SUPREME COURT OF FLORIDA

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No. SC 01-1226

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IN RE: RECOMMENDATIONS OF THE JURY INNOVATIONS COMMITTEE

RESPONSE BY THE SUPREME COURT COMMITTEE ON STANDARD JURY INSTRUCTIONS IN CIVIL CASES

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The Supreme Court Committee on Standard Jury Instructions in Civil Cases submits the following comments and observations addressing the report of the Jury Innovations Committee:

I. A Brief Description of the Standard Jury Instructions Committee and its Mission.

The Supreme Court Committee on Standard Jury Instructions was created in 1962 and first published approved, standard instructions in 1967. The first standard instructions were prepared for use in negligence cases. Over time, the Committee has prepared many standard instructions for use in a wide variety of civil cases, including commercial cases. This Court calls upon the Committee frequently to prepare new instructions or update older instructions.

The Committee has always attempted to write simple, but accurate, explanations of Florida law. From the Committee's inception, its goal has been to write instructions so that a jury could understand and apply the applicable law

during its deliberations. The introduction to the published loose-leaf book of standard jury instructions, *Florida Standard Jury Instructions in Civil Cases*, contains a brief discussion of the "theory and technique" of charging a jury with these instructions. Written in 1979, this discussion states: "The Committee's purpose has been to prepare instructions that express the applicable issues and guiding legal principles briefly and in simple, understandable language, without argument, without unnecessary repetition and without reliance on negative charges." The Committee recognizes that this goal is aspirational, and that its efforts to write simple instructions have not always been entirely successful.

As this Court is aware, the process of writing accurate, short and simple jury instructions is itself neither short nor simple. The Committee meets at least three times each year to write and revise instructions. In addition, subcommittees meet and correspond throughout the year to prepare proposals for consideration at the committee meetings. Members of the Committee are carefully selected to obtain a balance of viewpoints in an effort to assure that the instructions will be neutral statements of the law, not favoring one side or the other. Although it is a great honor to serve on this Committee, it is an honor accompanied by hard work.

II. Observations About the Recommendations of the Jury Innovations Committee.

The Standard Jury Instructions Committee does not believe that it would be useful for it to take an adversary position for or against specific recommendations in this proceeding. Several of the enumerated recommendations in the Summary of Recommendations contained in the Executive Summary of the Jury Innovations Committee, however, relate to matters that this Committee has already addressed in the standard instructions. Other recommendations might affect the work and workload of the Committee, as well as the Court's workload in considering whether to approve instructions proposed to it by the Committee.

Accordingly, this Committee provides the following specific observations in the hope that they may assist the Court in its deliberations. Because the Committee does not respond to each recommendation, this response identifies the number and title of each recommendation to which a response is provided.

13. Pre-Voir Dire Judicial Statements.

Many circuits already use pre-voir dire videotaped presentations to provide potential jurors with general information about the role of jurors. This recommendation suggests that such general information be augmented with case-specific

pre-voir dire statements by the trial judge. The standard instructions do not currently include pre-voir dire judicial statements. The Committee is uncertain whether such a standard instruction could achieve the goal of "increas[ing] juror interest in serving on the jury and reduc[ing] the number of jurors requesting dismissal from service."

If this goal requires case-specific instructions, such instructions should not be given unless they are agreed upon by all parties, perhaps as part of the pretrial stipulation. Any ad hoc statement prepared by the trial judge, which was not approved by the parties, would risk appellate challenge as an expression of the judge's assessment of the merits of the case.

14. Pre-Voir Dire Opening Statements.

The standard instructions do not include any instructions explaining the function of such statements. If pre-voir dire opening statements are permitted, Standard Instruction 1.0 will need to be amended to include an introduction to the statements. Whether such statements would serve a useful purpose is an issue beyond the purview of this Committee.

16. Questions by Jurors.

This Committee has previously discussed creating a standard instruction for use by trial judges who allow questions from jurors. The members of the Committee have been divided on whether it is a good idea for the trial judge to encourage questions from the jury. On one side, some lawyers and judges believe that affirmatively encouraging juror questions tends to keep the jury interested and involved in the trial. Those trial judges on the Committee who allow juror questions have not experienced any problems with this practice and tend to be enthusiastic in their support of this recommendation. On the other side, there are reports that jurors often ask questions about matters that are inadmissible. Especially when the matter is inadmissible because it is more prejudicial than probative, there is a risk that the question and the trial court's handling of the question could require a mistrial or new trial. For example, a trial judge would need to respond very carefully in an automobile negligence case to a question from the jury asking if one of the drivers received a ticket as a result of the accident.

Standard Jury Instruction 1.1 could be altered to accommodate questioning by jurors. If questions by jurors were encouraged in Standard Instruction 1.1, it is likely that the Committee would also need to develop some standardized

frameworks to assist trial judges in responding when juror questions could not be answered by the witness on the stand.

The Committee would note that section 40.50(3), Florida Statutes (2001), appears to mandate this procedure. Section 40.50 was enacted in 1999 and appears to mandate other procedures relevant to these recommendations. The Committee takes no position on whether the Legislature can constitutionally mandate such trial procedures. This Committee has been uncertain whether it should proceed to implement all aspects of this new statute. It would be useful to this Committee if the Court could provide guidance concerning this Committee's responsibilities arising from this new statute.

17. Discussion of Evidence Prior to Deliberation.

Standard Jury Instruction 1.1 would need significant revision to handle this change. Because the recommendation limits the right of the jury to discuss the evidence to situations when all jurors are present, it might be advisable to have a standard instruction on this subject that could be read before some or all recesses. Whether such discussion by the jury would serve a useful purpose is an issue beyond the purview of this Committee.

18. Note-Taking by Jurors.

The Court recently approved standard instructions prepared by the Committee addressing note-taking. See Fla. Std. Jury Instr. (Civ.) 1.8. If note-taking became mandatory, Instruction 1.8(b), which is an optional instruction prohibiting note-taking, would need to be removed from the standard instructions. The Committee notes that section 40.50(2), Florida Statutes (2001), appears to mandate note-taking in trials that exceed 5 days. The Committee's observations about section 40.50 in its discussion of Recommendation 16 is also relevant to this recommendation.

25. Simple and Clear Instructions.

In the Executive Summary, this recommendation is very brief. It merely states: "All instructions should be as simple and clear as possible." As reflected in the opening statement to this response, this Committee is, and always has been, in full agreement with this policy. Thus, if the Court ultimately adopts this recommendation, the Committee would not necessarily interpret that step as requiring this Committee to adopt a different approach to the standard instructions.

If the Court decided to adopt this recommendation, intending that this Committee alter its approach to the standard instructions, the Committee could not

implement such a policy without further, more specific instructions from the Court. Thus, this recommendation, more than all of the others, troubles this Committee.

Simplicity and clarity, at least in the context of jury instructions, do not always assure accuracy. Simplicity and clarity are relative terms. Simplicity and clarity are sometimes competing goals. A complex legal concept may not be amenable to a simple instruction. For example, lawyers occasionally complain that the causation instructions in Standard Instruction 5.1 are too complex. These instructions admittedly are not simple, but they are accurate statements of the law. Law students spend many hours trying to learn and understand the doctrine of legal causation. It may be unrealistic to believe that this difficult topic can be accurately distilled to one simple and clear sentence.

Ironically, when the standard instructions were first created, the members of this Committee were very proud of their efforts to create a clear instruction on causation. The discussion on "theory and technique" in the opening pages of *Florida Standard Jury Instructions in Civil Cases* states:

> The effort to use understandable language is perhaps best illustrated by the charges on causation. See Part V and especially 5.1. The Committee felt generally that more jurors are dazzled than are enlightened by charges that assemble all the expressions in legal language on the subject of causation: the *proximate* cause, the *remote* cause, the *efficient* cause, the *concurring* cause and the

> *intervening* cause that might or might not "*break the chain*" of causation. Charge 5.1 is the result of the Committee's attempt to express the essential elements of legal cause without resorting to obscure or technical language.
>
> > *". . . without argument, without unnecessary repetition and without reliance on negative charges."*

More recently, this Committee has struggled to write instructions explaining certain tort issues that the Legislature has modified by statute. The instructions in MI9 address the limited liability for emergency medical treatment. The new punitive damages instructions in PD 1 and PD 2 address statutory limitations on punitive damages. These instructions are not simple because the statutory scheme is not simple. The Committee spent countless hours attempting to write clear instructions on these complex topics, but the resulting instructions will still test the abilities of a jury. This Committee fears that it is unrealistic to expect anyone to write short and simple instructions explaining complicated legal concepts to jurors who often have never previously considered the legal doctrines explained by the instructions. In the battle between the competing goals of accuracy, clarity and simplicity, this Committee has often been forced to choose accuracy at some expense to simplicity.

Many of the instructions currently in use have been used for a generation or

longer. The Committee has maintained the same general format for its instructions and the same theory of instruction from its inception. There is now a significant body of case law addressing these instructions and approving their use. If the Committee is required to dramatically change the format of its instructions, this will generate more appeals and require the creation of a new body of case law addressing the sufficiency of the new instructions. The Court should consider that the cost of any dramatic simple English revision of the jury instructions may outweigh the benefit achieved by the new instructions.

In addition to the discussion of simplicity and clarity that occurs during the drafting of virtually every proposed instruction, the Committee has created a "simple English" subcommittee that attempts to examine the instructions from a broader perspective. That subcommittee is always considering new approaches to jury instructions and has spent considerable time on the concept of simple English instructions. We believe that this examination has been useful. At least to date, this examination, has not caused us to depart substantially from the existing format for the instructions. In large part, we have not abandoned the existing format because the Committee has received very little negative comment about the approved instructions from the lawyers and trial judges who use them on a daily basis. The Committee will continue to consider "plain English alternatives."

Even if reformatting all of the current instructions to accommodate the "plain English" advocates is unwarranted, some members of the Committee believe that optional plain English instructions could be proposed for use in some types of cases.. At the next meeting of the Committee, the possibility of creating such optional instructions will be discussed.

If the Court mandated that all of the instructions in the *Florida Standard Jury Instructions* be revised or modernized to achieve specific simple English guidelines, the task could be monumental. Anyone who has been involved in the process of writing even a paragraph for use as a standard instruction realizes how time-consuming this process can be. A volunteer committee could not accomplish such a task, and this Court could not review and approve its product, unless the project extended over a period of years. Such a project could limit or jeopardize the Committee's ability to address new substantive changes in the law. If revised instructions were required on a more expedited basis, the Court would need to request additional funding from the Legislature and arrange for the project to be handled, at least in part, by full-time employees of the Office of the State Courts Administrator.

Currently, the Committee receives virtually no state funding. It does not have funds to retain the services of linguistic experts. The Committee has discussed the

pros and cons of appointing one or more members whose expertise would be in English rather than in the law. Whether such an expert could be obtained as a volunteer is unclear. Certainly, if directed by the Court to expand its membership to include nonlegal experts in English, the Committee would seek to comply with that directive.

This Committee understands that it must respect the work of our predecessors on the Committee while keeping an open mind toward all new methods to express complex ideas in simple terms. Thus, we agree with Recommendation 25 of the Jury Innovations Committee, but do not believe that this recommendation warrants radical changes in the existing standard instructions nor in the methods by which those instructions are proposed to and adopted by this Court. Instead, Recommendation 25 should serve as a constant reminder of the importance of simplicity and clarity in the preparation of jury instructions.

26. Written Jury Instructions.

In 1984, the Committee added an addendum to the introduction to *Florida Standard Jury Instructions* encouraging judges to give a complete, unaltered written copy of the jury instructions to the jury for use in their deliberations. It is the impression of the Committee that written instructions are now provided to most

juries, especially in complex cases.

The advent of the word processor has made this recommendation far easier. The standard instructions are now readily available in formats for computer use. If this Court mandated the submission of written instructions, the existing standard instructions provide an adequate means to accomplish this goal.

27. Preliminary Jury Instructions.

The Standard Instructions contain an extensive preliminary instruction. See Fla. Std. Jury Instr. (Civil) 1.1. This instruction was recently revised to allow the trial judge to give some basic instructions on relevant legal issues at the beginning of the trial. The Committee's work on this revision uncovered widely differing views on the need for and the role of such legal instructions. Many trial judges are opposed to extensive legal instructions at the beginning of the trial, especially in cases that can be tried in one or two days. Trial lawyers appear to embrace this approach with greater enthusiasm. This Committee concluded that it was best to provide a standard instruction that allowed for such instruction, without mandating its use in every case.

The Jury Innovations Committee recommends "case-specific" preliminary

instructions. Almost by definition, case-specific instructions could not be created as standardized forms. The recommendation suggests that the trial judge should instruct the jury on "definitions of terms" in technical cases. This appears to be a recommendation that the judge give instructions on factual matters. As explained below, the Committee doubts that such instructions would be prudent unless all parties agreed to the instructions.

The Committee has some concern about the method by which a judge would instruct the jury on both law and fact. Currently, juries are often informed at the beginning of trial, or at some more appropriate time, that the parties have stipulated to certain basic facts. For example, the date and time of an event are often stipulated facts. The admission in an automobile negligence case that the defendant owned the relevant car is often published to the jury. It is common for such information to be published by the lawyer whose client must prove the factual issue. This Committee expresses no opinion on the feasibility of pretrial procedures requiring trial lawyers to stipulate to factual definitions or descriptions that could be read to the jury by the judge at the inception of the case. However, if such an instruction were given over the objection of one party, it would create, at the very inception of the trial, an issue for appeal. Thus, this Committee is concerned that such case-specific instructions should be given only by joint

stipulation.

This Committee has not prepared standard instructions that would assist a trial judge in reading stipulated facts or admissions to the jury. At its next meeting, the Committee will appoint a subcommittee to consider the preparation of such instructions. If the Court believes that judges, rather than lawyers, should always inform the jury of such factual information at the inception of the trial, the Committee will prepare a standard instructions to allow for such a policy.

28. Interim Instructions.

Section I of *Florida Standard Jury Instructions* contains many instructions for use throughout the trial. The Committee has continued to add interim instructions to the book as the need for such instructions arises. Thus, this Committee agrees with Recommendation 28 and believes that it is already adequately addressing this recommendation to the extent that standard instructions can achieve this goal.

29. Procedures for Jury Deliberations.

This Committee has recently debated the need for instructions to assist the jury with the process of deliberation. We are familiar with the recommendations of the American Judicature Society. When our committee debated this issue, there was little consensus. Interestingly, the trial lawyers on the Committee seemed to advocate in favor of such instructions more often than did the trial judges.

If directed by this Court, the Committee could certainly propose such an instruction. Our prior efforts, however, caused the Committee to believe that a short, simple instruction would contain information that the jury already understood in most cases. Many trial judges opposed such a simple instruction because they believed that it would appear demeaning to a jury. Many members of the Committee were concerned that a more complex instruction would at least appear to be judicial intrusion into the role of the jury.

Standard Jury Instruction 2.1 begins: "Members of the Jury, I shall now instruct you on the law that you must follow in reaching your verdict." If the trial judge at the end of these instructions provides methods that a jury "can" or "should" use during its deliberations, it is embarking on a new role that has never been the role of the judge. The jury foreperson leads the jury's decision-making process. It is unclear to this Committee that a judge has the constitutional power to

compel a jury to follow any particular approach to decision-making. Unless and until the court is permitted to compel certain methods of deliberation, the Committee has little consensus on the wisdom of such advisory instructions.

31. Final Instructions Before Closing Arguments.

The Standard Jury Instructions can be given either before or after the lawyer's closing arguments. The final sentence in Standard Instruction 7.2 must be altered if the instructions precede the arguments.

If the Court mandated a standard procedure of instructing the jury on the law prior to closing arguments, it probably would be prudent for the Committee to consider a standard instruction to be given after the arguments that repeated much of the information now contained in Standard Instructions 7.1 and 7.2.

32. Judicial Answers to Deliberating Jurors' Questions.

The Standard Jury Instructions do not contain any instructions for use in answering questions during deliberation. Such questions tend to be very case-specific. Such questions may, nevertheless, fall into a few common categories. For example, juries may ask (1) for new evidence, (2) for a read back of a witness's testimony, or (3) for confirmation of whether a specific witness answered

a particular question as recalled by a juror or the jury. If the Court believes that it would be useful, the Committee could attempt to prepare standard formats that trial judges could rely upon in fashioning specific answers to such questions.

The Jury Innovations Committee is critical of the time-honored tradition of telling juries to rely "upon their collective memory." Although that instruction is not always necessary or appropriate, there are many circumstances in which the factual answer to the jury's question cannot be provided by the judge. There are times when the court reporter cannot readily read dispositive, undisputed transcript to a jury. In those cases, an instruction beyond the "collective memory" approach may risk reversible error unless the parties stipulate to the special instruction. Thus, the Committee is concerned that the Court not overly criticize this common, non-standard instruction.

It should be noted that Recommendation 33 calls for guidelines for the read-back of testimony. This recommendation does not directly affect the work of this Committee. However, such guidelines might facilitate the process of creating standard approaches to jury instructions addressing questions during deliberations.

34. Juror Impasse.

The standard civil instruction on impasse is Standard Instruction 7.3. It is rarely used. It is shorter and arguably less forceful than its better-known counterpart, the Allen instruction. See Fla. Std. Jury Instr (Crim) 3.06.

Impasse instructions are a very special and delicate type of instruction. The trial judge uses this instruction to prod a group of citizens to make a collective decision. It is very important that the ultimate decision, if it is reached, be the decision of the members of the jury.

This Committee is doubtful that it has the skill required to create a more forceful standard instruction by which the trial judge would be "allowed to assist deliberating juries in reaching a verdict." The Committee is concerned that such assistance would often cause the judge to become a seventh juror.

Certainly, the Committee could revise the standard instruction so that a jury would know that an impasse would cause the case to be mistried. The jury could be informed in general of the cost to the parties and to the court system that is caused by such a mistrial. The Committee has at least briefly considered such an approach in the past. There was no consensus on the issue. Some members thought that it would be useful and others believed that juries already know the general consequences of a mistrial.

41. Post-Verdict Discussions.

The standard instructions were recently amended to include an instruction upon discharge of jury. Standard Instruction 7.4 now advises each juror regarding the right to avoid post-verdict discussions. Thus, the Committee believes that it has already addressed this recommendation.

42. Informal Communications Between the Judge and Jury.

This recommendation suggests that each trial judge should have discretion to conduct informal communications with the jury. The Court should be aware that it recently approved Standard Instruction 7.4, which contains the following language in a comment:

> [N]o further discussion should be had between the judge and the jurors, or between the attorneys and jurors, except in accordance with applicable law. <u>See</u> Fla. R. Civ. P. 1.431(h); R. Regulating Fla. Bar 4-3.5(d)(4).

This comment would not appear to extend the level of discretion to the trial judge that Recommendation 42 contemplates. This Committee is not inclined to alter the policy announced in its comment. Post-verdict discussions with jurors can inadvertently affect the trial court's ability to rule on post-trial motions. There are other ways to obtain input from jurors about the trial process without encouraging

conversation between the trial judge and the jurors about a case that is still pending. However, if the Court adopts Recommendation 42, the Committee will amend this comment as needed.

43. Post-Verdict Interviews by Attorneys and Researchers.

The observations concerning Recommendation 41 are equally applicable to this recommendation. Recommendation 43 suggests that the trial judge may have authority to regulate researchers who wish to contact jurors after the jurors have been discharged. This authority is not described in Standard Instruction 7.4. The Committee believes that Recommendation 41 raises significant First Amendment and juror privacy issues. However, the Committee has not conducted independent research on these issues and takes no position on the constitutional powers of judges in this regard.

The Supreme Court Committee on Standard Jury Instructions in Civil Cases thanks the Supreme Court for the opportunity to file this response and will send representatives to the oral argument on this matter. The Committee is also willing to respond in writing to any additional questions that the Court may have.

Respectfully submitted,

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I HEREBY CERTIFY that a true copy of the foregoing was served by U.S. Mail this_________day of November, 2001, to the Honorable Robert L. Shevin, Court Committee Chair, Third District Court of Appeal, 2001 Southwest 117th Avenue, Miami, Florida 33175-1716; the Honorable Philip J. Padovano, First District Court of Appeal, 301 Martin L. King, Jr., Boulevard, Tallahassee, Florida 32399-1850; Thomas P. Scarritt, Jr., Scarritt Law Group, 1509 West Swann Avenue, Suite 280, Tampa, Florida 33606; the Honorable Robert K. Rouse, Jr., Chief Judge, Volusia County Courthouse Annex, 125 East Orange Avenue, Suite 307, Daytona Beach, Florida 32114; Penny H. Brill, Office of the State Attorney, 1350 Northwest 12th Avenue, E.R. Graham Building, Miami, Florida 33138; Dwight Hines, Ph.D., Post Office Box 1431, Middleburg, Florida 32050; and Paul Mendelson, Office of the State Attorney, 1350 Northwest 12th Avenue, E.R. Graham Building, Miami, Florida 33136.

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