IN THE SUPREME COURT OF FLORIDA

In the matter of Standard Jury Instructions (Civil),

Committee Report Number 09-03

Jury Deadlocked Instruction

_____/

REPORT (NO. 09-03) OF THE COMMITTEE ON STANDARD JURY INSTRUCTIONS (CIVIL)

Honorable Ralph Artigliere
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Subcommittee Chair,
Allen Charge Subcommittee,
573 Ridge Road
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(706) 632-6035

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Joseph H. Lang, Jr.
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Honorable James Manly Barton, II
Florida Bar Number 189239
Committee Vice-Chair,
Supreme Court Committee on
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(813) 276-2725 (fax)

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

The Committee on Standard Jury Instructions in Civil Cases recommends that this Court approve for publication and use reorganized and revised Florida Standard Jury Instructions (Civil) for *Closing Instructions, Jury Deadlocked*, as set forth in Appendix A to this report. 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 09-03, proposes a revised Instruction 7.3(c), *Closing Instructions, Jury Deadlocked*, which would be numbered as Instruction 801.3 in the reorganized book. For ease of reference, this report references both the current and new proposed numbering system. Additionally, the appendix to report number 09-01 includes this proposed instruction as it would appear in the reorganized book if adopted by the Court.

The instruction proposed herein is a stand-alone instruction that 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.

II. DRAFTING HISTORY OF PROPOSED INSTRUCTION

In 2006, the Committee embarked on a project to reorganize the standard instructions for civil cases. This project is the first effort at comprehensive reorganization of the civil instructions since the original publication of the instructions in 1967. Concurrently, an Allen Charge Subcommittee was created in February 2006 to examine Instruction 7.3(c), *Jury Deadlocked*. Specifically, the subcommittee was charged as follows:

> a new subcommittee was created to consider revising instruction 7.3, the Allen charge. The subcommittee will keep in mind that the committee previously considered this issue [and] recommended against revising the Allen charge instruction in the jury innovations report.

Minutes of February 2006 Committee Meeting.

Specifically, the Jury Innovations Committee recommended the following:

> **Juror Impasse.** Trial judges in criminal and civil cases should be allowed to assist deliberating juries in reaching a verdict where an Allen charge has been given and the jury continues to report that they are deadlocked. Jurors should know exactly what can occur if they cannot reach a verdict, that is, what a mistrial actually means.

See Judicial Mgmt. Council, *Final Report of Jury Innovations Committee* (May 2001) 34 (on file with Clerk, Fla. Sup. Ct.). This Committee responded to the Jury Innovation Committee's recommendation on Jury Impasse as follows:

> The SJI-Civil is opposed to this recommendation. It is extremely difficult for a trial judge to "assist" a deliberating jury without becoming a seventh juror. A jury that is having difficulty reaching a verdict is a very delicate problem for the judicial system. Judges who modify the standard charge by including exhortatory language, such as encouraging a verdict to avoid the costs of retrial to the parties and the public, are often reversed, particularly when the modification is done "on the fly" or in an "ad lib" manner without the agreement of all parties. The SJI-Civil believes that juries understand the importance of their deliberations and the consequences of a mistrial. Placing more pressure on nonconforming jurors to accede to the will of the majority is not in the best interests of our system of trial by jury.
>
> The current instruction on this issue is adequate. The SJI-Civil suggests one addition to Standard Instruction 7.3 to alert the jury to the option of receiving a read-back of testimony. This addition is contained in Appendix A-6.

Response by the Supreme Court Committee on Standard Jury Instructions in Civil Cases, *In re: Final Report of the Jury Innovations Committee*, Case No. SC05-1091 at 23 (filed May 4, 2005). The one addition recommended by this Committee at that time is underscored below:

> JURY DEADLOCKED
>
> Members of the jury, it is your duty to agree on [a verdict] [verdicts] if you can do so without violating conscientiously held convictions that are based on the evidence. No juror, from mere pride of opinion hastily formed or expressed, should refuse

> to agree. Yet, no juror, simply for the purpose of terminating the case, should acquiesce in a conclusion that is contrary to his own conscientiously held view of the evidence. In determining the facts, you should rely on your collective memories of the testimony. If you have been unable to resolve your differences as to what a witness said, you may ask that the court reporter read back to you a specific portion of any witness's testimony. Because the typing of the court reporter's notes can take a large amount of time, any request to have testimony read back should be as specific as possible. You should listen to each other's views, talk over your differences of opinion in a spirit of fairness and candor and, if possible, resolve your differences and come to a common conclusion, so that [a verdict] [verdicts] may be reached and this case may be disposed of.
>
> You may retire to the jury room for further deliberations.

Response by the Supreme Court Committee on Standard Jury Instructions in Civil Cases, *In re: Final Report of the Jury Innovations Committee*, Case No. SC05-1091 at A-6 (filed May 4, 2005). While the Jury Innovations Committee's proposals were pending in this Court, the Allen Charge subcommittee continued its work. It reviewed Instruction 7.3(c) and reported that it was not written in plain English. On January 10, 2007, the Committee submitted a supplemental report to on the Jury Innovations this Court, which included a plain English re-write of Instruction 7.3(c), but maintained the original recommendation that the *Allen* charge should not be made any more coercive.

When this Court issued its opinion in *In re Amendments to the Florida Rules of Civil Procedure, etc. ("Implementation of Jury Innovations Committee*

Recommendations"), 967 So.2d 178 (Fla. 2007), it "defer[red] to the jury instructions committees' expertise on this matter and decline[d] to adopt any amendments to the current standard jury instruction." *Id.* at 183. The Court did not specifically comment on the proposed addition by this Committee underscored above.

Thus, the Committee decided to submit the plain English revisions, along with the additional paragraph originally proposed, through the publication and comment process for eventual submission to this Court. Having done so, the Committee now submits this proposal for a revised Instruction 7.3(c), which would be numbered as Instruction 801.3 in the reorganized book.

The proposal reads as follows:

7.3(c) Jury Deadlocked

~~Members of the jury, it is your duty to agree on [a verdict] [verdicts] if you can do so without violating conscientiously held convictions that are based on the evidence. No juror, from mere pride of opinion hastily formed or expressed, should refuse to agree. Yet, no juror, simply for the purpose of terminating the case, should acquiesce in a conclusion that is contrary to his own conscientiously held view of the evidence. You should listen to each other's views, talk over your differences of opinion in a spirit of fairness and candor and, if possible, resolve your differences and come to a common conclusion, so that [a verdict] [verdicts] may be reached and this case may be disposed of.~~

~~You may retire to the jury room for further deliberations.~~

Members of the jury, we understand you are having difficulty reaching a verdict. This case is important to the parties, and we appreciate your efforts. But I am going to ask you to go back to try again to reach a verdict if you reasonably can.

Please carefully consider the views of all the jurors, including those you disagree with. Keep an open mind and feel free to change your view if you conclude it is wrong.

You should not, however, give up your own conscientiously held views simply to end the case or avoid further discussion. Each of you must decide the case for yourself and not merely go along with the conclusions of other jurors.

If you cannot agree on what a witness said, you may ask that the court reporter read back to you a portion of any witness's testimony. To avoid delay, your request should be as specific as possible.

You may now return to the jury room for further deliberations.

III. APPENDICES

The following appendices are attached to this Report:

Appendix A:	Proposed instruction
Appendix B:	March 1, 2008, Florida Bar News published notice of proposed instruction
Appendix C:	Comments received by the Committee in response to publication
Appendix D:	Relevant excerpts from the Committee's minutes
Appendix E:	Committee materials relevant to this proposal

IV. DISSENTING VIEWS FROM THE COMMITTEE

There are no dissenting views from the Committee. The Committee believes that this instruction will greatly improve the jury's understanding of the law it must

follow and unanimously recommends publication of this change.

V. COMMENTS RECEIVED

The proposed new instructions were published for comment on March 1, 2008 and four comments were received. All four comments objected to the jury being informed that they can request a read-back of trial testimony. The Committee believes, however, that the more informed the jury is, the better its decision will be. Thus, the Committee agreed that no change was needed based on these comments.

One comment proposed amending the language in three different ways: (1) by adding the language back in that refers to a "consciously-held view of the evidence," (2) adding language that the case must be decided "solely on the evidence," and (3) reminding the jurors that they can ask questions of the court when deadlocked. The Committee agreed that the language "conscientiously held views" should be added to the proposal, as it was inadvertently omitted, but the Committee decided the other suggestions should not be implemented in the proposal.

The Committee now submits the following changes to Instruction 7.3(c), which would be numbered as Instruction 801.3 in the reorganized book, to the Court.

VI. CONCLUSION

WHEREFORE, the Committee respectfully requests that the Court approve the instruction set forth above and in Appendix A for publication and use as a new standard jury instruction for civil cases.

Respectfully submitted,

Tracy Raffles Gunn
Florida Bar Number 984371
Committee Chair,
Supreme Court Committee on
Standard Jury Instructions (Civil)
Gunn Appellate Practice
777 S. Harbour Island Blvd.
Suite 770
Tampa, Florida 33602
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Florida Bar Number 236128
Subcommittee Chair,
Allen Charge Subcommittee,
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Florida Bar Number 189239
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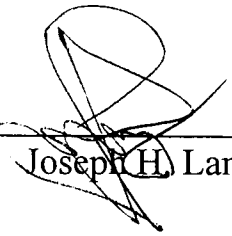
CERTIFICATE OF COMPLIANCE

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

7.3(c) Jury Deadlocked
(801.3)

~~Members of the jury, it is your duty to agree on [a verdict] [verdicts] if you can do so without violating conscientiously held convictions that are based on the evidence. No juror, from mere pride of opinion hastily formed or expressed, should refuse to agree. Yet, no juror, simply for the purpose of terminating the case, should acquiesce in a conclusion that is contrary to his own conscientiously held view of the evidence. You should listen to each other's views, talk over your differences of opinion in a spirit of fairness and candor and, if possible, resolve your differences and come to a common conclusion, so that [a verdict] [verdicts] may be reached and this case may be disposed of.~~
~~You may retire to the jury room for further deliberations.~~

Members of the jury, we understand you are having difficulty reaching a verdict. This case is important to the parties, and we appreciate your efforts. But I am going to ask you to go back to try again to reach a verdict if you reasonably can.

Please carefully consider the views of all the jurors, including those you disagree with. Keep an open mind and feel free to change your view if you conclude it is wrong.

You should not, however, give up your own conscientiously held views simply to end the case or avoid further discussion. Each of you must decide the case for yourself and not merely go along with the conclusions of other jurors.

If you cannot agree on what a witness said, you may ask that the court reporter read back to you a portion of any witness's testimony. To avoid delay, your request should be as specific as possible.

You may now return to the jury room for further deliberations.

TAB B

Notices

Proposed jury instruction on deadlocked juries

The Supreme Court Committee on Standard Jury Instructions in Civil Cases proposes to amend its instructions on 7.3(c) Jury Deadlocked. The proposed amendments are shown below with the current instruction shown with strike-through marks and the new instruction shown with underlining. Comments are invited. After reviewing all comments, the committee may submit its proposal to the Florida Supreme Court. Send all comments to Tracy Raffles Gunn, Committee Chair, Fowler White Boggs Banker, 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 March 31 to ensure that they are considered by the committee.

7.3(c) Jury Deadlocked

~~Members of the jury, it is your duty to agree on [a verdict] [verdicts] if you can do so without violating conscientiously held convictions that are based on the evidence. No juror, from mere pride of opinion hastily formed or expressed, should refuse to agree. Yet, no juror, simply for the purpose of terminating the case, should acquiesce in a conclusion that is contrary to his own conscientiously held view of the evidence. You should listen to each other's views, talk over your differences of opinion in a spirit of fairness and candor and, if possible, resolve your differences and come to a common conclusion, so that [a verdict] [verdicts] may be reached and this case may be disposed of.~~

~~You may retire to the jury room for further deliberations.~~

Members of the jury, we understand you are having difficulty reaching a verdict. This case is important to the parties, and we appreciate your efforts. But I am going to ask you to go back to try again to reach a verdict if you reasonably can.

Please carefully consider the views of all the jurors, including those you disagree with. Keep an open mind and feel free to change your view if you conclude it is wrong. You should not, however, give up your own views simply to end the case or avoid further discussion. Each of you must decide the case for yourself and not merely go along with the conclusions of other jurors.

If you cannot agree on what a witness said, you may ask that the court reporter read back to you a portion of any witness's testimony. To avoid delay, your request should be as specific as possible.

You may now return to the jury room for further deliberations.

Government Lawyer Section sets sights on student loans

Loan forgiveness workshop set for March 14 in Orlando

In an effort to make public service and government positions more attractive and financially viable for new lawyers, the Government Lawyer Section has created a Loan Forgiveness Committee that will meet in Orlando March 14.

Section Chair Bob Krauss has appointed Department of Children and Families General Counsel John J. Copelan, Jr., a former section chair, to lead the committee. Clark Jennings, chief counsel for the Florida Department of Agriculture, and Tony Musto, the legal writing and research director of the Community Outreach and Pro Bono Services Program at St. Thomas University School of Law, will serve as vice chairs.

"Upon graduation, law students have the decision of working in public service and government positions or working in private practice," said Copelan, noting the National Association of Student Financial Aid Administrators has found that 87 percent of public law school graduates have an average debt of $51,230 and 86 percent of private school graduates have an average debt of $64,854. "Facing these numbers, the average law school graduate's decision seems already made — practice in the more lucrative, private sector to be able to pay off those loans."

Saying the state should not lose its new lawyers to private practice due to high student loan debt, Copelan said the committee intends to focus on how the state can provide the financial incentives to work in public service.

Copelan said the creation of the federal Cost of College Reduction and Access Act of 2007 assists public service lawyers by lowering monthly loan repayments based on income and ultimately cancels remaining loan debt after 10 years of public service. To meet the requirements for loan forgiveness a borrower must make 120 qualifying monthly payments on an eligible Federal Direct Loan on or after October 1, 2007; be employed in a public service job as defined in the act during the time he or she makes the qualifying monthly payments; be employed in a public service job as defined by the act at the time the secretary of education forgives the loan, and make qualifying payments under the repayment options enumerated in the act.

Included in the repayment options, Copelan said, is the Income Contingent Repayment Plan, in which a borrower's repayments would be significantly reduced — based on income — over the 10-year repayment period, after which loan debt is forgiven.

"With the implementation of this new federal legislation, one of the Loan Forgiveness Committee's priorities has been to further study the possibility of the state legislature implementing a 'gap coverage' program," Copelan said. "Under such program a recent law school graduate's payments could be further reduced during the 10-year repayment period. Such a program would not only make public and governmental service attractive, but would let the state stand out at the forefront of recruiting public service attorneys."

The Loan Forgiveness Committee will meet March 14 in Orlando and all interested Bar members, law school administrators, and student bar leaders are invited. The meeting will begin at 9 a.m. in conference room 1106F of the Department of Children and Families building located at 400 West Robinson Street, S1114. Contact Copelan at (850) 488-2381 for more information.

TAB C

From: Steven P. Befera [mailto:spb@beferalaw.com]
Sent: Mon 3/3/2008 1:46 PM
To: Gunn, Tracy
Subject: Proposed Jury Instruction 7.3(c)

Tracy,

Paragraph 3 of the proposed instruction will open a Pandora's Box of problems in implementation. I strongly recommend against this portion of the proposed instruction.

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PAUL_S_CHERRY_ESQUIRE@MSN.COM

February 28, 2008

Tracy Raffles Gunn, Esquire
Fowler, White, Boggs, Banker
Suite 1700
501 East Kennedy Boulevard
Tampa, FL 33602-5239

Re: Proposed Jury Instruction 7.3(c)

Dear Ms. Gunn:

Please accept this communication as my comment on the proposed new jury instruction 7.3(c), jury deadlocked. I have re-typed the proposed instruction with my changes indicated: words to be eliminated are struck through and new words are underlined.

Members of the jury, we understand you are having difficulty reaching a verdict. This case is important to the parties, and we appreciate your efforts. ~~But~~[1] I am going to ask you to go back to try again to reach a verdict ~~if you reasonably can~~[2]. Please carefully consider the views of all the jurors, including those you disagree with. Keep an open mind and feel free to change your view ~~if you conclude it is wrong~~[3]. You should not, however, give up your own views simply to end the case or avoid further discussion, nor should you acquiesce to a conclusion that is contrary to your own consciously-held view of the evidence.[4] Each of you must decide the case for yourself and not merely go along with the conclusions of other jurors. Please remember that this case must be decided solely on the evidence.[5] If you have questions for the court, you may submit them to me in writing.[6] ~~If you cannot agree on what a~~

~~witness said, you may ask that the court reporter read back to you a portion of any witness's testimony. To avoid delay, your request should be as specific as possible.~~[7] You may now return to the jury room for further deliberations.

I justify my changes as follows:

1. "But" is the wrong conjunction. "But" means "on the other hand" or "in opposition to," such as "anyone but him," or "It's not mine but hers," or "I know not what others may think, but as for me give me liberty or give me death." The better grammatical practice is to eliminate the conjunction entirely and start a new sentence with the proper subject.

2. The phrase "if you reasonably can" is similarly misplaced and misused. Obviously, you want as verdict but not if they "unreasonably" can!

3. A juror is not going to change his or her view because that view is "wrong." You are giving the wrong impression, *viz.*, that a juror's view could be wrong. There is no right or wrong view, only an opposing view based upon that juror's conclusion of the evidence. By saying that a juror's view is wrong, you are telling a juror that he or she must go along with the right view, and that is precisely the position that the court should not take, as stated in the very next sentence. You are giving a mixed message here.

4. I added my own clause to reinforce the message that every juror must come to his or her own conclusion independent of the views of the other jurors with respect to being bullied but not with respect to being convinced to change his or her mind.

5. I added this sentence again to reinforce the view that the charge to the jury states that the case must be decided solely on the evidence presented in court.

6. I added this sentence to tell the jurors that they may ask questions to answer their doubts, and obviously they have doubts because that is precisely why they are deadlocked.

7. I struck these two sentences because they are redundant and unnecessary. The jurors really don't need to be told that they can ask for a portion of testimony to be played back to them, or, if they do have doubts about whether they can re-hear testimony, they can ask the judge if they can hear a certain portion of the testimony. The second sentence is a bit childish and talks down to

the jurors, something you want to avoid; this sentence sounds like it was written by the State Department or the IRS.

The present *Allen* instruction has many good points and a few bad ones. Your revision draws from the good points but creates its own bad points. Please accept my comments in the spirit in which I pose them: to make our jury instructions better and more attuned to the present-day state of the law and of our society.

Sincerely,

Paul S. Cherry

Paul S. Cherry

From: Abe Laeser [mailto:AbeLaeser@MiamiSAO.com]
Sent: Wed 3/5/2008 3:50 PM
To: Gunn, Tracy
Subject: Jury Instructions

I fully realize that your proposal in the recent Bar News deals only with civil cases. I am a homicide prosecutor in Miami, and your proposal should not disturb me - yet it does. I worry about the 'slippery slope'.

More specifically, the segment that suggests that the court reporter could read back the testimony. This is a practical impossibility in all major trials. The testimony in question may have been taken days or weeks before the deliberations. Perhaps another reporter was present on that date. The time involved in reading is usually greater than the time that the testimony took to present. One side or the other would object to a mere excerpt, and the court reporter would undoubtedly have to read the entire testimony. If my lead case agent was on the stand for two days, the 'reading' might take three or four days.

In addition, once we read one portion, invariably, the jury asks for something else to be read. Did someone believe that the present admonition to the jury: "Rely on your collective recollections" did not serve the greater good? This is a matter that I would keep from the jury's mind. If necessary, the Court has always had this power. How does telling the jury that they can request a 'read back' assist anything?

// ABE LAESER

From: charlespatrick@bellsouth.net [mailto:charlespatrick@bellsouth.net]
Sent: Sat 3/8/2008 3:19 PM
To: Gunn, Tracy
Subject: Objection to Proposed Revisions to FL.St.Jury Inst. 7.3(c)

Proposed Revisions to Florida Standard Jury Instructions in Civil Cases 7.3(c)

Dear Ms. Gunn,

I have reviewed the proposed changes to Florida Standard Jury Instruction 7.3(c) and wish to state my objections to the proposed revisions. The prior jury instruction was more than adequate to deal with deadlocked juries and does not need revision.

The proposed revisions go far beyond instructing deadlocked juries and open up an entirely new issue ie: reading portions of trial testimony back to juries. Requests from deadlocked jurors to review deposition transcripts and/or trial testimony are routinely denied by most trial judges. The reading of a *portion* of witnesses testimony without reading all of the testimony of that witness to a deadlocked jury places undue emphasis on the re-read portions and is improper and can constitute reversible error.

I would delete the last paragraph of the proposed jury instruction dealing with reading back of portions of the trial testimony since it is contrary to the practice of most trial judges and contrary to existing case law on the subject.

Charles B. Patrick, Esq.

Florida Bar #157550

Charles B. Patrick, P.A.

1648 South Bayshore Drive

Miami, FL 33133

(305) 854-1770

charlespatrick@bellsouth.net

TAB D

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)

Strelec reported that Artigliere reviewed the closing instructions. Artigliere suggested that the plain English subcommittee review instruction 7.3, the Allen charge. Lumish stated in three of her cases within the last year, the juries remained deadlocked after receiving the Allen charge.

Stewart pointed out that the committee previously discussed this issue in response to the recommendations of the jury innovations committee. Makar advised that recommendation 34 of the jury innovations committee report advocated revising the Allen charge to tell jurors what will happen if they cannot reach a verdict. This committee opposed this recommendation because the current instruction is adequate. Our report reasoned that judges cannot assist a deliberating jury. In addition, judgments are often reversed when juries are exhorted to reach a verdict.

Makar created a new subcommittee was created to consider revising instruction 7.3, the Allen charge. The subcommittee will keep in mind that the committee previously considered this issue recommended against revising the Allen charge instruction in the jury innovations report. Makar appointed Artigliere (chair), Graham, Bailey, Fulford, and LaRose.

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)

10.ALLEN CHARGE (Tab 9)

Artigliere explained that few civil cases discuss the Allen charge because it originates in criminal cases. Civil cases in this context suggest that the judge should not deviate from the standard instructions or intrude on the deliberations of the jury. The Jury Innovations Committee recommended amending the instruction to tell jurors in neutral terms what will happen if they fail to reach a verdict. This committee unanimously recommended that the Court not revise the instruction.

The subcommittee is reconsidering this recommendation because the Errors and Omissions subcommittee recently reviewed the charge and felt that it was not written in plain English. In addition, the committee may not have considered the differences between criminal and civil cases. In the civil context, there may not be any harm in telling jurors that no one is better suited to decide the case and that the parties have expended huge sums of money in the hopes of receiving a verdict. The subcommittee suggested that it review the instruction to make sure it is written in plain English and draft a note on use to advise parties that they can agree to a sterner instruction.

The committee then discussed the feasibility of drafting an instruction that advises jurors of the cost of a mistrial. Caldwell and Stewart pointed out that the decision in Hollywood Corporate Circle Assocs. v. Amato, 604 So. 2d 888 (Fla. 4th DCA 1992), holds that the judge cannot deviate from the standard instruction by telling jurors how expensive a mistrial will be for the parties. A stronger instruction would result in the judge injecting himself or herself into the jury's deliberations.

Brown agreed that the instruction should not be revised to ask jurors to consider the cost of a mistrial. This instruction would conflict with instructions directing jurors to decide the case on the evidence. Lewis added that there is no neutral way to convey to jurors that they should consider the costs of a hung jury.

The committee then discussed whether the instruction should be revised to make it more understandable. Makar noted that Bailey had written that the instruction is moribund and useless.

Makar commented that the only risk in proceeding is that the Court may revise the Allen charge in response to the Jury Innovations Report. Artigliere felt that this committee should proceed with plain English revisions. If the Court decides to make revisions, it will likely refer the issue back to this committee.

Makar pointed out that this committee recommended a slight change to the Allen charge in response to the Jury Innovations report. The subcommittee should work on the assumption that the Court will adopt the pending suggested revisions.

Makar directed the subcommittee to make plain English revisions to the Allen charge without making substantive changes to the instruction. The subcommittee will work from the revised instruction that this committee proposed in its response to the report of the Jury Innovations Committee. The subcommittee will then send the draft to the plain English subcommittee for further review.

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)

2. ALLEN CHARGE (Instruction 7.3) (Tab 9): Artigliere directed the committee's attention to the revised draft of instruction 7.3 on page 9-21. The subcommittee attempted to make the instruction more understandable without changing its substance. Page 9-22 contains a red-lined version showing the revisions from the existing instruction. In response to the Jury Innovations Report, this committee previously suggested adding the second paragraph of the revised instruction regarding rereading trial testimony. That proposal remains pending at the Court. The Court has scheduled oral argument on the responses to the Jury Innovations Report for February 14, 2007.

Artigliere suggested submitting a supplemental report in response to the Jury Innovations Report recommending these changes. The supplemental report would advise the Court that this committee continues to agree with the criminal jury instructions committee that the Allen charge cannot be changed substantively to make it more coercive. However, these revisions would make the instruction more understandable for jurors as recommended in the Jury Innovations Report.

Lewis commented that he thinks the revised language is very understandable. The revisions are much more appropriate than those this committee considered previously.

The committee then discussed the proposed language and made several revisions to further clarify the instruction. The committee revised the second paragraph, regarding requesting a read back of trial testimony, to provide: "If you cannot agree on what a witness said, you may ask that the court reporter read back to you a portion of any witness's testimony. To avoid delay, be as specific as possible."

The committee decided to delete the first paragraph and instead adopt the California Allen charge instruction, found on page 9-19. However, the committee revised the first sentence of third paragraph of the instruction on page 9-19 to provide: "You should not, however, give up your beliefs concerning the truth and the weight of the evidence simply for the purpose of ending the case or avoiding further discussion."

Artigliere asked the committee whether it felt that the revised Allen charge impermissibly commented on the evidence. Stewart responded that the instruction did not conceptually change the existing instruction. **Makar directed the subcommittee to revise the instruction in accord with the committee's comments. The committee will continue to consider the instruction at the Friday meeting.**

4. ALLEN CHARGE (Instruction 7.3) (Tab 9): Artigliere announced that the subcommittee had revised the instruction in accord with the committee's comments at the Thursday meeting. The committee continued revising the instruction.

In the second paragraph, Farmer suggested deleting the phrase instructing jurors to "keep an open mind." At this stage of the case, the jurors have heard all the evidence and are charged with deliberating to reach a verdict. Bailey and Cacciatore disagreed. Bailey felt that the phrase accurately conveys how the jurors should resolve the deadlock. Cacciatore added that it reminds the jury that it may still be possible to reach agreement at this point.

Griffin questioned the language telling jurors to consider the "opinions" of all jurors. The examination of evidence is not an opinion. In addition, telling the jurors to change their opinion if they "become convinced" it is wrong may be using too strong of a term.

Farmer recommended deleting the phrase "with whom," which is stilted and artificial. Authorities on grammer now recommend ending a sentence with a preposition rather than using the phrase "with whom."

The committee also discussed whether to tell jurors at the beginning of the instruction that "we appreciate your service." Bailey disagreed that this language is necessary because judges usually do this informally before reading the charge.

The committee then decided to eliminate the comment. Lumish asked whether it would be helpful to include a citation explaining how often the charge can be given. Bailey disagreed that this would assist judges. The key issue is determining whether the repeated charge is coercive, which depends on the circumstances in each case.

Bailey moved to adopt the instruction as revised at the meeting. Stewart seconded the motion and the committee adopted the following revision to instruction 7.3:

****

7.3 Jury Deadlocked

Members of the jury, we understand you are having difficulty reaching a verdict. This case is important to the parties, and we appreciate your efforts. But I am going to ask you to go back to try again to reach a verdict if you reasonably can.

Please carefully consider the views of all the jurors, including those you disagree with. Keep an open mind and feel free to change your view if you conclude it is wrong.

You should not, however, give up your own views simply to end the case or avoid further discussion. Each of you must decide the case for yourself and not merely go along with the conclusions of your fellow jurors.

If you cannot agree on what a witness said, you may ask that the court reporter read back to you a portion of any witness's testimony. To avoid delay, your request should be as specific as possible.

You may now return to the jury room for further deliberations.

****

Makar directed Artigliere to work with Rose to prepare a supplemental report in response to the Jury Innovations Report. The supplemental report will suggest these revisions to the Allen charge and explain that they are part of the committee's goal of instructing the jury

in plain English. The committee will strive to file the supplemental report by the end of November.

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)

9. ALLEN CHARGE (Tab 9):
Gunn informed the committee that the committee sent a proposal to the Supreme Court on January 10, 2007, which is still pending.

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)

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.**

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)

Allen Charge (801.3/801.4)

Because the Committee previously agreed upon and submitted instruction 801.3 for comment, this instruction will be kept and the "other version," instruction 801.4, will be removed from the revised materials. The instructions in section 800 will then need to be renumbered. The note on use to instruction 801.3 should be removed and replaced with the note on use to 801.4.

Boyer questioned whether a note on use should be added to instruction 801.3, directing that the instruction not be given unless and until the jury has announced that it has reached an impasse. Lumish also suggested that the note on use should cite cases holding that the instruction cannot be given twice. **Boyer and Lumish will send Stewart cases on these two respective points and Stewart will amend the note on use as necessary.**

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.)

Jury Deadlock Instruction:

All four comments to this instruction objected to the jury being informed that they can request a read-back of trial testimony. **The subcommittee believes, however, that the more informed the jury is, the better their decision will be. Thus, the subcommittee recommended no change. The committee agreed.**

One comment proposed amending the language in three different ways: (1) by adding the language back in that refers to a "consciously held position," (2) adding language that the case must be decided "solely on the evidence," and (3) reminding the jurors that they can ask questions of the court when deadlocked. **The subcommittee recommended only adding in the language "consciously held position," as this language was deleted unintentionally. The committee agreed with the subcommittee's recommendation.**

TAB E

REVISED MEMORANDUM July 6, 2006 (REVISING 6-11 MEMO)
------*PLEASE SUBSTITUTE FOR PRIOR MEMO*-----
TO: ALLEN CHARGE SUBCOMMITTEE (GRAHAM, BAILEY, FULFORD, LAROSE)

FROM: ARTIGLIERE

CC: MAKAR, GUNN, ROSE

RE: NEW SUBCOMMITTEE

BACKGROUND: At the February meeting, this subcommittee was formed and received the following charge:
"This new subcommittee was created to consider revising instruction 7.3. The subcommittee will keep in mind that the committee previously considered this issue and the committee's jury innovations report recommended against revising the Allen charge instruction."

I thought that I had already sent a prior version of this memo to each of you in preparation for our upcoming meeting in July, but apparently the transmission did not occur to some or all of the subcommittee. The only response I got was from Judge Bailey (see attached email). When I got a recent email from Gerry Rose to Jeff Fulford saying there had been no communications on the Allen charge subcommittee, I realized something must have gone awry. I apologize for any inconvenience on these matters. Obviously it is too late to do something for the July meeting, but I can distribute some materials at the Breakers in anticipation of some work we can do for the next meeting this fall.

The potential for revising standard instruction 7.3 keeps surfacing because of the tension between two competing concerns involving hung juries: the need to give juries capable of rendering a verdict enough guidance so they will be able to get the job done versus improper involvement of the judge in the jury deliberation process or, even worse, coercion. Proponents of the former view point out that jurors will not have the experience or understanding about how important it is to push through the difficulty of differences of opinion and make the hard decisions necessary to come up with a decision unless we tell them what's at stake (new trial, more cost, another jury taking on the very same issues with the same level of difficulty in reaching agreement). Proponents say that a bit of guidance regarding listening to each other to see if unanimity can be reached can avoid the cost of retrial. The most recent emanation of this approach came from the jury innovations study and Report in Florida (cited herein), and the recommendation was to consider more judicial involvement. Since these are civil cases, some of the concerns over the defendant's right to a mistrial are not as applicable. Many times, a mistrial and hung jury is a victory for the defense in a criminal case. The cost of a retrial most always falls harder on the prosecution, because they have now disclosed their entire case to the defense and defendants are often provided lawyers, trial costs, etc., by the state.

Opponents to changing the *Allen* charge say that the courts have already determined that the current instruction goes as far as possible and already does what proponents are asking. Any more would be illegal coercion and could cause a miscarriage of justice. They are especially concerned with judges ad-libbing additional language about what a new trial would cost the parties and the system. The SJI Committees Civil and Criminal have recommended that the Allen charges are adequate and further instruction by the judge is not advisable or that no change is necessary. (Full recommendations are attached, and all comments and recommendations are available on line on the Supreme Court's website). The Supreme Court has not acted on the recommendations to date.

The *Allen* charge derives from the case of *Allen v. U.S.,* 164 U.S. 492, a criminal case. The civil and criminal instructions are very similar. Florida appellate courts have not tolerated trial judge variance from the standard charge without permission of the parties. To be sure, even the timing of giving the correct charge one time has been criticized. See, *Singletary, by and through Barnett Banks Trust Co., N.A. v. Lewis,* 584 So. 2d 634 (Fla. 1st DCA 1991). However, there is authority in Florida for judicial variance from the *Allen* charge limitations in a **criminal** case where both parties saw the instruction in advance and agreed on it. See, *Palmer v. State*, 681 So. 2d 767, 767-8 (Fla. 5th DCA 1996). Query: shouldn't that rationale be even stronger in the civil context?

ISSUES:

(1) 7.3 appears to have been derived solely from criminal cases according to the Comment with the instruction. Should 7.3 be modified to comport with the civil context; i.e., to allow the flexibility of letting the judge tell the jury the generally what the costs of a retrial would be?

(2) The current wording is not plain, current English. Should 7.3 be updated and subjected to plain English scrutiny?

(3) Should judges be able to give more than one deadlocked charge?

(4) Should we reflect in a Note on Use that variance from the strict requirements of handling a deadlocked jury is permissible under certain circumstances with the agreement of the parties?

(5) Others?

ACTIONS RECOMMENDED: I will put together packets for each of you with attachments noted below to be distributed at the Breakers in July. After due consideration, I would like to hear from the Subcommittee members on your thoughts about the following:

1. What recommendations should we make to the SJI Committee:
    i. Pursue <u>non-substantive</u> changes to 7.3?
    ii. Eliminate or modify outdated note on use?
    iii. Pursue <u>substantive</u> changes to 7.3?
    iv. Give judges guidance about law in note on use.
    v. Other (specify).
2. What report should we make at *next* SJIC meeting (THIS FALL)?
    i. Give them background and status as set forth above
    ii. Get more information before reporting anything to Committee

iii. Other (specify).

ATTACHMENTS to be distributed to subcommittee members in July at the Breakers:

Allen charge (7.3) and Note on Use
Jury Innovations Report Recommendations
Our SJI Committee's response to innovations recommendations
Palmer v. State, 681 So. 2d 767(Fla. 5th DCA 1996).
Hollywood Corporate Circle Assocs. V. Amato, 604 So. 2d 888 (Fla. 4th DCA 1992).

7.3 *Jury deadlocked*

Members of the jury, it is your duty to agree on [a verdict] [verdicts] if you can do so without violating conscientiously held convictions that are based on the evidence. No juror, from mere pride of opinion hastily formed or expressed, should refuse to agree. Yet, no juror, simply for the purpose of terminating the case, should acquiesce in a conclusion that is contrary to his own conscientiously held view of the evidence. You should listen to each other's views, talk over your differences of opinion in a spirit of fairness and candor and, if possible, resolve your differences and come to a common conclusion, so that [a verdict] [verdicts] may be reached and this case may be disposed of.
You may retire to the jury room for further deliberations.

COMMENT

Adapted from Schneider v. State, 152 So.2d 731 (Fla. 1963); Nelson v. State, 148 Fla. 338, 4 So.2d 375 (1941); *Sigsbee v. State,* 43 Fla. 524, 30 So. 816 (1901); *Allen v. United States*, 164 U.S. 492 (1896).

JURY INNOVATIONS REPORT EXCERPT RE ALLEN CHARGE

34 Trial judges in criminal and civil cases should be allowed to assist deliberating juries in reaching a verdict where an *Allen*[4] charge has been given and the jury continues to report that they are deadlocked. Jurors should know exactly what can occur if they cannot reach a verdict, that is, what a mistrial actually means.

Discussion: If a jury is deadlocked, a judge should ask the jurors if they would like the attorneys to give additional argument on a particular issue. If the answer is in the affirmative, the presiding juror should describe the issue in writing to the court, which should submit it to the attorneys. If appropriate, limited closing argument on this issue alone should be allowed. The jurors would then be given a reasonable time to continue their deliberations.

The Committee believes that the standard juror instructions should be amended to explain to the jury, in neutral terms, the effect of a mistrial so that jurors are aware of what happens if they fail to reach agreement. This approach would improve the chances of a verdict, avoid needless mistrials, enhance the truth-seeking and educational aspects of the trial, and increase juror satisfaction with the process.

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4 The ***Allen*** charge refers to the 1896 opinion of the United States Supreme Court in *Allen v United States* 17 S. Ct. 154 (1896).

FSJIC RESPONSE TO JURY INNOVATIONS RECOMMENDATION

Recommendation 34 Jury Impasse

The Jury Innovations Committee recommended:

Juror Impasse. Trial judges in criminal and civil cases should be allowed to assist deliberating juries in reaching a verdict where an *Allen* charge has been given and the jury continues to report that they are deadlocked. Jurors should know exactly what can occur if they cannot reach a verdict, that is, what a mistrial actually means.

Florida case law reviewed by the Committee holds that a second Allen charge in a criminal case is per se reversible error, for which reason the Committee declines by unanimous vote to endorse this recommendation.

681 So.2d 767, 21 Fla. L. Weekly D2029

District Court of Appeal of Florida,
Fifth District.

Chris A. PALMER, Appellant,
v.
STATE of Florida, Appellee.

No. 95-1243.

Sept. 12, 1996.
Rehearing Denied Oct. 22, 1996.

Defendant was convicted upon jury verdict in the Circuit Court, Orange County, Michael F. Cycmanick, J., of battery on law enforcement officer. Defendant appealed. The District Court of Appeal held that: (1) erroneous overruling of defendant's objection to question "at some point did you tell your attorneys about it?" was harmless, and (2) trial court did not err in giving *Allen*-type instruction to jury.
Affirmed, sentence vacated and remanded.

West Headnotes

[1] KeyCite Notes

110 Criminal Law
110XXIV Review
110XXIV(Q) Harmless and Reversible Error
110k1170.5 Witnesses
110k1170.5(1) k. In General. Most Cited Cases

Erroneous overruling of defendant's objection, on grounds of attorney/client privilege, to question "at some point did you tell your attorneys about it?" was harmless in prosecution for battery on law enforcement officer.

[2] KeyCite Notes

110 Criminal Law
110XX Trial
110XX(J) Issues Relating to Jury Trial
110k865 Urging or Coercing Agreement
110k865(1.5) k. "Allen," "Dynamite," or "Hammer," Etc., Charge. Most Cited Cases

Allen-type jury instruction was not erroneous in prosecution for battery on a law enforcement officer, where court gave challenged instruction only after both counsel had reviewed it, commented upon it, and agreed to it.

[3] KeyCite Notes

350H Sentencing and Punishment
350HI Punishment in General
350HI(D) Factors Related to Offense

350Hk76 Weapons
350Hk77 k. In General. Most Cited Cases
(Formerly 110k1208.6(2))

Trial court erred in sentencing defendant by scoring 1.5 enhancement, under statute permitting enhancement for possession of firearm or destructive device, for simple battery on law enforcement officer. F.S.1993, § 775.087(2)(a) 2.

***767** James B. Gibson, Public Defender, and Susan A. Fagan, Assistant Public Defender, Daytona Beach, for Appellant.
Robert A. Butterworth, Attorney General, Tallahassee, and Allison Leigh Morris, Assistant Attorney General, Daytona Beach, for Appellee.

PER CURIAM.

[1] We find no merit in most of Palmer's multiple claims of error in the conduct of his trial, which resulted in conviction of battery on a law enforcement officer. We do agree with Palmer that the lower court erred in overruling his objection, on grounds of attorney/client privilege, to the question: "At some point did you tell your attorneys about it?" After reviewing the record and the context of the question and answer, however, we conclude that this error was harmless beyond a reasonable doubt. *State v. DiGuilio*, 491 So.2d 1129 (Fla.1986).

[2] On appeal, Palmer also claims the right to a new trial based on an *Allen* [FN1]-type of charge given to the jury at the court's suggestion. We question the wisdom of giving this charge, which is similar to the Eleventh Circuit Court of Appeals' pattern *Allen* instruction,[FN2] in preference to the Florida standard instruction. Florida courts have demonstrated extreme sensitivity to the potential coercive effect of such jury charges, and instructions containing elements broadly similar to the Eleventh Circuit's have been held to be reversible error in Florida. *See, e.g.,* ***768** *Bass v. State*, 611 So.2d 611, 611-12 (Fla. 2d DCA 1993) (modified *Allen* charge "urg[ed] the jurors to consider the expense that a new trial would involve"); *Hollywood Corp. Circle Assocs. v. Amato*, 604 So.2d 888, 891 (Fla. 4th DCA 1992) (modified *Allen* charge informed the jury that if it did not return a unanimous verdict "it was going to be 'terrible [sic] expensive to everybody' "); *Nelson v. State*, 438 So.2d 1060, 1062-63 (Fla. 4th DCA 1983) (modified *Allen* charge "made it appear that unless a verdict was reached great waste would occur and the court's confidence in the jury's common sense would somehow have been betrayed"); *see also Warren v. State*, 498 So.2d 472, 477-78 (Fla. 3d DCA 1986) (holding that emphasizing the "needless cost involved in retrying the case" was a strictly forbidden comment in Florida), *review denied*, 503 So. 2d 328 (Fla.1987); *Rodriguez v. State*, 462 So.2d 1175, 1178 (Fla. 3d DCA), *review denied*, 471 So.2d 44 (Fla.1985) ("The jurors should not have been required, as the trial judge told them, to consider the public moneys expended on the trial and to melt their 'minds and personalities into one to reach a verdict.' "). In this case, however, the court gave the now challenged instruction only after both counsel had reviewed it, commented upon it and agreed to it. Under the circumstances, there was no error, much less fundamental error.

FN1. *Allen v. United States*, 164 U.S. 492, 17 S.Ct. 154, 41 L.Ed. 528 (1896).

FN2. We note that one panel of the United States Eleventh Circuit Court of Appeals considered a similar instruction to be both confusing and coercive, although the panel ultimately found itself bound by circuit

precedent to hold the instruction to be permissible. *United States v. Rey,* 811 F.2d 1453 (11th Cir.), *cert. denied,*484 U.S. 830, 108 S.Ct. 103, 98 L.Ed.2d 63 (1987). The instruction subsequently has been held not to be coercive. *United States v. Chigbo,* 38 F.3d 543, 546 (11th Cir.1994), *cert. denied,*516 U.S. 826, 116 S.Ct. 92, 133 L.Ed.2d 48 (1995).

[3] As to sentencing, we agree that it was error to score a 1.5 enhancement for simple battery on a law enforcement officer. Section 775.087(2)(a) 2, Florida Statutes (1993), requires possession of a firearm or destructive device. *See*Fla. R.Crim. P. 3.702(d)(14). This error requires correction and resentencing. We find no merit to appellant's other attacks on his scoresheet.
JUDGMENT AFFIRMED; SENTENCE VACATED and REMANDED.

W. SHARP, GRIFFIN and THOMPSON, JJ., concur.

604 So.2d 888, 17 Fla. L. Weekly D2039

District Court of Appeal of Florida,
Fourth District.

HOLLYWOOD CORPORATE CIRCLE ASSOCIATES, a Florida General Partnership, Appellant,
v.
Charles AMATO, JR., and Cuyhoga Wrecking Corp., etc., Appellees.

No. 90-3302.

Sept. 2, 1992.

Motorist brought action against owner of property to recover for injuries sustained in automobile accident. The Circuit Court, Broward County, James M. Reasbeck, J., entered judgment in favor of motorist, and owner appealed. The District Court of Appeal, Alderman, James E., Senior Justice, held that: (1) jury misconduct required reversal; (2) trial court's ad lib comments given in connection with *Allen* charge constituted reversible error; but (3) evidence was sufficient to permit landowner to be held liable.
Reversed and remanded.

West Headnotes

[1] KeyCite Notes

275 New Trial
275II Grounds
275II(D) Disqualification or Misconduct of or Affecting Jury
275k44 Misconduct of Jurors in General
275k44(3) k. Consideration of Matters Not in Evidence. Most Cited Cases

Trial court should have granted motion for new trial once it became clear that juror had independently searched the law, relayed his opinion to other jurors, visited the accident scene, discussed the case with his police officer girlfriend, relayed her personal knowledge to other jurors, and carried a police regulations handbook into the jury room.

[2] KeyCite Notes

30 Appeal and Error
30XVI Review
30XVI(J) Harmless Error
30XVI(J)19 Conduct and Deliberations of Jury
30k1069.3 k. Recalling Jury and Further Instructions. Most Cited Cases

388 Trial KeyCite Notes
388VIII Custody, Conduct, and Deliberations of Jury

388k312 Instructions After Submission of Cause
388k312(2) k. Requisites and Sufficiency of Instructions. Most Cited Cases

Court's ad lib comments in connection with *Allen* charge that a retrial would be a terrible expense to everybody constituted reversible error.

[3] KeyCite Notes

388 Trial
388VIII Custody, Conduct, and Deliberations of Jury
388k312 Instructions After Submission of Cause
388k312(2) k. Requisites and Sufficiency of Instructions. Most Cited Cases

It was error to instruct jury to go back and agree only on percentage allocations for fault and not to reconsider total amount of damages when it was necessary to send the jurors back to recalculate their arithmetic.

[4] KeyCite Notes

48A Automobiles
48AVI Injuries from Defects or Obstructions in Highways and Other Public Places
48AVI(B) Actions
48Ak308 Questions for Jury
48Ak308(8) k. Negligence of Abutting Owner. Most Cited Cases

Jury could find landowner negligent for maintaining its property in such a manner as to create the optical illusion of a through street; property was a large circular parcel of land in the middle of a traffic circle in which a military academy had stood but which had since been removed, allowing drivers approaching the circle at night to see street lights and the headlights of oncoming cars on the other side of the circle, and there was a large gate where westbound traffic entered the traffic circle.

***889** Richard A. Sherman and Rosemary Wilder of Law Offices of Richard A. Sherman, P.A., Fort Lauderdale, for appellant.
Bruce L. Hollander of Hollander & Associates, P.A., Hollywood, for appellee-Charles Amato, Jr.

ALDERMAN, JAMES E., Senior Justice.
Appellant-defendant, Hollywood Corporate Circle Associates (H.C.C.A.), the defendant in the trial, appeals a final judgment for personal injuries awarded in a jury trial to the appellee-plaintiff, Charles Amato. We reverse and remand for a new trial.
Plaintiff's cause of action is grounded upon the rule set out in section 367, Restatement of Torts, as adopted by the Second District Court of Appeal in *Drady v. Hillsborough County Aviation Authority*, 193 So.2d 201, 203 (Fla. 2d DCA 1967):
A possessor of land who so maintains a part thereof that he knows or should know that others will reasonably believe it to be a public highway is subject to liability for bodily harm caused to them while using such part as a highway, by his failure to exercise reasonable care to maintain it in a reasonably safe condition for travel.
H.C.C.A. was the owner of a large circular parcel of land located in the middle of Hollywood Boulevard known as Military Circle. This land causes the two-way vehicular traffic proceeding on Hollywood Boulevard to divert to the north when going westerly and to the south when going easterly, creating one way traffic around Military Circle. For many years, a military academy had occupied the land. The buildings of the

academy prevented drivers on Hollywood Boulevard approaching Military Circle from seeing beyond the parcel of land to Hollywood Boulevard on the other side of the circle. As part of the defendant's development plan for a high rise office building, Cuyahoga Wrecking Corp. was hired to level the existing buildings and to remove the rubble. Once the buildings and rubble were removed, drivers approaching Military Circle at night could see the street lights and head lights of oncoming cars on the other side of the circle, creating the illusion that Hollywood Boulevard continued straight through Military Circle.

H.C.C.A. and Cuyahoga Wrecking Corp. used the east side of the circle to gain access to the property. Although a fence surrounded the property, there was a large gate where westerly bound traffic on Hollywood Boulevard turned right and proceeded around Military Circle.

The plaintiff had been drinking at the time of the accident and at trial he stipulated that he was legally drunk. He testified that he never saw any of the numerous directional markings on the highway indicating that he was approaching Military Circle and that Hollywood Boulevard turned right to go around Military Circle. He drove straight through the gate onto defendant's property and crashed into a bulldozer.

The plaintiff claimed that the defendant was negligent in failing to warn him that the construction site was not a public highway and that it was blocked by a bulldozer. Plaintiff testified that on October 22, 1984, after having at least three drinks at a nude dancing bar he gave a dancer from this bar a ride to her home. Upon arriving, she asked him in for a drink. While inside, and after he had at least two more drinks, she began to have an asthma attack. Plaintiff, offered to drive her to the hospital. Although he was aware of Military Circle on Hollywood Boulevard near the hospital, he did not recognize the circle when he came to it. He testified in part as follows:

Well, I was looking for what I normally would have been seeing from the other times I had traveled that area: the school, which is a landmark, and I believe a lot of people drive by that.

. . . . .

And I am looking for the school and, you know, there is no school there. And I'm driving and I am going west there, and all of a sudden, you know, I mean, I ***890*** see an area that's dark. Everything got very dark in front of me.

. . . . .

Why? Because I had run out of road, and that was the circle, only it looked like you can drive straight through from back there. And when I got to about where the gate was, I stepped on the brakes.

. . . . .

And as I stepped on the brakes and looked in front of me, there was a large object, and my car is skidding out of control, and I am trying to stop before I hit this thing. And the next thing I knew, I heard the sound of the impact and the glass splatter and felt myself holding on the wheel as tight as I could.

Plaintiff admitted that shortly after the accident he gave a false version of what occurred to an insurance adjuster. He told the adjuster that the woman fell over on him and hit the steering wheel, causing his foot to hit the gas and the car to drive into the circle. He claimed at trial that he told this version because he was scared and wanted the adjuster to believe the woman was at fault.

Plaintiff also initially told the investigating police in the emergency room that it was the woman, and not he, who was driving at the time of the accident. He recanted this story when the police confronted him with evidence that showed his chest wounds were caused by the steering wheel.

After the jury had deliberated for five hours, the jury foreperson indicated that they

were unable to unanimously agree because "one dissenting member is immoveable." Over the defendant's objection, and motion for mistrial, the trial court instructed the jury as follows:

I guess it's now five full days on the trial of this case. An awful lot of money has been spent, a lot of people have been put out of their normal planned functions, and required to come here against their will, but they did it because it was a process we have unique to the United States, or at least to the English speaking people. We all want a verdict, defendant wants a verdict, the court wants a verdict, and I want to read this instruction to you and give you one more chance to go back in the jury room.

The judge then gave an *Allen* [FN1] charge and advised the jury that if it could not reach a conclusion in a reasonable time he would declare a mistrial. The judge then said, "and it is going to be terrible [sic] expensive to everybody."

FN1. *Allen v. United States*, 164 U.S. 492, 17 S.Ct. 154, 41 L.Ed. 528 (1986). Fla.Std. Jury Instr. (Civ.) 3.06 (1981).

After about 45 minutes, the jury returned its first verdict, but the judge sent the jury back to recalculate the arithmetic. A second verdict found plaintiff 75% negligent, defendant 25% negligent and assessed total damages of $219,000. But juror Saunders, upon a poll of the jurors, replied that this was not his verdict, as he did not agree with the percentages of fault.

Over defendant's objections, the judge again sent the jury back in "to agree on the percentage" only. He informed the jury not to change any figures on the verdict form. Defendant again moved for a mistrial.

The jury's third verdict assessed 72% liability to plaintiff and 28% to defendant. But, upon a jury poll, juror Saunders, again, said this was not his verdict. Verdict four allocated 65% fault to plaintiff and 35% to defendant. This verdict was unanimous.

Prior to arriving at its final verdict, the jury foreperson told the judge "there is a possibility that there are some influential factors entering into his (juror Saunders') refusal to compromise." The nature of these influences were disclosed after the unanimous verdict was entered. The questioned conduct is summarized in an affidavit given by one of the jurors:

Juror, Jack Saunders, told other jurors that he had spoken to his girlfriend, a Hollywood police officer, about the credentials of Amato's expert witness, Rick ***891** Swope; during the trial, Saunders told other jurors that he would be attending the police academy next month and that Plaintiff's expert witness, Rick Swope, would be one of his instructors; during the trial, Saunders told other jurors that he looked forward to being in Mr. Swope's class. During the trial, Saunders told other jurors that he had researched Florida law and that there was a Florida Statute that says if someone has heavy construction equipment, they must have a fence around the property. During the trial, Jack Saunders brought a Police Regulations Handbook into the jury room; on Wednesday of the trial week, Saunders told other jurors that he had driven by the scene of the accident the previous day, during the trial; and Saunders told other jurors that he was once stopped by a Hollywood police officer and "blew" a 2.1 on a breathalyzer but since the officer was a friend, he was allowed to drive the last few blocks to his home.

[1] There are several errors in this case that require reversal. To begin with the trial court should have granted defendant's motion for a new trial once it became clear that Juror Saunders had independently researched Florida law, relayed his opinion to other jurors, visited the accident scene, discussed the case with his girlfriend, relayed her personal knowledge to other jurors, and carried a Police Regulations Handbook into the jury room. These violations

demonstrate a willful disregard for the sanctity of the jury process. In *Grissinger v. Griffin,* 186 So.2d 58 (Fla. 4th DCA1966) this court held the mere taking of a dictionary into the jury room, although there was no evidence it was used, constituted reversible error. In the present case the harmful effect of juror Saunders' misconduct is apparent and mandates a new trial.

[2] The ad lib comments of the trial court given in conjunction with the *Allen* charge also constitute reversible error. Among other things, the trial court improperly informed the jury that if they did not arrive at a unanimous verdict, it was going to be "terrible [sic] expensive to everybody." Such comments are not tolerated. *See* *Rodriquez v. State,* 462 So.2d 1175 (Fla. 3d DCA), *review denied,* 471 So.2d 44 (Fla.1985) (charge telling jurors to consider expense and indicating a verdict was desired held fundamental error).

[3] The court also erred when it instructed the jury to go back and agree only upon percentage allocations for fault, and by informing the jury not to reconsider the total amount of damages. *Stevens Markets, Inc. v. Markantonatos,* 189 So.2d 624 (Fla.1966) (jury to which verdict is returned for correction may alter verdict in substances or submit entirely different one.) *See also, McDonough Power Equipment, Inc. v. Brown,* 443 So.2d 1050 (Fla. 4th DCA), *review denied,* 453 So.2d 44 (Fla.1984) (error for trial court to resubmit, after first verdict, only the issue of compensatory damages, though cured by resubmitting all issues after a second verdict).

[4] In addition to the foregoing, defendant contends that the court erred in failing to grant its motion for a directed verdict. It argues that the plaintiff failed to prove that any breach of duty on its part proximately caused plaintiff's injury. From the evidence the jury might have found that there was no fault on the part of the defendant and that the plaintiff's injuries were solely the result of his own negligence. But the jury also might have found that the defendant so maintained its property that it knew or should have known that others would reasonably believe the property to be a public highway and that defendant's act of creating the optical illusion of a through street and its failure to do anything on its property to warn of the illusion was a contributing factor to the accident. That being the case, the motion for directed verdict was properly denied. REVERSED and REMANDED for a new trial.

DELL and GUNTHER, JJ., concur.

From: Bailey, Jennifer [JBailey@jud11.flcourts.org]
Sent: Monday, June 12, 2006 9:25 AM
To: Artigliere, Ralph; Edward LaRose; Gerry Rose (E-mail); Jeffrey Fulford; Scott Makar (Business Fax); Tracy Gunn (E-mail); Graham, Wendell
Subject: RE: Prep for next meeting

Dear Judge Artigliere:

As I see it, there are three major Allen charge issues coming up from the trenches:

1. Should we tell the jury what happens if they can't reach a verdict
2. Should we give the jury some methodology instructions – in other words, procedural instructions about new ways to approach the problem to break the deadlock. Cutting edge juror theory suggests that we should do a better job of providing guidance in terms of how jurors should do their jobs. We should confer with our juror consultant member about this.
3. Plain English should be used.

I personally believe that current Allen charge law is moribund and useless and would recommend submitting fundamental changes in the Allen charge to the Supreme Court. While no one ever want to coerce a verdict, very few parties are happy with a hung jury given the time and expense involved in today's trials and hung juries represent a huge waste of taxpayer dollars. I also think it would be worthy to consider a tiered Allen charge...in other words the Allen charge one might give after a jury with personality dysfunctions deliberates two hours and announces a deadlock would be different than a charge that might be given to a juror which deliberated for two days and announced a deadlock.

Subsidiary to this question is whether it would be appropriate to reveal partial verdicts on which unanimity has been reached in a civil case on some of the issues...for example, where there is a unanimous verdict on liability but the jury hangs on damages. Also, should we consider whether votes should be revealed? All of these are major hot-button issues that should be extensively debated.

I won't be there in July due to a long-standing family reunion conflict, but will be happy to work on this.

Regards,

Jennifer Bailey

-----Original Message-----
From: Artigliere, Ralph [mailto:RArtigliere@Jud10.FLCourts.org]
Sent: Sunday, June 11, 2006 11:12 AM
To: Edward LaRose; Gerry Rose (E-mail); Jeffrey Fulford; Bailey, Jennifer; Scott Makar (Business Fax); Tracy Gunn (E-mail); Graham, Wendell
Subject: Prep for next meeting

Attached is a memo I prepared for our subcommittee's tasks. Please give the group your comments and recommendations by return e-mail.

If you think we need to meet by telephone before the meeting, let me know.

I can prepare a PowerPoint presentation for the entire committee to present in July.

Let me know your thoughts.

I am sorry that it took me a while to get this information together for the committee.

Ralph Artigliere
<<6-31-06 INITIAL MEMO.doc>>

Recommendation 34 Jury Impasse

The Jury Innovations Committee recommended:

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Juror Impasse. Trial judges in criminal and civil cases should be allowed to assist deliberating juries in reaching a verdict where an *Allen* charge has been given and the jury continues to report that they are deadlocked. Jurors should know exactly what can occur if they cannot reach a verdict, that is, what a mistrial actually means.

The SJI-Civil is opposed to this recommendation. It is extremely difficult for a trial judge to "assist" a deliberating jury without becoming a seventh juror. A jury that is having difficulty reaching a verdict is a very delicate problem for the judicial system. Judges who modify the standard charge by including exhortatory language, such as encouraging a verdict to avoid the costs of retrial to the parties and the public, are often reversed, particularly when the modification is done "on the fly" or in an "ad lib" manner without the agreement of all parties.[2]

The SJI-Civil believes that juries understand the importance of their deliberations and the consequences of a mistrial. Placing more pressure on nonconforming jurors to accede to the will of the majority is not in the best interests of our system of trial by jury. The current instruction on this issue is adequate. The SJI-Civil suggests one addition to Standard Instruction 7.3 to alert the jury to the option of receiving a read-back of testimony. This addition is contained in AppendixA-6.

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[2] *See, e.g.,* Hollywood Corporate Circle Assocs. v. Amato, 604 So. 2d 888, 891 (Fla. 4th DCA 1992) ("The ad lib comments of the trial court given in conjunction withthe *Allen* charge also constitute reversible error. Among other things, the trial court improperly informed the jury that if they did not arrive at a unanimous verdict, it was going to be 'terrible [sic] expensive to everybody.' Such comments are not tolerated.") (citing standard charge); *see also* Young v. State, 711 So. 2d 1379, 1379 (Fla. 2d DCA 1998)("Because the trial court improperly modified the *Allen* charge, we reverse. Omitting the last sentence of the standard instruction is error."); Palmer v. State, 681 So. 2d 767, 767-68 (Fla. 5th DCA 1996) ("We question the wisdom of giving this charge, which is similar to the Eleventh Circuit Court of Appeals' pattern *Allen* instruction, in preference to the Florida standard instruction. Florida courts have demonstrated extreme sensitivity to the potential coercive effect of such jury charges, and instructions containing elements broadly similar to the Eleventh Circuit's have been held to be reversible error in Florida. ... In this case, however, the court gave the now challenged instruction only after both counsel had reviewed it, commented upon it and agreed to it. Under the circumstances, there was no error, much less fundamental error.") (citations omitted); McKinney v. State, 640 So. 2d 1183, 1186 (Fla. 2d DCA 1994) ("We agree that the trial court erred by asking the

foreperson how the jury was split before providing the *Allen* charge. We also agree that it erred by omitting two significant portions of the standard charge after agreeing to give that charge verbatim.").

Draft Instruction 7.3(c)

JURY DEADLOCKED

Members of the jury, it is your duty to agree on [a verdict] [verdicts] if you can do so without violating conscientiously held convictions that are based on the evidence. No juror, from mere pride of opinion hastily formed or expressed, should refuse to agree. Yet, no juror, simply for the purpose of terminating the case, should acquiesce in a conclusion that is contrary to his own conscientiously held view of the evidence. In determining the facts, you should rely on your collective memories of the testimony. If you have been unable to resolve your differences as to what a witness said, you may ask that the court reporter read back to you a specific portion of any witness's testimony. Because the typing of the court reporter's notes can take a large amount of time, any request to have testimony read back should be as specific as possible. You should listen to each other's views, talk over your differences of opinion in a spirit of fairness and candor and, if possible, resolve your differences and come to a common conclusion, so that [a verdict] [verdicts] may be reached and this case may be disposed of.

You may retire to the jury room for further deliberations.

Here is the newer CACI 5013 (plain language) Instruction - Deadlocked Jury Admonition:

You should reach a verdict if you reasonably can. You have spent time trying to reach a verdict and this case is important to the parties.

Please carefully consider the opinions of all the jurors, including those with whom you disagree. Keep an open mind and feel free to change your opinion if you become convinced that it is wrong.

You should not, however, surrender your beliefs concerning the truth and the weight of the evidence. Each of you must decide the case for yourself and not merely go along with the conclusions of your fellow jurors.

SOURCES AND AUTHORITY

> "The court told the jury they should reach a verdict if they reasonably could; they should not surrender their conscious convictions of the truth and the weight of the evidence; each juror must decide the case for himself and not merely acquiesce in the conclusion of his fellows; the verdict should represent the opinion of each individual juror; and in reaching a verdict each juror should not violate his individual judgment and conscience. These remarks clearly outweighed any offensive portions of the charge. The court did not err in giving the challenged instruction." (Inouye v. Pacific Southwest Airlines (1981) 126 Cal.App.3d 648, 652 [179 Cal.Rptr. 13].)

> "A trial court may properly advise a jury of the importance of arriving at a verdict and of the duty of individual jurors to hear and consider each other's arguments with open minds, rather than to prevent agreement by obstinate adherence to first impressions. But, as the exclusive right to agree or not to agree rests with the jury, the judge may not tell them that they must agree nor may he harry their deliberations by coercive threats or disparaging remarks." (Cook v. Los Angeles Ry. Corp. (1939) 13 Cal.2d 591, 594 [91 P.2d 118], internal citations omitted.)

> "Only when the Instruction has coerced the jurors into surrendering their conscientious convictions in order to reach agreement should the verdict be overturned." (Inouye v. Pacific Southwest Airlines, supra, 126 Cal.App.3d at p. 651.)

> "The Instruction says if the jury did not reach a verdict, the case would have to be retried. It also says the jurors should listen with deference to the arguments and distrust their own judgment if they find a large majority taking a different view of the case. In a criminal case the mere presence of these remarks in a jury Instruction is error. However, civil cases are subject to different considerations; the special protections given criminal defendants are absent." (Inouye v. Pacific Southwest Airlines, supra, 126 Cal.App.3d at p. 651, internal citation omitted.)

WEST'S EDITORIAL REFERENCES

Research References:
C.J.S. Trial § 815.
West's Key No. Digests, Trial k314.

This is the **older** BAJI 15.60 Instruction - Deadlocked Jury Admonition:

Do your best to reach a verdict if you can reasonably do so. This case is important to the parties and has been expensive to try. If you fail to reach a verdict, the case will have to be tried by another jury selected in the same manner as you were. You are certainly as competent as any other jury.

I am not suggesting that anyone should give up a conscientiously held opinion. However, I am asking each of you to listen with deference to the views of other jurors who do not agree with you and to ask yourself if they may be right and you may be wrong in how you evaluate the evidence and apply it to the law. If you are convinced you are wrong, you must be willing to change your opinion and you should not hesitate to do so.

Remember, it is your duty to try and reach a verdict if you can, and, bearing in mind what I have said, I am asking you to further deliberate in an effort to reach a verdict.

USE NOTE

Care should be exercised in using this instruction. If the circumstances of its use are coercive, any resulting verdict would be subject to being overturned.

COMMENT

This instruction is derived from that approved in Inouye v. Pacific Southwest Airlines (4th Dist.1981) 126 Cal.App.3d 648, 179 Cal.Rptr. 13. The court found that neither the instruction itself nor the circumstances of its use were coercive.

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My thoughts: The newer "plain language" instruction is a more touchy-feely and less forceful, but in my opinion not any more "plain language" than the older BAJI instruction. The older BAJI seems to be more in line with Florida's instruction in that it speaks of a "conscientiously held opinion." Both instructions appeared to me to be problematic (and markedly different from FL) in that they asked jurors to question themselves if others are going the other way, though the Inouye Court (appellate - not Supreme Court) appeared to not mind in civil cases. CA jury instructions are not sanctioned by our Supreme Court and CA verdicts need not be unanimous, with only a 9-3 needed to prevail, which may explain the harmlessness of instructing jurors to question themselves.

Bill

William M. Artigliere
Attorney at Law
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7.3 Jury Deadlocked

Members of the jury, it is your duty to agree on a verdict if you can do so without giving up a position based on the evidence that you truly hold in good conscience. The fact that you may form or express an opinion in deliberations on this case should not cause you to refuse to consider other opinions or views. Yet, no juror, simply for the purpose of ending the case or avoiding further discussion, should give in to a conclusion that is against his or her honest view of the evidence. You should listen to each other's views, talk over your differences of opinion in a spirit of fairness and candor and, if possible, resolve your differences and come to a common conclusion, so that a verdict may be reached and this case may be resolved.

You should rely on your group memories of the testimony. If you cannot resolve your differences as to what a witness said, you may ask that the court reporter read back to you a specific portion of any witness's testimony. Because locating testimony and typing the court reporter's notes can take so much time, any request to have testimony read back should be as specific as possible.

You may now retire to the jury room for further deliberations.

COMMENT

Adapted from Schneider v. State, 152 So.2d 731 (Fla. 1963); Nelson v. State, 148 Fla. 338, 4 So.2d 375 (1941); Sigsbee v. State, 43 Fla. 524, 30 So. 816 (1901); Allen v. United States, 164 U.S. 492 (1896).

7.3 Jury Deadlocked

Members of the jury, it is your duty to agree on a verdict if you can do so without giving up a position based on the evidence that you truly hold in good conscience. The fact that you may form or express an opinion in deliberations on this case should not cause you to refuse to consider other opinions or views. Yet, no juror, simply for the purpose of ending the case or avoiding further discussion, should give in to a conclusion that is against his or her honest view of the evidence. You should listen to each other's views, talk over your differences of opinion in a spirit of fairness and candor and, if possible, resolve your differences and come to a common conclusion, so that a verdict may be reached and this case may be resolved.

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Adapted from Schneider v. State, 152 So.2d 731 (Fla. 1963); Nelson v. State, 148 Fla. 338, 4 So.2d 375 (1941); Sigsbee v. State, 43 Fla. 524, 30 So. 816 (1901); Allen v. United States, 164 U.S. 492 (1896).

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TO: **BOB MANSBACH, Civil Rules 1.985 Committee** **1-10-07**

FROM: **RALPH ARTIGLIERE, SJI 1.985 Subcommittee**

RE: **Input from SJI Committee (Civil)**

By consensus, the Standard Jury Instructions Committee feels that "Form 1.985" is archaic and inconsistent with current practice and with Rule 1.470(b), and proposed preliminary and pre-*voir dire* instructions will further complicate the issue of judicial justification of benign variance from the "standard" forms of instruction. The Committee unanimously agrees that, *upon objection to* a modification of a standard instruction, the judge should be required to justify the variance as currently stated in Form 1.985, but that requirement should be incorporated in Rule 1.470(b), not in a Form 1.985. (We are aware that there are pending modifications to Rule 1.470(b).) We would request that Rule 1.470 require a contemporaneous objection to instructions given at any time during the case, not just instructions considered at the charge conference and given before or after closing. We would contemplate a rule that provides, if an objection is made, the judge would need to state on the record or by separate order the legal basis for the modified instruction or different instruction.

Ralph Artigliere
Circuit Judge
Florida's Tenth Judicial Circuit: *Where Professionalism is a Priority*
863-534-5860
Judicial Assistant: Pat Williams

The Supreme Court Committee on Standard Jury Instructions in Civil Cases proposes to amend its instructions on 7.3(c) Jury Deadlocked. The proposed amendments are shown below with the current instruction shown with strike-through marks and the new instruction shown with underlining. Comments are invited. After reviewing all comments, the committee may submit its proposal to the Florida Supreme Court.

Please send all comments to the chair of the committee, Ms. Tracy Raffles Gunn, Fowler White Boggs Banker PA, 501 East Kennedy Blvd. Suite 1700, Tampa, FL 33602. You can email your comments to her at tgunn@fowlerwhite.com or fax them to her at (813) 229-8313. Your comments must be received by March 31, 2008, to ensure that they are considered by the committee.

7.3(c) Jury Deadlocked

~~**Members of the jury, it is your duty to agree on [a verdict] [verdicts] if you can do so without violating conscientiously held convictions that are based on the evidence. No juror, from mere pride of opinion hastily formed or expressed, should refuse to agree. Yet, no juror, simply for the purpose of terminating the case, should acquiesce in a conclusion that is contrary to his own conscientiously held view of the evidence. You should listen to each other's views, talk over your differences of opinion in a spirit of fairness and candor and, if possible, resolve your differences and come to a common conclusion, so that [a verdict] [verdicts] may be reached and this case may be disposed of.**~~

~~**You may retire to the jury room for further deliberations.**~~

Members of the jury, we understand you are having difficulty reaching a verdict. This case is important to the parties, and we appreciate your efforts. But I am going to ask you to go back to try again to reach a verdict if you reasonably can.

Please carefully consider the views of all the jurors, including those you disagree with. Keep an open mind and feel free to change your view if you conclude it is wrong.

You should not, however, give up your own views simply to end the case or avoid further discussion. Each of you must decide the case for yourself and not merely go along with the conclusions of other jurors.

If you cannot agree on what a witness said, you may ask that the court reporter read back to you a portion of any witness's testimony. To avoid delay, your request should be as specific as possible.

You may now return to the jury room for further deliberations.