "probably" if used cries out for a definition which is simply "more likely than not". In order to avoid having to define "probably" simply substitute the precise definition of that word. It avoids confusion, eliminates another definition, and does not protract the instruction.

I greatly appreciate your consideration of this matter.

Sincerely yours,

Gregory M. Palmer
FBN 0784796

GMP:cp

663729

From: Jay Thomas [mailto:jay_thomas@verizon.net]
Sent: Wednesday, May 14, 2008 8:52 AM
To: tgunn@gunnappeals.com
Subject: FW: Proposed civil jury instructions in April 15 Fla Bar News

From: Jay Thomas [mailto:jay_thomas@verizon.net]
Sent: Wednesday, May 14, 2008 8:25 AM
To: 'tgunn@fowlerwhite.com'
Subject: Proposed civil jury instructions in April 15 Fla Bar News

Tracy:

Here are a few suggestions on the proposed instructions printed in the April 15 Florida Bar News.

§ 401.3 Greater Weight of the Evidence

(1) Is the following basic instruction (or something like it) provided anywhere in the Instructions? Should it be? I would think it would be helpful as the first sentence of the Greater Weight of the Evidence instruction, to orient the jurors as to what they're supposed to be doing.

> In this lawsuit, the [plaintiff] [defendant] must prove [his] [her] [claim[s]] [defense[s]] by the greater weight of the evidence. "Greater weight of the evidence" means . . . <<*continue as drafted*>>

(2) In my interpretation, the second sentence ("To prove a claim . . .") does not get across the idea of "the quantum of evidence that, at the least, tips the scales just over 50%". I think the problem is that people likely have varying interpretations of what "probably" means. If someone said to me, "That's probably true," and if I were asked to assign a percent or probability value to that statement, I would say it means maybe 75% or better. Cf. the definition of "probable" given in Random House Webster's College Dictionary, (1997 ed.): "in all likelihood; very likely." If something were just slightly more true than not, I would not use the term "probably" to describe the situation. I would suggest the following:

> To prove a claim [or defense] by the greater weight of the evidence, the party must convince you, by the evidence presented in court, that what [he] [she] [it] is trying to prove is more likely true than not.

(3) As an organizational point, it appears that the Greater Weight of the Evidence instruction is repeated in each major section of the Proposed Instructions. Would it be more efficient to present it once (in Section 700?), so that it doesn't have to be amended in multiple places if an amendment becomes necessary?

§ 700 Closing Instructions

(4) Paragraphs 9 and 15 ("When you go to the jury room . . ."; "Your verdict[s] must be unanimous"): After the term is defined, use either "presiding juror" or "foreperson", but not both back and forth. Since the term "presiding juror" is the one being defined, I would use that term in paragraph 15 as well.

(5) Miscellaneous punctuation suggestions:

- ¶5: Add series comma (as used elsewhere in the instructions): ". . . public opinion, or any other sentiment . . ."

- ¶6: Add comma to separate two clauses with different subjects: "I cannot participate in any way, and you should not . . ."
- ¶7: Comma before subordinate(?) clause and for ease in reading orally: "Pay careful attention to all the instructions that I gave you, for that is the law . . ."
- ¶7: Add commas to separate two clauses with different subjects: "All the instructions are important, and you must consider all of them together. There are no other laws that apply to this case, and even if you do not agree . . ."

§ 406.4 Probable Cause
(6) "Another" is somewhat abstract. You might have to think a second before you realize it means "a person". Suggestion:

> Probable cause means that at the time of [instituting] . . . a . . . proceeding against a person, . . .
>
> OR
>
> Probable cause means that at the time of [instituting] . . . a . . . proceeding against (Claimant), . . .

§ 407.8 Defense Issues
(7) Why is there a choice between "issue" and "issues", as reflected in the expression "issue[s]"? There are no options for adding or removing clauses later in the sentence. If "issue[s]" is to be retained, the verb should be changed from "are" to "[is] [are]".

Thank you.

Jay Thomas
Law Clerk
2d DCA

FLORIDA JUSTICE ASSOCIATION
218 South Monroe St.
Tallahassee, FL 32301

May 30, 2008

Comments of Florida Justice Association on Proposed Revisions to Standard Jury Instructions

The Florida Justice Association, following review by an ad hoc committee of trial lawyers experienced in the field of trail practice and board certified appellate specialists, and approval by the FJA Executive Committee, comments as follows concerning the Proposed Revisions to Standard Jury Instructions.

Proposed Instruction 401.3—Greater Weight of the Evidence

The proposed instruction re-defining greater weight of the evidence should not be recommended for approval because it substantively changes the parties' burden of proof.

Proposed instruction 401.3, Greater Weight of the Evidence, is identical to the existing standard jury instruction on greater weight of the evidence, Florida Standard Jury Instruction (Civil) 3.9, except for the addition of this sentence:

> To prove a claim [or defense] by the greater weight of the evidence, the party must convince you, by the evidence presented in court, that what [he] [she] [it] is trying to prove is probably true.

This revision is a substantive change to the definition of greater weight of the evidence because it introduces a new element that is not present in the current instruction, specifically, a probability that the matter to be proven is true. FJA objects to this revision because it is a substantive change in the instruction that can lead to anomalous and unfair results.

The current instruction on greater weight of the evidence does not require the jury to determine whether the claim or defense to be proven is probably true. Instead, it asks the jury to determine whether the evidence favoring the claim or defense is more persuasive and convincing than the evidence opposing it. Current instruction 3.9 reads: "'Greater weight of the evidence' means the more persuasive and convincing force and effect of the entire evidence in the case." Thus, the current instruction directs the jury to perform a balancing test and decide which side's evidence is more persuasive and convincing than the evidence on the other side. It does not ask the jury to determine whether it believes the claim or defense to be proven is probably true.

This distinction will affect the outcome in cases in which the jury is not convinced that either party's case is probably true. After considering all the evidence, jury may decide that the truth is not quite what the plaintiff claims it to be and not quite what the defense claims it to be either. The jury may believe that the truth is

some third version of events that does not match what either party presented in court, or it may find that it simply cannot determine what happened with sufficient confidence to say that it is probably true. In that situation, however, the jury almost always be able to determine that the evidence favoring one side is more persuasive and convincing than the evidence favoring the other. Under the current instruction, that is all that is necessary.

If the party that has the burden of proof puts forth the more convincing case, then it would prevail under the current instruction, but it would not prevail under proposed rule 401.3 if the jury is not convinced that its claim or defense is probably true. This would lead to an anomalous result, because the party who put forth the most convincing case would lose, having failed to convince the jury that its claim or defense is probably true, and the party who put forth the least convincing case would win.

To state this hypothetical in terms of probability percentages, assume a jury decides there is a 45% probability that the plaintiff's version of events is true and a 35% likelihood that the defendant's version of events is true. If the plaintiff has the burden of proof, the plaintiff would prevail under the current instruction because the jury has found the plaintiff's case more convincing than the defendant's, but under the proposed new instruction, the defendant would prevail because the plaintiff has

not convinced the jury that there is a 50% or greater probability that the plaintiff's version is true. Under the proposed new instruction, the defendant would prevail even though its case was the least convincing and least persuasive.

The Second District Court of Appeal's discussion of the greater-weight-of-the-evidence standard in *In re Estate of Brackett, Wakefield v. Brackett*, 109 So. 2d 375 (Fla. 2d DCA 1959) supports the balancing approach embodied in the current instruction, instruction 3.9. The court wrote:

> Weight of the evidence" has been held to be equivalent to "preponderance of the evidence." It simply means that proof on one side of a cause outweighs the proof on the other side.
>
> As was stated in the case of *Waldron v. New York Cent. Ry. Co.*, 1922, 106 Ohio St. 371, 140 N.E. 161, 163, as follows:
>
> "The terms 'weight of evidence' and 'sufficient evidence' have long been regarded as synonymous terms and used interchangeably."
>
> "Weight of evidence" does not necessarily mean a greater number of witnesses, since quality of testimony and credibility must also be considered. *Bjorklund v. Continental Casualty Co.*, 1931, 161 Wash. 340, 297 P. 155, 160.
>
> "Weight of evidence" is not a question of mathematics but depends on its effect in inducing belief. *Chenery v. Russell*, 1933, 132 Me. 130, 167 A. 857, 858.
>
> The expression "weight of evidence" signifies that the proof on one side is greater than on the other, and in any proceedings before a trial judge, probative value of the testimony of each witness, and not the quantity or amount of evidence, determines its weight.

109 So. 2d 378.

Proposed instruction 401.3 confusingly narrows the gap between the greater weight of the evidence standard and the "clear and convincing evidence" standard. To satisfy the greater weight of the evidence standard under 401.3, the party bearing the burden of proof "must convince" the jury to believe the fact in question. Reasonable jurors may find that standard to be indistinguishable from the standard for clear and convincing evidence that the proof "produces a firm belief or conviction without hesitation about the matter in issue." The "must convince" standard is too high.

For these reasons, we object to the second sentence in proposed instruction 401.3, which adds a new element to the definition of greater weight of the evidence requiring the jury to determine if the claim or defense is probably true. We request that this sentence be deleted, recognizing that this would leave the current instruction unchanged.

Therefore, the instruction should not be recommended for approval by the Supreme Court of Florida.

Proposed Instruction 402.4c—Professional Negligence

The Florida Justice Association submits that the proposed instruction 402.4c.

should be modified because the proposed instruction inaccurately reflects Florida law concerning the effect of the discovery of the presence of a foreign object in a person's body.

Florida Statute section 766.102(3) establishes that "the discovery of the presence of a foreign body, such as sponge, clamp, forceps, surgical needle, or other paraphernalia commonly used in surgical, examination, or diagnostic procedures shall be *prima facie* evidence of negligence on the part of the healthcare provider." Proposed instruction 402.4c. omits any reference—either expressly or by definition—of the concept of "*prima facie*." Instead, that instruction states: "The presence of an object in (claimant's) body, such as a (name of foreign body) is evidence of negligence on the part of (defendant) and may be considered by you, together with the other facts and circumstances, in determining whether such person was negligent." The omission from the instruction of any reference to the concept of "*prima facie*" mischaracterizes the legal effect of the discovery of a foreign object because that omission conceals from the jury the fact that discovery of the foreign object is, in and of itself, sufficient evidence of negligence to support a verdict in favor of the claimant.

The definition of "*prima facie*" employed by the Florida Supreme Court means "evidence sufficient to establish a fact unless and until rebutted." *State v. Kahler*, 232

So. 2d 166, 168 (Fla. 1970). *Accord, e.g., Castleman v. Office of Comptroller*, 538 So. 2d 1365 (Fla. 1st DCA 1989). Proposed instruction 402.4(c) is legally insufficient for failing to instruct the jurors that the presence of a foreign object in the claimant's body is evidence sufficient to establish the fact of medical malpractice, unless and until rebutted by the Defendant. Therefore, the instruction should not be recommended for approval by the Supreme Court of Florida.

Proposed Instruction 402.4d—Professional Negligence

Proposed instruction 402.4d. should not be recommended for approval because it mistakenly states the legal effect of the failure of a defendant to maintain required records. The Florida Supreme Court, in *Public Health Trust v. Valcin*, 507 So. 2d 596 (Fla. 1987), held that the effect of a malpractice defendant's failure to maintain required records that works to the prejudice of the claimant created a "rebuttable presumption . . . [which] shifts the burden of proof, insuring that the issue of negligence goes to the jury." *Id.* at 600-01. The instruction proposed by the committee mistakenly provides only that the jury "may infer that the missing evidence contain proof of negligence," not that a presumption is created by which the burden of disproving negligence is shifted to the defendant.

Therefore, the instruction should not be recommended for approval by the Supreme Court of Florida.

Proposed Instruction 404.5—Medical Malpractice Insurer's Bad Faith

[Comment to be provided separately]

Proposed Instruction 411.4a. and 414.4a.—Legal Cause

The Florida Justice Association comments as follows concerning the proposed instructions defining "legal cause" in cases involving claims of civil theft and claims by employees against employers possibly subject to the exception to Workers' Compensation immunity.

Proposed instructions 411.4a. and 414.4a., apparently mistakenly, refer to actions being a cause of "severe emotional distress." Such severe emotional distress is not likely to be a consequence of civil theft, and is not necessarily an element of a tort claim against an employer. Apparently the language was imported from the definition of legal cause in cases involving extreme outrageous conduct (Instruction 410.6a.) and was not appropriately modified. Therefore, these two instructions should be corrected before being submitted to the Florida Supreme Court for approval.

Proposed Instruction 414.5—Workers' Compensation Immunity Exception

The Florida Justice Association submits that proposed instruction 414.5 should be recommended for adoption and approval by the Supreme Court of Florida, because the proposed instruction accurately reflects Florida law concerning the matter in question in a clear and understandable form.

Proposed Instruction 503.1—Punitive Damages

The Florida Justice Association submits that proposed instruction 503.1, dealing with punitive damages, should be revised before being recommended for adoption and approval by the Supreme Court of Florida so as to substitute another term for the term "guilty," where the instruction states that, "[p]unitive damages are warranted against (defendant) if you find that clear and convincing evidence that (defendant) was guilty of intentional misconduct or gross negligence." Similarly, the Committee should substitute different language for the term "personally guilty" contained in all of the subparagraphs (2) (b), (c), and (d).

The FJA states that the term "guilty" is extremely misleading because it connotes a level of culpability equal to that which would support a criminal conviction. Jurors will invariably confuse the "clear and convincing" standard of proof applicable to punitive damages with the "beyond a reasonable doubt" standard necessary for a "guilty" verdict in a criminal case.

The FJA acknowledges that the term "guilty" has been used in standard instruction PD 1 previously approved by the Court. However, because the Supreme Court's committee is recommending revisions to instructions including the punitive damages instruction, instruction 503.1 should be revised to use less confusing terminology. Therefore, the instruction should not be recommended for approval by

the Supreme Court of Florida.

Respectfully submitted,

By: _____
FRANK M. PETOSA, President

TO PROMOTE THE ART OF ADVOCACY AND THE EFFICIENT ADMINISTRATION OF JUSTICE

FLORIDA CHAPTERS

May 12, 2008

ABOTA NATIONAL OFFICE
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Tracy Raffles Gunn, Chair
Supreme Court Committee on Standard Jury Instructions in Civil Cases
Fowler White Boggs Banker, P. A.
Post Office Box 1438
Tampa, Florida 33601-1438

Dear Chair Gunn:

FLABOTA (Florida Chapters of the American Board of Trial Advocates), an invitation only organization which is made up of trial attorneys, with a mix of fifty percent (50%) plaintiff attorneys and fifty percent (50%) defense attorneys, created a committee to review and comment on the proposed jury instructions as published on May 15, 2008. The committee was a balanced one, with three defense attorneys and three plaintiff attorneys, and its suggestions have been adopted by FLABOTA's Executive Committee. On behalf of FLABOTA, we wish to submit the following comments regarding the proposed jury instructions as published on May 15, 2008:

Our first concern involves instructing the jury prior to the beginning of the trial. Full instructions at the beginning of the trial, when the substantive issues that are ultimately decided by the jury can and often do change throughout the trial, causes us great concern. Should the substantive instructions change by the end of the trial, the court would be left with explaining the differences and, perhaps, giving emphasis to a particular instruction or issue, unfairly. This concern is amplified if the judge gives copies of the instructions to the jury for its use throughout the trial, only to have to collect the wrong instructions and replace them. Given how trials can take on a life of their own, including the dismissal of some claims, directed verdicts being granted, pleadings being amended to conform to the evidence, etc., we strongly urge that the only instructions that are given at the onset of the trial be the ones that are given in virtually every civil jury trial (concerning the introduction of evidence or the weighing of the credibility of the witnesses, etc). and not substantive instructions. We do support the giving of the instructions prior to closing argument.

Second, we have strong concerns regarding the rewording of "Greater Weight of the Evidence." new jury instruction 404.3. Our concern is with the new additional sentence: "To prove a claim (or defense) by the greater weight of the evidence, the party must convince you, by the evidence presented in court, that what (he) (she) (it) is trying to prove is probably true." The original instruction on "greater weight" is felt to be one of the most clear instructions. The additional language, we believe, creates confusion where there has not been any, and will generate more disagreement among the jurors as to the meaning of greater weight.

FLORIDA CHAPTERS

Third, we are extremely concerned that instruction 4-1.12 (b) on Concurrent Cause does not accurately reflect the current state of the law and that the words that are included in the Intervening Cause instruction "acts of another"," natural cause" be included in the Concurrent Cause instruction.

Lastly, we have been studying the bad faith instructions and, due to time issues, have not been able to form a response yet, but have every intention of doing so.

We would like to commend the committee for its hard work on this very worthy endeavor in creating instructions that are more user friendly. On behalf of FLABOTA, we would also thank the Committee for their consideration of our comments.

Respectfully submitted,

Patricia D. Crauwels

Patricia D. Crauwels
FLABOTA President-elect and
Chair of Special Committee

-----Original Message-----
From: StHeintz@aol.com [mailto:StHeintz@aol.com]
Sent: Wednesday, July 30, 2008 10:41 AM
To: tgunn@gunnappeals.com
Subject: Proposed Jury Instruction

Dear Ms Gunn

Adding the word "convinced" to the greater weight of the evidence instruction would be a substantive change in the law. If the purpose is to clarify, I believe the mark has been missed. Greater weight of the evidence-more likely than not is more clear and easier to understand as it is. Adding "convinced" elevates the burden and injects confusion. Please do not recommend that change. Thank you for considering my opinion.

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-----Original Message-----
From: John Alpizar [mailto:John@AlpizarLaw.com]
Sent: Wednesday, July 30, 2008 10:33 AM
To: tgunn@gunnappeals.com
Subject: proposed jury instructions

Dear Ms. Gunn

I saw the proposed revisions to the civil jury instructions in the Florida Bar News. While we all appreciate any efforts to make the instructions clearer for jurors, we must be careful in making such changes. The proposed change to 401.3 ?The Greater Weight of the Evidence? in which the jury is told they must be ?convinced? is inappropriate and confusing. The word convinced connotes something more than the greater weight of the evidence or ?more likely than not.?

I would urge the committe to back off of this language. As a lawyer that trys alot of personal injury cases I can tell you without reservatons that defense attorneys will seize on this word to argue to juries that a higher standard of proof is required due to the language in the instruction. Greater weight is adequately covered in the instructions currently being used. To add the word "convinced" implies that the level of proof in civil cases must be without doubt. While that may be the standard in criminal cases it is not in civil cases.

I appeciate the efforts of the committee but would urge you to revisit this issue.

thank you.

O. John Alpizar, Esq
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July 30, 2008

Tracy Raffles Gunn, Chair
Florida Bar Committee on
Civil Jury Instructions
Gunn Appellate Practice, P.A.
777 S. Harbour Island Blvd., Ste. 770
Tampa, FL 33602

Dear Ms. Gunn:

This is in regard to the proposed revisions to the Civil Jury Instructions published in the *Florida Bar News*.

My concern is with regard to the proposed change to SJI 401.3 "Greater weight of the evidence". The use of the word "convinced" would, in my opinion, confuse the ordinary negligence standard with the higher "clear and convincing" standard required for situations where a higher standard of proof above ordinary negligence is required.

I urge that the word "convince" not be use with regard to the Standard Jury Instruction on ordinary negligence.

Sincerely,

David H. Burns

DHB/hjd

cc: Honorable James Manly Barton, II, Vice Chair

-----Original Message-----
From: Sean Domnick [mailto:SCD@acallforjustice.com]
Sent: Wednesday, July 30, 2008 10:10 AM
To: tgunn@gunnappeals.com
Cc: dprather@palmbeachlaw.com, gwc@bclclaw.com, shawkins@jones-foster.com, lsmall@smallawpalmbeach.com
Subject: proposed civil jury instructions

Dear Ms. Gunn:

I saw the proposed revisions to the civil jury instructions in the Florida Bar News. While we all appreciate any efforts to make the instructions clearer for jurors, we must be careful in making such changes. The proposed change to 401.3 ?The Greater Weight of the Evidence? in which the jury is told they must be ?convinced? is inappropriate and confusing. The word convinced connotes something more than the greater weight of the evidence or ?more likely than not.? Convince is defined as to ?persuade someone or make them certain.? A ?convincing win? is a win or victory in which the person that wins is **much** better than the person they are competing against. These definitions are found in The Cambridge Dictionary. I believe that the effect of adding the word ?convince? to the instruction is to elevate the burden required on a particular issue. In fact, we already have a heightened standard in some situations, such as punitive damage claims, of ?clear and convincing? evidence. To add the word ?convince? for ordinary negligence claims takes us closer to that heightened standard and is unwarranted under the law. I strongly urge the committee to step back from this recommendation. Such a move, however well intentioned, will create confusion rather than clarify. Thank you for your attention to this matter.

Sean C. Domnick
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-----Original Message-----
From: Dock Blanchard [mailto:DBlanchard@bmaklaw.com]
Sent: Wednesday, July 30, 2008 01:19 PM
To: tgunn@gunnappeals.com
Cc: flrt@yahoogroups.com
Subject: Jury Instructions

Dr. Ms. Gunn:

I believe that the use of ?convincing? is inappropriate and confusing?it contradicts the whole concept of ?greater weight? We should not obfuscate in our efforts to clarify.

Dock A. Blanchard

Board Certified Appellate Practice and Civil Trial

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Ocala,Fl 34478

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-----Original Message-----
From: Dutch Anderson [mailto:gha@bestandanderson.com]
Sent: Monday, August 4, 2008 02:44 PM
To: tgunn@gunnappeals.com
Subject: Proposed jury instruction change

Dear Ms. Gunn:

As a civil trial lawyer, I write to oppose any change in the instruction regarding the "greater weight of the evidence." Specifically, changing it to tell the jury they must be "convinced" is misleading. It gives the impression (and the defense will vigorously argue) that something more than the "greater weight of the evidence" is required. It will lead to a de facto higher standard than that which the law calls for.

I can hear the closing now..."If you aren't clear...if you aren't convinced...". The standard for clear and convincing evidence will be subsumed in ordinary negligence. While some may wish that result, it is not the law. I strongly oppose this change.

Thank you for your work and that of the committee in looking at these matters.

George H. "Dutch" Anderson III

Board Certified Civil Trial Lawyer

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-----Original Message-----
From: Neil Anthony [mailto:nanthony@injurylawyers.com]
Sent: Saturday, August 9, 2008 03:01 PM
To: tgunn@gunnappeals.com
Cc: 'Michael Steinger', 'Gary Iscoe'
Subject: Proposed civil jury instructions

Dear Ms. Gunn,

I am writing to you to voice a widely shared concern about the proposed change to the *Greater Weight of the Evidence* instruction.

The proposed phrase, "the party must convince you", is an addition that can mislead juries. Webster's dictionary defines the word "convince" as "to overcome the doubts of...to make or feel sure". Thus, the word will lead juries to believe that they must be sure and free of doubt before returning a plaintiff's verdict.

There is no question that the point can be argued in an almost infinite number of ways. On both sides. What is clear, however, is that some or many countless future juries would be misled.

An addition to the existing instruction is unnecessary. If a change must be made, a more neutral addition would read as follows:

> **"To prove a claim by the greater weight of the evidence, the party making the claim [or defense] must prove, by the evidence presented in court, that what [he][she][it] is trying to prove is more likely true than not."**

Thank you in advance for your consideration.

Neil P. Anthony, Esq.
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Mellon United Bank Building
1645 Palm Beach Lakes Boulevard, 9th Floor
West Palm Beach, Florida 33401
Direct (561)932-1504
Fax (561)721-1148

-----Original Message-----
From: Neil Anthony [mailto:nanthony@injurylawyers.com]
Sent: Wednesday, August 13, 2008 09:28 AM
To: tgunn@gunnappeals.com
Subject: Proposed civil jury instructions

Dear Ms. Gunn,

I am writing to express concern about the proposed change to the *Greater Weight of the Evidence* instruction.

The proposed phrase, "the party must convince you", used in the same sentence just before the expression, "more likely true than not" creates confusion. If a thing is "more likely" it does not necessarily follow that a person must be "convinced" of that thing. "Convinced" is a greater burden than "more likely". It takes more to be "convinced" than it does to believe a something is "more likely".

An addition to the existing instruction is unnecessary. If a change must be made, a more neutral addition would read as follows:

> **"To prove a claim by the greater weight of the evidence, the party making the claim [or defense] must prove, by the evidence presented in court, that what [he][she][it] is trying to prove is more likely true than not."**

Thank you in advance for your consideration.

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August 6, 2008

Via E-mail tgunn@gunnappeals.com

Tracy Raffles Gunn,
Committee Chair
Supreme Court Committee on
Standard Jury Instructions
Gunn Appellate Practice, P.A.
777 South Harbour Island Blvd.
Suite 770
Tampa, FL 33602

Dear Ms. Gunn:

I am writing this letter to urge the Committee to reconsider its proposed changes to civil jury instructions which were published in the Bar Journal of August 1, 2008.

I believe that the current "greater weight of evidence" instruction does not need amplification and that the Committee's proposed change, emphasizing the word "convince", creates ambiguity and confusion. In fact I was very surprised at the Committee's emphasis on the word "convince" to describe the burden of proof required by the "greater weight of the evidence" when MI 11d already contains the following critical distinction:

> **"Clear and convincing evidence" differs from the "greater weight of the evidence" in that it is more compelling and persuasive. "Clear and convincing evidence" is evidence that is precise, explicit, lacking in confusion, and of such weight that it produces a firm belief or conviction without hesitation about the matter in issue.**

I would prefer that you **not** attempt to "improve" upon the FSJI "greater weight of evidence" instruction already in effect; but if the Committee feels that is **must** do so, then I would suggest the following modification of your proposed instruction:

> "Greater weight of the evidence" means the more persuasive and convincing force and effect of the entire evidence in the case. In order to prevail on an issue, the party which bears the burden of proof on that issue must introduce evidence showing that its position is more likely than not reflective of the truth.

Second, with respect to the proposed "failure to maintain records" instruction, I believe that the final sentence is unnecessary, confusing and does not reflect the Supreme Court's intent in *Public Health Trust v. Valcin*, 507 So.2d 596 (Fla. 1987). I would eliminate the second sentence.

Thank you for this opportunity to comment on the proposed instructions. I have been a trial attorney in Miami-Dade County for over thirty years and hope that my input will be useful.

Very truly yours,

TIMOTHY CARL BLAKE (electronic signature)

TIMOTHY CARL BLAKE, ESQ.

TCB/lr

From: Law Offices of Butler & Boyd, P.A. [mailto:jamestbutler@ij.net]
Sent: Wednesday, August 06, 2008 9:05 AM
To: 'tgunn@gunnappeals.com'
Subject: Proposed civil jury instructions

Dear Ms. Gunn:

I saw the proposed revisions to the civil jury instructions in the Florida Bar News. The proposed change will change the burden of proof for the plaintiff and make it too close to the criminal standard of proof.

The proposed change to 401.3 "The Greater Weight of the Evidence" in which the jury is told they must be "convinced" is inappropriate and confusing. The word convinced connotes something more than the greater weight of the evidence or "more likely than not." Convince is defined as to "persuade someone or make them certain." A "convincing win" is a win or victory in which the person that wins is **much** better than the person they are competing against. I believe that the effect of adding the word "convince" to the instruction is to elevate the burden required on a particular issue. In fact, we already have a heightened standard in some situations, such as punitive damage claims, of "clear and convincing" evidence. To add the word "convince" for ordinary negligence claims takes us closer to that heightened standard and is unwarranted under the law.

I strongly urge the committee to step back from this recommendation. Thank you for your attention to this matter.

James T Butler
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-----Original Message-----
From: Lincoln Connolly [mailto:LJC@rbrlaw.com]
Sent: Tuesday, August 12, 2008 06:55 PM
To: tgunn@gunnappeals.com
Subject: Comment on Proposed CJI 401.3

To: Tracy Raffles Gunn, Committee Chair
Supreme Court Committee on Standard Jury Instructions in Civil Cases
Gunn Appellate Practice, P.A.
777 South Harbour Island Boulevard
Suite 770
Tampa, FL 33602
tgunn@gunnappeals.com

Dear Chairperson Gunn:

I contact you to furnish the Committee with a comment upon proposed jury instruction 401.3 "Greater Weight of the Evidence".

The revised instruction, as proposed, instructs the jury that either party pressing a claim or defense must "convince" the jury that the claim or defense is more likely than not true. In my view, this may psychologically skew the burden or proof upward for both sides, by subliminally increasing that burden above "more likely than not" to "convincing". That is, currently plaintiffs do not have to convince the jury in their case and defendants do not have to convince the jury in their counterclaims, crossclaims, and affirmative defenses. Each party must only persuade the jury that something is more likely than not.

As such, I respectfully suggest that the word "persuade" be substituted for "convince," so that the revised instruction (with the substituted addition underlined) reads as follows:

"Greater weight of the evidence" means the more persuasive and convincing force and effect of the entire evidence in the case. To prove a claim [or defense] by the greater weight of the evidence, the party must persuade you, by the evidence presented in court, that what [he] [she] [it] is trying to prove is more likely than not true.

I thank the Committee for its efforts and consideration.

Respectfully submitted,

Lincoln J. Connolly
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-----Original Message-----
From: Robert J. Fiore, Esq. [mailto:robert@fiorelawoffice.com]
Sent: Sunday, August 3, 2008 07:21 PM
To: tgunn@gunnappeals.com
Subject: proposed civil jury instructions

Dear Ms. Gunn:

I read with interest the proposed revisions to the civil jury instructions in *The Florida Bar News* and am concerned with what I read. Specifically, I would not recommend the proposed change to 401.3 ?The Greater Weight of the Evidence? in which the jury is told they must be ?convinced.? As I see it, this word indicates a higher burden than the greater weight of the evidence or ?more likely than not? standard which is the law in ordinary negligence case. This is inconsistent with Florida law in my opinion and will inject confusion into the process of jurors deciding questions of fact.

I appreciate the efforts of the committee. However, for the reasons above, I strongly urge the committee to reconsider this recommendation.

Thank you.

Robert J. Fiore, Esquire

Robert J. Fiore, P.A.

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RISSMAN, BARRETT, HURT, DONAHUE & McLAIN, P. A.

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CHRISTINE V. ZHAROVA

August 21, 2008

Tracy Raffles Gunn, Committee Chair
Gunn Appellate Practice, P.A.
777 South Harbour Island Blvd.
Suite 770
Tampa, Florida 33602

Re: Civil Jury Instructions

Dear Ms. Gunn:

We have reviewed the proposed Civil Jury Instructions recently published by the Committee. For ease of reference, a copy of the proposed Civil Jury Instructions is attached.

REQUEST FOR INFORMATION

We are interested in determining the reasons that the Committee has generated the proposed changes in the Civil Jury Instructions. We would appreciate it if you would provide us with the transcript of the Committee's meetings regarding the proposed instructions.

As a threshold issue, we would question the need for changes to the existing instructions governing these areas. We are unaware of any court, either trial court or appellate court, that has suggested the need for changes in existing jury instructions or the need for the new jury instructions that the Committee has proposed. Please advise if your committee is aware of any such court ruling.

We understand the Committee prepares proposed standard jury instructions only in those areas in which the law is settled and no controversy exists. It is clear that the proposed instructions are highly controversial and are not appropriate to become the subject of standard jury instructions.

For example, in regard to Florida Statute Section 766.102(3) and Florida Statute Section 395.0197, we are not aware of any trial court or appellate court ruling finding that there is a private cause of action on behalf of a plaintiff based upon those statutes. No court to our knowledge has recognized that a plaintiff may pursue a cause of action for negligent failure to maintain records. Moreover, we cannot conceive of any factual scenario in which a plaintiff would be able to prove medical causation for failure to maintain a record. We are especially troubled that the Committee is proposing new jury instructions which apparently have the effect of creating new causes of action.

401.3 GREATER WEIGHT OF THE EVIDENCE

The Committee has proposed adding a second sentence to Florida Standard Jury Instruction 3.9 - Greater Weight (Preponderance) of Evidence Defined. The Committee has proposed to instruct the jury that to prove a claim or defense of the greater weight of the evidence, a party must convince the jury, by the evidence presented in court, that what the party is trying to prove is more likely true than not true.

We strongly object to the additional sentence being added to an instruction which has worked perfectly well for many years. We are unaware of any court finding that FSJI 3.9 is incomplete or inadequate. It is our belief that the addition to

FSJI 3.9 is unnecessary and actually has the potential to confuse a jury. The wording of the proposed amended instruction is troublesome. A party does not prove a claim or a defense by persuading a jury that the claim or the defense is true or not true. A party prevails in proving a claim or defense by proving that its position is the more persuasive and convincing position on that claim or defense.

402.4(c) FOREIGN BODIES

We do not believe that the proposed instruction accurately reflects applicable case law. Further, if a statutory section is going to be relied upon and the evidence supports giving the instruction to the jury, then in that event FSJI 4.11 should be used and the statute should be quoted accurately.

We suggest this proposed instruction creates a conflict with Section 90.302, Fla. Stat. involving presumptions. Under that evidentiary statute, presumptions affect the burden of producing evidence requiring the finder of fact to assume the existence of the presumed fact unless there is credible evidence sufficient to sustain a finding of the nonexistence of the presumed fact, in which case the jury is left to weigh the facts without reference to the presumption.

However, the proposed jury instruction 402.4(c) misleads the jury into thinking that a case is "proven" if there is a foreign body found. Section 766.102(3) uses the term "prima facie" to explain that the existence of certain specifically named foreign bodies "... shall be prima facie evidence of negligence ...".

The definition of "prima facie" is that the proponent has fulfilled the duty of producing evidence and that there is sufficient evidence for the jury to consider the claim. See, Ehrhardt, Florida Evidence, Section 301.2. All that means is that the proponent who presents a prima facie case can survive a motion for directed verdict on the issue - it does not create an irrebuttable presumption of negligence. The proposed instruction inappropriately extends the law set forth in Florida

Statutes §766.102(3) by informing a jury as case has been proven when the law is otherwise.

402.4(d) FAILURE TO MAINTAIN RECORDS

We believe that the proposed instruction is inaccurate and vague. The instruction begins by telling the jury that the law requires defendant as a licensed healthcare provider to prepare and maintain healthcare records. The jury is left to speculate as to what records are required by the law and given no guidance on the standard by which to decide the issues before it.

Florida case law already provides for a method of instructing a jury regarding lost or missing evidence. In ***Public Health Trust v. Valcin***, 507 So.2d 596 (Fla. 1987), the Florida Supreme Court set forth in great detail the method to be used by a court in instructing a jury regarding missing evidence.

The proposed instruction also inaccurately describes the effect of any rebuttable presumption. If the defendant produces evidence regarding an explanation for the missing records, the presumption then vanishes and a jury should not be instructed on the issue of missing records.

Proposed instruction 402.4(d) appears to create a cause of action from a presumption arising from ***Valcin***, supra. Presumptions are not causes of action. Under ***Valcin***, any purported "conclusive presumption" from "missing records" is invalid.

The evidence of "missing records" is first limited to actions due to the deliberate actions or omissions of a healthcare provider. The language of deliberate actions or omissions does not exist in the proposed instruction.

The absent record must also bear on the issues in the malpractice action. There is no limitation in the proposed instruction limiting the missing record to the issues of malpractice. Most importantly, the proposed instruction removes the burden from the plaintiff to " ... establish to the

satisfaction of the court that the absence of the records hinders his ability to establish a prima facie case" as established in ***Valcin***.

402.4(f) RISK MANAGEMENT AND COMPETENCE OF STAFF

The legislature did not indicate that it intended Florida Statute Section 395.0197 to create a private cause of action for violation of its requirements. Instead, the legislature enacted Florida Statute Section 395.0197 to require healthcare institutions to implement risk management practices to enhance patient care. The statute was not created to expose a healthcare institution to liability if it does not comply with the requirements of the statute.

We are not aware of any court that has upheld a private cause of action asserted by a patient against a healthcare institution for alleged violation of Florida Statute Section 395.0197. To our knowledge, the Florida Supreme Court has not requested formulation of such an instruction.

The proposed instruction purports to say that failure to conform to the statutory requirements for a healthcare risk management program is "negligent," wholly ignoring any reference to whether the failure caused injury. Even if the instruction is reworded to say that a failure to conform to the statutory requirements that causes injury to the plaintiff is negligence, there are statutory immunities from liability that appear to negate, if not limit, the ability of a court to find legal liability.

Florida Statute Sect. 395.0197 (cited in the proposed instruction) states, at subsection (16):

> "There shall be no monetary liability on the part of, and no cause of action for damages shall arise against, any risk manager, licensed under Section 395.10974, for the implementation and oversight of the internal risk management program in a facility licensed under this chapter or chapter 390

> as required by this section, for any act or proceeding undertaken or performed within the scope of the functions of such internal risk management program if the risk manager acts without intentional fraud."

The statutory immunity of the individual risk manager introduces a fatal flaw in finding the healthcare organization liable. An organization is, in accordance with law, held vicariously liable for the acts or omissions of its officers, agents or employees.

In subsection (17) of the statute, it is stated that "[a] privilege against civil liability is hereby granted to any licensed risk manager or licensed facility with regard to information furnished pursuant to [the statute], unless the risk manager or facility acted in bad faith or with malice in providing such information."

In order to prove that a defendant's risk management program was deficient in some way, it is inescapable that the information generated by the program will be the nucleus around which the case is built. If there is a blanket immunity from civil liability attached to the furnishing of information, an action based on such allegations cannot be maintained.

Section 395.0197(16) indicates that there would be no monetary liability for any action taken pursuant to that statute unless there was intentional fraud. This proposed instruction also fails to note that the existence of certain immunities pursuant to statute as well.

It is important to consider the public policy behind the Legislature's inclusion of these immunities in the statute. If healthcare risk management is to function properly, those involved must be secure from the threat of liability for their decisions in creating and operating their internal programs. To open the door to lawsuits and claims of negligence has the potential to inhibit the programs and discourage individuals from entering or remaining in the field of healthcare risk management.

Finally, the Department of Health has the responsibility to ensure compliance with Florida Statute §395.0197. There is no need for this institution in a civil context when the only available remedy is administrative.

CONCLUSION

For the reasons set forth above, we urge the committee to refuse to adopt the proposed changes in existing instructions and to not accept the proposed new instructions. The proposed changes are not necessary nor are the provisions accurate. The proposed instructions concern areas of law which are not settled on causes of action which do not exist.

Very truly yours,

Jennings L. Hurt III
Richard S. Womble

RSW/sdr/vmw/res

Enclosure

cc: All Committee Members
Justice R. Fred Lewis

Proposed civil jury instructions

The Supreme Court Committee on Standard Jury Instructions in Civil Cases noticed proposed changes and new instructions for public comment on April 15 and May 1. As a result of comments received, the committee proposes the following changes in the proposed instructions. Comments are again invited. After reviewing all comments, the committee may submit these proposals to the Florida Supreme Court. Send all comments concerning these proposed changes to Tracy Raffles Gunn, Committee Chair, Gunn Appellate Practice P.A., 777 S. Harbour Island Blvd. Suite 770, Tampa 33602 or e-mail comments to her at tgunn@gunnappeals.com. Comments must be received by August 15 to ensure that they are considered by the committee.

The changes are as follows:

401.3 GREATER WEIGHT OF THE EVIDENCE
"Greater weight of the evidence" means the more persuasive and convincing force and effect of the entire evidence in the case. To prove a claim [or defense] by the greater weight of the evidence, the party must convince you, by the evidence presented in court, that what [he] [she] [it] is trying to prove is more likely true than not true.

402.4(c) FOREIGN BODIES:
[Negligence is the failure to use reasonable care]. The presence of (name foreign object) in (patient's) body proves negligence unless (defendant(s)) prove(s) otherwise by the greater weight of the evidence.

NOTE ON USE FOR 402.4(c)
Derived from Fla. Stat. 766.102(3). The statute uses the term "prima facie evidence of negligence." The committee recommends that this term not be used in the instruction, as it is not helpful to a jury. See, e.g., State v. Kahler, 232 So. 2d 166, 168 (Fla. 1970) ("prima facie" means "evidence sufficient to establish a fact unless and until rebutted.").

402.4(d) FAILURE TO MAINTAIN RECORDS:
[Negligence is the failure to use reasonable care]. The law requires (defendant) as a licensed health care provider to prepare and maintain health care records.

[Because (defendant) did not [make] or [maintain] (describe missing record(s)),]

or
[If you find that a person who was responsible for [making] [or] [maintaining] (describe the missing record(s)) failed to [make] [or][maintain] such record(s),]
you should presume that the missing record(s) contained evidence of negligence unless (defendant) proves otherwise by the greater weight of the evidence. You may consider this presumption, together with the other facts and circumstances in evidence, in determining whether (defendant) was negligent.

NOTE ON USE FOR 402.4(d)
The first indented bracket should be used if there is no issue about whether the defendant

failed to make or maintain records. If there is an issue about the failure to make or maintain records, then the second indented bracket should be used.

402.4(f) RISK MANAGEMENT AND COMPETENCE OF STAFF:
[Negligence is the failure to use reasonable care]. Healthcare facilities have a duty to assure comprehensive risk management and the competence of their medical staff and personnel, including but not limited to:

1. [Adopting written procedures for the selection of staff members and a periodic review of the medical care and treatment rendered to patients by each member of the medical staff];

2. [Adopting a comprehensive risk management that includes (list applicable provisions from section 395.0197, Florida Statutes)];

3. Initiating and diligently administering [such medical reviews] [and] [risk management process] including the supervision of the medical staff and personnel to the extent necessary to ensure that [the medical reviews] [and] [risk management processes] are being diligently carried out.

Failure to use reasonable care to [create] or [administer] such procedures is negligence.

-----Original Message-----
From: Greg King [mailto:greg@kinglawfirm.org]
Sent: Wednesday, July 30, 2008 01:05 PM
To: tgunn@gunnappeals.com
Subject: Civil Jury Instruction Changes

Dear Ms. Gunn:I disagree with the proposed change to 401.3 "The Greater Weight of the Evidence." Instructing a jury that they must be "convinced" is inappropriate and confusing. The word convinced indicates something more than the greater weight of the evidence or "more likely than not." In fact, convince indicates a certainty rather than "more likely than not." Adding the word "convince" to the instruction has the practical effect of elevating the burden in a negligence case. In fact, to convince, can be interpreted to be a higher standard than "beyond a reasonable doubt."

I ask that the committee remove this proposed change from its recommendation. Thank you for your attention to this matter.

Greg King

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-----Original Message-----
From: Blane G. McCarthy [mailto:bgm@bgmccarthy.com]
Sent: Tuesday, August 5, 2008 12:58 PM
To: tgunn@gunnappeals.com
Subject: Opposition to proposed change to 401.3

Ms. Gunn,

Thank you for your work chairing this committee. I am generally very pleased with the rewrite that your committee has done with the standard jury instructions. They are clearer to understand (from the jury's end) and easier to work with (from the lawyer's end), with one notable exception...

The wording of the proposed 401.3 concerns me, particularly the inclusion of the word "convince". Indeed, the party with the burden of proof also has the burden of persuasion. Yet by instructing the jury that it must be "convinced" of anything will greatly confuse the GWE burden, misleading the jury to believe that more is required. "Convince" sounds more of a criminal burden of proof, beyond a reasonable doubt.

I would ask the committee to eliminate that word so as to not create a potential internal conflict in the instruction. The last sentence could be phrased as follows:

> "To prove a claim [or defense] by the greater weight of the evidence, the party must cause you to believe, by the evidence presented in court, that what [he][she][it] is trying to prove is more likely true than not true."

Please kindly forward my comments to the other members of your committee. Thank you.

Blane

--
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-----Original Message-----
From: Richard Moore, Jr. [mailto:RMoore@jaxlegalhelp.com]
Sent: Wednesday, July 30, 2008 02:53 PM
To: tgunn@gunnappeals.com
Subject: Proposed Civil Jury Instruction 401.3

I am writing to comment on the above proposed civil jury instruction. The addition of the language ?? the party must convince you?? is unnecessary and adds a burden greater than what is required to prove a case. Convince means, among other things, to make someone agree or make feel certain, something more akin to the criminal burden of proof or a heightened burden of proof which is more that the greater weight of the evidence. Black?s Law Dictionary, 6th ed., defines ?convincing proof? as such as is sufficient to establish the proposition in question, *beyond hesitation, ambiguity, or reasonable doubt,* in an unprejudiced mind. This is not the civil burden of proof. The instruction, in its current form, is the model of simplicity and more than adequately describes what the greater weight means. Why the committee would want to change this is a mystery to me. I object.

J.Richard Moore Jr. Esq.

Rahaim, Watson, Dearing & Moore, P.A.

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-----Original Message-----
From: Andrew Needle [mailto:ANeedle@needleellenberg.com]
Sent: Thursday, July 31, 2008 11:00 AM
To: tgunn@gunnappeals.com
Cc: dprather@palmbeachlaw.com, gwc@bclclaw.com, shawkins@jones-foster.com, lsmall@smallawpalmbeach.com
Subject: proposed civil jury instructions

Dear Ms. Gunn:

I saw the proposed revisions to the civil jury instructions in the Florida Bar News. The proposed change to 401.3 "The Greater Weight of the Evidence" in which the jury is told they must be "convinced" is a confusing statement of the law, that mischaracterizes the actual burden that the Plaintiff has, which is merely "the greater weight of the evidence"-- 51% vs. 49% etc. Not to "convince" a juror, which communicates a far greater burden than merely "the greater weight". I urge you and the committee to reconsider the proposed language. Thanks.

Andrew Needle
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Fax: 305.530.0000
ANeedle@needleellenberg.com
www.needleellenberg.com

-----Original Message-----
From: J. Steele Olmstead [mailto:prsistns@tampabay.rr.com]
Sent: Thursday, July 31, 2008 03:47 PM
To: tgunn@gunnappeals.com
Subject: Change to great weight of evidence is not merited.

Dear Ms. Gunn:
I do not usually read the The Florida Bar *News*, but I do glance at topics I am interested in. I have wanted to be on the J.I. When I read the proposed revisions to the civil jury instructions, I was disturbed. I do appreciate any clarifications instructions for jurors, but we must be careful in making such changes without altering the import of the instructions . The proposed change to 401.3 ?The Greater Weight of the Evidence? in which the jury is told they must be ?convinced? is just such an inappropriate alteration. The word "convinced" connotes something **more** than the greater weight of the evidence or the equivalent ?more likely than not.? "Convince" is defined as to ?persuade someone or make them certain.? A ?convincing win? is a win or victory in which the person that wins is **much** better than the person they are competing against. This appears to These definitions are found in The Cambridge Dictionary. Adding the word ?convince? to the instruction is to elevate the burden required on a particular issue. As any trial lawyer will tell you, we already have a heightened standard in some situations, such as punitive damage claims, of ?clear and convincing? evidence. To add the word ?convince? for ordinary negligence claims takes us closer to that heightened standard and is unwarranted under the law.

I ask the committee to withdraw this recommendation. This insertion is not necesary, will create confusion and won't help the jury. Thank you for your attention to this matter.

J. Steele Olmstead

-----Original Message-----
From: Lisa Small [mailto:lsmall@smallawpalmbeach.com]
Sent: Sunday, August 3, 2008 11:57 PM
To: 'Sean Domnick', tgunn@gunnappeals.com
Cc: dprather@palmbeachlaw.com, gwc@bclclaw.com, shawkins@jones-foster.com
Subject: RE: proposed civil jury instructions

Dear Sean:

Thank you for taking the time to share your comments with us. I agree with your assessment of the proposed change to the civil jury instructions and in particular, that the word "convinced" connotes something more than the greater weight of the evidence. It definitely would lead to confusion and to jurors applying a stricter standard than required.

Best regards.
Lisa

-----Original Message-----
From: Sean Domnick [mailto:SCD@acallforjustice.com]
Sent: Wed 7/30/2008 10:10 AM
To: tgunn@gunnappeals.com
Cc: dprather@palmbeachlaw.com; gwc@bclclaw.com; shawkins@jones-foster.com; Lisa Small
Subject: proposed civil jury instructions

Dear Ms. Gunn:

I saw the proposed revisions to the civil jury instructions in the Florida Bar News. While we all appreciate any efforts to make the instructions clearer for jurors, we must be careful in making such changes. The proposed change to 401.3 "The Greater Weight of the Evidence" in which the jury is told they must be "convinced" is inappropriate and confusing. The word convinced connotes something more than the greater weight of the evidence or "more likely than not." Convince is defined as to "persuade someone or make them certain." A "convincing win" is a win or victory in which the person that wins is much better than the person they are competing against. These definitions are found in The Cambridge Dictionary. I believe that the effect of adding the word "convince" to the instruction is to elevate the burden required on a particular issue. In fact, we already have a heightened standard in some situations, such as punitive damage claims, of "clear and convincing" evidence. To add the word "convince" for ordinary negligence claims takes us closer to that heightened standard and is unwarranted under the law.

I strongly urge the committee to step back from this recommendation. Such a move, however well intentioned, will create confusion rather than clarify. Thank you for your attention to this matter.

Sean C. Domnick
Florida Bar Board Certified Civil Trial Attorney
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(f) 561-630-5654
scd@acallforjustice.com

-----Original Message-----
From: John J. Spiegel [mailto:jspiegel@bellsouth.net]
Sent: Wednesday, July 30, 2008 10:47 AM
To: Tgunn@gunnappeals.com
Subject: Civil Jury instruction change

Dear Ms. Gunn:

I join with others who have voiced their concerns about a proposed civil jury instruction concerning the Greater Weight of the Evidence which advises juries to the effect that they must be "convinced." This is way beyond any common understanding of "more likely than not" or "50% plus one," and may even be a more stringent standard than "beyond and to the exclusion of reasonable doubt." The current instruction on Greater Weight is just fine as it is. I strongly urge the committee to decline to adopt any instruction which incorporates "convinced" as the standard.

I do appreciate your efforts. Thank you for your consideration.

--

John J. Spiegel
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305-539-0700
305-539-1894, fax
305-804-3051 mobile

-----Original Message-----
From: Michael J. Trentalange [mailto:mjt@trentalange.com]
Sent: Wednesday, July 30, 2008 10:59 AM
To: tgunn@gunnappeals.com
Subject: Proposed Civil Jury Instruction 401.3

Dear Ms. Gunn:

Before I offer my comments to you on proposed Civil Jury Instruction 401.3 (Greater weight), let me take a moment to thank you sincerely for your service on the committee. It is easy to criticize hard work done by others, but much more difficult to put forth the effort you and the rest of the committee undoubtedly have in crafting the proposed revisions. You are to be commended for making the selfless efforts you have.

I would respectfully suggest that the proposed jury instruction on greater weight of the evidence and burden of proof unintentionally raises the familiar preponderance standard to something else. Use of the word ?convince? is particularly troubling, since it resembles the ?clear and convincing? standard applicable in punitive damages cases. It also implies that a jury can have no doubts when the fact is that a jury may have considerable doubts, so long as they believe that the party with the burden of proof has demonstrated facts to be ?more likely than not? true.

Please pass these comments on to the rest of the committee (along with my thanks for their service as well).

Sincerely,

Mike Trentalange

Mike Trentalange, Esq.

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TAB D

SUPREME COURT COMMITTEE ON STANDARD JURY INSTRUCTIONS (CIVIL)

Casa Monica Hotel
95 Cordova
St. Augustine, Florida 32804
February 20-21, 2003
1:00 p.m. to 5:00 p.m. (Thursday)
8:30 a.m. to Noon (Friday)

(C) Appointments To Subcommittees.

Altenbernd solidified the existence of a series of standing subcommittees, some of which already exist. The standing subcommittees are as follows: (i) nominating; (ii) plain language; (iii) legislative implementation; (iv) hot topics and case law; (v) errors and omissions; and (vi) Florida Supreme Court filing.

The Supreme Court filing subcommittee will be responsible for filing proposed instructions with the Florida Supreme Court, once such proposed instructions have completed the committee's review and publication process. Its members are Altenbernd, Makar, and Gunn.

The hot topics and case law subcommittee will be comprised of Walsh, Cobb, Eaton, and Gunn. Walsh will chair this subcommittee.

The legislative implementation subcommittee will be comprised of Pillans, Mitchell, and Cacciatore. Mitchell will chair this subcommittee.

The errors and omissions subcommittee will be tasked with reviewing a portion of the jury instruction book for each meeting to ensure that the book as a whole makes sense and remains consistent. The subcommittee will start by reviewing the introduction and will report on that portion of the book at the July 2003 meeting. The subcommittee will be comprised of Artigliere, Austin, Gerald, and Strelec.

The plain language subcommittee will be tasked with coming up with one idea for improving the plain language of the instructions for discussion at each meeting. The subcommittee will be comprised of Berman, Wagner,

Makar, Ficarrotta, Caldwell, Lewis, Farmer, and Brown. Berman will chair this subcommittee.

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.

SUPREME COURT COMMITTEE ON STANDARD JURY INSTRUCTIONS (CIVIL)

The Breakers
One South County Road
Palm Beach, Florida 33480
July 10-11, 2003
1:00 p.m. to 5:00 p.m. (Thursday – Full committee meeting)
8:30 a.m. to 9:45 (Friday – Full committee meeting)
10:00 a.m. to noon (Friday – Joint Meeting with SJI Criminal Committee)

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.

SUPREME COURT COMMITTEE ON STANDARD JURY INSTRUCTIONS (CIVIL)

The Biltmore Hotel
1200 Anastasia Avenue
Coral Gables, Florida 33134
November 13-14, 2003
1:00 p.m. to 5:00 p.m. (Thursday – Full committee meeting)
8:30 a.m. to noon (Friday – Full committee meeting)

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.

SUPREME COURT COMMITTEE ON
STANDARD JURY INSTRUCTIONS (CIVIL)

Stetson Law Center
1700 N. Tampa St.
Tampa, Florida
February 19-20, 2004
1:15 p.m. to 5:00 p.m. (Thursday -- Full committee meeting)
8:30 a.m. to noon (Friday -- Full committee meeting)

5. PLAIN ENGLISH SUBCOMMITTEE (Tab 3).

(A) Instruction 2.2., Believability of Witnesses. The committee discussed the plain language revisions to instruction 2.2 set forth on pages 3-103 through 3-111.

Artigliere favors giving the jury a list of questions to consider similar to the criminal jury instructions. The permissive list allows the judge to tailor the questions so that only those relevant to the case are given. Graham and Mitchell agreed that the civil instructions should use a permissive list of questions, which allows the judge to tailor the instructions to the case and can be used by the attorneys during closing argument.

Strelec and Austin stated that they disagree with the revision eliminating the factors included in the current instruction 2.2. Brown countered that many jurors do not understand all of the terms used in the current instruction, such as "demeanor." Cacciatore advocated using the approach of the existing 2.2(a), but simplifying the language, for example, telling the jurors to use their common sense when evaluating the believability of witnesses.

Altenbernd stated that he is concerned that using a list of questions for the jury to consider may invade the province of the jury. Also, if the list is too long, the jurors may think that they are prohibited from considering other factors.

In response to concerns from former member Bill Wagner that the revision commented on the evidence, the instruction informs jurors that it is their job to determine the believability of the witness.

Stewart expressed concern with the length and emphasis injected by the list of questions. In his opinion, the proposal goes beyond providing a framework for the jurors and ignores that it is the attorney's responsibility to make arguments regarding the believability of witnesses. Similarly, Kahn expressed strong disagreement with using a list of questions, which invades the province of the jury. Altenbernd observed that the vast majority of committee prefers approach of the current 2.2.

(B) Gross v. Lyons Instruction. Altenbernd proposed postponing the discussion of the plain English revision to instruction 6.2g, regarding Gross v. Lyons, 763 So. 2d 276 (Fla. 2000), found at pages 3-112 to 3-113 until the July 2004 meeting.

SUPREME COURT COMMITTEE ON STANDARD JURY INSTRUCTIONS (CIVIL)

MINUTES

The Breakers
Palm Beach

July 8-9, 2004

Thursday, July 8, 2004 (Full Committee Meeting, 1:10 p.m. to 5:15 p.m.)
Friday, July 9, 2004 (Joint Committee Meeting with Criminal Instructions Committee, 8:30 a.m. to 11:25 a.m.)

a. **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.**

SUPREME COURT COMMITTEE ON STANDARD JURY INSTRUCTIONS (CIVIL)

MINUTES

Amelia Island Plantation
Amelia Island

October 21-22, 2004
October 21, 2004 (1:00 p.m. to 5:00 p.m.)
October 22, 2004 (8:30 a.m. to noon)

2. PLAIN ENGLISH (Tab 3)

Berman directed the committee's attention to page 3-112 and the draft revision of instruction 6.2.c, adopted in response to Gross v. Lyons. Berman explained that the subcommittee adopted Farmer's revisions.

Farmer noted that a problem arises if both the initial and subsequent tortfeasors are defendants in the case. Altenbernd stated that the instruction only applies when the defendant caused the later event. Mitchell believes that the draft captures the Gross v. Lyons situation. Cacciatore observed that the instruction could ask the jury to determine how much damage was caused by the first event.

Lewis suggested deleting the second sentence. Walsh countered that the second sentence is needed to convey the concept of separation to the jury.

Altenbernd suggested using the phrase "you should attempt to separate," similar to instruction 6.2.g. Brown feels that the phrase "try to separate" is written in plain English.

Campo commented that the proposed language will be confusing to a lay person. For example, the draft first uses the term "injury," and then asks the jury about the amount of "damages."

In addition, Campo feels the jury needs a brief introduction to explain why the instruction is being given. Farmer disagreed that an introduction is needed because the jurors have already been introduced to these topics. Berman observed that Campo's suggestion

presents a fundamental plain English issue. The subcommittee revised the instruction by starting with the existing instruction. A more fundamental revision may be needed to address plain English concerns.

The committee adopted Campo's suggestion and revised the first sentences to provide a brief introduction. The committee attempted to avoid language that could be interpreted as the judge commenting on the evidence. Altenbernd reminded the committee that when it originally drafted the Gross v. Lyons instruction, the committee struggled with the burden of proof and did not resolve the issue.

Wells suggested revising the structure of the instruction so that it parallels conversation (if you find A was hurt by B, then...). Altenbernd and Gunn agreed with Wells' suggestion. Altenbernd pointed out that adopting this approach will require a plain English revision of all of the instructions in tab 6. Austin added that the model charges will also need to be revised, to make sure that the revised instructions in tab 6 fit within the rest of the instructions. Berman questioned whether the committee should first ask the Supreme Court to approve marginal changes, so that it will understand the need to make wholesale plain English revisions.

Collectively, the committee revised the draft revision to 6.2.c as follows:

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You have heard that (claimant) **may have been injured in [two] events. If you find that** (claimant) **was injured by** (defendant) **and was also injured in a later event, you should try to separate the damages and award** (claimant) **only those damages caused by** (defendant). **However, you should award any damages that you cannot separate as if they were all caused by** (defendant).

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Altenbernd will immediately publish this draft revision to 6.2.c for comment with an explanation that the revision is an attempt to simplify the jury instruction by putting it in plain English. Altenbernd will also send the proposed revisions to groups with an interest in commenting. The proposed revision will not be submitted to the Supreme Court until the committee also completes a substantial revision to 6.2.g. Once 6.2.c and 6.2.g are complete, the committee will revise the rest of the instructions in tab 6. The Plain English Subcommittee will immediately consider 6.2.g.1 (aggravation or activation of disease or defect) and the draft of 6.2.d, which was not discussed at this meeting. If possible, the draft revision to 6.2.d will also be published for comment. Caldwell asked that plain English subcommittee copy the Negligence subcommittee with all correspondence on this issue.

Altenbernd also suggested that the committee write an article on the proposal. Berman remarked that the committee may want to submit an article explaining its plain English efforts, in response to article in the Florida Bar Journal on plain English that ignored the committee's efforts. Gunn explained that the Appellate Practice Committee submitted the prior article to the Journal and could submit this committee's article as an update. However, an article in the Bar News would be published quicker than an article in the Journal. **Berman will draft an article and coordinate with Rose regarding publication in the Bar News.**

SUPREME COURT COMMITTEE ON STANDARD JURY INSTRUCTIONS (CIVIL)

MINUTES

Stetson University College of Law
Tampa

February 17-18, 2005
February 17, 2005 (1:00 p.m. to 5:00 p.m.)
February 17 (8:30 a.m. to noon)

9. 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 begining 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 superflous 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.

SUPREME COURT COMMITTEE ON STANDARD JURY INSTRUCTIONS (CIVIL)

MINUTES
The Breakers
West Palm Beach, Florida

July 14-15, 2005
July 14, 2005 (1:00 p.m. to 5:00 p.m.)
July 15, 2005 (8:30 a.m. to noon)

3. ADMINISTRATIVE MATTERS (Tab 1).

A. Status of proposed instructions:

1. Jury Innovations: The committee's report remains pending at the Supreme Court.
2. Gross v. Lyons Instruction: Instruction 6.2(D) was published for comments on January 1, 2005. Inadvertently, it had not been published in the prior cycle. Altenbernd recommended that the committee adopted the comment of Judge Thomas Bateman set forth on page 3-144. The committee will submit the revised instruction to the Supreme Court.
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.

SUPREME COURT COMMITTEE ON STANDARD JURY INSTRUCTIONS (CIVIL)

MINUTES
Supreme Court of Florida
Tallahassee, Florida

November 3-4, 2005
November 3, 2005 (1:00 p.m. to 5:00 p.m.)
November 4, 2005 (8:30 a.m. to noon)

1. ADMINISTRATIVE MATTERS (Tab 1):

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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.

The subcommittee will revise the preliminary instructions to propose alternatives to the Court that will allow trial judges to vary from the standard preliminary instruction without giving reasons on the record. Makar will forward to Justice Lewis copies of the translator report and the jury innovations report that were previously filed with the Supreme Court. In the future, Justice Lewis will be provided with a courtesy copy of anything the committee files with the Court. Any specific

recommendations for amendments to instructions that were included in the jury innovations report will have to be resubmitted as a formal report to the Court requesting an amendment.

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10.ERRORS AND OMISSIONS (Tab 2): Artigliere reported that the subcommittee has completed a painstaking review through instruction 3.9. The subcommittee requested guidance on whether all the changes should be presented to the Court or once or in small increments. Justice Lewis responded that it is easier for the Court to address the revisions in small increments.

Makar asked Justice Lewis if the revised Introduction to the jury instructions book needs to be formally submitted to the Court. Artigliere believes there is not a problem with submitting the Introduction. Justice Lewis asked that the committee provide him with a courtesy copy of anything filed with the Court.

Artigliere will circulate to the committee the revisions the subcommittee made to the instructions though instruction 3.9. After the committee reviews these instructions, they will be published for comment. The subcommittee will continue correcting errors and omissions in meaningful portions of the jury instructions book. The committee will submit the revised Introduction to the jury instructions book to the Supreme Court. Justice Lewis will be provided a courtesy copy of all submissions to the Court.

SUPREME COURT COMMITTEE ON STANDARD JURY INSTRUCTIONS (CIVIL)

MINUTES

Stetson Law School
Tampa, Florida

February 23-24, 2006
February 23, 2006 (1:00 p.m. to 5:00 p.m.)
February 24, 2006 (8:30 a.m. to noon)

1. **ADMINISTRATIVE MATTERS** (Tab 1):
   C. Status of Proposed Instructions:
   i. Collateral Source Rule--6.13: The Florida Supreme Court issued an opinion today approving the proposed instruction.
   ii. Gross v. Lyons--6.2g(2): The Florida Supreme Court issued an opinion today approving the proposed instruction.
   iii. Translator instructions: The reports filed by this committee and the criminal instructions committee remain pending.

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.**

SUPREME COURT COMMITTEE ON STANDARD JURY INSTRUCTIONS (CIVIL)

MINUTES

The Breakers
West Palm Beach, Florida

July 13-14, 2006
July 13, 2006 (1:00 p.m. to 5:00 p.m.)
July 14, 2006 (8:30 a.m. to noon)

1. ADMINISTRATIVE MATTERS (Tab 1):

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C. Status of proposed instructions:

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iv. Jury Innovations: The committee complied with the Court's request to refile its report in another electronic format. The committee's response to the Jury Innovations Report remains pending. **Rose will e-mail the committee a link to the committee's response to the Jury Innovations Report.**

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2. REORGANIZATION OF BOOK (Tab 11). Lewis reported that pages 11-84 to 11-86 contain the subcommittee's draft Table of Contents of the reorganized jury instructions. Stewart explained that the subcommittee needs guidance from the committee on: (1) whether to give substantive instructions before the jury hears the evidence; (2) whether closing instructions should be given before or after closing arguments; and (3) what format should be used in the reorganized instructions. The subcommittee is also considering whether to reorder the sequence of the instructions and whether substantive instructions need plain English revisions.

Stewart suggested that the subcommittee could start by reorganizing the negligence instructions. After the committee approves the format of the negligence instructions, other subcommittees can use them as a guide to reorganize the rest of the instructions.

Artigliere commented that he likes the organization in the revised Table of Contents. Two new instructions may be required: (1) explaining that if there are any differences between the preliminary and closing instructions, the closing instructions control; and (2) giving the jury a procedure to use if they need to ask a question during deliberations. Graham responded that there may be a criminal instruction on the second issue. Makar may assign other subcommittees to fill any gaps in the instructions.

Graham observed that this project could be an opportunity for the committee to use its new website. Lewis agreed that it would be helpful to post the drafts on the website to get comments from the committee.

Makar directed the subcommittee to move forward with reorganizing the jury instructions book using the new Table of Contents. Makar will discuss the reorganization project with Justice Lewis to determine: (1) whether the Court is likely to support the project; and (2) whether there is a format the Court would prefer the committee to use when it submits the reorganized book for approval.

SUPREME COURT COMMITTEE ON STANDARD JURY INSTRUCTIONS (CIVIL)

MINUTES

Supreme Court Building
Tallahassee, Florida

November 2-3, 2006
Thursday, November 2, 2006 (1:00 p.m. to 5:00 p.m.)
Friday, November 3, 2006 (8:30 a.m. to noon)

1. ADMINISTRATIVE MATTERS (Tab 1):

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G. Jury Innovations. Makar reported that the Court has scheduled oral argument for February 14, 2007. Artigliere agreed to give the oral argument on behalf of this committee.

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6. PLAIN ENGLISH SUBCOMMITTEE (Tab 3): Makar explained that Berman will be rotating off the committee. Makar appointed Farmer to chair the subcommittee and added Bailey and Barton.

Stewart proposed making plain English revisions to the closing instructions and negligence. Once those instructions are revised, the same principles can be applied to the medical malpractice and products liability instructions.

Makar directed the subcommittee to make plain English revisions to the closing instructions. After the reorganization subcommittee reformats the negligence instructions, the plain English subcommittee will make plain English revisions to the negligence instructions.

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8. REORGANIZATION OF BOOK (Tab 11):

Lewis directed the committee's attention to the revised table of contents on pages 11-89 to 11-90. The subcommittee added a summary of contents and an instruction on taking notes. The subcommittee renamed some sections. For example, the "Evidence Instructions" section used to be called "Trial Instructions."

A key issue the committee must decide is when substantive instructions should be given. The subcommittee strongly recommends that the trial judge substantive instructions both in the beginning of the case and then again at the close of the case.

Lewis expects that the subcommittee will reorganize and format the negligence instructions before the February meeting. The negligence instructions are also crying out for plain English revisions, which will not be that difficult to make.

Stewart suggested that the reorganization committee focus on reformatting the negligence instructions for the February meeting. Members can then tackle a plain English review of the negligence instructions at the July meeting. Lewis agreed.

Cacciatore asked if the medical malpractice subcommittee can incorporate the changes made to the negligence instructions. Lewis responded that he and Stewart are on both subcommittees and will coordinate the revisions.

The reorganization subcommittee will reformat the negligence instructions for the February meeting. The medical malpractice subcommittee will make parallel revisions to the medical malpractice instructions.

SUPREME COURT COMMITTEE ON STANDARD JURY INSTRUCTIONS (CIVIL)

MINUTES
Tampa, Florida

DATES
Thursday, February 15, 2007 (1:00 p.m. to 5:00 p.m.)
Friday, February 16, 2007 (8:30 a.m. to noon)

1. ADMINISTRATIVE MATTERS (Tab 1):

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D. Status of proposed instructions:

(1) Jury Innovations: Artigliere updated the committee on the jury innovations argument he made before the Supreme Court on February 14. Artigliere noted that this committee's proposals are supported by the Supreme Court's recent directions. The main issue for the Court is how much discretion they are going to take away from judges in giving instructions. The Court is concerned about the issue of juror questions. The criminal rules committee and the criminal defense lawyers associations don't like allowing jurors to ask questions. Artigliere stated that his own opinion is that these concerns are not present in civil cases. However, they should be treated consistently. If a juror serves on a civil case and is allowed to ask questions, the juror will feel disenfranchised if they are later serving on a criminal jury and are not allowed to ask questions.

Regarding instructing the jury before final argument, Stewart asked whether Artigliere thought there will be any spillover from criminal defense lawyers. Artigliere thinks the answer is "yes." He stated that getting the criminal lawyers to understand that the civil context is different and could have its own set of different rules is very difficult. The criminal defense lawyers are ultimately concerned the prosecutor will have the last word if the judge doesn't give instructions after closing.

****

4. REORGANIZATION OF BOOK (Tab 11):

Stewart directed the committee's attention to the proposed template for substantive instructions and sample charge located on pages 11-93 and 11-94. The idea behind the template is that the most effective way to communicate to the jury is to tell them first what they have to do, then give them the rules necessary to accomplish that task, and then finally give them the general instructions. Thus, under the template, the jury is first instructed regarding the claims; second, the jury is given the applicable definitions and principles; third, the boilerplate/general instructions are given. Stewart stated that the subcommittee's goal is to get committee approval of the template, then to place the negligence instructions into this format and bring the finished product before the committee at the July 2007.

The committee then discussed the practicality of instructing the jury on the claims at the beginning of the case, and whether it would be more appropriate to read the definitions first. Stewart stated that the subcommittee had debated the idea of giving the definitions first and noted the committee's concerns.

Brown made a motion for approval of the template and the committee gave unanimous approval. Caldwell stated he would like to join the subcommittee.

The committee then discussed the necessity of combining book reorganization with the revisions made by the errors and omissions subcommittee, and the necessity of putting all instructions into plain English. **Farmer stated that the plain English subcommittee could revise the negligence instructions in plain English after the reorganization subcommittee reformats the instructions. The final draft of the negligence instructions will be presented at the July 2007 meeting.**

As a closing note, Stewart stated that if the template comes to fruition, there will be a large amount of new material for publication. Stewart suggested communicating early with the Florida Bar regarding the best way logistically to achieve publication and suggested a pre-publication notification. The committee also discussed giving early notification to the trial lawyers association, the defense lawyers association, circuit court judges, the Florida

Justice Association, and Florida Supreme Court liaison Justice Lewis.

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5. **PLAIN ENGLISH SUBCOMMITTEE** (Tab 3):
Farmer stated there is nothing to report.

SUPREME COURT COMMITTEE ON STANDARD JURY INSTRUCTIONS (CIVIL)

MINUTES
The Breakers
Palm Beach, Florida

[DATES]
July 12, 2007 (1:00 p.m. to 5:00 p.m.)
July 13, 2007 (8:30 a.m. to noon)

2. REORGANIZATION OF BOOK (Tab 11):

On behalf of the book reorganization subcommittee, Stewart presented the first proposed reorganized materials: the negligence and medical negligence instructions. Stewart informed the Committee that these revised instructions include some plain English changes that are not intended to alter substantive instructions. The instructions were reworked by the subcommittee following the template approved at the February 2007 meeting.

Stewart noted, however, that in order to rework the instructions, the numbering system had to be changed. He asked the Committee to review the new numbering system and to report back any comments. Stewart further noted that, in reworking the instructions, the subcommittee combined all notes on use and comments. As a result, there will no longer be any "comments," only "notes on use."

The Committee then reviewed each negligence instruction and provided the following comments/suggestions[1]:

401.1

Rose pointed out that the word "slightly" in line 6 should be in brackets.

Gunn suggested separating 401.1 into two parts -- 401.1 (a) and 401.1(b)-one for introductory use, and the other for use at closing. Stewart agreed and noted this change.

---

1 **The plain English changes made in this section should be applied to <u>all</u> instructions in this section as necessary.**

Gunn further suggested that the instructions inform jurors that they will get a complete set of written instructions before deliberations, so that they do not worry about remembering everything they are orally instructed on.

Gunn also noted that Barton suggested the Committee consider proposing a standard instruction to inform potential jurors about how the jury selection process will be handled. The Committee discussed whether this issue is proper for the Committee and decided not to pursue it at this time.

401.2

After discussion, instruction was revised to state:

> **The claims [and defenses] in this case are as follows. (Claimant) claims that (Defendant) was negligent in (describe alleged negligence), which caused [him] [her] harm.**
>
> **(Defendant) denies that claim [and also claims that (Claimant) was [himself] [herself] negligent in (describe the alleged comparative negligence), which caused [his] [her] harm]. [Additionally (describe any other affirmative defenses).]**
>
> **The parties must prove all claims [and defenses] by the greater weight of the evidence. I will now define some of the terms you will use in deciding this case.**

401.3

Farmer suggested removing the phrase "more likely than not" and replacing it with the word "probably." Wagner then suggested removing the phrase "When I tell you a party must" and beginning the second sentence with "To prove a claim…" Wagner also suggested taking out the phrase "I mean" in the following line. After further Committee discussion, the instruction was rewritten as follows:

> **"Greater weight of the evidence" means the more persuasive and convincing force and effect of the entire**

evidence in the case. To prove a claim [or defense] by the greater weight of the evidence, the party must convince you, by the evidence presented in court, that what [he] [she] [it] is trying to prove is probably true.

401.4

After considerable discussion regarding the wording of this instruction, whether the second sentence was necessary, and whether the word "same" in the proposed instruction should be changed back to the word "like" (as it was in the original instruction), the Committee revised the instruction as follows:

Negligence is the failure to use reasonable care, which is the care that a reasonably careful person would use under the same circumstances. Negligence is doing something that a reasonably careful person would not do under the same circumstances or failing to do something that a reasonably careful person would do under like circumstances.

401.5

After discussion, the Committee agreed the instruction be revised as follows:

Reasonable care on the part of a child is the care that a reasonably careful child of the same age, mental capacity, intelligence, training and experience would use under like circumstances.

Wells further noted that the last citation in the note on use (*Medina v. McAllister*) needs to be corrected (1) so that only the case name (and not the numerical citation) is italicized and (2) to add a period after "Fla." Corrected, the citation should read:

***E.g.*, *Medina v. McAllister*, 202 So. 2d 755 (Fla. 3d DCA 1967).**

401.6

Stewart noted that this instruction needs to be amended to comport with the revisions the Committee made to instruction 401.4. The Committee amended the instruction as follows:

Negligence is the failure to use reasonable care.

The (Defendant) is a common carrier. The reasonable care for a common carrier (or Defendant) is different than that required of an individual. Negligence of a common carrier may be doing something that a very careful person would not do under the like circumstances or failing to do something that a very careful person would do under like circumstances.

[In connection with the (Defendant's) defense, reasonable care is what a reasonably careful person would do under like circumstances. Negligence may be doing something that a reasonably careful person would not do under like circumstances or failing to do something that a reasonably careful person would do under like circumstances.]

Stewart also suggested that a note on use be added to address how to deal with situations involving multiple defendants. In that note, reference should be made to instruction 401.4 and the comparative fault instructions.

401.7

After considerable discussion, instruction 401.7 was rewritten as follows:

If you find that ordinarily the [incident or injury] would not have happened without negligence,

***[and that the (name the item) causing the injury was in the exclusive control of (name the defendant) at the time it caused the injury,] or**

***[that the (name the item) causing the injury was in the exclusive control of (name the defendant) at the time the negligent act or omission, if any, must have occurred and that the (name the item), after leaving the defendant's control, was not improperly used or handled by others or subjected to harmful forces or conditions,]**

you may infer that (name the defendant) was negligent unless, taking into consideration all of the evidence in the case, you conclude that the occurrence was not due to any negligence on the part of (name the defendant).

There are also a few typos in the note on use, such that when corrected, the Note should read:

***Use the second bracketed paragraph in cases involving exploding bottles *see, e.g.*, *Burkett v. Panama City Coca-Cola Bottling Co.*, 93 So. 2d 580 (Fla. 1957), or other instrumentalities that are no longer in the defendant's control at the time of plaintiff's injury [compare *Wagner v. Associated Shower Door Co.*, 99 So. 2d 619 (Fla. 3d DCA 1958)]. Use the first bracketed paragraph in all other cases.**

401.8

Gunn pointed out that in the first note on use, the reference should be to instruction "401.9," not "401.09." No other changes or alterations were made to this instruction

401.9

Only two changes were made to this instruction: (1) replacing the word "determining" in the last sentence of the instruction with "deciding" and (2) changing the reference in the first note on use to "401.8" (instead of 4-1.10). Therefore, the instruction should read:

Violation of this [statute] [ordinance] [regulation] is evidence of negligence. It is not, however, conclusive evidence of negligence. If you find that (Defendant or individual(s) claimed to have been negligent) violated this [statute] [ordinance] [regulation], you may consider that fact, together with the other facts and circumstances, in deciding whether such person was negligent.

401.10

The following changes were made: (1) bold the title (2) change third sentence to "[him] [her]" (3) change last sentence to "[his] [her]." The corrected instruction reads:

401.10 EQUAL AND RECIPROCAL RIGHTS AND DUTIES OF MOTORISTS AND PEDESTRIANS

All persons [whether [pedestrians] or [motorists] or (other)] may use the [street] [highway] but each has a duty [to comply with lawful regulations of its use applicable to [him] [her] and]* to use reasonable care for [his] [her] own safety and for the safety of others.

401.11

The only change made to the instruction was to replace the word "exercise" in the first sentence with the word "use." The corrected instruction reads:

A motorist must use reasonable care to guard against the unpredictable and erratic behavior of children on or near the [street] [highway] if [he] [she] knows or should know of their presence.

Further, in the second note on use to this instruction, the word "committee" should be capitalized.

401.12

This instruction has not gone to publication yet. **Accordingly, Maker suggested the Committee approve this instruction for purposes of book reorganization only, but noted that its current status should be looked into.**

Makar adjourned the meeting at 5:20 p.m.

Friday, July 13, 2007

Makar called the meeting to order at 8:32 a.m. The Committee thanked Brown for arranging a wonderful dinner at Safire restaurant Thursday evening.

The Committee continued with Book Reorganization (Tab 11):

401.13

The Committee made no changes to this instruction.

401.14

The Committee made no changes to this instruction.

401.15

The Committee made no changes to this instruction.

401.16

The Committee made no changes to this instruction.

401.17

The Committee discussed whether situations involving multiple preliminary issues require the burden of proof instruction after each issue, or whether it should only be given after all preliminary issues are charged. The Committee concluded that the existing notes, which provide that the burden of proof instruction be given after each issue, are proper.

The Committee made no changes to this instruction.

401.18

The Committee discussed this instruction and revised it as follows:

The [other] issues on (Claimant's) claim for you to decide are:

a. *Negligence generally*:

whether (Defendant) was negligent in (describe negligence); and, if so, whether the negligence was a legal cause of [loss] [injury] [or] [damage] to (Claimant, Decedent, or person for whose injury claim is made).

b. *Two drivers' negligence*:

whether (Defendant) or (Defendant) was negligent in operating the vehicles; and, if so, whether the negligence was a legal cause of [loss] [injury] [or] [damage] to (Claimant, Decedent, or person for whose injury claim is made).

c. *Negligence of parent (damage caused by child)*:

whether (Defendant parent) negligently provided [his] [her] child [a] [an] [name the item] which, because of the

child's age or lack of judgment or experience, was an unreasonable risk of ham to others] [or] [failed to restrain or control [his] [her] child, (name),] [or] [directed or encouraged [his] [her] child, (name) to do something involving an unreasonable risk of harm to others]; and, if so, whether the negligence was a legal cause of [loss] [injury] [or] [damage] to (Claimant, Decedent, or person for whose injury claim is made)].

In discussing this instruction, the Committee addressed the need for an "introductory issues" instruction, to be placed at the very beginning of section 401. **Makar asked that Artigliere look into this and send a proposed instruction to Stewart.**

401.19

The instruction was rewritten as follows:

The next issue on (Claimant's) claim, for you to decide is:

a. Landowner or possessor's negligence (toward invitee and invited licensee):
whether (Defendant) [negligently failed to maintain his premises in a reasonably safe condition], [or] [negligently failed to correct a dangerous condition about which (Defendant) either knew or should have known by the use of reasonable care,] [or] *[negligently failed to warn (Claimant) of a dangerous condition about which (Defendant) had, or should have had, knowledge greater than that of (Claimant)].

b. Land owner or possessor's negligence (toward discovered trespasser or foreseeable licensee):
whether (defendant) negligently failed to warn (claimant) of a dangerous condition and risk which were known to (defendant) and of which (claimant) neither knew nor should have known, by the use of reasonable care; and, if so, whether the negligence was a legal cause of [loss] [injury] [or] [damage] to (Claimant, Decedent or person for whose injury claim is made)].

c. Attractive nuisance:

whether (defendant) was negligent in maintaining or in failing to protect (claimant child) from the (describe structure or other artificial condition) on the land or premises in question; and, if so, whether the negligence was a legal cause of [loss] [injury] [or] [damage] to (Claimant, Decedent, or person for whose injury claim is made).

d. Landlord's negligence (toward tenant):

i. when leased premises are not residential:

whether (defendant landlord) negligently failed to disclose to (claimant tenant) a dangerous condition on the leased premises which was known to (Defendant), which was not known to (Claimant) or discoverable by [him] [her] by the use of reasonable care, and which (Defendant) had reason to believe (Claimant) could not discover; and, if so, whether the negligence was a cause of [loss] [injury] [or] [damage] to (Claimant, Decedent or person for whose injury claim is made).

ii. when leased premises are residential (not common areas):

whether [,before allowing (claimant tenant) to take possession of the dwelling, (defendant landlord) negligently failed to repair a defect that was discoverable by a reasonable inspection] [or] [,after (claimant tenant) took possession of the dwelling, (defendant landlord) negligently failed to repair a dangerous or defective condition on the premises of which [he] [she] had actual notice]; and, if so, whether the negligence was a legal cause of [loss] [injury] [or] [damage] to (Claimant, Decedent, or person for whose injury claim is made).

e. Municipality's negligence in maintenance of sidewalks and streets:

whether the city negligently failed to maintain its [sidewalk] [or] [street] in a reasonably safe condition or failed to correct or warn (claimant) of a dangerous condition of which the city either knew or should have known, by the use of reasonable care; and, if so, whether the negligence was a legal cause of [loss] [injury] [or] damage to (Claimant, Decedent or person for whose injury claim is made).

401.20
The instruction was rewritten as follows:

If the greater weight of the evidence does not support [one or more of] (Claimant's) claim[s], your verdict should be for (Defendant)(s) on [that] [those] claim[s].

[However, if the greater weight of the evidence supports [one or more of] (Claimant's) claim[s], then your verdict should be for (Claimant) and against (Defendant) on [that] [those] claim(s)].

[However, if the greater weight of the evidence supports (Claimant's) claim against one [or] [both] [more] of the defendants, then you should decide and write on the verdict form the percentage of the total negligence of [both] [all] defendants was caused by each of them].

401.21
The instruction was rewritten as follows:

If, however, the greater weight of the evidence supports [one or more] of the (Claimant's) claim[s], then you shall consider the defense[s] raised by (Defendant).

On the [first]* defense, the issue[s] for you to decide [is] [are]:

a. Comparative negligence generally:

whether (Claimant or person for whose injury or death claim is made) was [himself] [herself] negligent in (describe negligence) and, if so, whether the negligence was a contributing legal cause of the injury or damage to (Claimant).

b. Driver's comparative negligence (when owner sues third party):

whether (driver), while operating a vehicle owned by (Claimant) * [with [his] [her] consent, express or implied,] was [himself] [herself] negligent in the operation of the vehicle and, if so, whether the negligence was a contributing legal cause of the injury or damage to (Claimant).

c. Joint enterprise (driver's negligence)

whether (driver) was operating the automobile at the time and place of the [collision] [incident in this case] to further the purposes of a joint enterprise in which [he] [she] was engaged with (Claimant passenger); if so, whether (driver) was negligent in the operation of the automobile; and, if so, whether the negligence was a contributing legal cause of the [loss] [injury] [or] [damage] to (Claimant). A joint enterprise exists when two or more persons agree, expressly or impliedly, to engage in an activity in which they have a common interest in the purposes to be accomplished and equal rights to control and manage the operation of an automobile in the enterprise. Each member of a joint enterprise is responsible for the negligence of another member in the operation of the automobile if the negligence occurs while [he] [she] is acting under the agreement and to further the purposes of the joint enterprise.

For the remaining subsections of instruction 401.21 (subsections d-g), the Committee made no changes other than the plain English changes made to all of the negligence instructions.

401.22

The instruction was rewritten as follows:

If the greater weight of the evidence does not support (Defendant's) defense[s] and the greater weight of the evidence supports (Claimant's) claim[s], then [your verdict should be for (claimant) in the total amount of [his] [her] damages] *[you should decide and write on the verdict form what percentage of the total negligence of [both] [all] defendants was caused by each defendant].

If, however, the greater weight of the evidence shows that both (Claimant) and [defendant] [one or more of the defendants] were negligent and that the negligence of each contributed as a legal cause of [loss] [injury] [or] [damage] to (Claimant), you should decide and write on the verdict form what percentage of the total negligence of [both] [all] parties to this action was caused by each of them.

Makar directed the negligence subcommittee to present the Committee with a proposed Fabre addition to this instruction, including an accompanying note on use.

401.23
No changes were made to this instruction.

Upon Austin's motion, the Committee adopted the revised negligence instructions subject to the plain English changes being made.

Professional Negligence (section 402)

Stewart moved for approval of the revised professional negligence instructions, subject to all necessary editorial and plain English changes. Bailey seconded the motion, and the Committee approved.

SUPREME COURT COMMITTEE ON STANDARD JURY INSTRUCTIONS (CIVIL)

MINUTES
[The Omni Hotel]
Jacksonville, Florida

[DATES]
October 25, 2007 (1:00 p.m. to 5:00 p.m.)
October 26, 2007 (8:30 a.m. to noon)

1. ADMINISTRATIVE MATTERS (Tab 1):

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C. Status of proposed instructions

(1) Jury Innovations: Artigliere informed the Committee that the Supreme Court's opinion on the Jury Innovation Committee's report was issued on October 4, 2007. Artigliere walked the Committee through the Court's opinion. Some issues involve Committee consideration or action:

The Supreme Court adopted new Rule of Civil Procedure 1.452, which requires a court to permit jurors to submit written questions directed to witnesses or to the court. Instruction 1.13, drafted by this Committee in anticipation of the Supreme Court's decision on juror questions, was also approved by the Court. Griffin noted, however, that while the Supreme Court's opinion states that courts will be required to permit jurors to submit written questions to witnesses or the court, instruction 1.13 does not contain the phrase "or the court."

Artigliere suggested the Committee consider revising instruction 1.13 to conform to the Court's opinion permitting jurors to submit written questions to witnesses or the court.

The Supreme Court also authorized publication and use of instruction 1.8 on juror note-taking, and authorized a revision of instruction 7.2 regarding the use of notes during deliberations.

Artigliere noted that instruction 1.8 states that juror notes will be collected during recess, but section 40.050, Florida Statutes, states that jurors will have their notes available during recess. **Artigliere asked the Committee to consider whether this discrepancy needs to be addressed.**

Artigliere also explained that the Court deferred to the Committee's recommendation against a more active judicial role when there is juror impasse. Artigliere noted that the Committee needs to submit its proposed plain English changes to instruction 7.3 (Allen Charge) through the normal process of publication and submission to the Court. **Makar directed the publication of instruction 7.3 after the plain-English changes are made.**

Finally, Artigliere volunteered to compare the appendix of the opinion to our instructions for accuracy. Austin volunteered to help.

The Committee thanked Artigliere for all of his efforts on this project.

****

1. **REORGANIZATION OF BOOK** (Tab 11): The book reorganization subcommittee has incorporated the formatting templates into the entire book. Judge Wells's staff attorneys helped out considerably by going through the materials and correcting citations. Gunn explained that the subcommittee's goal is to have the entire book re-write finalized in February. Gunn then walked the Committee through the re-written material:

Gunn explained that, for the most part, the new material comprises the existing instructions in a more user-friendly format; the material also includes the new PIP instruction and the implementation of the Jury Innovations' project.

****

Instruction 601.1 "Weighing the Evidence"-The Committee discussed the instruction and compared it to the language about the jury's "job"

in instruction 201.2. To make instruction 601.1 consistent with 201.2, the Committee amended the second paragraph of instruction 601.1 to state (revised language italicized):

In reaching your verdict, you must think about and weigh the testimony and any documents, photographs, or other material you are shown here in Court. You may also consider any facts that were admitted or agreed to by the lawyers. *Your job is to determine what the facts are wherever there is disagreement about them.* You may use reason and common sense to reach conclusions. You may draw reasonable inferences from the evidence. But, you should not guess about things that were not covered here. You *must* always apply the law as I have explained it to you.

****

Instruction 700 "Closing Instructions (After Final Argument)"-The Committee reviewed and discussed this instruction and concluded that the instruction needs significant work. This instruction, which comes from the California instructions, is inconsistent, as written, with some of our existing instructions.

SUPREME COURT COMMITTEE ON STANDARD JURY INSTRUCTIONS (CIVIL)

MINUTES
[February 21-22, 2008]
Tampa, Florida

February 21, 2008 (1:00 p.m. to 5:00 p.m.)
February 22, 2008 (8:30 a.m. to noon)

2. REORGANIZATION OF BOOK (Tab 11):

Revisions as a result of jury innovations

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As a result of the jury innovations opinion, it has been noted that instruction 202.3 is slightly different than what the supreme court recently approved. The question was posed whether to amend the instruction, given that it was so recently approved. **Artigliere suggested that the Committee proceed to amend instruction 202.3 in the new materials, because it will be a while before the materials get reviewed by the court.**

Stewart pointed out that the revised instructions add a note to 401.1 and all of the introductory instructions to reflect that the trial judge has the discretion to instruct the jury either during trial or before or after final argument, but that the Committee strongly recommends instructing before final argument.

Instruction 700 combines the two instructions the supreme court passed, but it contains other language as well. Stewart polled the Committee as to whether the instruction goes too far. The majority preferred keeping the instruction as it exists, but voted to **add a note to the second paragraph stating that where it is impracticable to take exhibits into the jury room, the instruction can be modified.**

SUPREME COURT COMMITTEE ON STANDARD JURY INSTRUCTIONS (CIVIL)

MINUTES
[July 10-11, 2008]
The Breakers, West Palm Beach, Florida

July 10, 2008 (12:00 p.m. to 5:00 p.m.)
July 11, 2008 (8:00 a.m. to 1:00 p.m.)

2. REORGANIZATION OF BOOK (Tab 11):

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Basic Book Comments:

One comment to the basic book in general raised concerns with instructing the jury at the beginning of the case. The committee has addressed this issue on multiple occasions and believes that instructing the jury at the beginning of the case is a better practice. **Thus, the subcommittee recommended no change, and the committee agreed.**

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Comments on Greater Weight:

- Multiple comments addressed the new sentence to 401.3, which states that to prove a claim or defense, the party must convince the jury that what he/she/it is trying to prove is "probably" true. These comments suggested replacing the word "probably" with the phrase "more likely than not" or "more likely than not true." Alan Campo was consulted for his opinion. Campo recommended using the phrase "more probably true than not true." The subcommittee suggested that three other options for this instruction are: (1) to go back to the original greater weight instruction and eliminate the sentence completely, (2) add even more language to the proposed instruction to try to explain greater weight, or (3)

to use Campo's suggestion but modify it to "more likely true than not true."

Farmer recommended following Campo's original suggestion, but Gunn stated she thinks the problem raised in the comment is with the word "probably," and Campo's suggestion does not resolve this. Littky-Rubin stated she preferred "likely" over "probably." Lang noted that Campo's suggestion is closer to the 11th Circuit pattern instruction, which is a pretty good articulation. The committee further debated the use of the words "probably" and "likely." The committee voted, and the majority preferred "likely." **Thus, the instruction will be amended to state, "more likely true than not true."**

Gunn reminded the committee of Justice Lewis's directions not to submit any new substantive material with the revised book, and inquired whether this instruction would have to be submitted separately. Stewart suggested discussing that question further with Justices Lewis and Quince.

****

Stewart moved, subject to re-publication of the greater weight and three medical malpractice instructions, to authorize submission of the complete book to the supreme court, subject also to the advice the committee intends to get regarding the submission procedure. Austin seconded, and the committee agreed.

Stewart then moved that the committee handle by email comments on the four instructions being re-published, so that a committee vote can be taken via email, and the instructions submitted to the court thereafter. Gunn noted, however, that if there are comments to the medical malpractice instructions that require discussion, the committee will discuss in-person as necessary.

TABLE

IN THE SUPREME COURT OF FLORIDA

In the matter of Standard Jury Instructions (Civil),

Committee Report 08-02

Greater Weight of the Evidence, Negligence, Believability of Witnesses and Closing Instructions

/

REPORT (NO. 08-02) OF THE COMMITTEE ON STANDARD JURY INSTRUCTIONS (CIVIL)

(Committee Materials for this Report are found in Appendix E of Report 08-01 and are hereby incorporated by reference)

TAB F

Appendix F to report 08-02

CACI 200 provides: A party must persuade you, by the evidence presented in court, that what he or she is required to prove is more likely to be true than not true. This is referred to as "the burden of proof."

CACI 5000: Members of the jury, you have now heard all the evidence [and the closing arguments of the attorneys]. [The attorneys will have one last chance to talk to you in closing argument. But before they do, it] [It] is my duty to instruct you on the law that applies to this case. You must follow these instructions as well as those that I previously gave you. You will have a copy of my instructions with you when you go to the jury room to deliberate. [I have provided each of you with your own copy of the instructions.] [I will display each instruction on the screen.] You must decide what the facts are. You must consider all the evidence and then decide what you think happened. You must decide the facts based on the evidence admitted in this trial. Do not do any research on your own or as a group. Do not use dictionaries, the Internet, or other reference materials. Do not investigate the case or conduct any experiments. Do not contact anyone to assist you, such as a family accountant, doctor, or lawyer. Do not visit or view the scene of any event involved in this case. If you happen to pass by the scene, do not stop or investigate. All jurors must see or hear the same evidence at the same time. [Do not read, listen to, or watch any news accounts of this trial.] You must not let bias, sympathy, prejudice, or public opinion influence your decision. I will now tell you the law that you must follow to reach your verdict. You must follow the law exactly as I give it to you, even if you disagree with it. If the attorneys [have said/say] anything different about what the law means, you must follow what I say. In reaching your verdict, do not guess what I think your verdict should be from something I may have said or done. Pay careful attention to all the instructions that I give you. All the instructions are important because together they state the law that you will use in this case. You must consider all of the instructions together. After you have decided what the facts are, you may find that some instructions do not apply. In that case, follow the instructions that do apply and use them together with the facts to reach your verdict. If I repeat any ideas or rules of law during my instructions, that does not mean that these ideas or rules are more important than the others are. In addition, the order in which the instructions are given does not make any difference. [Most of the instructions are typed. However, some handwritten or typewritten words may have been added, and some words may have been deleted. Do not discuss or consider why words may have been added or deleted. Please treat all the words the same, no matter what their format. Simply accept the instruction in its final form.]

CACI 5009: When you go to the jury room, the first thing you should do is choose a presiding juror. The presiding juror should see to it that your discussions are orderly and that everyone has a fair chance to be heard. It is your duty to talk with one another in the jury room and to consider the views of all the jurors. Each of you must decide the case for yourself, but only after you have considered the evidence with the other members of the jury. Feel free to change your mind if you are convinced that your position should be different. You should all try to agree. But do not give up your honest beliefs just because the others think differently. Please do not state your opinions too strongly at the beginning of your deliberations. Also, do not immediately announce how you plan to vote. Keep an open mind so that you and your fellow jurors can easily share ideas about the case. You should use your common sense, but do not use or consider any special training or unique personal experience that any of you have in matters involved in this case. Such training or experience is not a part of the evidence received in this case. Sometimes jurors disagree or have questions about the evidence or about what the witnesses said in their testimony. If that happens, you may ask to have testimony read back to you or ask to see any exhibits admitted into evidence that have not already been provided to you. Also, jurors may need further explanation about the laws that apply to the case. If this happens during your discussions, write down your questions and give them to the clerk or bailiff. I will do my best to answer them. When you write me a note, do not tell me how you voted on an issue until I ask for this information in open court. [At least nine jurors must agree on each verdict and on each question that you are asked to answer. However, the same jurors do not have to agree on each verdict or each question. Any nine jurors is sufficient. As soon as you have agreed on a verdict and answered all the questions as instructed, the presiding juror must date and sign the form(s) and notify the clerk or the bailiff.] Your decision must be based on your personal evaluation of the evidence presented in the case. Each of you may be asked in open court how you voted on each question. While I know you would not do this, I am required to advise you that you must not base your decision on chance, such as a flip of a coin. If you decide to award damages, you may not agree in advance to simply add up the amounts each juror thinks is right and then make the average your verdict. You may take breaks, but do not discuss this case with anyone, including each other, until all of you are back in the jury room.