

**Civil Jury Instructions Committee**  
State Bar of Arizona  
4201 N. 24<sup>th</sup> Street, Suite 100  
Phoenix, Arizona 85016

September 2, 2020  
3:00 to 4:00 pm  
Virtual Meeting

**Minutes (Approved (date))**

**MEMBER ATTENDANCE:**

**P = present in person; V = present virtually; A= absent.**

Alicia Funkhouser (Chair)	V	Daniel Torrens	V
Kara Klima (Secretary)	V	Hon. Kenton Jones	A
Rodney Ott	A	Jack Klecan	V
Lincoln Combs	V	Rodney Ott	A
Ben Cooper	V	Sara Regan	V
Dominic Gomez	V	David Shughart	A
Richard Langerman	V	Steve Kramer	V
Patrick Lopez	V		
Hon Scott McCoy	A		
Hon. Roger Brodman	V		
Nate Meyer	A		

**OTHER ATTENDEES:**

None

**State Bar Staff: Iona Kukan**

**Minutes taken by: Kara Klima**

**I. CALL TO ORDER**

**Called to Order by: Alicia Funkhouser**

**Time: 3:00 p.m.**

**II. Review and approval of meeting minutes of August 5, 2020: Richard Langerman**  
**Moved to Approve) ( ) seconded), Motion carried.**

### III. Agenda Items

#### 1. Comments to Preliminary Jury Instructions – Alicia Funkhouser

Discussion regarding Judge Hannah’s comments on Preliminary Instructions Nos. 9, 12, and 16.

**Preliminary 9:** Based on the comment received, the following sentence was added to the 2<sup>nd</sup> paragraph: “*You must base any decision only on the evidence that is produced here in the courtroom, because the fairness of the trial depends on both parties knowing exactly what evidence you are considering so that they can respond to it or address it in their arguments.*” Alicia Funkhouser moved to amend the sentence; Judge Brodman seconded. Motion carried unanimously.

**Preliminary 12:** Based on comment received, the second paragraph from the instruction was stricken from the instruction. Steve Kramer moved to strike the paragraph; Lincoln Combs seconded the motion. Motion carried unanimously.

**Preliminary 16:** It was unanimously agreed by the committee that the 2<sup>nd</sup> paragraph of this instruction did not need amending. **Not sure who moved and who seconded.**

**Alicia Funkhouser moved to adopt the language proposed by Judge Hannah in Preliminary Instruction No. 9; Judge Brodman seconded. Motion carried.**

**Alicia Funkhouser moved to send the Amended Preliminary Jury Instructions to the Rules Committee; Steve Kramer seconded. Motion carried.**

#### 2. Vicarious Liability Jury Instructions Subcommittee Update – PJ Lopez

PJ Lopez provide an update that there is a need to update the vicarious liability instruction to reflect the adoption of Restatement 3<sup>rd</sup> Agency § 3.13 which sets forth the test for “course & scope.” He is preparing a revised Standard 5 to circulate to the Vicarious Liability subcommittee for discussion.

Ben Cooper asked whether in light of the *Engler* case it was necessary to revisit all vicarious liability instructions. PJ stated that it was not necessary because *Engler* is narrow.

The next Vicarious Liability subcommittee meeting is set for Tuesday, September 29 at 12:00 p.m.

#### 3. Bad Faith Instructions – Alicia Funkhouser

Alicia reported that the Bad Faith subcommittee has had two meetings thus far, and presented to the Committee the Introduction and Bad Faith 3. An initial revision of the Bad Faith instructions was attempted years ago and the Committee received a large amount of public comment at that time. The subcommittee's goal is now to incorporate those public comments into the current revisions.

Richard Langerman noted that the Introduction is a long comment that is used only by lawyers and judges. The last paragraph of the Introduction concerns the insurer's duty of good faith and fair dealing.

Ben Cooper noted that there is a more extensive Introduction because of the way the instructions are divided into First Party instructions and Third Party instructions.

Alicia clarified, in response to Jack Klekan's question, that the blue section of the Introduction was to be deleted. Ben further clarified that the blue section was being deleted because it is undecided under Arizona law, so the comment was not helpful and deleting it removed speculation.

**Alicia moved to approve the Bad Faith Introduction as presented; Steve seconded. Motion carries.**

Ben Cooper spoke regarding Bad Faith 3. The word "intentionally" was removed, and intentionality is dealt with specifically in Bad Faith 4.

Ben stated that "recklessly disregarded" was introduced in the 2013 version and what is before the Committee now went to public comment. The new language in the *Nobel* case best established the elements the Supreme Court used in *Deese* and *Zilisch*.

Ben further stated that Bad Faith 3 contains a comment on "Fair Debatability" because there is no instruction for fair debatability.

Richard Langerman stated that the 2015 proposed changes inserted "reckless disregard" and that this was an intentional decision to insert words that had been omitted in 1991. There were 16 public comments regarding this phrase. While this is not quite the exact language of *Rawlings*, there has been no appellate objection to the original formulation. The question is which phrasing would be more helpful to a jury.

Steve commented that "recklessly disregarded" doesn't make a lot of sense – was it a way to infer intent or was it an element?

Alicia stated she would circulate the public comments to the full Committee.

Judge Brodman asked, from an efficiency standpoint, what cases to read to begin analysis. Ben offered *Noble, Rawlings, Deese, Zilisch, and Nardelli*. Richard offered *Noble and Rawlings* for “reckless disregard” and *Clearwater and Sparks* for “fairly debatable.”

PJ asked whether the current instruction misstates the law, and if so, we need to correctly state the law; further, if the statement of the law is correct, do we need to change the instruction.

Jack Klecan asked if the subcommittee had considered dropping “recklessly” from the “recklessly disregard” phrasing.

Richard requested that Alicia circulate side-by-side comparisons with the existing language and the proposed changes.

Ben requested that the Committee send other phrasings or language to the subcommittee for discussion.

**4. Recommendations for New or Revised Instructions – Alicia Funkhouser**

None.

**5. Any Other Business – Alicia Funkhouser**

Judge Brodman reported that the Employment law committee has a meeting on September 18, and he hopes to be able to present the committee’s work product at the next meeting.

Richard Langerman also reported that he had a subcommittee working on updating **Personal Injury Damages 1**. He is preparing a memo based on his research results and will circulate the memo to his subcommittee and that they might have some work product for the next meeting

**Agenda Items Not Reached: N/A.**

**CALL TO THE PUBLIC – Alicia Funkhouser**

**Individuals addressing the Committee. None present.**

**Meeting adjourned by: Motion to adjourn (Richard Langerman). Seconded (Jack Klecan) Motion carried. Alicia Funkhouser adjourned meeting at 4: 18 P.M.**

**Next Meeting: October 2, 2020 at 3:00 p.m.**