IN THE SUPREME COURT OF FLORIDA

In the matter of Standard Jury Instructions (Civil),

Medical Malpractice Insurer's Bad Faith Failure to Settle

_____/

Committee Report Number 09-05

REPORT (NO. 09-05) 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 a new Florida Standard Jury Instruction for *Medical Malpractice Insurer's Bad Faith Failure to Settle*, as set forth below. 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 09-05, proposes a new instruction for use in insurance bad faith cases involving medical malpractice insurers. For ease of reference, this report uses the 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

The current jury instructions contain a general instruction for use in common law and statutory cases against insurance companies for bad faith failure to settle claims. See Florida Standard Jury Instruction MI 3.1.

The legislature created a special statutory scheme for bad faith claims involving medical malpractice liability insurers. Section 766.1185(1), Florida Statutes, provides that a medical malpractice insurer is not liable for bad faith if certain factors are met. Subsection (2) of the same statute sets forth certain enumerated criteria that the finder of fact "shall consider" if a bad faith claim against a medical malpractice insurer goes to trial.

The Committee unanimously agreed that because the statute mandates that the finder of fact "shall consider" these factors, the statute requires a new jury instruction informing the jury of the statutory factors. The Committee drafted a proposed instruction which tracks verbatim the language of the statute, along with a proposed Note on Use.

The following proposal was published in the Florida Bar News for comment:

404.5 MEDICAL MALPRACTICE INSURER'S BAD FAITH FAILURE TO SETTLE

In determining whether (Defendant) **acted in bad faith, you shall consider the following factors or circumstances;**

[(Defendant's) **willingness to negotiate with** (Claimant) **in anticipation of settlement],**

[the propriety of (Defendant's) **methods of investigating and evaluating the claim of** (Claimant)],

[whether (Defendant) timely **informed** (Insured) **of an offer to settle within the limits of coverage, the right to retain personal counsel, and the risk of litigation],**

[whether (Insured) **denied liability or requested that the case be defended after** (Defendant) **fully advised** (Insured) **as to the facts and risks],**

[whether (Claimant) **imposed any condition, other than the tender of the policy limits, on the settlement of the claim],**

[whether (Claimant) **provided relevant information** to (Defendant) **on a timely basis],**

[whether and when other defendants in the case settled or were dismissed from the case],

[whether there were multiple claimants seeking, in the aggregate, compensation in excess of policy limits from (Insured) **or from** (Defendant)],

[whether (Insured) **misrepresented material facts** to (Defendant) **or made material omissions of fact to** (Defendant)],

[**and** (list such additional factors as the court may determine to be relevant)].

NOTE ON USE FOR 404.5

This instruction lists the factors that the jury "shall consider" under section 766.1185(2), Florida Statutes, and should be used only in cases to which that statute applies. It should be given in conjunction with and immediately after 404.4. The Committee recommends that specific factors should be omitted from the instruction when they are not an issue in the case.

III. APPENDICES

The following appendices are attached to this Report:

Appendix A:	Proposed instruction
Appendix B:	May 1, 2008 Florida Bar News notice
Appendix C:	Comments received by the Committee
Appendix D:	Relevant excerpts from the Committee's minutes
Appendix E:	Committee materials relating to this topic

IV. DISSENTING VIEWS FROM THE COMMITTEE

There are no dissenting views from the Committee. The Committee believes that this instruction is necessary to implement the statute, and unanimously recommends its adoption by the Court and publication for use.

V. COMMENTS RECEIVED

The proposed instruction was published for comment and five comments were received.

Two comments addressed the brackets around the various factors in the instruction and the last sentence of the proposed Note On Use. The objection was that the brackets would be seen as giving the trial court discretion to omit factors, especially in light of the last sentence in the proposed Note On Use. The comments pointed out that the statutory language was mandatory – the jury "shall consider" – and that the absence of evidence of a factor can be as probative as its presence. Therefore, according to the comments, the trial court has no discretion to omit factors from the instruction unless agreed by the parties.

The subcommittee agreed in part with these comments. The Committee agrees that the absence of a factor may be relevant. However, the Committee also believes that some of the enumerated factors could be irrelevant and confusing in some cases, and that the trial courts should have the ability to omit those factors even without agreement of the parties.

The Committee revised the proposal in the light of these comments. The proposal removes the brackets, and proposes revised Notes on Use as follows:

1. This instruction implements Florida Statutes section 766.1185 and should be used only in cases to which that statute applies. It should be given in conjunction with and immediately after instruction 404.4 (previously MI 3.1).

2. The statute requires that the jury "shall consider" all the enumerated factors. The absence of a factor may be relevant for the jury's consideration. The court should therefore instruct on all factors unless there is no issue as to a particular factor.

Two comments recommended a Note On Use stating that this instruction must be given in connection with the general bad faith instruction. The proposed Note On Use already specifies this.

One comment recommended a new Note On Use stating that the instruction only applies to a "failure to settle" case and stating that there are other types of bad faith. Another comment recommended changing the title of the instruction to make it clear that it only applies to cases where the carrier fails to settle "within policy limits." The Committee notes in response to both comments that the title of the

proposed instruction already includes the words "failure to settle," and the proposed note on use properly defines the scope of the instruction as applying to cases within the statute.

One comment recommended adding "medical malpractice" before the word "case" in the fourth and seventh factors listed in the instruction. However, this instruction is only given in medical malpractice situations, so this addition is unnecessary.

One comment recommended expanding the final factor – "(list such additional factors)" – to add that bad faith must be based on a "totality of the circumstances." However, section 766.1185 does not contain such language.

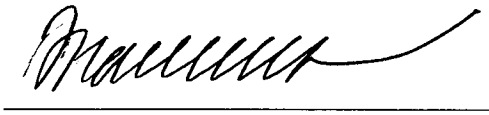
The subcommittee recommended that no changes were required by reason of these comments, and the Committee agreed.

Two commentators also submitted comments on a number of other instructions in the bad faith section, which do not directly relate to this proposed instruction. Those comments were referred to the insurance subcommittee for consideration.

VI. CONCLUSION

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

Respectfully submitted,



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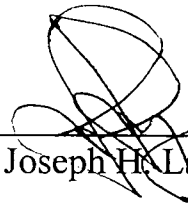
CERTIFICATE OF COMPLIANCE

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

404.5 MEDICAL MALPRACTICE INSURER'S BAD FAITH FAILURE TO SETTLE

In determining whether (Defendant) **acted in bad faith, you shall consider the following factors or circumstances;**

(Defendant's) **willingness to negotiate with** (Claimant) **in anticipation of settlement,**

the propriety of (Defendant's) **methods of investigating and evaluating the claim of** (Claimant),

whether (Defendant) timely **informed** (Insured) **of an offer to settle within the limits of coverage, the right to retain personal counsel, and the risk of litigation,**

whether (Insured) **denied liability or requested that the case be defended after** (Defendant) **fully advised** (Insured) **as to the facts and risks,**

whether (Claimant) **imposed any condition, other than the tender of the policy limits, on the settlement of the claim,**

whether (Claimant) **provided relevant information** to (Defendant) **on a timely basis,**

whether and when other defendants in the case settled or were dismissed from the case,

whether there were multiple claimants seeking, in the aggregate, compensation in excess of policy limits from (Insured) **or from** (Defendant),

whether (Insured) **misrepresented material facts** to (Defendant) **or made material omissions of fact to** (Defendant),

and (list such additional factors as the court may determine to be relevant).

NOTE ON USE FOR 404.5

1. This instruction implements Florida Statutes section 766.1185 and should be used only in cases to which that statute applies. It should be given in conjunction with and immediately after 404.4 (previously MI3.1).

2. The statute requires that the jury "shall consider" all the enumerated factors. The absence of a factor may be relevant for the jury's consideration. The court should therefore instruct on all factors unless there is no issue as to a particular factor.

TAB B

Notices

Proposed civil jury instructions for medical malpractice insurer's bad faith failure to settle

The Supreme Court Committee on Standard Jury Instructions in Civil Cases proposes a new instruction 404.5 for a medical malpractice insurer's bad faith failure to settle. This instruction is proposed as part of the overall reorganization of the book. The new instruction is numbered in accordance with the reorganized book and shows where it would fit within the book. This instruction is based on section 766.1185(2), Florida Statutes. Comments are invited. Provide comments on this instruction separately from comments on other aspects of the book reorganization. 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 Chiar, Fowler White Boggs Banker, 501 East Kennedy Blvd. Suite 1700, Tampa 33602 or e-mail comments to her at tgunn@fowlerwhite.com or fax them to her at (813) 229-8313. Cmments must be received by May 30 to ensure that they are considered by the committee.

404.5 MEDICAL MALPRACTICE INSURER'S BAD FAITH FAILURE TO SETTLE

In determining whether (Defendant) **acted in bad faith, you shall consider the following factors or circumstances;**

[(Defendant's) **willingness to negotiate with** (Claimant) **in anticipation of settlement],**

[the propriety of (Defendant's) **methods of investigating and evaluating the claim of** (Claimant)],

[whether (Defendant) timely **informed** (Insured) **of an offer to settle within the limits of coverage, the right to retain personal counsel, and the risk of litigation],**

[whether (Insured) **denied liability or requested that the case be defended after** (Defendant) **fully advised** (Insured) **as to the facts and risks],**

[whether (Claimant) **imposed any condition, other than the tender of the policy limits, on the settlement of the claim],**

[whether (Claimant) **provided relevant information** to (Defendant) **on a timely basis],**

[whether and when other defendants in the case settled or were dismissed from the case],

[whether there were multiple claimants seeking, in the aggregate, compensation in excess of policy limits from (Insured) **or from** (Defendant)],

[whether (Insured) **misrepresented material facts** to (Defendant) **or made material omissions of fact to** (Defendant)],

[and (list such additional factors as the court may determine to be relevant)].

Jury instructions for intentional torts as an exception to the exclusive remedy of workers' compensation

The Supreme Court Committee on Standard Jury Instructions in Civil Cases proposes new instructions for intentional torts as an exception to the exclusive remedy of workers' compensation. Instruction 414.5 is based on section 440.11, Florida Statutes. These instructions are proposed as part of the overall reorganization of the book and they follow the format used in the proposed reorganized book (see Notice published on April 15). The table of contents for this section appears below to illustrate how this instruction fits into the new proposed format. Comments are invited. Provide comments on instruction 414.5 separately from comments on other aspects of the proposed book reorganization. After reviewing all comments, the committee may submit its proposal to the Supreme Court. Send all comments concerning these proposed changes to Tracy Raffles Gunn, Committee Chair, Fowler White Boggs Banker, 501 East Kennedy Blvd. Suite 1700, Tampa 33602 or e-mail comments to tgunn@fowlerwhite.com or fax them to her at (813) 229-8313. Comments must be received by May 30 to ensure that they are considered by the committee.

414 INTENTIONAL TORT AS AN EXCEPTION TO EXCLUSIVE REMEDY OF WORKERS' COMPENSATION

414.1 Introduction
414.2 Summary of Claims
414.3 Clear and Convincing Evidence
414.4 Legal Cause
414.5 Issues on Claim
414.6 Burden of Proof

414.5 ISSUES ON CLAIM

The issues you must decide on (Claimant's) **claim against** (Defendant) **are whether:**

1. (Defendant) **deliberately intended to injure** (Claimant), **or**

2. whether (Defendant)

(a) **engaged in conduct that** (Defendant) **knew, based upon [prior similar accidents] [or] [explicit warnings specifically identifying a known danger], was virtually certain to result in death or injury to** (Claimant); **and**

(b) (Claimant) **was not aware of the risk because the danger was not apparent; and**

(c) (Defendant) **deliberately concealed or misrepresented the danger so as to prevent** (Claimant) **from exercising an informed judgment;**

and, if so, whether that conduct was a legal cause of [loss] [injury] [or] [damage] to (Claimant).

Proposed changes and reorganization of civil jury instructions for cases for professional negligence

The Supreme Court Committee on Standard Jury Instructions in Civil Cases proposes changes and reorganization of the jury instructions for civil cases for professional negligence. As part of the overall reorganization of jury instructions for civil cases, the committee has grouped together all professional negligence instructions in a single section, numbered 402. These reorganized instructions follow the same format as is used in the new reorganized book (see Notice published on April 15), so that the jury is first informed of the basic definitions that they must apply, followed by the issues that they must decide. In addition, some of the professional negligence instructions have been substantially rewritten and new provisions have been added to reflect new statutory and/or case law. Finally, as with the rest of the reorganized book, the Committee also has substituted "plain English" language wherever possible without altering the substantive meaning of the instructions. The table of contents for the new, reorganized professional negligence instructions appears below. Due to size limitations, the instructions 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. Please provide comments on these changes separately from comments on other aspects of the book reorganization. Send all comments to Tracy Raffles Gunn, Committee Chair, Fowler White Boggs Banker PA, 501 East Kennedy Blvd. Suite 1700, Tampa 33602 or e-mail comments to her at tgunn@fowlerwhite.com or fax them to (813) 229-8313. Comments must be received by May 30 to ensure that they are considered by the committee.

402 Professional Negligence
402.1 Introduction
402.2 Summary of Claims
402.3 Greater Weight of the Evidence
402.4 Medical Negligence
402.5 Other Professional Negligence
402.6 Legal Cause
402.7 Legal Cause (Treatment Without Informed Consent)
402.8 Preemptive Charges
402.9 Preliminary Issues - Vicarious Liability
402.10 Burden of Proof on Preliminary Issues
402.11 Issues on Main Claim
402.12 Issues on Claim of Attorney Malpractice Arising Out of Civil Litigation
402.13 Burden of Proof on Main Claim
402.14 Defense Issues
402.15 Burden of Proof on Defense Issues
402.16 Emergency Medical Treatment Claims

Proposed amendments to jury instructions for punitive damages cases

The Supreme Court Committee on Standard Jury Instructions in Civil Cases proposes changes and reorganization of the jury instructions for civil cases for punitive damages.

As part of the overall reorganization of jury instructions for civil cases, the Committee has reorganized the punitive damage instructions. New material has been added in the form of transitional language and "plain English" terms. These charges are not intended to alter the substantive meaning of the instructions but only to make them more understandable. In addition, the proposed instructions clarify the distinction between a claim of direct liability as opposed to vicarious liability against an employer. A new section has been added to address the factual scenario where punitive damages are being sought against an employer for the acts of its employee who is either not a party or is not being sued for punitive damages.

The instructions for causes of action arising prior to October 1, 1999 have been moved to a new Appendix C.

These proposed instructions are part of the overall reorganization of the civil jury instructions and are numbered in accordance with the reorganized book to show where it would fit within the book.

Due to size limitations, the instructions 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. Provide comments on these changes separately from comments on other aspects of the book reorganization.

Send all comments to Tracy Raffles Gunn, Committee Chiar, Fowler White Boggs Banker, 501 East Kennedy Blvd. Suite 1700, Tampa 33602 or 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 30 to ensure that they are considered by the committee.

TAB C

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Reply to Dade

May 28, 2008

Via email tgunn@fowlerwhite.com,
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Tracy Raffles Gunn, Committee Chair
Supreme Court Committee on Standard
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Tampa, Florida 33602

RE: Comments on Proposed Civil Jury Instruction For Medical Malpractice Insurer's Bad Faith Failure to Settle – 404.5

Dear Ms. Gunn:

This firm represents First Professionals Insurance Company. We submit the following comments on the proposed civil jury instruction for medical malpractice insurer's bad faith failure to settle, 404.5, for consideration by the Committee:

- A comment should be added that the court is to first give standard jury instruction 404.5 - Insurer's Bad Faith (Failure to Settle), which defines "bad faith"; and

- A comment should be added that the court has discretion to omit one of the enumerated factors or circumstances only when both parties agree or there is no issue in the case as to that factor or circumstance.

ANALYSIS

The proposed jury instruction is intended to implement section 766.1185(2), Florida Statutes. The statute provides in pertinent part:

In all actions for bad faith against a medical malpractice insurer relating to professional liability insurance coverage for medical negligence, and in determining whether the insurer could and should have settled the claim within the policy limits had it acted fairly and honestly towards its insured with due regard for her or his interest, whether under statute or common law:

(1) (a) An insurer shall not be held in bad faith for failure to pay its policy limits if it tenders its policy limits and meets other reasonable conditions of settlement by the earlier of either:

* * *

(2) When subsection (1) does not apply, the trier of fact, in determining whether an insurer has acted in bad faith, shall consider:

(a) The insurer's willingness to negotiate with the claimant in anticipation of settlement.

(b) The propriety of the insurer's methods of investigating and evaluating the claim.

(c) Whether the insurer timely informed the insured of an offer to settle within the limits of coverage, the right to retain personal counsel, and the risk of litigation.

(d) Whether the insured denied liability or requested that the case be defended after the insurer fully advised the insured as to the facts and risks.

(e) Whether the claimant imposed any condition, other than the tender of the policy limits, on the settlement of the claim.

(f) Whether the claimant provided relevant information to the insurer on a timely basis.

(g) Whether and when other defendants in the case settled or were dismissed from the case.

(h) Whether there were multiple claimants seeking, in the aggregate, compensation in excess of policy limits from the defendant or the defendant's insurer.

(i) Whether the insured misrepresented material facts to the insurer or made material omissions of fact to the insurer.

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(j) In addition to the foregoing, the court shall allow consideration of such additional factors as the court determines to be relevant.

(emphasis supplied).

I. Proposed Jury Instruction 404.5 Lacks the Statutory Definition of "Bad Faith."

Section 768.1185 incorporates the definition of "bad faith" in failing to settle set forth by the Florida Supreme Court in *State Farm Mutual Automobile Ins. Co. v. LaForet*, 658 So. 2d 55, 62 (Fla. 1995)[1] -- failing to settle when, under all the circumstances, it could and should have done so had it acted fairly and honestly toward it insured with due regard for his interests -- and then enumerates a list of circumstances/factors which must be considered by the trier of fact in determining whether the insurer has acted in bad faith, *i.e.* whether it failed to settle when it could and should have settled had it acted fairly and honestly toward its insured with due regard for her or his interest.

Proposed jury instruction 404.5 enumerates the statutory factors to be considered in determining whether the insurer acted in bad faith, but does not define bad faith. Bad faith is defined in standard jury instruction 404.4:

> Bad faith on the part of an insurance company is failing to settle a claim when, under all the circumstances, it could and should have done so, had it acted fairly and honestly toward [its policy holder] [its insured] [an excess carrier] and with due regard for [his] [her] [its] [their] interests.

Therefore, a comment should be added to proposed jury instruction 404.5 that standard jury instruction 404.4, which defines bad faith, should be given first.

II. The proposed jury instruction improperly gives the trial court discretion to omit a factor or circumstances which the statute mandates shall be considered by the trier of fact.

Section 768.1185(2) states in mandatory terms that the trier of act "shall consider" all of the enumerated factors or circumstances set forth in (a) through (i) and "(j) [i]n addition to the foregoing, the court shall allow consideration of such additional factors as the court determines to be relevant."

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[1] ("an insurer has acted in bad faith if it has '[n]ot attempt[ed] in good faith to settle claims when, under all the circumstances, it could and should have done so, had it acted fairly and honestly toward its insured and with due regard for [the insured's] interest'", *citing* Fla. Stat. 624.155(1)(b)1, and holding same standard applies to common law bad faith actions)

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However, proposed jury instruction 404.5 has brackets around each of the enumerated factors, giving the court discretion to omit one of the mandatorily required factors set forth in (a) through (i), thereby conflicting with the statute.

While it is possible that in a particular case the parties may agree that a factor/circumstances does not apply, or there is no issue in the case as to that factor or circumstances, such that an enumerated factor/circumstances should be omitted from the jury instruction, as written the proposed jury instruction conflicts with the statute. A court confronted with the proposed jury instruction may believe that it has discretion in all cases to omit the enumerated factors/circumstances, leading to erroneous instructions.

Therefore, a comment should be added that the court has discretion to omit one of the enumerated factors or circumstances only when both parties agree or there is no issue in the case as to that factor or circumstances.

CONCLUSION

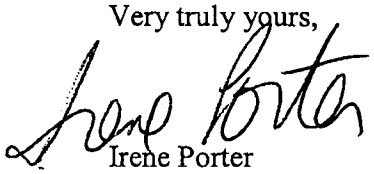
In conclusion the Committee should:

- Add a comment that the court is to first give standard jury instruction 404.5 – Insurer's Bad Faith (Failure to Settle), which defines "bad faith"; and

- Add a comment that the court has discretion to omit one of the enumerated factors or circumstances only when both parties agree or there is no issue in the case as to that factor or circumstance.

Thank you for your kind attention to this matter and if you have any questions, please do not hesitate to contact us.

Very truly yours,



Irene Porter

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Comments of Florida Justice Association on Proposed Revisions to Florida Standard Jury Instructions 404.5 and 404.6

Proposed Instruction 404.5 -- Medical Malpractice Insurer's Bad Faith

We recommend two changes to proposed instruction 404.5, which addresses actions for a medical insurer's bad faith. First, a note on use should be added to reflect that this instruction applies only to actions for a medical insurer's failure to settle. This instruction is based on Fla. Stat. §766.1185. The preamble to this section makes clear that it applies only when the insurer is alleged to have committed bad faith in failing to settle the claim. It does not apply to other types of bad faith, such as a violation of the carrier's duties to communicate with its insured.

Second, the brackets should be removed from the instruction, so as to eliminate the erroneous suggestion that the factors are discretionary. Listing the factors in brackets implies that the court would only read that factor if it determines that there is some evidence to support it. This conflicts with §766.1185, which indicates that every factor should be considered by the jury in every case. The absence of evidence supporting a factor is just as relevant to the bad faith action as the presence of that evidence.

Proposed Instruction 404.6 -- Legal Cause

We also recommend two changes to proposed instruction 404.6. Initially, we note that this instruction inadvertently refers to "negligence." Insurance bad faith is not negligence. Correcting this would avoid possible juror confusion. Further, the notes on use should be changed to make clear that this instruction, which addresses legal cause, should not be given when the damages are only the amount of the judgment, interest, attorney's fees and costs.

Via E-Mail and U.S. Mail
Tracy Raffles Gunn
Chair of Florida Supreme Court Standard Jury Instructions Committee (Civil)
Gunn Appellate Practice, P.A.
777 S. Harbour Island Blvd., Suite 770
Tampa, Florida 33602

Dear Ms. Gunn,

This committee undertook the Herculean task of overhauling the Florida Standard Jury Instructions for civil litigation to make them more easily understood by Florida's juries. We appreciate your work. We also appreciate the opportunity to offer comments regarding the proposed jury instructions. This letter focuses only on those instructions relating to insurer's bad faith. These instructions are currently found in MI 3.1. The proposed jury instructions separate that single jury instruction into thirteen jury instructions, grouped together in section 404. Below, we suggest changes to some of those instructions and to some of the notes on use for particular instructions.

I. Instruction 404.2 (Summary of Claims or Contentions)

A. The note on use should be amended to clarify the circumstances in which the bracketed language regarding cause applies.

1. Discussion
Instruction 404.2 summarizes the claims or contentions in an insurance bad faith case. It includes bracketed language that should be read when the jury is asked to determine whether the insurance company's conduct caused the claimant or insured to sustain damages. The note on use states that this bracketed language does not apply when the court, instead of the jury, is going to determine the damages. This note should be modified to make clear that this language should not be given when the only damages sought are the amount of the judgment, interest, costs and attorneys' fees in the underlying case.

The current version of Florida Standard Jury Instruction MI 3.1 includes such a statement in note 2. Standard Jury Instructions in Civil Cases, 849 So. 2d 1083, 1086 (Fla. 2003). That note is found in the note for proposed jury instruction 404.9. A similar note should be included here and in proposed jury instructions 404.6 and 404.7 to be clear and consistent.[1]

[1] Proposed jury instructions 404.6 and 404.7 are addressed later in this letter.

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■

2. Proposed Change
The note on use should be amended, as follows:

> ~~Use the~~ The bracketed clause in the first paragraph on causation and 404.6 ~~if the issues of damages are going to be submitted to the jury. If the court is going to determine damages (see 404.9), then the bracketed clause in the first paragraph and 404.6 should be omitted.~~ should be given only in cases in which an issue of damages is submitted to the jury, such as a claim for emotional distress or other consequential damages. This clause should not be given with respect to claims, such as the amount of the underlying judgment, interest, costs and attorneys' fees, that are decided by the court (see 404.9).

Alternatively, the note on use could be slightly modified, as follows:

> Use the bracketed clause in the first paragraph on causation and 404.6 if an ~~the~~ issues of damages is ~~are~~ going to be submitted to the jury. If the court is going to determine all damages (see 404.9), then the bracketed clause in the first paragraph and 404.6 should be omitted.

III. Instruction 404.5 (Medical Insurer's Bad Faith Failure to Settle)

A. The title should be changed and a note on use added to make clear that this instruction applies only to bad faith actions against med-mal liability carriers for failing to settle claims within policy limits.

1. Discussion
Instruction 404.5 implements section 766.1185, Florida Statutes (2007), which pertains to bad faith actions against med-mal liability carriers for failing to settle claims.

The scope of the statute's applicability is limited not just in terms of the type of underlying claim involved (i.e., medical malpractice), but also in terms of the type of bad faith conduct that is alleged. Although the most well-known type of third-party bad faith is the carrier's failure to settle a claim within policy limits when it could have and should have done so, it is not the *only* type of bad faith that is actionable. The carrier's duty of good faith imposes a number of obligations upon it. Not only is the carrier obligated to settle a claim within policy limits when it could and should do so, but also "to advise the insured of settlement opportunities, to advise as to the probable outcome of the litigation, to warn of the possibility of an excess judgment, and to advise the insured of any steps he might take to avoid same." Boston Old Colony Insurance Company v. Gutierrez, 386 So. 2d 783, 785 (Fla. 1980). A breach of one of these latter duties is sufficient to support a cause of action for bad faith, independently of the question of whether the carrier could have and should have settled the claim. See United States Fire Ins. Co. v. Morrison

Assurance Co., 600 So. 2d 1147 (Fla. 1st DCA 1992); Odom v. Canal Insurance Co., 582 So. 2d 1203 (Fla. 1st DCA 1991).

The preamble to section 766.1185 indicates that the statute is limited to bad faith actions in which the carrier is alleged to have committed bad faith in failing to settle the claim, and does *not* apply to other types of bad faith, such as a violation of the carrier's duties to communicate with its insured.

Specifically, the preamble to section 766.1185 says it applies:

> In all actions for bad faith against a medical malpractice insurer relating to professional liability insurance coverage for medical negligence, and in determining whether the insurer could and should have settled the claim within the policy limits had it acted fairly and honestly towards its insured with due regard for her or his interest, whether under statute or common law . . . .

This preamble applies to all of the subsections of the statute (1 through 4) because it is placed prior to all of the subsections. Subsection (2) lists the factors for the jury to consider. Therefore, the mandate of subsection (2) that the jury consider these factors only applies when the jury is determining whether the med-mal carrier could have and should have settled the claim within the policy limits.

For these reasons, instruction 404.5 should be given only in bad faith cases alleging a failure to settle, and not in cases based on breaches of the other good-faith duties of a liability insurer.

2. Proposed Changes

a. Note on use

A Note on Use should be created, stating,

> Charge 404.5 is applicable only when the particular matter at issue is the failure of a medical malpractice insurance company's failure to settle a claim. This charge does not apply if liability is asserted for the insurance company's violation of some other duty. *See, e.g., Boston Old Colony Insurance Company v. Gutierrez*, 386 So. 2d 783, 785 (Fla. 1980) (duty "to advise the insured of settlement opportunities, to advise as to the probable outcome of the litigation, to warn of the possibility of an excess judgment, and to advise the insured of any steps he might take to avoid same"); *Powell v. Prudential Property & Casualty Ins. Co.*, 584 So. 2d 12, 14 – 15 (Fla. 3d DCA 1991) ("Where the insured reasonably relies on the insurer to conduct settlement negotiations, and the insurer fails to disclose

settlement overtures to the insured, the jury may find bad faith"); *Odom v. Canal Insurance Co.*, 582 So. 2d 1203 (Fla. 1st DCA 1991).

b. Title

MEDICAL MALPRATICE INSURER'S BAD FAITH FAILURE TO SETTLE WITHIN POLICY LIMITS

B. The instruction should be changed and a note on use added to make clear that all the factors should be read in every case in which this instruction applies.

1. Discussion

In the current draft of instruction 404.5, each listed factor is put in brackets. This implies that the court would only read that factor if it determines that there is some evidence to support it.

This approach is incorrect. Each factor should be read in every case to which instruction 404.5 applies. The plain language of section 766.1185 indicates that every factor should be considered by the trier of fact in every case. Subsection (2) of the statute states:

> (2) When subsection (1) does not apply,[2] the trier of fact, in determining whether an insurer has acted in bad faith, *shall consider*: ...

... and proceeds to list the factors. (Emphasis added). So, section 766.1185(2) requires that the jury consider all the listed factors.

Also, many of the factors, if not all of them, are defined in such a way that the *absence* of the factor is just as relevant as the *presence* of the factor. If the presence of the factor favors one party, then the absence of the factor favors the other party. As an example, the fifth statutory factor is, "Whether the claimant imposed any condition, other than the tender of the policy limits, on the settlement of the claim." §766.1185(2)(e). If the claimant *did* impose conditions on settlement other than the tender of the policy limits, then the jury may consider that factor as weighing in favor of the insurer. But, if the claimant did *not* impose any conditions other than tender of the policy limits, then the jury should consider that factor as weighing in favor of insured (or the claimant, if the claimant files the bad faith action).

For these reasons, the court should read every factor in every case, and not just the factors that are supported by evidence.

---

[2] Subsection (1) sets out the safe harbor provisions.

■

2. Proposed Changes

a. Jury instruction
All brackets that enclose each factor except for the last one, which directs the court to instruct the jury on any other factors it finds to be relevant, should be removed.

b. Notes on use
A note on use should be added that states,

> When giving this instruction, every factor that is not enclosed in brackets must be read even if some of them are not supported by any evidence. *See* F.S. s. 766.1185(2). The court shall also instruct the jury on any other factors that it determines to be relevant.

C. Language should be added to the jury instruction to state that the jury may consider other circumstances in addition to these factors

1. Discussion
In both statutory and common-law bad faith actions, a "totality of the circumstances" standard is used in determining whether the insurer acted in bad faith. Berges v. Infinity Ins. Co., 896 So. 2d 665, 680 (Fla. 2004); State Farm Mut. Auto. Ins. Co. v. Laforet, 658 So. 2d 55, 62 - 63 (Fla. 1995); *see also* § 624.155(1)(b)1, Fla. Stat. (2007) (authorizing a cause of action against an insurer for failing to settle a claim when "under all the circumstances" it could have and should have done so).

Although section 766.1185(2) sets forth a list of factors for a jury to consider, it does not limit the jury's consideration to those factors and does not overrule the "totality of the circumstances standard."

When a jury is read a list of factors and told to consider them in making its determination, the jury may erroneously infer that those are the *only* factors it should consider. The jury therefore should be instructed that these are not the only factors that it may consider and reminded that its determination shall be based on the totality of the circumstances. Although instruction 404.4 (the main bad faith instruction) does refer to "all the circumstances," the jury will hear instruction 404.5 (the list of factors) after it has heard 404.4, so it would be appropriate to remind the jury to consider all the circumstances.

2. Proposed Change
Language should be added to the end of the instruction stating,

> **These factors and circumstances are not the only ones that you may consider. Your determination of whether** (Defendant) **acted in bad faith must be based on the totality of the circumstances. In other words, you must consider all the circumstances of the case.**

■

D. The reference to "case" in the jury instruction should be changed to "medical malpractice case"

1. Discussion

The fourth and seventh factors in instruction 404.5 (corresponding to 766.1185(2) (d) and (g)) are written as follows:

> **whether** (Insured) **denied liability or requested that the case be defended after** (Defendant) **fully advised** (Insured) **as to the facts and risks**

and

> **whether and when other defendants in the case settled or were dismissed from the case**

When the jury hears the word "case," it will likely think this refers to the bad faith case, although it is clear to bad faith lawyers that it really refers to the underlying malpractice case. Although the statute also uses the word "case" without modification, it should be clarified in the instruction so as not to mislead the jury.

2. Proposed changes

Insert "medical malpractice" before "case," so that the fourth and seventh factors would read:

> **whether** (Insured) **denied liability or requested that the medical malpractice case be defended after** (Defendant) **fully advised** (Insured) **as to the facts and risks**

and

> **whether and when other defendants in the medical malpractice case settled or were dismissed from the medical malpractice case**

III. Instruction 404.6 (Legal Cause)

A. The reference to "negligence" in the jury instructions and the notes on use should be changed to "bad faith conduct."

1. Discussion

Proposed jury instruction 404.6 and five of the six notes on use inadvertently use the term of "negligence." Insurer's bad faith is not negligence.

■

2. Proposed change
Replace "negligence" with "bad faith conduct" in each instruction found in 404.6 and throughout the comments. This change is incorporated in the proposed language at the end of this section of the letter.

B. The bracketed terms "loss," "injury" and "damage" in the jury instructions should be changed to "harm."

1. Discussion
This proposed jury instruction exactly tracts the legal cause jury instruction given in negligence cases. That instruction uses these negligence concepts to identify the resulting harm: loss, injury and damage. These terms do not apply as readily in an insurer bad faith action. One of the new proposed jury instructions, instruction 404.2, uses the term "harm" instead. Proposed instruction 404.6 should be amended to use this term as well.

2. Proposed change
Replace "[loss] [injury] [or] [damage]" with "harm" in each instruction and in the notes on use. This change is incorporated in the proposed language at the end of this section of the letter.

C. The first note on use should be changed to remove the suggestion that the trial court has unlimited discretion in giving jury instruction 404.6b.

1. Discussion
The third sentence of the note on use currently numbered one states, "Charge 404.6b (concurring cause), to be given when the court considers necessary, does not set forth any additional standard for the jury to consider in determining whether negligence was a legal cause of damage but only negates the idea that a defendant is excused from the consequences of his negligence by reason of some other cause concurring in time and contributing to the same damage." The underlined clause implies that the trial court has unlimited discretion in determining whether to give jury instruction 404.6b. That is not the law. This instruction is required when supported by the facts.

2. Proposed change
The clause "to be given when the court considers necessary" should be removed from this note on use. That change is incorporated in the proposed language at the end of this section of the letter. This text now appears in the paragraph appearing at subsection a below.

■

D. The second note on use should be deleted.

1. Discussion
The second note on use states that instruction 404.6a applies when determining a claimant's comparative negligence. This note should be deleted because comparative negligence does not apply in an insurer bad faith action.

2. Proposed change
The second note on use is deleted in the proposed language at the end of this section of the letter.

E. The fourth note on use should be deleted.

1. Discussion
The fourth note on use addresses instruction 404.6c, which is the intervening cause instruction. The comments in this note address negligence cases and insurer bad faith is not negligence. In fact, no reported decision addresses the concept of intervening cause in a bad faith action. Therefore, this note should be deleted because it does not apply.

2. Proposed change
The fourth note on use is deleted in the proposed language at the end of this section of the letter.

F. The fifth and sixth notes on use should be deleted.

1. Discussion
The fifth and sixth notes on use address the Committee's use of certain terms in the instruction 404.6. These comments are not necessary and do not particularly assist a trial judge. In addition, they are designed to give guidance for negligence cases. An action for insurer bad faith is not a negligence action.

2. Proposed change
The fifth and sixth notes on use are deleted in the proposed language at the end of this section of the letter.

G. The remaining notes on use should be amended to clarify the circumstances in which this instruction applies.

1. Discussion
The remaining notes on use should be modified to make clear that these instructions should not be given when the only damages sought are the amount of the judgment, interest, costs and attorneys' fees in the underlying case.

■

2. Proposed changes

These proposed changes are incorporated in the proposed language at the end of this section of the letter.

H. Proposed changes incorporating all of the above suggestions.

1. Jury instruction

a. Legal cause generally:

Bad faith conduct ~~Negligence~~ is a legal cause of harm ~~[loss] [injury] [or] [damage]~~ if it directly and in natural and continuous sequence produces or contributes substantially to producing such harm ~~[loss] [injury] [or] [damage]~~, so that it can reasonably be said that, but for the bad faith conduct ~~negligence~~, the harm ~~[loss] [injury] [or] [damage]~~ would not have occurred.

b. Concurring cause:

Bad faith conduct ~~Negligence~~ may be a legal cause of harm ~~[loss] [injury] [or] [damage]~~ even though it operates in combination with some other cause if the bad faith conduct ~~negligence~~ contributes substantially to producing such harm ~~[loss] [injury] [or] [damage]~~.

c. Intervening cause:

** Do not use the bracketed first sentence if this charge is preceded by the charge on concurring cause.*

*** [In order to be regarded as a legal cause of harm ~~[loss] [injury] [or] [damage]~~, bad faith conduct ~~negligence~~ need not be its only cause.] Bad faith conduct ~~Negligence~~ may also be a legal cause of harm ~~[loss] [injury] [or] [damage]~~ even though it operates in combination with [the act of another] [some natural cause] [or] some other cause occurring after the bad faith conduct ~~negligence~~ occurs if [such other cause was itself reasonably foreseeable and the bad faith conduct ~~negligence~~ contributes substantially to producing such harm ~~[loss] [injury] [or] [damage]~~] [or] [the resulting harm ~~[loss] [injury] [or] [damage]~~ was a reasonably foreseeable consequence of the bad faith conduct ~~negligence~~ and the bad faith conduct ~~negligence~~ contributes substantially to producing it].**

2. Notes on use

a. First paragraph on notes on use[3]

The first paragraph of the notes on use should be amended, as follows:

> ~~1.~~ Charges 404.6a, b and c ~~(legal cause generally) is~~ are to be given only in ~~all~~ cases in which an ~~the~~ issue of damages is submitted to the jury, such as a claim for emotional distress or other consequential damages. No part of these ~~this~~ instructions should be given ~~if the court is going to determine damages~~ with respect to claims, such as the amount of the underlying judgment, interest, costs and attorneys' fees, that are decided by the court (see 404.9).

Alternatively, this paragraph could be slightly modified, as follows:

> ~~1.~~ Charges 404.6a, b and c ~~(legal cause generally)~~ are ~~is~~ to be given only in ~~all~~ cases in which an ~~the~~ issue of damages is submitted to the jury. No part of these ~~this~~ instructions should be given if the court is going to determine all damages (see 404.9).

b. Second paragraph and following subsections of the notes on use

> Subject to that limitation, the following additional comments apply only to those cases where they are applicable.
>
> a. In those cases, charge ~~Charge~~ 404.6b (concurring cause)~~, to be given when the court considers it necessary,~~ does not set forth any additional standard for the jury to consider in determining whether bad faith conduct ~~negligence~~ was a legal cause of damage but only negates the idea that a defendant is excused from the consequences of his bad faith conduct ~~negligence~~ by reason of some other cause concurring in time and contributing to the same damage. Similarly, in such cases, charge ~~Charge~~ 404.6c (intervening cause) is to be given only in cases in which the court concludes that there is a jury issue as to the presence and effect of an intervening cause.
>
> ~~2. The jury will properly consider charge 404.6a not only in determining whether defendant's negligence is actionable but also in determining whether claimant's negligence contributed as a legal cause to claimant's damage, thus reducing recovery.~~
>
> b. ~~3.~~ 404.6b must be given whenever there is a contention that some other cause may have contributed, in whole or part, to the

[3] These proposed changes mirror those proposed to the notes on use for instructions 404.2 and 404.7.

occurrence or resulting harm ~~injury~~. If there is an issue of aggravation of a preexisting condition or of subsequent harm ~~injuries~~/multiple events, instruction 501.2h(1) or (2) should be given as well. See *Hart v. Stern*, 824 So. 2d 927, 932-34 (Fla. 5th DCA 2002); *Marinelli v. Grace*, 608 So. 2d 833, 835 (Fla. 4th DCA 1992).

~~4. Charge 404.6c (intervening cause) embraces two situations in which negligence may be a legal cause notwithstanding the influence of an intervening cause: (1) where the damage was a reasonably foreseeable consequence of the negligence although the other cause was not foreseeable [*Mozer v. Semenza*, 177 So. 2d 880 (Fla. 3d DCA 1965)] and (2) where the intervention of the other cause was itself foreseeable [*Gibson v. Avis A Car System, Inc.*, 386 So. 2d 520 (Fla. 1980)].~~

~~5. *"Probable" results.* The Committee recommends that the jury not be charged that the damage must be such as would have appeared "probable" to the actor or to a reasonably careful person at the time of the negligence. In cases involving an intervening cause, the term "reasonably foreseeable" is used in place of "probable." The terms are synonymous and interchangeable. See *Sharon v. Luten*, 165 So. 2d 806, 810 (Fla. 1st DCA 1964); Prosser, *Torts* (3d ed.) 291; 2 Harper and James, *The Law of Torts* 1137.~~

~~6. The term "substantially" is used throughout the charge to describe the extent of contribution or influence negligence must have in order to be regarded as a legal cause. "Substantially" was chosen because the word has an acceptable common meaning and because it has been approved in Florida as a test of causation not only in relation to defendant's negligence [*Loftin v. Wilson*, 67 So. 2d 185, 191 (Fla. 1953)] but also in relation to plaintiff's contributory negligence [*Shayne v. Saunders*, 176 So. 2d 495, 498 (Fla. 1937)].~~

IV. Instruction 404.7 (Issues on Claim)

A. Instruction 404.7 should be moved so that it proceeds instruction 404.4.

1. Discussion

Instruction 404.7 defines the issues on a bad faith claim. Instruction 404.4 then expounds on that instruction by defining insurance bad faith conduct. Instruction 404.5 then follows to define bad faith in the context of medical malpractice cases. It is logical that the issues should be identified for the jury before the instructions are given to define those issues.

2. Proposed change
Renumber proposed instruction 404.7 to 404.4, and sequentially renumber all the following instructions.

B. The jury instruction should be amended to use the word "harm" and to address the handling of claims generally.

1. Discussion
As explained twice above, the carrier's duty of good faith imposes a number of obligations upon it. Instruction 404.7 addresses only the carrier's obligation to settle a claim within policy limits when it could and should do so. The instruction should be amended so that it addresses bad faith actions premised on all of the good faith obligations owed by carriers.

Also, as explained in section IV. B. above, reference to the negligence concepts of loss, damage and injury should be changed to "harm."

2. Proposed change

> **The issue you must decide on** (claimant's) **claim against** (defendant) **is whether** (defendant) **acted in bad faith ~~in failing to settle~~ in the handling of the claim [of] [against]** (insured) **[and, if so, whether that bad faith was a legal cause of ~~[loss] [injury] [or] [damage]~~ harm to** (claimant)**].**

C. The note on use should be amended to clarify the circumstances in which the bracketed language regarding cause applies.

1. Discussion
As explained in the above discussion of instruction 404.2, this note on use should be modified to make clear that the bracketed language regarding a jury determining causation should not be given when the only damages sought are the amount of the judgment, interest, costs and attorneys' fees in the underlying case.

2. Proposed Change[4]
The note on use should be amended, as follows:

> ~~For cases in which the court will determine damages, omit the~~ The bracketed phrase on causation~~.~~ should be given only in cases in which an issue of damages is submitted to the jury, such as a claim for emotional distress or other consequential damages.[5] This phrase should not be given

[4] These proposed changes mirror those proposed to the notes on use for instructions 404.2 and 404.6.
[5] The proposed jury instruction inadvertently states "phase," instead of "phrase."

with respect to claims, such as the amount of the underlying judgment, interest, costs and attorneys' fees, that are decided by the court (see 404.9). ~~If the issue of damages is being submitted to the jury for determination, then the entire instruction should be given.~~

Alternatively, the note on use could be slightly modified, as follows:

> For cases in which the court will determine all damages, omit the bracketed phrase on causation.[6] If an ~~the~~ issue of damages is being submitted to the jury for determination, then the entire instruction should be given.

V. Instruction 404.9 (Concluding Instruction When Court to Award Damages)

A. The note on use should be amended to slightly clarify the circumstances in which this instruction applies.

1. Discussion

As explained in the above discussion of instruction 404.2, this note on use should be modified to make clear that this instruction applies when the only damages sought are the amount of the judgment, interest, costs and attorneys' fees in the underlying case. This proposed jury instruction most clearly describes the circumstances in which causation instructions are not given to the jury. A few changes make this point more clear.

2. Proposed Change

> This instruction does not ask the jury to insert on the verdict form the amounts of the judgment, interest, costs and attorneys' fees in the underlying case, because these ~~amounts~~ damages, in ~~many~~ most cases, will be decided by the court as a matter of law. The Committee does not intend the omission of these issues from the instructions to affect the admissibility of such ~~amounts~~ damages. When any damages are to be determined by the jury, appropriate instructions and verdict form will be needed. See 404.10-13.

VI. Instruction 404.10 (Damages (Cases with Claims for Mental Distress)

A. The note on use should be amended to clarify that this instruction applies only to bad faith actions arising from a failure to timely pay medical benefits.

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[6] The proposed jury instruction inadvertently states "phase," instead of "phrase."

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1. Discussion

This instruction tracks the holding of Time Ins. Co. v. Burger, 712 So. 2d 389 (Fla. 1998), to define when damages are available for mental distress. However, these damages are available in other contexts as well. Butchikas v. Travelers Indemnity Co., 343 So. 2d 816, 819 (Fla. 1976). The note on use should be amended to make clear that this instruction applies only to actions arising from a failure to timely pay medical benefits.

2. Proposed Change

> 1. Use this instruction only if the court determines that there is a sufficient predicate to support a claim for mental distress from the failure to timely pay medical benefits. See Time Insurance Co. v. Burger, 712 So. 2d 389 (Fla. 1998). The Committee takes no position on whether claims for mental distress may be available in other situations. See Butchikas v. Travelers Indemnity Co., 343 So. 2d 816, 819 (Fla. 1976).

VII. Instruction 404.12 (Damages on Mental Distress Claim)

A. The note on use should be added to clarify that other consequential damages are available.

1. Discussion

This instruction suggests that the only consequential damages potentially available are those for mental distress. That is incorrect. Dadeland Depot, Inc. v. St. Paul Fire and Marine Ins. Co., 945 So. 2d 1216, 1222-23 (Fla. 2006) (recognizing loss of business opportunity as a potential consequential loss and observing such damage is more tangible than those for emotional distress); Swamy v. Caduceus Self Ins. Fund, Inc., 648 So. 2d 758, 761 (Fla. 1st DCA 1995) (recognizing availability of consequential damages that are a "natural and contemplated result of the carrier's breach" of insurance contract); Dunn v. National Security Fire and Cas. Co., 631 So. 2d 1103, 1106 (Fla. 5th DCA 1993) (holding that direct consequential damages are recoverable in bad faith cases).

Similarly, section 624.155(8) Florida Statutes (2008), does not limit the recoverable consequential damages to those for mental distress. It broadly provides, in pertinent part, "The damages recoverable pursuant to this section shall include those damages which are a reasonably foreseeable result of a specified violation of this section by the authorized insurer and may include an award or judgment in an amount that exceeds the policy limits." See also Conquest v. Auto-Owners Ins. Co., 773 So. 2d 71, 74 (Fla. 1998) (recognizing that section 624.155 authorizes recovery for various compensatory damages).

Therefore, a note on use should be added to make clear that additional instructions may be needed for other consequential damages.

2. Proposed change

> When any other consequential damages are to be determined by the jury, appropriate instructions and verdict form will be needed. See *Conquest v. Auto-Owners Ins. Co.*, 773 So. 2d 71, 74 (Fla. 1998); *Swamy v. Caduceus Self Ins. Fund, Inc.*, 648 So. 2d 758, 761 (Fla. 1st DCA 1995);); *Dunn v. National Security Fire and Cas. Co.*, 631 So. 2d 1103, 1106 (Fla. 5th DCA 1993); § 624.155(8), Fla. Stat. (2008).

We thank you for your consideration of reviewing our comments and are available to discuss any of our proposed changes.

Sincerely,

Celene Humphries
Shea Moxon
Dale Swope

Date: 6/4/08

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June 10, 2008

Tracy Raffles Gunn, Chair
Supreme Court Committee on Standard
Jury Instructions in Civil Cases
777 S. Harbour Island Blvd #770
Tampa, FL 33602

Re: ABOTA

Dear Tracy:

I apologize for getting this to you late, but it just came to me.

The attached letter (in rough form) is from another of our ABOTA members commenting on the bad faith instructions. I think most of these comments blend with what we've already provided to you and I pass this on to you hopefully for your further consideration.

Thanks for your attention to the above.

Very truly yours,

William E. Hahn

WEH/mlh/49
cc: Patricia D. Crauwels
Joshua A. Whitman

Re: proposed amendments to Florida Standard Jury Instructions

Dear Ms. Gunn:

Thank you for the opportunity to present my comments regarding the proposed changes to the Florida Standard Jury Instructions. Based on my review of the proposed instructions dealing with insurer's bad faith, I am making the following suggestions.

I recommend two changes to proposed jury instruction 404.5, which addresses actions for a medical insurer's bad faith. First, a note on use should be added to reflect that this instruction applies only to actions for a medical insurer's bad faith failure to settle. This instruction is based on section 766.1185, Florida Statutes (2007). The preamble to this section makes clear that it applies only when the insurer is alleged to have committed bad faith in failing to settle the claim. It does not purport to apply to other types of bad faith, such as a violation of the carrier's duties to communicate with its insured.

Second, the brackets should be removed from the instruction to remove the suggestion that the factors are discretionary. Listing the factors in brackets implies that the court would only read that factor if it determines that there is some evidence to support it. This conflicts with section 766.1185, which indicates that every factor should be considered by the jury in every case. The absence of evidence supporting a factor is just as relevant to the bad faith action as the presence of that evidence.

I also recommend two changes to proposed jury instruction 404.6. First, I noticed that this instruction inadvertently refers to "negligence." Insurance bad faith is not negligence. Correcting this would avoid confusing juries. Second, I recommend that the notes on use be changed to make clear that this instruction, which addresses legal cause, should not be given when the damages are only the amount of the judgment, interest, attorney's fees and costs.

Thank you for the hard work by you and your committee and for considering my suggested changes to these particular proposed jury instructions.

Sincerely,

To: Bill Hahn

From: Dale Swope, Shea Moxon

COMMENTS ON PROPOSED JURY INSTRUCTION
REGARDING MEDICAL MALPRACTICE BAD FAITH CASES

I. Introduction.

The proposed instruction is number 404.5, entitled "Medical Malpractice Insurer's Bad Faith Failure to Settle." The purpose of this instruction is to implement the relatively new statute on medical malpractice bad faith actions, section 766.1185, Florida Statute (2007). At first glance the instruction appears to be a direct and straightforward adaptation of section 766.1185. Subsection (2) of section 766.1185 provides a list of factors for a jury to consider when determining whether a medical malpractice liability insurer committed bad faith in failing to settle a claim. Proposed instruction 404.5 copies the factors listed in subsection (2), with a few minor alterations, and directs the jury to consider those factors. Therefore, it looks like a simple implementation of the statute.

On closer inspection, however, proposed instruction 404.5 has a few significant problems that need to be corrected in order to comport with the intent of the statute and to ensure that it is applied to both parties fairly.

II. Instruction 404.5 Should be Limited to Cases Alleging Failure to Settle Within Policy Limits.

It would be easy to assume that proposed instruction 404.5 applies in any bad faith action against a medical malpractice insurer, but that assumption would be incorrect. Because the instruction is an implementation of section 766.1185, it should be used only when section 766.1185 is applicable. Section 766.1185 does not apply to every type of bad faith claim that may be asserted against a medical malpractice carrier, but only to claims alleging that the carrier failed to settle a claim within policy limits when it could have and should have done so.

Although the most well-known type of third-party bad faith is the carrier's failure to settle a claim within policy limits when it could have and should have done so, that is not the *only* type of bad faith that is actionable. The carrier's duty of good faith imposes a number of obligations upon it. Not only is the carrier obligated to settle a claim within

policy limits when it could and should do so, but it is also obligated "to advise the insured of settlement opportunities, to advise as to the probable outcome of the litigation, to warn of the possibility of an excess judgment, and to advise the insured of any steps he might take to avoid same." Boston Old Colony Insurance Company v. Gutierrez, 386 So. 2d 783, 785 (Fla. 1980). A breach of one of these latter duties is sufficient to support a cause of action for bad faith, independently of the question whether the carrier could have and should have settled the claim. See United States Fire Ins. Co. v. Morrison Assurance Co., 600 So. 2d 1147 (Fla. 1st DCA 1992); Odom v. Canal Insurance Co., 582 So. 2d 1203 (Fla. 1st DCA 1991).

Returning to section 766.1185, the opening paragraph of the statute indicates that the entire statute is limited to bad faith actions in which the carrier is alleged to have committed bad faith in failing to settle the claim. Specifically, the opening paragraph of 766.1185 says it applies:

> In all actions for bad faith against a medical malpractice insurer relating to professional liability insurance coverage for medical negligence, and in determining whether the insurer could and should have settled the claim within the policy limits had it acted fairly and honestly towards its insured with due regard for her or his interest, whether under statute or common law . . . .

This language applies to all of the subsections of the statute (1 through 4) because it is placed prior to all of the subsections. Most significantly, it applies to subsection (2), which is the portion of the statute that proposed instruction 404.5 attempts to implement. Therefore, subsection (2)'s mandate that the jury consider the listed factors only applies when the jury is determining whether the med-mal carrier could have and should have settled the claim within the policy limits. It does *not* apply to other types of bad faith, such as a violation of the carrier's duties to communicate with its insured.

For these reasons, instruction 404.5 should have a note on use informing the trial judge that this instruction should be given only in bad faith cases alleging a failure to settle, and not in cases based on breaches of the other good-faith duties of a liability insurer. We propose this language for the note on use:

> 404.5 is applicable only when the particular matter in issue is the failure of a medical malpractice insurance company's failure to settle a claim. This instruction does not apply if liability is asserted for the insurance company's violation of some other duty. *See, e.g., Boston Old Colony Insurance Company v. Gutierrez*, 386 So. 2d 783, 785 (Fla. 1980) (duty "to advise the insured of settlement opportunities, to advise as to the probable outcome of the litigation, to warn of the possibility of an excess judgment, and to advise the insured of any steps he might take to avoid same"); Powell v. Prudential Property & Casualty Ins. Co., 584 So. 2d 12, 14 – 15 (Fla. 3d DCA 1991) ("Where the insured reasonably relies on the insurer to conduct settlement negotiations, and the insurer fails to disclose

settlement overtures to the insured, the jury may find bad faith"); Odom v. Canal Insurance Co., 582 So. 2d 1203 (Fla. 1st DCA 1991).

Additionally, it would help make the point clearer if the title of the instruction were amended to reflect that it is limited to claims of a failure to settle within policy limits. The current title of proposed instruction is "MEDICAL MALPRATICE INSURER'S BAD FAITH FAILURE TO SETTLE." The limited scope of the instruction's application would be further clarified by adding the phrase "WITHIN POLICY LIMITS" at the end, so the title would be, "MEDICAL MALPRATICE INSURER'S BAD FAITH FAILURE TO SETTLE WITHIN POLICY LIMITS."

III. All Factors Should Be Read in Every Case.

In the current draft of instruction 404.5, each listed factor is put in brackets, which indicates that the court would only read that factor if it determines that there is some evidence to support it. This approach is incorrect. Each factor should be read in every case to which instruction 404.5 applies.

The plain language of section 766.1185 indicates that every factor should be considered by the trier of fact in every case. Subsection (2) of the statute states:

> (2) When subsection (1) does not apply,[1] the trier of fact, in determining whether an insurer has acted in bad faith, *shall consider*: . . .

(Emphasis added). Subsection (2) then proceeds to list the factors. The mandatory language of subsection (2) – "shall consider" – indicates that the jury shall consider all of the listed factors in every case.

Also, many of the factors listed in the statute are defined in such a way that the *absence* of the factor is just as relevant as the *presence* of the factor. If the presence of the factor favors one party, then the absence of the factor favors the other party. As an example, the fifth statutory factor is, "Whether the claimant imposed any condition, other than the tender of the policy limits, on the settlement of the claim." §766.1185(2)(e). If the claimant *did* impose conditions on settlement other than the tender of the policy limits, then the jury may consider that factor as weighing in favor of the insurer. But, if the claimant did *not* impose any conditions other than tender of the policy limits, then the jury should consider that factor as weighing in favor of insured (or the claimant, if the claimant files the bad faith action).

For these reasons, the court should read every factor in every case, and not just the factors that are supported by evidence. This is essential to carrying out the legislative intent of the statute and to ensure fairness to both parties. If the court were to read only

[1] Subsection (1) sets out the safe harbor provisions.

those factors that it considers to be supported by the evidence, its emphasis of those factors would unfairly favor the party that is benefited by the presence of those factors, whether the plaintiff or the defendant. Conversely, when certain factors are not supported by the evidence, then the party who ought to benefit from the absence of certain factors will be unfairly deprived of the benefit of the statute if the court does not instruct the jury to consider those factors.

For these reasons, the brackets should be removed from each of the factors listed in proposed instruction 404.5, except for the last one, which is a catch-all factor.[2] Also, a second note on use should be added to direct the court to read every factor (other than the last one) in every case. Assuming the brackets are removed from all the factors but the last one, this note on use could say:

> When giving this instruction, every factor that is not enclosed in brackets must be read even if some of them are not supported by any evidence. *See* F.S. s. 766.1185(2). The court shall also instruct the jury on any other factors that it determines to be relevant.

IV. The Jury Should Not Be Limited to These Factors.

In both statutory and common-law bad faith actions, a "totality of the circumstances" standard is used in determining whether the insurer acted in bad faith. Berges v. Infinity Ins. Co., 896 So. 2d 665, 680 (Fla. 2004); State Farm Mut. Auto. Ins. Co. v. Laforet, 658 So. 2d 55, 62 - 63 (Fla. 1995); *see also* § 624.155(1)(b)1, Fla. Stat. (2007) (authorizing a cause of action against an insurer for failing to settle a claim when "under all the circumstances" it could have and should have done so).

Although section 766.1185(2) sets forth a list of factors for a jury to consider, it does not limit the jury's consideration to those factors and does not overrule the "totality of the circumstances standard."

When a jury is read a list of factors and told to consider them in making its determination, the jury may erroneously infer that those are the *only* factors it should consider. The jury therefore should be instructed that these are not the only factors that it may consider and reminded that its determination shall be based on the totality of the circumstances. Although instruction 404.4 (the main bad faith instruction) does refer to "all the circumstances," the jury will hear instruction 404.5 (the list of factors) after it has heard 404.5, so it would be appropriate to remind the jury to consider all the circumstances.

Therefore, we propose adding this language to the end of the instruction:

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[2] The last factor states, "[and (list such additional factors as the court may determine to be relevant)]." The brackets are appropriate for this factor.

These factors and circumstances are not the only ones that you may consider. Your determination of whether (Defendant) **acted in bad faith must be based on the totality of the circumstances. In other words, you must consider all the circumstances of the case.**

V. "Case" Should be Clarified to Say "Medical Malpractice Case"

The fourth and seventh factors in instruction 404.5 (corresponding to 766.1185(2)(d) and (g)) are written as follows:

> **whether** (Insured) **denied liability or requested that the case be defended after** (Defendant) **fully advised** (Insured) **as to the facts and risks**
>
> and
>
> **whether and when other defendants in the case settled or were dismissed from the case**

When the jury hears the word "case," it will likely think this refers to the bad faith case, although it is clear to bad faith lawyers that it really refers to the underlying malpractice case. Although the statute also uses the word "case" without modification, it should be clarified in the instruction so as not to mislead the jury.

Therefore, the word "case" in the fourth and seventh factors should be replaced with "medical malpractice case," so that they would read:

> **whether** (Insured) **denied liability or requested that the medical malpractice case be defended after** (Defendant) **fully advised** (Insured) **as to the facts and risks**
>
> and
>
> **whether and when other defendants in the medical malpractice case settled or were dismissed from the medical malpractice case.**

TAB D

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)

7. ERRORS AND OMISSIONS (Tab 2):

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B. Updating the Jury Instructions Book: Artigliere explained that the committee has been systematically reviewing the jury instructions book to correct errors and omissions. **Artigliere will draft a red-lined version of the revisions discussed at the meeting and post it on the committee website. The subcommittee will continue updating citations and correcting minor errors. The subcommittee will review the first half of the jury instructions book through the damages section by the November 2005 meeting.**

1. Medical Malpractice: Artigliere explained that the medical malpractice statutes changed significantly in 2003. As explained on page 2-136, Artigliere is concerned that the committee may need to review all of the medical malpractice instructions in light of the new statutes. In particular, the committee may need to revise the definitions of informed consent and medical negligence, especially in the context of the Good Samaritan Act and hospital emergency rooms. Some of these revisions will also affect the MI section. Artigliere also suggested updating the citations in the notes. In addition, on page 2-141, Artigliere explained that the statute of limitations instruction in medical malpractice cases may need to be revised. **Gunn created a Medical Malpractice subcommittee to consider these issues and appointed: Cacciatore (chair), Lewis, Stewart, Ficarotta, Barton, and Artigliere.**

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)

3. MEDICAL MALPRACTICE (Tab 15):

Cacciatore directed the committee's attention to the working draft medical malpractice instruction found on pages 15-13 to 15-27. The subcommittee unanimously feels that the medical malpractice instructions should be in a separate section of the jury instructions book. The subcommittee also considered legislative changes to chapter 766.

The subcommittee also considered including an instruction on the Valcin issue that arises when medical records are not available. The subcommittee determined that the spoilation subcommittee is already considering this issue.

Farmer observed that although the Valcin issue arises frequently in other contexts, there should be a Valcin instruction specifically tailored to the medical malpractice context. For example, defendants in medical malpractice cases have a statutory duty to maintain medical records that does not exist in other contexts. Stewart agreed.

Lewis reported that reorganization subcommittee agrees that the medical malpractice instructions should be in a separate section.

Makar directed the subcommittee to continue considering these issues and added Fulford and Edwards to the subcommittee.

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5. ERRORS AND OMISSIONS (Tab 2):

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Lang reviewed the miscellaneous instructions and suggested several technical changes. The introductory comment to MI 9 contains an incorrect statutory cite due to legislative changes in 2003. Instructions MI 9.1 and 9.2 should note the 2003 revisions. The medical malpractice committee should consider whether substantive changes are needed to address the amendment.

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Makar directed the medical malpractice subcommittee to consider whether substantive changes to instructions MI 9, 9.1 and 9.2 are needed in light of the 2003 amendments to the Medical Malpractice Act.

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)

8. MEDICAL MALPRACTICE (Tab 15)

Cacciatore reported that the subcommittee determined that the instructions do not need to be revised in response to the 2003 amendments to the Medical Malpractice Act. The subcommittee also drafted a stand-alone medical malpractice section for the jury instructions book (see pages 15-29 to 15-50). This section consolidates instructions currently found in other areas of the book.

Regarding the 2003 amendments, Mitchell commented that he previously drafted a revision in response to the changes to the standard of care in the amendment to section 766.102. Mitchell will forward his draft to the subcommittee for its consideration.

Mitchell also pointed out that the 2003 amendments added a section on insurer bad faith in the medical malpractice setting. The statute creates a different standard for an insurer's bad faith in the medical malpractice context by creating a safe harbor for insurers to tender policy limits. This may require a bad faith instruction specific to medical malpractice cases. When the committee considered this statute previously, members questioned its constitutionality. Mitchell is not aware of any decisions resolving the constitutional question.

Stewart countered that an instruction is not necessary because whether the statute applies is a question of law for the court. If the court determines as a matter of law that the insurer complied with the safe harbor provision, the plaintiff will no longer have a claim for bad faith. Mitchell acknowledged that Stewart may be correct, but suggested that the bad faith subcommittee consider the issue.

Regarding the new medical malpractice section, Gunn observed that the reorganization subcommittee also recommends moving the medical malpractice instructions into a separate section of the book.

The committee then discussed whether the new medical malpractice section should be published, and, if so, the timing of the publication. The committee debated whether to publish the section immediately or to wait until the entire book is reorganized.

Makar stated that the next step for the reorganization of the book is to come up with a format for the instructions and how to present them to the Court. Lewis does not believe that the reorganization needs to be published for comment because judges are not required to give the jury instructions in a specific order. However, Lewis recommends that the committee publish the medical malpractice section before the entire reorganization is completed. Gunn, Stewart and Lumish all agreed that the medical malpractice section should be published as soon as possible because it will assist the public in drafting jury instructions. Makar hopes that the committee will be able to publish the new medical malpractice section following the next meeting.

Stewart pointed out that there is a new instruction on non-delegable duty on page 15-31 that will have to be published and approved by the Court. Lewis asked whether the instruction is necessary. It assumes that the court has already determined a non-delegable duty exists as a matter of law. Gunn suggested that the instruction mirror instruction X.1c on vicarious liability, which simply states that the court has determined that a duty exists as a matter of law. Brown agreed that the jury only needs to know that a duty exists, not that the duty is non-delegable. Lewis suggested that instructions for non-delegable duty and vicarious liability could be combined into one instruction stating that a duty exists.

Lang added that the committee will also have to publish instruction X.2a(1), on vicarious liability for an agent, because a new sentence has been added to the end of the existing instruction.

Gunn observed that instruction X.2a(2), on apparent agency, also appears to have some new language. Gunn requested that the subcommittee circulate

a red-lined version of the medical malpractice section showing any language that has been changed from the existing instructions.

Makar reactivated the bad faith subcommittee to consider whether any revisions to the jury instructions are needed in light of the 2003 amendment to the Medical Malpractice Act regarding insurer bad faith. Makar added Cacciatore, Edwards and Wagner to the bad faith subcommittee.

Makar directed the medical malpractice subcommittee to create a red-lined version of the proposed medical malpractice section showing any changes from the existing instructions. Lumish will correct the citations in the new medical malpractice section. The medical malpractice subcommittee will consider two issues relating to instruction X.1(c), non-delegable duty: (1) should there be an instruction for cases where the existence of a non-delegable duty is a question of fact for the jury; and (2) when the court determines that a non-delegable duty exists as a matter of law, should the instruction track instruction X.1(b) on vicarious liability, or should the two instructions be combined. The subcommittee will also consider Mitchell's draft revisions to instructions on the standard of care in light of changes in the 2003 amendments.

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)

5. MEDICAL MALPRACTICE (Tab 15)

Cacciatore presented the subcommittee's draft of a new medical malpractice section, with red-lining showing any changes from the existing instructions (pages 15-51 to 15-72).

The committee first discussed instruction X.2a(1), on distinguishing agents from independent contractors. Bailey suggested that if multiple entities are acting as an agent or independent contractor, the instruction might not clearly tell jurors to examine each entity. Cacciatore responded that, typically, only one entity will be acting as an agent or independent contractor. In the rare case involving more than one entity, the court can modify the instruction.

Barton commented that the last line of instruction X.2a(1) seems to improperly exclude consideration of the parties' contract. The jury should consider the contract along with all the other statements of the parties and the circumstances. Cacciatore explained that instruction is intended to convey that the hospital cannot change the status of the relationship by using a legal label in the contract. Bailey stated the instruction should be rewritten so that jurors do not think that the contract controls.

Farmer suggested reconsidering the entire instruction in light of Griffin's opinion in Pope v. Winter Park Healthcare Group, Ltd., 939 So. 2d 185 (Fla. 5th DCA 2006). The Pope decision explains all the theories of vicarious liability. It provides an instructive framework that might result in a more coherent approach.

Cacciatore observed that any changes to this instruction should also be made to instruction 3.3, the general instruction on agency.

Makar asked if the committee needs to add this new sentence to instruction X.2a(1) immediately. Stewart, Mitchell, and Cacciatore all responded that the change should be made immediately because the concept is not included in the current instructions. Bailey added that this issue comes up in all agency cases.

Griffin disagreed that it is necessary to revise this language immediately. Many concepts are not included in the standard instructions. Parties can always ask the judge for a special instruction. Griffin is also not comfortable that the instruction uses the correct legal test. While the label used by the contract is not dispositive, Griffin is not sure that the totality of the circumstances test is correct. Farmer also believes that the totality of the circumstances test is not necessarily correct.

The committee then discussed instruction X.4(c). Makar suggested adding a note on use referencing section 766.110, Florida Statutes. Bailey added that the committee might need to define "comprehensive risk management program." Stewart observed that the instruction could added to instruction X.9 in a definitional section. Makar cautioned that the committee should carefully consider the nuances of section 766.110.

Regarding instruction X.9c, Bailey pointed out that "foreign body" is not a plain English term. Strelec responded that it is a statutory term. Artigliere suggested leaving the title "foreign body," but using the term "foreign object" in the instruction.

Bailey also asked whether directed verdicts are always granted when a foreign object is left in the patient. Fulford responded that sometimes there is a jury question on who left the foreign object in the patient. Bailey stated the instruction might need to be revised to address that. Mitchell added that there may be circumstances where it is not negligence to leave the foreign object in the patient.

On instruction X.9d, destruction of evidence, Artigliere observed that the law is currently developing that the routine destruction of electronic records may be considered spoliation. The civil rules committee is considering this

issue, which may effect this instruction. This instruction also does not encompass the failure to properly make a record.

Farmer stated that Valcin should be relegated to medical contexts where there is a duty to keep the medical record. Cacciatore responded that this instruction is tailored to the medical malpractice context.

Lumish asked whether all of the instructions in X.9 are methods of defining negligence. Some involve proof of negligence instead.

Lewis commented that the reorganization committee is currently debating how to order the instructions. The order of the medical malpractice section is not in the most understandable order for jurors. Stewart responded that once the reorganization subcommittee decides on a template, the medical malpractice instructions will be reorganized in that format.

Makar directed the negligence subcommittee to examine the agency issues discussed at the meeting and consider global changes to instructions 3.3 and X.2.

Makar directed the medical malpractice subcommittee to reconsider instruction X.9 in light of the comments at the meeting. Specifically, the subcommittee will reconsider instructions X.9c (foreign bodies), X.9d (destruction of evidence), and whether all of instruction X.9 defines negligence or relates to proof of negligence. The subcommittee will also revise the causation instruction in accord with the revisions made to instruction 5.1b and consider a separate instruction on section 766.110.

8. REORGANIZATION OF BOOK (Tab 11):

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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)

7. MEDICAL MALPRACTICE (Tab 15):

Cacciatore directed the committee's attention to the materials found on pates 15-73 through 15-97. He noted that the subcommittee amended the medical malpractice instructions pursuant the committee's directions at the November 2006 meeting. First, instruction x.2a(1) was modified to fit the analytical framework in the Pope decision. Additionally, in instruction x.2a(1), the independent contractor language was clarified. The foreign bodies instruction in x.9(c) was also amended. Finally, x.9(d) was amended based on Public Health Trust of Dade County v. Valcin, 507 So. 2d 596, 600-01 (Fla. 1987). The final version of x.9(d) agreed upon by the medical malpractice and spoliation committees is found in the materials at page 15-97.

Cacciatore noted that these instructions are ready to be published. Cacciatore questioned whether the revisions need to be immediately sent to the plain English subcommittee. Gunn, Farmer, and Cacciatore all supported going forward with publication without going to the plain English subcommittee first, especially since the Valcin instruction appeared to already be written in plain English.

The question arose as to whether or not the "So. 2d" cite for Valcin should include a space before the "2d." Farmer suggested eliminating the space to make the citations consistent throughout. Lang noted he would leave the space in because this is correct under the Bluebook, but the most important thing is consistency. Gunn noted that the committee does not have the same "spacing" concerns as West Publishing, and voted to leave the space in.

Upon a final call for questions from Gunn, Wells noted there is a misplaced comma in the second sentence of the proposed instruction after the phrase "health care records" (p. 15-97). Gunn also noted some possible spacing errors in the Valcin cite.

The committee decided to publish the material beginning on page 15-73 through 15-96, substituting the material (the x.9(d) instruction and comment to x.9(d)) on page 15-97 for the version on page 15-87. Gunn further noted that Rose should make sure that Wells receives the material before it goes to publication so she can make sure citations are correct and consistent.

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)

4. MEDICAL MALPRACTICE (Tab. 15):

As a result of the enactment of section 766.1185, Florida Statutes, the subcommittee was asked to determine whether this statute is a substitute for the common law. The subcommittee determined that the factors listed in subsection (2) of the statute necessitated a revision of the existing instruction, MI 3.2.

Accordingly, the subcommittee proposed a modified instruction with two different options for an accompanying note on use. The Committee was asked to read the instruction and both versions of the proposed note on use, and to discuss which was preferred.

The Committee preferred option 2 of the proposed note on use. Stewart suggested that the word "may" in the last sentence should be replaced with the word "should." Thus, the note on use that will accompany MI 3.2, as revised, states:

This instruction combines the standard instruction for insurance bad faith provided in MI 3.1 with the factors that the jury "shall consider" under sec. 766.1185(2), Florida statutes. The Committee recommends that specific factors should be omitted from the instruction when they are not an issue in the case.

Makar directed the instruction and note on use be published for comment.

Finally, Austin suggested expanding the scope of the Medical Malpractice

Subcommittee to include all professional negligence. **Makar directed that the Medical Malpractice Subcommittee be renamed the "Professional Negligence Subcommittee."**

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):

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Bad Faith: 404

Stewart noted that adding the standard legal cause language into the bad faith instructions required modifying the instructions. Instruction 404.2 now has a note on use directing which instructions to use depending on whether damages will go to the jury. Instruction 404.4 is substantively the same, but has been reformatted to fit within the revised instructions.

404.6 is standard legal cause with a note on use that has been slightly modified; 404.7 is the issue instruction where damages are going to go to the jury; there is now a complete set of instructions for bad faith. No changes were made to these revised instructions.

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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Comments Concerning Med Mal Insurers' Bad Faith:

Most of the comments concerning med mal insurers' bad faith are beyond the scope of book reorganization and have been referred to the bad faith subcommittee for consideration. Some comments, however, involved book reorganization and were addressed by that subcommittee:

- One comment recommended amending the note on use to 404.2, making it clear that causation is not an issue when the only damages are damages already found in the underlying action. **The subcommittee agreed, and recommended adding to the second sentence of the instruction: "or the only damages are those already determined in the underlying action." The committee agreed.**

- One comment to instruction 404.5 recommended changing the title of the instruction to make it clear the instruction only applies to cases where the carrier fails to settle "within policy limits." **The subcommittee recommended no change, concluding that the title is clear. The committee agreed.**

- Another comment to instruction 404.5 suggested adding the phrase "medical malpractice" before the word "case" in the

fourth and seventh factors listed in the instruction. The subcommittee recommended no change because the instruction is only given in medial malpractice situations to begin with. **The committee agreed, but referred to the bad faith subcommittee the question of whether any other language should be added for cases where there are alternative claims.**

- One comment recommended adding a new note on use, making clear that instruction 404.5 only applies to a "failure to settle case." **The subcommittee recommended adding a new note on use stating:**

  This instruction implements Florida Statute 766.1185 relating to whether a medical malpractice insurer should have settled within policy limits and should be used only in cases to which that statute applies. It should be given in conjunction with and immediately after 404.4

  The committee agreed with the proposed note on use.

- Two comments addressed the brackets in the last sentence of the currently proposed note on use to instruction 404.5, suggesting that the brackets appear to give the trial court the discretion to omit certain factors. **The subcommittee recommended removing the brackets and changing the last sentence of the note on use to read: "The statute requires that the jury 'shall consider' all the enumerated factors so all should be given unless the parties agree otherwise." The committee agreed.**

- Two comments recommended adding a note on use to instruction 404.5, stating that the instruction must be given in connection with instruction 404.4, which defines bad faith. **The subcommittee recommended no action on this comment, and the committee agreed.**

- One comment recommended adding to instruction 404.5 that bad faith must be based on a "totality of the circumstances." **The subcommittee recommended no**

change because section 766.1185 does not contain such language. The committee agreed.

- One comment suggested changing "negligence" to "bad faith conduct" in instruction 404.6 (legal cause). **The subcommittee recommended making this change. The committee agreed.**

- One comment suggested changing the bracketed terms in instruction 404.6 from "loss," "injury," and "damage," to "harm." **The subcommittee recommended changing the terms to "loss," "damage," and "harm." The committee agreed.**

- One comment suggested changing the first note on use to address when 404.6(b) should be given. **The subcommittee recommended no change because this is the standard note that is used throughout the book. The committee agreed.**

- One comment suggested deleting the second note on use to instruction 404.6 because comparative bad faith does not apply in an insurer bad faith action. **The subcommittee recommended deleting this note and renumbering the notes accordingly. The committee agreed.**

- One comment suggested modifying the notes on use to instruction 404.6 to make clear the instruction should not be given when damages are not an issue. **The subcommittee recommended no change because this language already appears in note 1. The committee agreed.**

- One comment to instruction 404.7 recommended changing the order of the bad faith instructions so that 404.7 precedes 404.4. **The subcommittee recommended no change as the current order of the instructions follows the approved template. The committee agreed.**

- Another comment to instruction 404.7 recommended changing the bracketed terms from "loss," "injury," and "damage," to "harm." **Consistent with the change recommended to instruction 404.6, the subcommittee recommended changing the terms to "loss," "damage," and "harm." The committee agreed.**

- One comment recommended changing the note on use to 404.7 to make it clear that causation is not an issue when the only damages are damages already found in the underlying action. **The subcommittee recommended changing the note by adding the phrase "or the only damages are those already determined in the underlying action." The committee agreed.**

- One comment recommended amending the note on use to instruction 404.9 by changing the word "amount" in line three to "damages" and changing "amounts" in line five to "damages." **The subcommittee recommended making the changes, but the committee disagreed, concluding that the instruction is clear as-is.**

- One comment recommended a change to the comment to 404.10 regarding the scope of the instruction. **This was deemed beyond book reorganization and was referred to the bad faith subcommittee for consideration. The committee agreed.**

Another comment recommended adding a note on use to instruction 404.12, addressing other consequential damages. **This too is beyond the scope of book reorganization, so the subcommittee recommended referring it to the bad faith subcommittee. The committee agreed**.

TAB E

"Gunn, Tracy"
<tgunn@fowlerwhite.com>
10/30/2006 09:59 AM

To <grose@flabar.org>
cc <SMakar@coj.net>
bcc
Subject insurance subcommittee

This is the report of the "bad faith" committee, which should be renamed the "insurance" committee.

(1) We all agree that the amendment to the medical malpractice statute requires a wholly different instruction for bad faith cases in which the underlying claim was for medical malpractice. The statute provides certain legal defenses for the carrier, which would likely be decided by the court as a matter of law and would not impact the instructions, so some people believed that the statute required no change. However, the amendment also enumerates different factors to be considered by the trier of fact if the case does go to trial. The current general bad faith instructions do not enumerate these factors. We will provide a new instruction for the committee's consideration in February.

(2) Judge Altenbernd suggested that there should be a standard instruction for use in UM cases to advise the jury of the role of the carrier. This subcommittee can handle this issue as it relates to insurance (hence the name change). We will provide a proposal in February.

Tracy Raffles Gunn
Board Certified Appellate Attorney
Shareholder, Fowler White Boggs Banker PA
Tampa, Florida
(813) 228-7411

"Sammy Cacciatore" <sammy@nancelaw.com>
06/20/2007 11:55 AM

To <grose@flabar.org>
cc
bcc
Subject FW: Medical Malpractice Bad Faith

History: This message has been replied to.

Gerry,

Please include this e-mail chain and attachments in the meeting materials.

Sammy

From: Sammy Cacciatore
Sent: Thursday, June 14, 2007 9:29 AM
To: Gunn, Tracy; alanwagner@wagnerlaw.com; Mr. Thomas S Edwards Jr. (E-mail); Jeff; Sammy Cacciatore
Cc: grose@flabar.org
Subject: Medical Malpractice Bad Faith

Just realized that I did not include the attachments In Monday's e-mail. Sorry. Here they are.

Sammy

From: Sammy Cacciatore
Sent: Monday, June 11, 2007 9:26 AM
To: Gunn, Tracy; 'Jeff'; alanwagner@wagnerlaw.com; Mr. Thomas S Edwards Jr. (E-mail)
Cc: Sammy Cacciatore
Subject: Medical Malpractice Bad Faith

Sub Committee Colleagues

As Tracy requested at the Feb. meeting I am sending you Fl Stat 766.1185(2) and the version of the instruction that Dan Mitchell and I had earlier done. We were asked to consider whether the statute is a substitute for the common law. I have attached both.

The complete medical malpractice statute is attached. Certainly Fl Stat 766.1185(1) as it sets out a timeline of safe harbors changes the common law. The timeline in Sec (1) negates any bad faith if they are met. We need to discuss though whether subsection (2) in conjunction with the language in the initial paragraph ("...whether the insurer could and should have settled the claim within the policy limits had it acted fairly and honestly towards its insured with due regard for his or her interest, whether under statue or common law:..") is a change in the common law or is subsection (2) merely a reiteration of the items encompassed in the common law. I noted that subsection (2) ends with a catchall giving discretion to the trial court which seems to capture any other circumstances recognized at common law.

If subsection (2) is not a substitute for the common law, do we need a new instruction setting these out? The standard for recovery in the initial paragraph is language similar to what we currently have in MI 3.1a.

If we do need a new instruction, we have been asked to do a Plain English rewrite of the earlier proposal that tracked the statutory language.

After you have reviewed the materials, please circulate your thoughts and comments to the subcommittee. Based on the comments I will then set a telephone conference.

S. Sammy Cacciatore
Nance, Cacciatore
P. O. Box 361817
Melbourne, Fl. 32936
Ph.:321-777-7777
Sammy@NanceLaw.com[attachment "MedicalMalpracticeBad FaithStatute.wpd" deleted by Gerry Rose/The Florida Bar] [attachment "MedMalpBadFaithMI3.1.doc" deleted by Gerry Rose/The Florida Bar]

766.1185 Bad faith actions.--In all actions for bad faith against a medical malpractice insurer relating to professional liability insurance coverage for medical negligence, and in determining whether the insurer could and should have settled the claim within the policy limits had it acted fairly and honestly towards its insured with due regard for her or his interest, whether under statute or common law:

1. (1)(a) An insurer shall not be held in bad faith for failure to pay its policy limits if it tenders its policy limits and meets other reasonable conditions of settlement by the earlier of either:

1. The 210th day after service of the complaint in the medical negligence action upon the insured. The time period specified in this subparagraph shall be extended by an additional 60 days if the court in the bad faith action finds that, at any time during such period and after the 150th day after service of the complaint, the claimant provided new information previously unavailable to the insurer relating to the identity or testimony of any material witnesses or the identity of any additional claimants or defendants, if such disclosure materially alters the risk to the insured of an excess judgment; or

2. The 60th day after the conclusion of all of the following:

a. Deposition of all claimants named in the complaint or amended complaint.

b. Deposition of all defendants named in the complaint or amended complaint, including, in the case of a corporate defendant, deposition of a designated representative.

c. Deposition of all of the claimants' expert witnesses.

d. The initial disclosure of witnesses and production of documents.

e. Mediation as provided in s. **766.108.**

(b) Either party may request that the court enter an order finding that the other party has unnecessarily or inappropriately delayed any of the events specified in subparagraph (a)2. If the court finds that the claimant was responsible for such unnecessary or inappropriate delay, subparagraph (a)1. shall not apply to the insurer's tendering of policy limits. If the court finds that the defendant or insurer was responsible for such unnecessary or inappropriate delay, subparagraph (a)2. shall not apply to the insurer's tendering of policy limits.

(c) If any party to an action alleging medical negligence amends its witness list after service of the complaint in such action, that party shall provide a copy of the amended witness list to the insurer of the defendant health care provider.

(d) The fact that the insurer did not tender policy limits during the time periods specified in this paragraph is not presumptive evidence that the insurer acted in bad faith.

(2) When subsection (1) does not apply, the trier of fact, in determining whether an insurer has acted in bad faith, shall consider:

(a) The insurer's willingness to negotiate with the claimant in anticipation of settlement.

(b) The propriety of the insurer's methods of investigating and evaluating the claim.

(c) Whether the insurer timely informed the insured of an offer to settle within the limits of coverage, the right to retain personal counsel, and the risk of litigation.

(d) Whether the insured denied liability or requested that the case be defended after the insurer fully advised the insured as to the facts and risks.

(e) Whether the claimant imposed any condition, other than the tender of the policy limits, on the settlement of the claim.

(f) Whether the claimant provided relevant information to the insurer on a timely basis.

(g) Whether and when other defendants in the case settled or were dismissed from the case.

(h) Whether there were multiple claimants seeking, in the aggregate, compensation in excess of policy limits from the defendant or the defendant's insurer.

(i) Whether the insured misrepresented material facts to the insurer or made material omissions of fact to the insurer.

(j) In addition to the foregoing, the court shall allow consideration of such additional factors as the court determines to be relevant.

(3) The provisions of s. **624.155** shall be applicable in all cases brought pursuant to that section unless specifically controlled by this section.

(4) An insurer that tenders policy limits shall be entitled to a release of its insured if the claimant accepts the tender.

History.--s. 56, ch. 2003-416.

MI 3.2

INSURER'S BAD FAITH FAILURE TO SETTLE

MEDICAL MALPRACTICE ACTIONS
(SECTION 766.1185, FLORIDA STATUTES)

In determining whether (defendant) **acted in bad faith, you shall consider [**(defendant's) **willingness to negotiate** (claimant) **in anticipation of settlement], [the propriety of** (defendant's) **methods of investigating and evaluating the claim of** (claimant)**], [whether timely informed** (insured) **of an offer to settle within the limits of coverage, the right to retain personal counsel, and the risk of litigation], [whether** (insured) **denied liability or requested that the case be defended after** (defendant) **fully advised** (insured) **as to the facts and risks], [whether** (claimant) **imposed any condition, other than the tender of the policy limits, on the settlement of the claim], [whether** (claimant) **provided relevant information to** (defendant) **on a timely basis], [whether and when other defendants in the case settled or were dismissed from the case], [whether there were multiple claimants seeking, in the aggregate, compensation in excess of policy limits from** (insured) **or from** (defendant)**], [and] [whether** (insured) **misrepresented material facts to** (defendant) **or made material omissions of fact to** (defendant)**] [and] [**(such additional factors as the court may determine to be relevant)**].**

NOTE ON USE

1. MI 3.2 is applicable only in cases to which Section 766.1185(2), Florida Statutes, applies.

2. Where MI 3.2 is used, it should be given after MI 3.1 a. and before MI 3.1 b.

"Sammy Cacciatore" <sammy@nancelaw.com>
06/28/2007 05:55 PM

To "Jeff" <jeff@fulfordkinglaw.com>, "Gunn, Tracy" <tgunn@fowlerwhite.com>, "Alan Wagner" <AlanWagner@WagnerLaw.com>, "Tom Edwards" <grose@flabar.org>
cc
bcc
Subject RE: Medical Malpractice Bad Faith

Jeff,

Thanks for taking the project over while I am gone. Just was able to check my e-mails today and it was there. It is good with me and vote to send it on to Gerry.

Sammy
Sammy@NanceLaw.com

From: Jeff [mailto:jeff@fulfordkinglaw.com]
Sent: Wednesday, June 27, 2007 3:06 PM
To: Gunn, Tracy; Sammy Cacciatore; Alan Wagner; Tom Edwards
Cc: grose@flabar.org
Subject: RE: Medical Malpractice Bad Faith

Tracy,

Attached is a version of the combined instructions (3.1a & 3.2), along with both comment options. Let me know if I can do anything else.

Jeff

From: Gunn, Tracy [mailto:tgunn@fowlerwhite.com]
Sent: Thursday, June 21, 2007 12:31 PM
To: Jeff; Sammy Cacciatore; Alan Wagner; Tom Edwards
Subject: RE: Medical Malpractice Bad Faith

Jeff, can you put your format of the combined instruction together, then both options for the note on use. We can either reach a final subcommittee consensus on which note to use, or present both options to the full committee. Either way we can (and probably should) discuss all these points at the full Committee meeting.

Thanks,
Tracy

Tracy Raffles Gunn
Board Certified Appellate Attorney
Shareholder, Fowler White Boggs Banker P.A.

501 East Kennedy Boulevard Suite 1700
Tampa, Florida 33602
(813) 228-7411
fax (813) 229-8313

From: Jeff [mailto:jeff@fulfordkinglaw.com]
Sent: Thursday, June 21, 2007 11:17 AM
To: Sammy Cacciatore; Alan Wagner; Tom Edwards; Gunn, Tracy
Subject: RE: Medical Malpractice Bad Faith

I would agree with the note on use since it does allow the parties and trial judge the opportunity to omit certain of the factors if not an issue in the case. I wouldn't call or consider the enumerated statutory list 'elements' of the cause of action. They are merely 'factors or circumstances' that could lead a jury to determine the ultimate question as to whether the carrier acted fairly and honestly toward its insured and with due regard for his/her interests.

However, I still wonder if we are not doing a disservice to the trial judges who depend on our guidance by not being more definitive in our position. I think the comment should go a step further and say that "specific factors may be omitted when not an issue in the case." The cause of action for bad faith, as codified under the med mal statute, does not really change existing law on the type of conduct actionable. It merely gives the safe harbor time limits to a med mal carrier (unconstitutional in my mind, but that is a different story) while preserving the bad faith actions that existed under common law. It did go further and set forth the factors to be considered by a jury, but common sense tells us that those factors should only be listed for the jury IF applicable in a given case. Obviously, not all factors will be applicable in every case. If we infer by our comment that there is an argument that they should all be given, no matter the circumstances or factors at issue, then I believe that sets up a jury argument that allows consideration for non-issues in the case which could actually cause confusion. (I think Tom's comment below is well taken, also). I can go either way on the comment, but would prefer that we take a stand, if appropriate.

From: Sammy Cacciatore [mailto:sammy@nancelaw.com]
Sent: Thursday, June 21, 2007 8:46 AM
To: Alan Wagner; Jeff; Tom Edwards; Gunn Tracy
Cc: Sammy Cacciatore
Subject: RE: Medical Malpractice Bad Faith

I like Tracy's suggestion also.

Sammy

From: Alan Wagner [mailto:AlanWagner@WagnerLaw.com]
Sent: Thursday, June 21, 2007 8:35 AM
To: Jeff; Sammy Cacciatore; Tom Edwards; Gunn Tracy
Subject: RE: Medical Malpractice Bad Faith

This instruction combines the standard for insurance bad faith provided in MI3 with the factors that the

jury "shall consider" under Florida Statutes section 766.1185(2). Pending further developments in the law, the Committee takes no position on whether specific factors that are not at issue in a given case can be omitted from the instruction.

I like Tracy's suggestion.

Alan

-------*Original Message*-------

From: Gunn, Tracy
Date: 6/21/2007 7:48:23 AM
To: Alan Wagner; Jeff; Sammy Cacciatore; Tom Edwards
Subject: RE: Medical Malpractice Bad Faith

I don't see this as being much different than the substantive "elements" of any other claim, which can be omitted if they are not at issue. But I do see Alan's point. It may not be fair to the plaintiff to state that these factors can be omitted if they will then face a potential argument on appeal (or on DV) that they failed to prove a required element of their case.

I am sure there is no case law on this issue with regard to this specific statute. Of course, as a practical matter, an agreed instruction will never become an issue on appeal. Still, if this is a concern, we can deal it in a format similar to that discussed below.

In the past, where we are unsure of a legal issue and there is no guiding case law, we have seen our job as a Committee to alert practitioners to the issue without "making law." This allows parties to make the argument and allows us to provide an instruction without creating a trap. The way that would work here is to provide the instruction in the format Jeff suggested, followed by a note on use such as:

This instruction combines the standard for insurance bad faith provided in MI3 with the factors that the jury "shall consider" under Florida Statutes section 766.1185(2). Pending further developments in the law, the Committee takes no position on whether specific factors that are not at issue in a given case can be omitted from the instruction.

If we can agree as a subcommittee that these formats would be proper for both options but cannot agree which is the correct one to use, we can finalize them and present both options to the full Committee for discussion.

Tracy Raffles Gunn
Board Certified Appellate Attorney
Shareholder, Fowler White Boggs Banker PA
Tampa, Florida
(813) 228-7411

From: Alan Wagner [mailto:AlanWagner@WagnerLaw.com]
Sent: Wed 6/20/2007 11:41 PM
To: Gunn, Tracy; Jeff; Sammy Cacciatore; Tom Edwards
Subject: RE: Medical Malpractice Bad Faith

But if the statute says the jury shall consider, shouldn't the plaintiff put on evidence that the doctor either did or did not ask them to settle, so that the jury can consider what the statute says tat they must?

There is a legislative mandate that the jury must consider certain things. Stupid mandate, but it is there.

Alan

-------*Original Message*-------

From: Tom Edwards
Date: 6/20/2007 9:35:54 PM
To: Alan Wagner; Gunn Tracy; Jeff; Sammy Cacciatore
Subject: RE: Medical Malpractice Bad Faith

I think I agree with Tracy. If there is no evidence on an element because all parties decide not to put in any evidence on that issue then I think there would be no basis for the jury to consider that element--regardless of the statute ---if there is no evidence for example of whether or not the Dr. asked them not to settle, it would be wrong to permit the jury to be instructed on that and risk them going down a rabbit trail.

Thomas S. Edwards, Jr.
501 Riverside Ave., Suite 601
Jacksonville, Florida 32202
Phone 904-399-1609
Fax 904-399-1615
tse@peekcobb.com

From: Alan Wagner [mailto:AlanWagner@WagnerLaw.com]
Sent: Wed 6/20/2007 5:52 PM
To: Gunn Tracy; Jeff; Tom Edwards; Sammy Cacciatore
Subject: RE: Medical Malpractice Bad Faith

Or that we take no position as to whether the entire list must be provided.

It is a curious statute. If the statute says that the jury must consider all the factors, I think the argument can be made that it then becomes the plaintiff's burden to put on some evidence that addresses each factor -- even to show that it in fact played no role in the company's decision. That sounds like a malpractice trap, but if the law says the jury "shall" consider certain factors would that not compel the plaintiff to put on the appropriate evidence to allow the jury to so consider the required factors?

Alan

Alan F. Wagner
Wagner, Vaughan, McLaughlin & Brennan
601 Bayshore Boulevard; Ste 910
Tampa, Florida 33606
www.WagnerLaw.com
-------Original Message-------

From: Sammy Cacciatore
Date: 6/20/2007 4:36:44 PM
To: Gunn, Tracy; Alan Wagner; Jeff; Tom Edwards
Subject: RE: Medical Malpractice Bad Faith

That is a solution.

Sammy

From: Gunn, Tracy [mailto:tgunn@fowlerwhite.com]
Sent: Wednesday, June 20, 2007 4:20 PM
To: Sammy Cacciatore; Alan Wagner; Jeff; Tom Edwards
Subject: RE: Medical Malpractice Bad Faith
What about including all the factors but adding a note on use stating that the parties may request that any of the factors not at issue in a given case be omitted from the instruction.

Tracy Raffles Gunn
Board Certified Appellate Attorney
Shareholder, Fowler White Boggs Banker P.A.
501 East Kennedy Boulevard Suite 1700
Tampa, Florida 33602
(813) 228-7411
fax (813) 229-8313

From: Sammy Cacciatore [mailto:sammy@nancelaw.com]
Sent: Wednesday, June 20, 2007 4:15 PM
To: Alan Wagner; Gunn, Tracy; Jeff; Tom Edwards
Subject: RE: Medical Malpractice Bad Faith

Alan, I agree it is shall, but am concerned about listing any item that is not been made an issue by the evidence. I am fearful of the Court instructing the jury on any concept that does not have some basis in the evidence and has been a part of the trial. It can open a Pandora's box for them to start speculating.

Sammy

From: Alan Wagner [mailto:AlanWagner@WagnerLaw.com]
Sent: Wednesday, June 20, 2007 4:10 PM
To: Gunn Tracy; Jeff; Tom Edwards; Sammy Cacciatore
Cc: Sammy Cacciatore
Subject: RE: Medical Malpractice Bad Faith

Sammy, I don't agree that the "Court must allow the jury to consider" the factors. The statute says "shall":

"(2) When subsection (1) does not apply, the trier of fact, in determining whether an insurer has acted in bad faith, shall consider:"

Even if one of the listed items is not an issue, doesn't the statute mandate that the jury consider the item (or its absence) into consideration in reaching a decision? Could you ever remove an item from the list? If the jury is supposed to consider each item doesn't it follow that they should also consider the absence of the item in reaching a BF decision?

Alan

-------Original Message-------

From: Sammy Cacciatore
Date: 6/20/2007 3:56:04 PM
To: Gunn, Tracy; Jeff; alanwagner@wagnerlaw.com; Tom Edwards
Cc: Sammy Cacciatore
Subject: RE: Medical Malpractice Bad Faith

Tracy and Jeff,

My thinking originally when Dan and I were first addressing the issue was that the factors

needed to be listed. Upon re-reading it I was struck by the language in the first paragraph that did not change the standard of care. I see the list as various factors that the Court must allow the jury to consider based on the evidence in each case; but each of the factors may not be an issue in any given case depending on the evidence. But, I have no strong feelings. I see that Alan has also concluded as you and Jeff. It looks like my first impression was probably right.

Sammy

From: Gunn, Tracy [mailto:tgunn@fowlerwhite.com]
Sent: Wednesday, June 20, 2007 3:32 PM
To: Sammy Cacciatore; Jeff
Subject: RE: Medical Malpractice Bad Faith
Sammy, if you have time can you tell us your thinking about why the factors would not need to be listed?

Thanks.

Tracy

From: Sammy Cacciatore [mailto:sammy@nancelaw.com]
Sent: Wednesday, June 20, 2007 3:28 PM
To: Jeff
Cc: Gunn, Tracy
Subject: RE: Medical Malpractice Bad Faith
Jeff,

Thanks for your e-mail. I understand yours and Tracy's position. Since you have given thought to the structure of the instruction would you mind drafting a proposal? I am swamped and I am leaving tomorrow.

Sammy

From: Jeff [mailto:jeff@fulfordkinglaw.com]
Sent: Wednesday, June 20, 2007 1:40 PM
To: Gunn, Tracy; Sammy Cacciatore; alanwagner@wagnerlaw.com; Tom Edwards
Cc: Vanessa McCurry
Subject: RE: Medical Malpractice Bad Faith

Sammy,

I just finished a trial and this is my first day back in the office in over 2 weeks. Sorry for the delay in my response. I just finished researching some of these cases and statute. Before Tracy's email, I was going to conclude the same thing. I believe the statute merely codifies the existing common law by its introductory paragraph before (1). However, when it listed the elements to consider under (2), then I believe it went a step further. Per the statute, I think there is now a statutory requirement that in all medical malpractice cases the jury is required to consider the elements you and Dan laid out in the proposed instruction. I think the elements must be given in a med mal trial. I would offer the original BF instruction (3.1), to be followed by the additional circumstances for the jury to consider as listed in the statute. Since the original instruction mentions 'under all the circumstances', then I would use that language as a transition into the factors or circumstances listed in the statute. For example, start the new instruction (to follow 3.1)

"In determining whether (defendant) acted in bad faith, you shall consider the following factors and circumstances; (then list all in the statute).

Also, I did note a couple of typos; 1- 'with' should be included on line 2 of 3.2 before (claimant). 2- '(defendant)' needs to be added on line 3 of 3.2 as follows –'whether (defendant) timely informed…'

Jeff

Ps enjoy your vacation

From: Gunn, Tracy [mailto:tgunn@fowlerwhite.com]
Sent: Wednesday, June 20, 2007 1:00 PM
To: Sammy Cacciatore; alanwagner@wagnerlaw.com; Tom Edwards; Jeff
Cc: Vanessa McCurry
Subject: RE: Medical Malpractice Bad Faith

Thanks Sammy. My interpretation is that the mandate in subsection (2) listing certain factors that the trier of fact "shall consider" requires a jury instruction advising the jury of those factors. I am not sure how

we'd otherwise ensure that the fact finder complied with this mandate. The overall standard may be the same, ie this additional "factors" instruction would be used in conjunction with our existing instruction.

Thanks for your work on this.

Tracy

Tracy Raffles Gunn
Board Certified Appellate Attorney
Shareholder, Fowler White Boggs Banker P.A.
501 East Kennedy Boulevard Suite 1700
Tampa, Florida 33602
(813) 228-7411
fax (813) 229-8313

From: Sammy Cacciatore [mailto:sammy@nancelaw.com]
Sent: Wednesday, June 20, 2007 11:53 AM
To: Gunn, Tracy; alanwagner@wagnerlaw.com; Tom Edwards; Sammy Cacciatore; Jeff
Cc: Vanessa McCurry
Subject: FW: Medical Malpractice Bad Faith

Colleagues,

I have not heard from anyone regarding the Medical Malpractice statute issue. I will be leaving on vacation tomorrow until July 19th. My analysis is that there has not been a change in the standard of duty so we do not need a new or separate an instruction. Nevertheless, I would appreciate your thoughts. I will be able to access my e-mails periodically, but not on a regular basis.

Sammy
Sammy@NanceLaw.com

From: Sammy Cacciatore
Sent: Thursday, June 14, 2007 9:29 AM
To: Gunn, Tracy; alanwagner@wagnerlaw.com; Mr. Thomas S Edwards Jr. (E-mail); Jeff; Sammy Cacciatore
Cc: grose@flabar.org
Subject: Medical Malpractice Bad Faith

Just realized that I did not include the attachments In Monday's e-mail. Sorry. Here they are.

Sammy

From: Sammy Cacciatore
Sent: Monday, June 11, 2007 9:26 AM
To: Gunn, Tracy; 'Jeff'; alanwagner@wagnerlaw.com; Mr. Thomas S Edwards Jr. (E-mail)
Cc: Sammy Cacciatore
Subject: Medical Malpractice Bad Faith

Sub Committee Colleagues

As Tracy requested at the Feb. meeting I am sending you Fl Stat 766.1185(2) and the version of the instruction that Dan Mitchell and I had earlier done. We were asked to consider whether the statute is a substitute for the common law. I have attached both.

The complete medical malpractice statute is attached. Certainly Fl Stat 766.1185(1) as it sets out a timeline of safe harbors changes the common law. The timeline in Sec (1) negates any bad faith if they are met. We need to discuss though whether subsection (2) in conjunction with the language in the initial paragraph ("...whether the insurer could and should have settled the claim within the policy limits had it acted fairly and honestly towards its insured with due regard for his or her interest, whether under statue or common law:..") is a change in the common law or is subsection (2) merely a reiteration of the items encompassed in the common law. I noted that subsection (2) ends with a catchall giving discretion to the trial court which seems to capture any other circumstances recognized at common law.

If subsection (2) is not a substitute for the common law, do we need a new instruction setting these out? The standard for recovery in the initial paragraph is language similar to what we currently have in MI 3.1a.

If we do need a new instruction, we have been asked to do a Plain English rewrite of the earlier proposal that tracked the statutory language.

After you have reviewed the materials, please circulate your thoughts and comments to the subcommittee. Based on the comments I will then set a telephone conference.

S. Sammy Cacciatore
Nance, Cacciatore
P. O. Box 361817
Melbourne, Fl. 32936
Ph.:321-777-7777
Sammy@NanceLaw.com

well as the anticipated time and additional fees involved.

3.1 INSURER'S BAD FAITH FAILURE TO SETTLE

a. Issue:

The issue for your determination is whether (defendant) acted in bad faith in failing to settle the claim [of] [against] (insured). An insurance company acts in bad faith in failing to settle a claim when, under all the circumstances, it could and should have done so, had it acted fairly and honestly toward [its policyholder] [its insured] [an excess carrier] and with due regard for [his] [her] [its] [their] interests.

3.2 MEDICAL MALPRACTICE INSURER'S BAD FAITH FAILURE TO SETTLE

In determining whether (defendant) acted in bad faith, you shall consider the following factors or circumstances; [(defendant's) willingness to negotiate with (claimant) in anticipation of settlement], [the propriety of (defendant's) methods of investigating and evaluating the claim of (claimant)], [whether defendant timely informed (insured) of an offer to settle within the limits of coverage, the right to retain personal counsel, and the risk of litigation], [whether (insured) denied liability or requested that the case be defended after (defendant) fully advised (insured) as to the facts and risks], [whether (claimant) imposed any condition, other than the tender of the policy limits, on the settlement of the claim], [whether (claimant) provided relevant information to (defendant) on a timely basis], [whether and when other defendants in the case settled or were dismissed from the case], [whether there were multiple claimants seeking, in the aggregate, compensation in excess of policy limits from (insured) or from (defendant)], [and] [whether (insured) misrepresented material facts to (defendant) or made material omissions of fact to (defendant)] [and] [(such additional factors as the court may determine to be relevant)].

Comment on MI 3.2

Option 1 - This instruction combines the standard instruction for insurance bad faith provided in MI 3.1 with the factors that the jury "shall consider" under sec. 766.1185(2), Florida Statutes. Pending further developments in the law, the Committee takes no position on whether specific factors that are not at issue in a given case can be omitted from the instruction.

Option 2 - This instruction combines the standard instruction for insurance bad faith provided in MI 3.1 with the factors that the jury "shall consider" under sec. 766.1185(2), Florida Statutes. The Committee recommends that specific factors may be omitted from the instruction when they are not an issue in the case.

NOTES ON USE

1. MI 3.2 is applicable only in cases to which sec. 766.1185(2), Florida Statutes, applies.

2. Where MI 3.2 is used, it should be given after MI 3.1a. and before MI 3.1b.

October 15, 2007

Notice: Proposed instruction dealing with med mal bad faith

The Supreme Court Committee on Standard Jury Instructions in Civil Cases is presently considering an instruction on medical malpractice insurer's bad faith failure to settle. After reviewing the comments received in response to this notice, the committee may submit its proposal to the Florida Supreme Court. Send all comments to Scott Makar, Committee Chair, Office of the Attorney General, # PL-01, The Capitol, Tallahassee 32399-1050. Comments also may be e-mailed to Scott.Makar@myfloridalegal.com or fax to (850) 410-2672. Comments must be received by December 1to ensure that they are considered by the committee.

MI 3.2 MEDICAL MALPRACTICE INSURER'S BAD FAITH FAILURE TO SETTLE

In determining whether (defendant) **acted in bad faith, you shall consider the following factors or circumstances;**
[(defendant's) **willingness to negotiate with** (claimant) **in anticipation of settlement],**
[the propriety of (defendant's) **methods of investigating and evaluating the claim of** (claimant)**],**
[whether (defendant) **timely informed** (insured) **of an offer to settle within the limits of coverage, the right to retain personal counsel, and the risk of litigation],**
[whether (insured) **denied liability or requested that the case be defended after** (defendant) **fully advised** (insured) **as to the facts and risks],**
[whether (claimant) **imposed any condition, other than the tender of the policy limits, on the settlement of the claim],**
[whether (claimant) **provided relevant information to** (defendant) **on a timely basis],**
[whether and when other defendants in the case settled or were dismissed from the case],
[whether there were multiple claimants seeking, in the aggregate, compensation in excess of policy limits from (insured) **or from** (defendant)**],**
[and]
[whether (insured) **misrepresented material facts to** (defendant) **or made material omissions of fact to (defendant)],**
[and (list such additional factors as the court may determine to be relevant)**].**

NOTE ON USE FOR MI 3.2

This instruction lists the factors that the jury "shall consider" under section 766.1185(2), Florida Statutes, and should be used only in cases to which that statute applies. It should be given in conjunction with and immediately after MI 3.1. The Committee recommends that specific factors should be omitted from the instruction when they are not an issue in the case.

[Updated: 10-10-2007]

October 15, 2007

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[whether there were multiple claimants seeking, in the aggregate, compensation in excess of policy limits from (insured) **or from** (defendant)**],**
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[whether (insured) **misrepresented material facts to** (defendant) **or made material omissions of fact to (defendant)],**
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This instruction lists the factors that the jury "shall consider" under section 766.1185(2), Florida Statutes, and should be used only in cases to which that statute applies. It should be given in conjunction with and immediately after MI 3.1. The Committee recommends that specific factors should be omitted from the instruction when they are not an issue in the case.

[Updated: 10-10-2007]

FLORIDA CHAPTERS

May 12, 2008

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2001 Bryan St., Ste. 3000
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(800) 932-2682

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
FLABOTA President-elect and
Chair of Special Committee

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 414.5should 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

RYWANT, ALVAREZ, JONES, RUSSO, & GUYTON, P.A.

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•TAMPA •INVERNESS •BRANDON •GAINESVILLE

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May 12, 2008

VIA FACSIMILE: 813-229-8313

Tracy Raffles Gunn, Esq.
Fowler, White et al.
Post Office Box 1438
Tampa, Florida 33601

Re: Florida State Jury Instructions

Dear Tracy:

Please allow this to serve as my comment with regard to the proposed revisions to the Florida Standard Jury Instructions. As you may expect, I reviewed with interest the proposed instructions dealing with insurer's bad faith.

Initially, I would encourage the committee to consider an instruction dealing with the insurance carrier's duty to advise the insured. I realize the note for the use of proposed instruction 404.4 reflects that other instructions may be necessary. However, in my practice, I have found that the duty to advise is present (along with the corresponding question of whether the duty was met) in almost every case. As such, I would propose the attached instruction which is based upon the decisions Boston Old Colony Insurance Company v. Gutierrez, 386 So.2d 783 (Fla. 1980) and Berges v. Infinity Insurance Company, 896 So.2d 665 (Fla. 2004).

I think it appropriate that the committee continue to use the language in proposed instruction 404.4. As you know, this instruction follows Florida Standard Jury Instruction MI 3.1. As such, I believe it is unnecessary and confusing to include a proposed instruction on legal cause (404.6). Legal cause is not referenced in either 404.4 or MI 3.1. Bad faith is adequately covered by MI 3.1. See Nationwide v. King, 568 So.2d 990 (4th DCA 1990). Further, the concept of negligence is not referenced in MI 3.1 or proposed 404.4. Similarly, a number of the concepts addressed in the notes of 404.6 just do not apply to a bad faith cause of action. Bad faith is an action ex contractu. GEICO v. Grounds, 311 So.2d 164 (1st DCA 1975).

I'll be happy to discuss these issues with you or any other member of the committee. I appreciate all the work you and your committee have done relative to the "overhaul" of the Florida Standard Jury Instructions.

Please contact me with any questions.

Very truly yours,

Michael S. Rywant

MSR/jm
Enc. (Proposed Instruction: Carrier's Duty to Advise)

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CARRIER'S DUTY TO ADVISE

An insurance company has a duty to advise its insured of settlement opportunities, to advise as to the probable outcome of litigation, to warn of the possibility of excess judgment and to advise its insured of any steps he (or she) might take to avoid same. These duties exist even with regard to opportunities for settlement within the policy limits.

Boston Old Colony Insurance Company v. Gutierrez, 386 So.2d 783 (Fla. 1980)
Berges v. Infinity Insurance Company, 896 So.2d 665 (Fla. 2004)

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Reply to Dade

May 28, 2008

Via email tgunn@fowlerwhite.com,
Facsimile (813) 229-8313, and U.S. Mail

Tracy Raffles Gunn, Committee Chair
Supreme Court Committee on Standard
Jury Instructions in Civil Cases
Fowler White Boggs Banker
501 East Kennedy Boulevard, Suite 1700
Tampa, Florida 33602

RE: Comments on Proposed Civil Jury Instruction For Medical Malpractice Insurer's Bad Faith Failure to Settle – 404.5

Dear Ms. Gunn:

This firm represents First Professionals Insurance Company. We submit the following comments on the proposed civil jury instruction for medical malpractice insurer's bad faith failure to settle, 404.5, for consideration by the Committee:

- A comment should be added that the court is to first give standard jury instruction 404.5 - Insurer's Bad Faith (Failure to Settle), which defines "bad faith"; and

- A comment should be added that the court has discretion to omit one of the enumerated factors or circumstances only when both parties agree or there is no issue in the case as to that factor or circumstance.

ANALYSIS

The proposed jury instruction is intended to implement section 766.1185(2), Florida Statutes. The statute provides in pertinent part:

In all actions for bad faith against a medical malpractice insurer relating to professional liability insurance coverage for medical negligence, and in determining whether the insurer could and should have settled the claim within the policy limits had it acted fairly and honestly towards its insured with due regard for her or his interest, whether under statute or common law:

(1) (a) An insurer shall not be held in bad faith for failure to pay its policy limits if it tenders its policy limits and meets other reasonable conditions of settlement by the earlier of either:

* * *

(2) When subsection (1) does not apply, the trier of fact, in determining whether an insurer has acted in bad faith, shall consider:

(a) The insurer's willingness to negotiate with the claimant in anticipation of settlement.

(b) The propriety of the insurer's methods of investigating and evaluating the claim.

(c) Whether the insurer timely informed the insured of an offer to settle within the limits of coverage, the right to retain personal counsel, and the risk of litigation.

(d) Whether the insured denied liability or requested that the case be defended after the insurer fully advised the insured as to the facts and risks.

(e) Whether the claimant imposed any condition, other than the tender of the policy limits, on the settlement of the claim.

(f) Whether the claimant provided relevant information to the insurer on a timely basis.

(g) Whether and when other defendants in the case settled or were dismissed from the case.

(h) Whether there were multiple claimants seeking, in the aggregate, compensation in excess of policy limits from the defendant or the defendant's insurer.

(i) Whether the insured misrepresented material facts to the insurer or made material omissions of fact to the insurer.

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(j) In addition to the foregoing, the court shall allow consideration of such additional factors as the court determines to be relevant.

(emphasis supplied).

I. Proposed Jury Instruction 404.5 Lacks the Statutory Definition of "Bad Faith."

Section 768.1185 incorporates the definition of "bad faith" in failing to settle set forth by the Florida Supreme Court in *State Farm Mutual Automobile Ins. Co. v. LaForet*, 658 So. 2d 55, 62 (Fla. 1995)[1] -- failing to settle when, under all the circumstances, it could and should have done so had it acted fairly and honestly toward it insured with due regard for his interests -- and then enumerates a list of circumstances/factors which must be considered by the trier of fact in determining whether the insurer has acted in bad faith, *i.e.* whether it failed to settle when it could and should have settled had it acted fairly and honestly toward its insured with due regard for her or his interest.

Proposed jury instruction 404.5 enumerates the statutory factors to be considered in determining whether the insurer acted in bad faith, but does not define bad faith. Bad faith is defined in standard jury instruction 404.4:

> Bad faith on the part of an insurance company is failing to settle a claim when, under all the circumstances, it could and should have done so, had it acted fairly and honestly toward [its policy holder] [its insured] [an excess carrier] and with due regard for [his] [her] [its] [their] interests.

Therefore, a comment should be added to proposed jury instruction 404.5 that standard jury instruction 404.4, which defines bad faith, should be given first.

II. The proposed jury instruction improperly gives the trial court discretion to omit a factor or circumstances which the statute mandates shall be considered by the trier of fact.

Section 768.1185(2) states in mandatory terms that the trier of act "shall consider" all of the enumerated factors or circumstances set forth in (a) through (i) and "(j) [i]n addition to the foregoing, the court shall allow consideration of such additional factors as the court determines to be relevant."

---

[1] ("an insurer has acted in bad faith if it has '[n]ot attempt[ed] in good faith to settle claims when, under all the circumstances, it could and should have done so, had it acted fairly and honestly toward its insured and with due regard for [the insured's] interest'", *citing* Fla. Stat. 624.155(1)(b)1, and holding same standard applies to common law bad faith actions)

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However, proposed jury instruction 404.5 has brackets around each of the enumerated factors, giving the court discretion to omit one of the mandatorily required factors set forth in (a) through (i), thereby conflicting with the statute.

While it is possible that in a particular case the parties may agree that a factor/circumstances does not apply, or there is no issue in the case as to that factor or circumstances, such that an enumerated factor/circumstances should be omitted from the jury instruction, as written the proposed jury instruction conflicts with the statute. A court confronted with the proposed jury instruction may believe that it has discretion in all cases to omit the enumerated factors/circumstances, leading to erroneous instructions.

Therefore, a comment should be added that the court has discretion to omit one of the enumerated factors or circumstances only when both parties agree or there is no issue in the case as to that factor or circumstances.

CONCLUSION

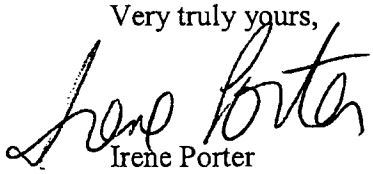
In conclusion the Committee should:

- Add a comment that the court is to first give standard jury instruction 404.5 – Insurer's Bad Faith (Failure to Settle), which defines "bad faith"; and

- Add a comment that the court has discretion to omit one of the enumerated factors or circumstances only when both parties agree or there is no issue in the case as to that factor or circumstance.

Thank you for your kind attention to this matter and if you have any questions, please do not hesitate to contact us.

Very truly yours,



Irene Porter

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Comments of Florida Justice Association on Proposed Revisions to Florida Standard Jury Instructions 404.5 and 404.6

Proposed Instruction 404.5 -- Medical Malpractice Insurer's Bad Faith

We recommend two changes to proposed instruction 404.5, which addresses actions for a medical insurer's bad faith. First, a note on use should be added to reflect that this instruction applies only to actions for a medical insurer's failure to settle. This instruction is based on Fla. Stat. §766.1185. The preamble to this section makes clear that it applies only when the insurer is alleged to have committed bad faith in failing to settle the claim. It does not apply to other types of bad faith, such as a violation of the carrier's duties to communicate with its insured.

Second, the brackets should be removed from the instruction, so as to eliminate the erroneous suggestion that the factors are discretionary. Listing the factors in brackets implies that the court would only read that factor if it determines that there is some evidence to support it. This conflicts with §766.1185, which indicates that every factor should be considered by the jury in every case. The absence of evidence supporting a factor is just as relevant to the bad faith action as the presence of that evidence.

Proposed Instruction 404.6 -- Legal Cause

We also recommend two changes to proposed instruction 404.6. Initially, we note that this instruction inadvertently refers to "negligence." Insurance bad faith is not negligence. Correcting this would avoid possible juror confusion. Further, the notes on use should be changed to make clear that this instruction, which addresses legal cause, should not be given when the damages are only the amount of the judgment, interest, attorney's fees and costs.

Via E-Mail and U.S. Mail
Tracy Raffles Gunn
Chair of Florida Supreme Court Standard Jury Instructions Committee (Civil)
Gunn Appellate Practice, P.A.
777 S. Harbour Island Blvd., Suite 770
Tampa, Florida 33602

Dear Ms. Gunn,

This committee undertook the Herculean task of overhauling the Florida Standard Jury Instructions for civil litigation to make them more easily understood by Florida's juries. We appreciate your work. We also appreciate the opportunity to offer comments regarding the proposed jury instructions. This letter focuses only on those instructions relating to insurer's bad faith. These instructions are currently found in MI 3.1. The proposed jury instructions separate that single jury instruction into thirteen jury instructions, grouped together in section 404. Below, we suggest changes to some of those instructions and to some of the notes on use for particular instructions.

I. Instruction 404.2 (Summary of Claims or Contentions)

A. The note on use should be amended to clarify the circumstances in which the bracketed language regarding cause applies.

1. Discussion

Instruction 404.2 summarizes the claims or contentions in an insurance bad faith case. It includes bracketed language that should be read when the jury is asked to determine whether the insurance company's conduct caused the claimant or insured to sustain damages. The note on use states that this bracketed language does not apply when the court, instead of the jury, is going to determine the damages. This note should be modified to make clear that this language should not be given when the only damages sought are the amount of the judgment, interest, costs and attorneys' fees in the underlying case.

The current version of Florida Standard Jury Instruction MI 3.1 includes such a statement in note 2. Standard Jury Instructions in Civil Cases, 849 So. 2d 1083, 1086 (Fla. 2003). That note is found in the note for proposed jury instruction 404.9. A similar note should be included here and in proposed jury instructions 404.6 and 404.7 to be clear and consistent.[1]

[1] Proposed jury instructions 404.6 and 404.7 are addressed later in this letter.

■

2. Proposed Change
The note on use should be amended, as follows:

> ~~Use the~~ The bracketed clause in the first paragraph on causation and 404.6 ~~if the issues of damages are going to be submitted to the jury. If the court is going to determine damages (see 404.9), then the bracketed clause in the first paragraph and 404.6 should be omitted.~~ should be given only in cases in which an issue of damages is submitted to the jury, such as a claim for emotional distress or other consequential damages. This clause should not be given with respect to claims, such as the amount of the underlying judgment, interest, costs and attorneys' fees, that are decided by the court (see 404.9).

Alternatively, the note on use could be slightly modified, as follows:

> Use the bracketed clause in the first paragraph on causation and 404.6 if an ~~the~~ issues of damages is ~~are~~ going to be submitted to the jury. If the court is going to determine all damages (see 404.9), then the bracketed clause in the first paragraph and 404.6 should be omitted.

III. Instruction 404.5 (Medical Insurer's Bad Faith Failure to Settle)

A. The title should be changed and a note on use added to make clear that this instruction applies only to bad faith actions against med-mal liability carriers for failing to settle claims within policy limits.

1. Discussion
Instruction 404.5 implements section 766.1185, Florida Statutes (2007), which pertains to bad faith actions against med-mal liability carriers for failing to settle claims.

The scope of the statute's applicability is limited not just in terms of the type of underlying claim involved (i.e., medical malpractice), but also in terms of the type of bad faith conduct that is alleged. Although the most well-known type of third-party bad faith is the carrier's failure to settle a claim within policy limits when it could have and should have done so, it is not the *only* type of bad faith that is actionable. The carrier's duty of good faith imposes a number of obligations upon it. Not only is the carrier obligated to settle a claim within policy limits when it could and should do so, but also "to advise the insured of settlement opportunities, to advise as to the probable outcome of the litigation, to warn of the possibility of an excess judgment, and to advise the insured of any steps he might take to avoid same." Boston Old Colony Insurance Company v. Gutierrez, 386 So. 2d 783, 785 (Fla. 1980). A breach of one of these latter duties is sufficient to support a cause of action for bad faith, independently of the question of whether the carrier could have and should have settled the claim. See United States Fire Ins. Co. v. Morrison

Assurance Co., 600 So. 2d 1147 (Fla. 1st DCA 1992); Odom v. Canal Insurance Co., 582 So. 2d 1203 (Fla. 1st DCA 1991).

The preamble to section 766.1185 indicates that the statute is limited to bad faith actions in which the carrier is alleged to have committed bad faith in failing to settle the claim, and does *not* apply to other types of bad faith, such as a violation of the carrier's duties to communicate with its insured.

Specifically, the preamble to section 766.1185 says it applies:

> In all actions for bad faith against a medical malpractice insurer relating to professional liability insurance coverage for medical negligence, and in determining whether the insurer could and should have settled the claim within the policy limits had it acted fairly and honestly towards its insured with due regard for her or his interest, whether under statute or common law . . . .

This preamble applies to all of the subsections of the statute (1 through 4) because it is placed prior to all of the subsections. Subsection (2) lists the factors for the jury to consider. Therefore, the mandate of subsection (2) that the jury consider these factors only applies when the jury is determining whether the med-mal carrier could have and should have settled the claim within the policy limits.

For these reasons, instruction 404.5 should be given only in bad faith cases alleging a failure to settle, and not in cases based on breaches of the other good-faith duties of a liability insurer.

2. Proposed Changes

a. Note on use

A Note on Use should be created, stating,

> Charge 404.5 is applicable only when the particular matter at issue is the failure of a medical malpractice insurance company's failure to settle a claim. This charge does not apply if liability is asserted for the insurance company's violation of some other duty. *See, e.g., Boston Old Colony Insurance Company v. Gutierrez*, 386 So. 2d 783, 785 (Fla. 1980) (duty "to advise the insured of settlement opportunities, to advise as to the probable outcome of the litigation, to warn of the possibility of an excess judgment, and to advise the insured of any steps he might take to avoid same"); *Powell v. Prudential Property & Casualty Ins. Co.*, 584 So. 2d 12, 14 – 15 (Fla. 3d DCA 1991) ("Where the insured reasonably relies on the insurer to conduct settlement negotiations, and the insurer fails to disclose

settlement overtures to the insured, the jury may find bad faith"); *Odom v. Canal Insurance Co.*, 582 So. 2d 1203 (Fla. 1st DCA 1991).

b. Title

MEDICAL MALPRATICE INSURER'S BAD FAITH FAILURE TO SETTLE WITHIN POLICY LIMITS

B. The instruction should be changed and a note on use added to make clear that all the factors should be read in every case in which this instruction applies.

1. Discussion

In the current draft of instruction 404.5, each listed factor is put in brackets. This implies that the court would only read that factor if it determines that there is some evidence to support it.

This approach is incorrect. Each factor should be read in every case to which instruction 404.5 applies. The plain language of section 766.1185 indicates that every factor should be considered by the trier of fact in every case. Subsection (2) of the statute states:

> (2) When subsection (1) does not apply,[2] the trier of fact, in determining whether an insurer has acted in bad faith, *shall consider*: ...

... and proceeds to list the factors. (Emphasis added). So, section 766.1185(2) requires that the jury consider all the listed factors.

Also, many of the factors, if not all of them, are defined in such a way that the *absence* of the factor is just as relevant as the *presence* of the factor. If the presence of the factor favors one party, then the absence of the factor favors the other party. As an example, the fifth statutory factor is, "Whether the claimant imposed any condition, other than the tender of the policy limits, on the settlement of the claim." §766.1185(2)(e). If the claimant *did* impose conditions on settlement other than the tender of the policy limits, then the jury may consider that factor as weighing in favor of the insurer. But, if the claimant did *not* impose any conditions other than tender of the policy limits, then the jury should consider that factor as weighing in favor of insured (or the claimant, if the claimant files the bad faith action).

For these reasons, the court should read every factor in every case, and not just the factors that are supported by evidence.

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[2] Subsection (1) sets out the safe harbor provisions.

■

2. Proposed Changes

a. Jury instruction
All brackets that enclose each factor except for the last one, which directs the court to instruct the jury on any other factors it finds to be relevant, should be removed.

b. Notes on use
A note on use should be added that states,

> When giving this instruction, every factor that is not enclosed in brackets must be read even if some of them are not supported by any evidence. *See* F.S. s. 766.1185(2). The court shall also instruct the jury on any other factors that it determines to be relevant.

C. Language should be added to the jury instruction to state that the jury may consider other circumstances in addition to these factors

1. Discussion
In both statutory and common-law bad faith actions, a "totality of the circumstances" standard is used in determining whether the insurer acted in bad faith. Berges v. Infinity Ins. Co., 896 So. 2d 665, 680 (Fla. 2004); State Farm Mut. Auto. Ins. Co. v. Laforet, 658 So. 2d 55, 62 - 63 (Fla. 1995); *see also* § 624.155(1)(b)1, Fla. Stat. (2007) (authorizing a cause of action against an insurer for failing to settle a claim when "under all the circumstances" it could have and should have done so).

Although section 766.1185(2) sets forth a list of factors for a jury to consider, it does not limit the jury's consideration to those factors and does not overrule the "totality of the circumstances standard."

When a jury is read a list of factors and told to consider them in making its determination, the jury may erroneously infer that those are the *only* factors it should consider. The jury therefore should be instructed that these are not the only factors that it may consider and reminded that its determination shall be based on the totality of the circumstances. Although instruction 404.4 (the main bad faith instruction) does refer to "all the circumstances," the jury will hear instruction 404.5 (the list of factors) after it has heard 404.4, so it would be appropriate to remind the jury to consider all the circumstances.

2. Proposed Change
Language should be added to the end of the instruction stating,

> **These factors and circumstances are not the only ones that you may consider. Your determination of whether** (Defendant) **acted in bad faith must be based on the totality of the circumstances. In other words, you must consider all the circumstances of the case.**

■

D. The reference to "case" in the jury instruction should be changed to "medical malpractice case"

1. Discussion

The fourth and seventh factors in instruction 404.5 (corresponding to 766.1185(2) (d) and (g)) are written as follows:

> **whether** (Insured) **denied liability or requested that the case be defended after** (Defendant) **fully advised** (Insured) **as to the facts and risks**

and

> **whether and when other defendants in the case settled or were dismissed from the case**

When the jury hears the word "case," it will likely think this refers to the bad faith case, although it is clear to bad faith lawyers that it really refers to the underlying malpractice case. Although the statute also uses the word "case" without modification, it should be clarified in the instruction so as not to mislead the jury.

2. Proposed changes

Insert "medical malpractice" before "case," so that the fourth and seventh factors would read:

> **whether** (Insured) **denied liability or requested that the medical malpractice case be defended after** (Defendant) **fully advised** (Insured) **as to the facts and risks**

and

> **whether and when other defendants in the medical malpractice case settled or were dismissed from the medical malpractice case**

III. Instruction 404.6 (Legal Cause)

A. The reference to "negligence" in the jury instructions and the notes on use should be changed to "bad faith conduct."

1. Discussion

Proposed jury instruction 404.6 and five of the six notes on use inadvertently use the term of "negligence." Insurer's bad faith is not negligence.

2. Proposed change
Replace "negligence" with "bad faith conduct" in each instruction found in 404.6 and throughout the comments. This change is incorporated in the proposed language at the end of this section of the letter.

B. The bracketed terms "loss," "injury" and "damage" in the jury instructions should be changed to "harm."

1. Discussion
This proposed jury instruction exactly tracts the legal cause jury instruction given in negligence cases. That instruction uses these negligence concepts to identify the resulting harm: loss, injury and damage. These terms do not apply as readily in an insurer bad faith action. One of the new proposed jury instructions, instruction 404.2, uses the term "harm" instead. Proposed instruction 404.6 should be amended to use this term as well.

2. Proposed change
Replace "[loss] [injury] [or] [damage]" with "harm" in each instruction and in the notes on use. This change is incorporated in the proposed language at the end of this section of the letter.

C. The first note on use should be changed to remove the suggestion that the trial court has unlimited discretion in giving jury instruction 404.6b.

1. Discussion
The third sentence of the note on use currently numbered one states, "Charge 404.6b (concurring cause), to be given when the court considers necessary, does not set forth any additional standard for the jury to consider in determining whether negligence was a legal cause of damage but only negates the idea that a defendant is excused from the consequences of his negligence by reason of some other cause concurring in time and contributing to the same damage." The underlined clause implies that the trial court has unlimited discretion in determining whether to give jury instruction 404.6b. That is not the law. This instruction is required when supported by the facts.

2. Proposed change
The clause "to be given when the court considers necessary" should be removed from this note on use. That change is incorporated in the proposed language at the end of this section of the letter. This text now appears in the paragraph appearing at subsection a below.

D. The second note on use should be deleted.

1. Discussion
The second note on use states that instruction 404.6a applies when determining a claimant's comparative negligence. This note should be deleted because comparative negligence does not apply in an insurer bad faith action.

2. Proposed change
The second note on use is deleted in the proposed language at the end of this section of the letter.

E. The fourth note on use should be deleted.

1. Discussion
The fourth note on use addresses instruction 404.6c, which is the intervening cause instruction. The comments in this note address negligence cases and insurer bad faith is not negligence. In fact, no reported decision addresses the concept of intervening cause in a bad faith action. Therefore, this note should be deleted because it does not apply.

2. Proposed change
The fourth note on use is deleted in the proposed language at the end of this section of the letter.

F. The fifth and sixth notes on use should be deleted.

1. Discussion
The fifth and sixth notes on use address the Committee's use of certain terms in the instruction 404.6. These comments are not necessary and do not particularly assist a trial judge. In addition, they are designed to give guidance for negligence cases. An action for insurer bad faith is not a negligence action.

2. Proposed change
The fifth and sixth notes on use are deleted in the proposed language at the end of this section of the letter.

G. The remaining notes on use should be amended to clarify the circumstances in which this instruction applies.

1. Discussion
The remaining notes on use should be modified to make clear that these instructions should not be given when the only damages sought are the amount of the judgment, interest, costs and attorneys' fees in the underlying case.

■

2. Proposed changes

These proposed changes are incorporated in the proposed language at the end of this section of the letter.

H. Proposed changes incorporating all of the above suggestions.

1. Jury instruction

a. Legal cause generally:

Bad faith conduct ~~Negligence~~ is a legal cause of harm ~~[loss] [injury] [or] [damage]~~ if it directly and in natural and continuous sequence produces or contributes substantially to producing such harm ~~[loss] [injury] [or] [damage]~~, so that it can reasonably be said that, but for the bad faith conduct ~~negligence~~, the harm ~~[loss] [injury] [or] [damage]~~ would not have occurred.

b. Concurring cause:

Bad faith conduct ~~Negligence~~ may be a legal cause of harm ~~[loss] [injury] [or] [damage]~~ even though it operates in combination with some other cause if the bad faith conduct ~~negligence~~ contributes substantially to producing such harm ~~[loss] [injury] [or] [damage]~~.

c. Intervening cause:

** Do not use the bracketed first sentence if this charge is preceded by the charge on concurring cause.*

*** [In order to be regarded as a legal cause of harm ~~[loss] [injury] [or] [damage]~~, bad faith conduct ~~negligence~~ need not be its only cause.] Bad faith conduct ~~Negligence~~ may also be a legal cause of harm ~~[loss] [injury] [or] [damage]~~ even though it operates in combination with [the act of another] [some natural cause] [or] some other cause occurring after the bad faith conduct ~~negligence~~ occurs if [such other cause was itself reasonably foreseeable and the bad faith conduct ~~negligence~~ contributes substantially to producing such harm ~~[loss] [injury] [or] [damage]~~] [or] [the resulting harm ~~[loss] [injury] [or] [damage]~~ was a reasonably foreseeable consequence of the bad faith conduct ~~negligence~~ and the bad faith conduct ~~negligence~~ contributes substantially to producing it].**

2. Notes on use

a. First paragraph on notes on use[3]

The first paragraph of the notes on use should be amended, as follows:

> ~~1.~~ Charges 404.6a, b and c ~~(legal cause generally) is~~ are to be given only in ~~all~~ cases in which an ~~the~~ issue of damages is submitted to the jury, such as a claim for emotional distress or other consequential damages. No part of these ~~this~~ instructions should be given ~~if the court is going to determine damages~~ with respect to claims, such as the amount of the underlying judgment, interest, costs and attorneys' fees, that are decided by the court (see 404.9).

Alternatively, this paragraph could be slightly modified, as follows:

> ~~1.~~ Charges 404.6a, b and c ~~(legal cause generally)~~ are ~~is~~ to be given only in ~~all~~ cases in which an ~~the~~ issue of damages is submitted to the jury. No part of these ~~this~~ instructions should be given if the court is going to determine all damages (see 404.9).

b. Second paragraph and following subsections of the notes on use

> Subject to that limitation, the following additional comments apply only to those cases where they are applicable.
>
> a. In those cases, charge ~~Charge~~ 404.6b (concurring cause)~~, to be given when the court considers it necessary,~~ does not set forth any additional standard for the jury to consider in determining whether bad faith conduct ~~negligence~~ was a legal cause of damage but only negates the idea that a defendant is excused from the consequences of his bad faith conduct ~~negligence~~ by reason of some other cause concurring in time and contributing to the same damage. Similarly, in such cases, charge ~~Charge~~ 404.6c (intervening cause) is to be given only in cases in which the court concludes that there is a jury issue as to the presence and effect of an intervening cause.
>
> ~~2. The jury will properly consider charge 404.6a not only in determining whether defendant's negligence is actionable but also in determining whether claimant's negligence contributed as a legal cause to claimant's damage, thus reducing recovery.~~
>
> b. ~~3.~~ 404.6b must be given whenever there is a contention that some other cause may have contributed, in whole or part, to the

[3] These proposed changes mirror those proposed to the notes on use for instructions 404.2 and 404.7.

occurrence or resulting harm ~~injury~~. If there is an issue of aggravation of a preexisting condition or of subsequent harm ~~injuries~~/multiple events, instruction 501.2h(1) or (2) should be given as well. See *Hart v. Stern*, 824 So. 2d 927, 932-34 (Fla. 5th DCA 2002); *Marinelli v. Grace*, 608 So. 2d 833, 835 (Fla. 4th DCA 1992).

~~4. Charge 404.6c (intervening cause) embraces two situations in which negligence may be a legal cause notwithstanding the influence of an intervening cause: (1) where the damage was a reasonably foreseeable consequence of the negligence although the other cause was not foreseeable [*Mozer v. Semenza*, 177 So. 2d 880 (Fla. 3d DCA 1965)] and (2) where the intervention of the other cause was itself foreseeable [*Gibson v. Avis A Car System, Inc.*, 386 So. 2d 520 (Fla. 1980)].~~

~~5. *"Probable" results.* The Committee recommends that the jury not be charged that the damage must be such as would have appeared "probable" to the actor or to a reasonably careful person at the time of the negligence. In cases involving an intervening cause, the term "reasonably foreseeable" is used in place of "probable." The terms are synonymous and interchangeable. See *Sharon v. Luten*, 165 So. 2d 806, 810 (Fla. 1st DCA 1964); Prosser, *Torts* (3d ed.) 291; 2 Harper and James, *The Law of Torts* 1137.~~

~~6. The term "substantially" is used throughout the charge to describe the extent of contribution or influence negligence must have in order to be regarded as a legal cause. "Substantially" was chosen because the word has an acceptable common meaning and because it has been approved in Florida as a test of causation not only in relation to defendant's negligence [*Loftin v. Wilson*, 67 So. 2d 185, 191 (Fla. 1953)] but also in relation to plaintiff's contributory negligence [*Shayne v. Saunders*, 176 So. 2d 495, 498 (Fla. 1937)].~~

IV. Instruction 404.7 (Issues on Claim)

A. Instruction 404.7 should be moved so that it proceeds instruction 404.4.

1. Discussion

Instruction 404.7 defines the issues on a bad faith claim. Instruction 404.4 then expounds on that instruction by defining insurance bad faith conduct. Instruction 404.5 then follows to define bad faith in the context of medical malpractice cases. It is logical that the issues should be identified for the jury before the instructions are given to define those issues.

2. Proposed change
Renumber proposed instruction 404.7 to 404.4, and sequentially renumber all the following instructions.

B. The jury instruction should be amended to use the word "harm" and to address the handling of claims generally.

1. Discussion
As explained twice above, the carrier's duty of good faith imposes a number of obligations upon it. Instruction 404.7 addresses only the carrier's obligation to settle a claim within policy limits when it could and should do so. The instruction should be amended so that it addresses bad faith actions premised on all of the good faith obligations owed by carriers.

Also, as explained in section IV. B. above, reference to the negligence concepts of loss, damage and injury should be changed to "harm."

2. Proposed change

> **The issue you must decide on** (claimant's) **claim against** (defendant) **is whether** (defendant) **acted in bad faith ~~in failing to settle~~ in the handling of the claim [of] [against]** (insured) **[and, if so, whether that bad faith was a legal cause of ~~[loss] [injury] [or] [damage]~~ harm to** (claimant)**].**

C. The note on use should be amended to clarify the circumstances in which the bracketed language regarding cause applies.

1. Discussion
As explained in the above discussion of instruction 404.2, this note on use should be modified to make clear that the bracketed language regarding a jury determining causation should not be given when the only damages sought are the amount of the judgment, interest, costs and attorneys' fees in the underlying case.

2. Proposed Change[4]
The note on use should be amended, as follows:

> ~~For cases in which the court will determine damages, omit the~~ The bracketed phrase on causation~~.~~ should be given only in cases in which an issue of damages is submitted to the jury, such as a claim for emotional distress or other consequential damages.[5] This phrase should not be given

[4] These proposed changes mirror those proposed to the notes on use for instructions 404.2 and 404.6.
[5] The proposed jury instruction inadvertently states "phase," instead of "phrase."

with respect to claims, such as the amount of the underlying judgment, interest, costs and attorneys' fees, that are decided by the court (see 404.9). ~~If the issue of damages is being submitted to the jury for determination, then the entire instruction should be given.~~

Alternatively, the note on use could be slightly modified, as follows:

> For cases in which the court will determine all damages, omit the bracketed phrase on causation.[6] If an ~~the~~ issue of damages is being submitted to the jury for determination, then the entire instruction should be given.

V. Instruction 404.9 (Concluding Instruction When Court to Award Damages)

A. The note on use should be amended to slightly clarify the circumstances in which this instruction applies.

1. Discussion

As explained in the above discussion of instruction 404.2, this note on use should be modified to make clear that this instruction applies when the only damages sought are the amount of the judgment, interest, costs and attorneys' fees in the underlying case. This proposed jury instruction most clearly describes the circumstances in which causation instructions are not given to the jury. A few changes make this point more clear.

2. Proposed Change

> This instruction does not ask the jury to insert on the verdict form the amounts of the judgment, interest, costs and attorneys' fees in the underlying case, because these ~~amounts~~ damages, in ~~many~~ most cases, will be decided by the court as a matter of law. The Committee does not intend the omission of these issues from the instructions to affect the admissibility of such ~~amounts~~ damages. When any damages are to be determined by the jury, appropriate instructions and verdict form will be needed. See 404.10-13.

VI. Instruction 404.10 (Damages (Cases with Claims for Mental Distress)

A. The note on use should be amended to clarify that this instruction applies only to bad faith actions arising from a failure to timely pay medical benefits.

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[6] The proposed jury instruction inadvertently states "phase," instead of "phrase."

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1. Discussion

This instruction tracks the holding of Time Ins. Co. v. Burger, 712 So. 2d 389 (Fla. 1998), to define when damages are available for mental distress. However, these damages are available in other contexts as well. Butchikas v. Travelers Indemnity Co., 343 So. 2d 816, 819 (Fla. 1976). The note on use should be amended to make clear that this instruction applies only to actions arising from a failure to timely pay medical benefits.

2. Proposed Change

> 1. Use this instruction only if the court determines that there is a sufficient predicate to support a claim for mental distress from the failure to timely pay medical benefits. See Time Insurance Co. v. Burger, 712 So. 2d 389 (Fla. 1998). The Committee takes no position on whether claims for mental distress may be available in other situations. See Butchikas v. Travelers Indemnity Co., 343 So. 2d 816, 819 (Fla. 1976).

VII. Instruction 404.12 (Damages on Mental Distress Claim)

A. The note on use should be added to clarify that other consequential damages are available.

1. Discussion

This instruction suggests that the only consequential damages potentially available are those for mental distress. That is incorrect. Dadeland Depot, Inc. v. St. Paul Fire and Marine Ins. Co., 945 So. 2d 1216, 1222-23 (Fla. 2006) (recognizing loss of business opportunity as a potential consequential loss and observing such damage is more tangible than those for emotional distress); Swamy v. Caduceus Self Ins. Fund, Inc., 648 So. 2d 758, 761 (Fla. 1st DCA 1995) (recognizing availability of consequential damages that are a "natural and contemplated result of the carrier's breach" of insurance contract); Dunn v. National Security Fire and Cas. Co., 631 So. 2d 1103, 1106 (Fla. 5th DCA 1993) (holding that direct consequential damages are recoverable in bad faith cases).

Similarly, section 624.155(8) Florida Statutes (2008), does not limit the recoverable consequential damages to those for mental distress. It broadly provides, in pertinent part, "The damages recoverable pursuant to this section shall include those damages which are a reasonably foreseeable result of a specified violation of this section by the authorized insurer and may include an award or judgment in an amount that exceeds the policy limits." See also Conquest v. Auto-Owners Ins. Co., 773 So. 2d 71, 74 (Fla. 1998) (recognizing that section 624.155 authorizes recovery for various compensatory damages).

Therefore, a note on use should be added to make clear that additional instructions may be needed for other consequential damages.

2. Proposed change

> When any other consequential damages are to be determined by the jury, appropriate instructions and verdict form will be needed. See *Conquest v. Auto-Owners Ins. Co.*, 773 So. 2d 71, 74 (Fla. 1998); *Swamy v. Caduceus Self Ins. Fund, Inc.*, 648 So. 2d 758, 761 (Fla. 1st DCA 1995);); *Dunn v. National Security Fire and Cas. Co.*, 631 So. 2d 1103, 1106 (Fla. 5th DCA 1993); § 624.155(8), Fla. Stat. (2008).

We thank you for your consideration of reviewing our comments and are available to discuss any of our proposed changes.

Sincerely,

Celene Humphries
Shea Moxon
Dale Swope

Date: 6/4/08

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June 10, 2008

Tracy Raffles Gunn, Chair
Supreme Court Committee on Standard
Jury Instructions in Civil Cases
777 S. Harbour Island Blvd #770
Tampa, FL 33602

Re: ABOTA

Dear Tracy:

I apologize for getting this to you late, but it just came to me.

The attached letter (in rough form) is from another of our ABOTA members commenting on the bad faith instructions. I think most of these comments blend with what we've already provided to you and I pass this on to you hopefully for your further consideration.

Thanks for your attention to the above.

Very truly yours,

William E. Hahn

WEH/mlh/49
cc: Patricia D. Crauwels
Joshua A. Whitman

Re: proposed amendments to Florida Standard Jury Instructions

Dear Ms. Gunn:

Thank you for the opportunity to present my comments regarding the proposed changes to the Florida Standard Jury Instructions. Based on my review of the proposed instructions dealing with insurer's bad faith, I am making the following suggestions.

I recommend two changes to proposed jury instruction 404.5, which addresses actions for a medical insurer's bad faith. First, a note on use should be added to reflect that this instruction applies only to actions for a medical insurer's bad faith failure to settle. This instruction is based on section 766.1185, Florida Statutes (2007). The preamble to this section makes clear that it applies only when the insurer is alleged to have committed bad faith in failing to settle the claim. It does not purport to apply to other types of bad faith, such as a violation of the carrier's duties to communicate with its insured.

Second, the brackets should be removed from the instruction to remove the suggestion that the factors are discretionary. Listing the factors in brackets implies that the court would only read that factor if it determines that there is some evidence to support it. This conflicts with section 766.1185, which indicates that every factor should be considered by the jury in every case. The absence of evidence supporting a factor is just as relevant to the bad faith action as the presence of that evidence.

I also recommend two changes to proposed jury instruction 404.6. First, I noticed that this instruction inadvertently refers to "negligence." Insurance bad faith is not negligence. Correcting this would avoid confusing juries. Second, I recommend that the notes on use be changed to make clear that this instruction, which addresses legal cause, should not be given when the damages are only the amount of the judgment, interest, attorney's fees and costs.

Thank you for the hard work by you and your committee and for considering my suggested changes to these particular proposed jury instructions.

Sincerely,

To: Bill Hahn

From: Dale Swope, Shea Moxon

COMMENTS ON PROPOSED JURY INSTRUCTION
REGARDING MEDICAL MALPRACTICE BAD FAITH CASES

I. Introduction.

The proposed instruction is number 404.5, entitled "Medical Malpractice Insurer's Bad Faith Failure to Settle." The purpose of this instruction is to implement the relatively new statute on medical malpractice bad faith actions, section 766.1185, Florida Statute (2007). At first glance the instruction appears to be a direct and straightforward adaptation of section 766.1185. Subsection (2) of section 766.1185 provides a list of factors for a jury to consider when determining whether a medical malpractice liability insurer committed bad faith in failing to settle a claim. Proposed instruction 404.5 copies the factors listed in subsection (2), with a few minor alterations, and directs the jury to consider those factors. Therefore, it looks like a simple implementation of the statute.

On closer inspection, however, proposed instruction 404.5 has a few significant problems that need to be corrected in order to comport with the intent of the statute and to ensure that it is applied to both parties fairly.

II. Instruction 404.5 Should be Limited to Cases Alleging Failure to Settle Within Policy Limits.

It would be easy to assume that proposed instruction 404.5 applies in any bad faith action against a medical malpractice insurer, but that assumption would be incorrect. Because the instruction is an implementation of section 766.1185, it should be used only when section 766.1185 is applicable. Section 766.1185 does not apply to every type of bad faith claim that may be asserted against a medical malpractice carrier, but only to claims alleging that the carrier failed to settle a claim within policy limits when it could have and should have done so.

Although the most well-known type of third-party bad faith is the carrier's failure to settle a claim within policy limits when it could have and should have done so, that is not the *only* type of bad faith that is actionable. The carrier's duty of good faith imposes a number of obligations upon it. Not only is the carrier obligated to settle a claim within

policy limits when it could and should do so, but it is also obligated "to advise the insured of settlement opportunities, to advise as to the probable outcome of the litigation, to warn of the possibility of an excess judgment, and to advise the insured of any steps he might take to avoid same." Boston Old Colony Insurance Company v. Gutierrez, 386 So. 2d 783, 785 (Fla. 1980). A breach of one of these latter duties is sufficient to support a cause of action for bad faith, independently of the question whether the carrier could have and should have settled the claim. See United States Fire Ins. Co. v. Morrison Assurance Co., 600 So. 2d 1147 (Fla. 1st DCA 1992); Odom v. Canal Insurance Co., 582 So. 2d 1203 (Fla. 1st DCA 1991).

Returning to section 766.1185, the opening paragraph of the statute indicates that the entire statute is limited to bad faith actions in which the carrier is alleged to have committed bad faith in failing to settle the claim. Specifically, the opening paragraph of 766.1185 says it applies:

> In all actions for bad faith against a medical malpractice insurer relating to professional liability insurance coverage for medical negligence, and in determining whether the insurer could and should have settled the claim within the policy limits had it acted fairly and honestly towards its insured with due regard for her or his interest, whether under statute or common law . . . .

This language applies to all of the subsections of the statute (1 through 4) because it is placed prior to all of the subsections. Most significantly, it applies to subsection (2), which is the portion of the statute that proposed instruction 404.5 attempts to implement. Therefore, subsection (2)'s mandate that the jury consider the listed factors only applies when the jury is determining whether the med-mal carrier could have and should have settled the claim within the policy limits. It does *not* apply to other types of bad faith, such as a violation of the carrier's duties to communicate with its insured.

For these reasons, instruction 404.5 should have a note on use informing the trial judge that this instruction should be given only in bad faith cases alleging a failure to settle, and not in cases based on breaches of the other good-faith duties of a liability insurer. We propose this language for the note on use:

> 404.5 is applicable only when the particular matter in issue is the failure of a medical malpractice insurance company's failure to settle a claim. This instruction does not apply if liability is asserted for the insurance company's violation of some other duty. *See, e.g., Boston Old Colony Insurance Company v. Gutierrez*, 386 So. 2d 783, 785 (Fla. 1980) (duty "to advise the insured of settlement opportunities, to advise as to the probable outcome of the litigation, to warn of the possibility of an excess judgment, and to advise the insured of any steps he might take to avoid same"); Powell v. Prudential Property & Casualty Ins. Co., 584 So. 2d 12, 14 – 15 (Fla. 3d DCA 1991) ("Where the insured reasonably relies on the insurer to conduct settlement negotiations, and the insurer fails to disclose

settlement overtures to the insured, the jury may find bad faith"); Odom v. Canal Insurance Co., 582 So. 2d 1203 (Fla. 1st DCA 1991).

Additionally, it would help make the point clearer if the title of the instruction were amended to reflect that it is limited to claims of a failure to settle within policy limits. The current title of proposed instruction is "MEDICAL MALPRATICE INSURER'S BAD FAITH FAILURE TO SETTLE." The limited scope of the instruction's application would be further clarified by adding the phrase "WITHIN POLICY LIMITS" at the end, so the title would be, "MEDICAL MALPRATICE INSURER'S BAD FAITH FAILURE TO SETTLE WITHIN POLICY LIMITS."

III. All Factors Should Be Read in Every Case.

In the current draft of instruction 404.5, each listed factor is put in brackets, which indicates that the court would only read that factor if it determines that there is some evidence to support it. This approach is incorrect. Each factor should be read in every case to which instruction 404.5 applies.

The plain language of section 766.1185 indicates that every factor should be considered by the trier of fact in every case. Subsection (2) of the statute states:

> (2) When subsection (1) does not apply,[1] the trier of fact, in determining whether an insurer has acted in bad faith, *shall consider*: . . .

(Emphasis added). Subsection (2) then proceeds to list the factors. The mandatory language of subsection (2) – "shall consider" – indicates that the jury shall consider all of the listed factors in every case.

Also, many of the factors listed in the statute are defined in such a way that the *absence* of the factor is just as relevant as the *presence* of the factor. If the presence of the factor favors one party, then the absence of the factor favors the other party. As an example, the fifth statutory factor is, "Whether the claimant imposed any condition, other than the tender of the policy limits, on the settlement of the claim." §766.1185(2)(e). If the claimant *did* impose conditions on settlement other than the tender of the policy limits, then the jury may consider that factor as weighing in favor of the insurer. But, if the claimant did *not* impose any conditions other than tender of the policy limits, then the jury should consider that factor as weighing in favor of insured (or the claimant, if the claimant files the bad faith action).

For these reasons, the court should read every factor in every case, and not just the factors that are supported by evidence. This is essential to carrying out the legislative intent of the statute and to ensure fairness to both parties. If the court were to read only

[1] Subsection (1) sets out the safe harbor provisions.

those factors that it considers to be supported by the evidence, its emphasis of those factors would unfairly favor the party that is benefited by the presence of those factors, whether the plaintiff or the defendant. Conversely, when certain factors are not supported by the evidence, then the party who ought to benefit from the absence of certain factors will be unfairly deprived of the benefit of the statute if the court does not instruct the jury to consider those factors.

For these reasons, the brackets should be removed from each of the factors listed in proposed instruction 404.5, except for the last one, which is a catch-all factor.[2] Also, a second note on use should be added to direct the court to read every factor (other than the last one) in every case. Assuming the brackets are removed from all the factors but the last one, this note on use could say:

> When giving this instruction, every factor that is not enclosed in brackets must be read even if some of them are not supported by any evidence. *See* F.S. s. 766.1185(2). The court shall also instruct the jury on any other factors that it determines to be relevant.

IV. The Jury Should Not Be Limited to These Factors.

In both statutory and common-law bad faith actions, a "totality of the circumstances" standard is used in determining whether the insurer acted in bad faith. Berges v. Infinity Ins. Co., 896 So. 2d 665, 680 (Fla. 2004); State Farm Mut. Auto. Ins. Co. v. Laforet, 658 So. 2d 55, 62 - 63 (Fla. 1995); *see also* § 624.155(1)(b)1, Fla. Stat. (2007) (authorizing a cause of action against an insurer for failing to settle a claim when "under all the circumstances" it could have and should have done so).

Although section 766.1185(2) sets forth a list of factors for a jury to consider, it does not limit the jury's consideration to those factors and does not overrule the "totality of the circumstances standard."

When a jury is read a list of factors and told to consider them in making its determination, the jury may erroneously infer that those are the *only* factors it should consider. The jury therefore should be instructed that these are not the only factors that it may consider and reminded that its determination shall be based on the totality of the circumstances. Although instruction 404.4 (the main bad faith instruction) does refer to "all the circumstances," the jury will hear instruction 404.5 (the list of factors) after it has heard 404.5, so it would be appropriate to remind the jury to consider all the circumstances.

Therefore, we propose adding this language to the end of the instruction:

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[2] The last factor states, "[and (list such additional factors as the court may determine to be relevant)]." The brackets are appropriate for this factor.

These factors and circumstances are not the only ones that you may consider. Your determination of whether (Defendant) **acted in bad faith must be based on the totality of the circumstances. In other words, you must consider all the circumstances of the case.**

V. "Case" Should be Clarified to Say "Medical Malpractice Case"

The fourth and seventh factors in instruction 404.5 (corresponding to 766.1185(2)(d) and (g)) are written as follows:

> **whether** (Insured) **denied liability or requested that the case be defended after** (Defendant) **fully advised** (Insured) **as to the facts and risks**
>
> and
>
> **whether and when other defendants in the case settled or were dismissed from the case**

When the jury hears the word "case," it will likely think this refers to the bad faith case, although it is clear to bad faith lawyers that it really refers to the underlying malpractice case. Although the statute also uses the word "case" without modification, it should be clarified in the instruction so as not to mislead the jury.

Therefore, the word "case" in the fourth and seventh factors should be replaced with "medical malpractice case," so that they would read:

> **whether** (Insured) **denied liability or requested that the medical malpractice case be defended after** (Defendant) **fully advised** (Insured) **as to the facts and risks**
>
> and
>
> **whether and when other defendants in the medical malpractice case settled or were dismissed from the medical malpractice case.**