

IN THE SUPREME COURT OF FLORIDA
CASE NO. SC10-51
Committee Report 2010-01(Civil)
Committee Report 2010-01 (Criminal)

**In the matter of Standard Jury
Instructions (Civil) and (Criminal),
Juror's Use of Electronic Devices**

RESPONSE OF THE COMMITTEE
ON STANDARD JURY INSTRUCTIONS
(CIVIL) TO COMMENTS OF INTERESTED
PERSONS REGARDING REPORT NO. 2010-01

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

On January 14, 2010, the Committee on Standard Jury Instructions in Civil Cases and the Committee on Standard Jury Instructions in Criminal Cases jointly submitted their report No. 2010-01 (Juror's Use of Electronic Devices). The report recommended that this Court approve for publication and use a new qualifications instruction to be given to all prospective jurors in civil and criminal cases, as set forth in Appendix A to the Report. The Committees also requested the Court to approve for publication and use new or revised Florida Standard Jury Instructions (Civil) and (Criminal) for Preliminary Instructions and Closing Instructions, as set forth in Appendices B (Civil), and C (Criminal) to the Report.

On January 28, 2010, this Court issued a publication notice, inviting all interested persons to comment on the Committees' proposals by March 17, 2010. The publication notice directed the Committee Chairs to file any response to the comments received by April 7, 2010.

Three comments were received, from: (1) Betty Strifler, Clerk of the Circuit Court for Citrus County; (2) Sylvia Walbolt of Carlton Fields, P.A., and Judge Peter D. Webster of the First District Court of Appeal; and (3) the Florida Association of Criminal Defense Lawyers. It must be noted that, in the three weeks between the due date for comments from interested persons (March 17, 2010) and the due date for this Committee's response (April 7, 2010), the Civil

Committee had no general membership meeting scheduled. To meet this Court's deadline, the Civil Committee could not follow its usual procedure of discussing the comments during phone conferences of the subcommittee and a general meeting of the full committee. Instead, the Civil Committee thoroughly discussed and voted on the comments by e-mail.

A. **Betty Strifler, Clerk of the Circuit Court for Citrus County:** This comment concerns the proposed instruction to be given while jurors are being qualified before the jurors enter a courtroom (Report Appendix, A1-A2). Clerk Strifler recommends this information should be included in the video shown to prospective jurors, rather than having a clerk read this instruction during the qualifications stage.

As discussed on pages 31-32 of the Report, the question of how to deliver information to jurors during the qualifications stage, before jurors enter a courtroom, may fall outside the scope of the work of the Civil Committee. Instead, this question likely falls within the expertise of the Office of the State Courts Administrator ("OSCA") or the Florida Rules of Judicial Administration Committee.

Despite this concern, the Civil Committee feels it is important to convey information on electronic devices to jurors as soon as possible. The majority of the Civil Committee, 22 members, recommends that a judge, rather than a clerk, give

the instruction during the qualification stage. The Civil Committee feels that prospective jurors will give the instruction more weight and gravity if the instruction is read by a judge. If the instruction is only read by a clerk or included in a video shown to jurors, prospective jurors might miss the significance of the instruction.

In addition, 18 of these Civil Committee members voting that a judge read the instruction also recommend the Court direct OSCA to add information on the use of electronic devices to the video shown to prospective jurors. Hearing information on electronic devices twice--in an instruction and in the video--will reinforce the importance of this information.

Only three members of the Civil Committee voted to approve Clerk Strifler's comment and recommend that information on electronic devices be included in the juror video and not read in an instruction.

B. Florida Association of Criminal Defense Lawyers: This comment is generally in favor of the proposed instructions. The Florida Association of Criminal Defense Lawyers, however, suggests adding an instruction requiring judges to collect cell phones and electronic devices from jurors.

By a vote of 25 to 5, the majority of the Civil Committee recommends against adopting this comment. As explained in the Report, Part IV.B, the Civil

Committee continues to recommend that this Court further study the issue of whether to collect jurors' cell phones and electronic devices.

The Civil Committee considered this issue at its October 2009 meeting (Report Appendix F3, Minutes). Civil Committee members raised concerns that collecting phones from jurors might create problems of judicial administration

(Id.). The minutes state the Civil Committee

continued to discuss the issue of judges taking devices away, but ultimately concluded it is an issue outside the scope of the Committee's duties. The Committee should do no more than note that many judges have resorted to collecting devices at various times.

(Id.).

The Committee's administrative concerns included that collecting cell phones might deter people from serving as jurors. For example, prospective jurors with young children or elderly parents might not be able to serve as jurors if they cannot remain in phone contact. Other members of the Committee raised the concern that the State may face potential liability if jurors missed important calls after their phones had been collected by the judge. Finally, the Committee discussed how judges across the state have followed different procedures when collecting cell phones. In short, these administrative concerns would be better addressed by OSCA or a substantive rules committee than this Committee.

It should be noted that a minority of five members agreed with this comment and felt that judges should instruct jurors that cell phones will be collected during the trial. Fifteenth Circuit Judge Lucy Brown agreed that cell phones should be collected when jurors are sitting in the jury box and during jury deliberations, but not during breaks.

B. Sylvia Walbolt and Judge Peter D. Webster:

Both Ms. Sylvia Walbolt and First District Court of Appeal Judge Peter D. Webster are respected former chairs of this Committee. Their comment recommends expanding the explanation of the reasons for the rule prohibiting jurors from conducting Internet research or communicating about the case electronically. Ms. Walbolt and Judge Webster suggest specifically advising jurors that, if they discover information outside the courtroom, the judge and parties have no way to make sure the information is relevant or to rebut it, and that this will deprive the parties of a fair trial.

The comment suggests adding a new paragraph after the language “All of us are depending on you to follow these rules, so that there will be a fair and lawful resolution of the case.” That sentence is actually found twice in the proposed instructions—first in the qualifications instruction (Report Appendix A1) and again in instruction 201.2, given during voir dire, before jurors are sworn (formerly numbered 1.0) (Report Appendix B3). The committee interprets this comment as

suggesting adding the following paragraph to instruction 201.2/1.0, found on page B3 of the Appendix to the Report:

Unlike questions that you may be allowed to ask in court, which will be answered in court in the presence of the judge and the parties, if you investigate, research or make inquiries on your own outside of the courtroom, the trial judge has no way to assure they are proper and relevant to the case. The parties likewise have no opportunity to dispute the accuracy of what you find or to provide rebuttal evidence to it. That is contrary to our judicial system, which assures every party the right to ask questions about and rebut the evidence being considered against it and to present argument with respect to that evidence. Secret, out-of-court inquiries and investigations unfairly and improperly prevent the parties from having that opportunity our judicial system promises.

The Civil Committee discussed this comment extensively through e-mail.

Almost all members of the Civil Committee expressed agreement with Ms.

Walbolt and Judge Webster that jurors are more likely to follow the electronic devices instructions if they understand the reasons for the instruction.

The Civil Committee was approximately evenly split regarding whether the instruction proposed in the Report already adequately conveys the reasons for the instruction. Sixteen members of the Civil Committee, just shy of a majority, voted to adopt this amendment with minor revisions to simplify the language used, as set forth on pages 10-11 below. Twelve members of the Civil Committee, while deferential to the expertise of Ms. Walbolt and Judge Webster, felt no revisions

were needed because the instructions proposed in the Report adequately explain the reasons for the instruction.

The Civil Committee had considered this specific concern at the October 2009 meeting and revised the draft instructions to better explain the reasons for the rule. The minutes state:

Lytal questioned whether, as written, the jurors will understand why this instruction is necessary. He suggested a juror is more likely to follow the instruction if there is some explanation of why the request is being made of him/her. Campo agreed.

The Committee discussed how to rewrite the instruction to cover these and other issues, including the continuing evolution of technology. The Instruction was revised as follows:

(Report Appendix F3).

The Committee's revisions included adding language to instruction 201.2/1.0, given during voir dire before jurors are sworn (Appendix A4; H13).

The committee added the following language to the draft on page H13 of the

Appendix to the Report:

In order to have a fair and lawful trial, there are rules that all jurors must follow. A basic rule is that jurors must decide the case only on the evidence presented in the courtroom.

(Report Appendix H13, A4).

In addition to this revision, the first sentence of the last new paragraph of instruction 201.2/1.0 (immediately before the “Voir Dire” paragraph), also provides that “All of us are depending on you to follow these rules, so that there will be a fair and lawful resolution of this case.” (Report Appendix A5).

The instruction given after voir dire (reorganized instruction number 202.2/former instruction number 1.1), reinforces this concept by telling jurors that they must “consider only the evidence”:

Consider Only the Evidence. It is the things you hear and see in this courtroom that matter in this trial. The law tells us that a juror can consider only the testimony and other evidence that all the other jurors have also heard and seen in the presence of the judge and the lawyers. Doing anything else is wrong and is against the law. That means that you must ~~cannot~~ do any homework or investigation of your own. You must ~~cannot~~ obtain on your own any information about the case or about anyone involved in the case, from any source whatsoever, ~~including the Internet~~ This includes reading newspapers, watching television or using a computer, cell phone, the Internet, any electronic device, or any other means at all, to get information related to this case or the people and places involved in this case. This applies whether you are in the courthouse, at home, or anywhere else. you cannot You must not visit places mentioned in the trial or use the Internet to look at maps or pictures to see any place discussed during trial.

~~The law also tells us that j~~Jurors must ~~cannot~~ have discussions of any sort with friends or family members about the case or ~~its subject~~ the people and places involved in this case. So, do not let even the closest family members make comments to you or ask questions about the trial. In this age of electronic communication, I

want to stress again that just as you must not talk about this case face-to-face, you must not talk about this case by using an electronic device. You must not use phones, computers or other electronic devices to communicate. Do not send or accept any messages related to this case or your jury service. Do not discuss this case or ask for advice by any means at all, including posting information on an Internet website, chat room or blog. Similarly, it is important that you avoid reading any newspaper accounts, or watching or listening to television or radio comments that have anything to do with this case or its subject.

(Report Appendix A9-A10).

One of the reasons this Committee did not revise the proposed instructions at the October 2009 meeting to include additional language was that this Court had directed that it file a joint proposal with the Criminal Committee. During the drafting process, members of the Criminal Subcommittee voiced strong opposition to the length of the instructions on electronic devices. The Civil Committee was hesitant to add substantial language to the proposed draft because it did not want to lose the support of the Criminal Committee. The Civil Committee wanted to propose core language addressing the use of electronic devices that could be used in both the civil and criminal instructions.

Given the opportunity to revisit this issue in response to this comment, many members of the Civil Committee voiced strong agreement with the concerns raised by Ms. Walbolt and Judge Webster. For example, First District Court of Appeal Judge Charles Kahn felt that the instructions proposed by the Committees did not

adequately explain the due process considerations. A reasonable juror might think the rule is arbitrary and perform Internet research as a means to find the best information possible to decide the case. As Donald M. Hinkle pointed out, good explanations for the rule will increase jurors' compliance.

If this Court accepts this Committee's recommendation to adopt the amendment proposed by Ms. Walbolt and Judge Webster, the Civil Committee suggests revising the proposed language as set forth below. The Civil Committee made these revisions to simplify the language consistent with the Committee's new "plain English" approach. In the three weeks allowed for a response, however, the Civil Committee could not hold a general membership meeting. As a result, the Civil Committee could not follow its usual deliberative process to fully discuss the proposed language. The Civil Committee did not put this language in the format usually used in the civil jury instructions. If the Court adopts this revision, the Civil Committee would be happy to further study this language and propose additional revisions.

In the interim, the Committee proposes the following revisions to simplify the proposal suggested by Ms. Walbolt and Judge Webster:

Unlike questions that you may be allowed to ask in court, which will be answered in front of ~~in the presence~~ of the judge and the parties, if you investigate, research or find out information ~~make inquiries~~ on your own outside of the courtroom, the trial judge has no way to make sure ~~assure~~ they are proper and relevant to the case.

The parties will ~~likewise~~ have no opportunity to dispute the accuracy of what you find or to provide rebuttal evidence to it. That is contrary to our judicial system, which gives ~~assures~~ every party the right to ask questions about and rebut the evidence being considered against it and to present argument about ~~with respect to~~ that evidence. Secret, out-of-court ~~inquiries and~~ investigations unfairly and improperly prevent the parties from having that opportunity our judicial system promises.

For these reasons, the Civil Committee recommends that the Court adopt the following revisions to instruction 201.2, which is given to jurors at the beginning of voir dire, before the swearing of the jurors:

201.2 INTRODUCTION OF PARTICIPANTS AND THEIR ROLES

Who are the people here and what do they do?

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

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

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

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

Court Clerk: **This person sitting in front of me, (name), is the court clerk.**

[He] [She] is here to assist me with some of the mechanics of the trial process, including the numbering and collection of the exhibits that are introduced in the course of the trial.

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

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

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

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

In order to have a fair and lawful trial, there are rules that all jurors must follow. A basic rule is that jurors must decide the case only on the evidence presented in the courtroom. You must not communicate with anyone, including friends and family members, about this case, the people and places involved, or your jury service. You must not disclose your thoughts about this case or ask for advice on how to decide this case.

I want to stress that this rule means you must not use electronic devices or computers to communicate about this case, including tweeting, texting, blogging, e-mailing, posting information on a website or chat room, or any other means at all. Do not send or accept any messages to or from anyone about this case or your jury service.

You must not do any research or look up words, names, [maps], or

anything else that may have anything to do with this case. This includes reading newspapers, watching television or using a computer, cell phone, the Internet, any electronic device, or any other means at all, to get information related to this case or the people and places involved in this case. This applies whether you are in the courthouse, at home, or anywhere else.

All of us are depending on you to follow these rules, so that there will be a fair and lawful resolution to this case. Unlike questions that you may be allowed to ask in court, which will be answered in front of the judge and the parties, if you investigate, research or find out information on your own outside of the courtroom, the trial judge has no way to make sure they are proper and relevant to the case. The parties will have no opportunity to dispute the accuracy of what you find or to provide rebuttal evidence to it. That is contrary to our judicial system, which gives every party the right to ask questions about and rebut the evidence being considered against it and to present argument about that evidence. Secret, out-of-court investigations unfairly and improperly prevent the parties from having that opportunity our judicial system promises.

If you become aware of any violation of these instructions or any other instruction I give in this case, you must tell me by giving a note to the bailiff.

NOTE ON USE FOR 201.2

The portion of this instruction dealing with communication with others and outside research may need to be modified to include other specified means of communication or research as technology develops.

CONCLUSION

WHEREFORE, for the above reasons, the Civil Committee respectfully requests that the Court approve these instructions for publication and their inclusion in the reorganized book as new Standard Jury Instructions for Civil Cases.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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

By: _____
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