STANDARD INSTRUCTIONS

Introduction

The original source of RAJI (CIVIL) Standard Instructions 1 through 8 primarily was the Manual of Model Jury Instructions for the Ninth Circuit. The first eight Standard Instructions following have been used for many years in the form herein and are not changed in substance or form in RAJI (CIVIL) 7th. Some Standard Instructions that appeared in RAJI (CIVIL) 3d have been moved to Preliminary Instructions or eliminated.

Standard Instruction 9 in RAJI (CIVIL) 4th entitled "Insurance," was a new Standard Instruction. The Committee felt that the language was a correct statement of the law, when an instruction on insurance is to be given. (*See* "Source" to Standard Instruction 9.) Differences in views concerning an insurance instruction arose over when to use an insurance instruction. Some Arizona trial judges desire to routinely use an insurance instruction in the Preliminary Instructions and/or in the final set in applicable cases. Other trial judges, until an appellate decision comes down, prefer to use an instruction only when "insurance" is referenced during trial. The Arizona Jury Project, authorized by the Arizona Supreme Court in 1993, was a strong factor in the analysis and suggested handling of the insurance problem as stated in an article entitled *Jury Room Rumination of Forbidden Topics,* 87 VA. L. REV. 1857 (Dec. 2001), noting that Arizona Jury Project shows that jurors' conversations about insurance occurred in 85% of all cases and on average four times during deliberations. This article advocates the routine use of an insurance jury instruction with the regular instructions as the better way to avoid or minimize the usual juror speculation and discussions about the parties' insurance coverage in deliberations.

In April 2019, the Committee added a new Standard 10 Instruction on Spoliation.

STANDARD 1

Impeachment with Felony Conviction

Evidence that a witness has previously been convicted of a felony may be considered only as it may affect the credibility of that person as a witness. You may not consider that evidence for any other purpose.

[You must not consider that evidence as tending to prove or disprove any of the claims in this case, or as evidence that the witness is a bad person or predisposed to commit crimes.]

SOURCE: RAJI (CIVIL) 3d Standard 8; Ariz. R. Evid. 609; *State v. Canedo*, 125 Ariz. 197 (1980); *State v. Cruz*, 127 Ariz. 33 (1980); *State v. Turner*, 141 Ariz. 470 (1984).

USE NOTE: 1. Consider giving the bracketed paragraph when the felon witness is a defendant in the case, or when there is any need for a more limiting instruction than is contained in the first paragraph. A limiting instruction must be given when there is proper request. Rule 105, Arizona Rules of Evidence.

2. If the prior conviction is admitted for some purpose other than impeachment of credibility, that additional purpose (and limitation) should also be stated in the instruction, and the first paragraph of the instruction should be modified accordingly.

COMMENT: A felony conviction is admissible for impeachment purposes if the court, following a hearing, makes the findings required by Ariz. R. Evid. 609. *Wilson v. Riley Whittle, Inc.*, 145 Ariz. 317, 324 (App. 1984).

STANDARD 2

Burden of Proof
(More Probably True)

Burden of proof means burden of persuasion. On any claim, the party who has the burden of proof must persuade you, by the evidence, that the claim is more probably true than not true. This means that the evidence that favors that party outweighs the opposing evidence. In determining whether a party has met this burden, consider all the evidence that bears on that claim, regardless of which party produced it.

SOURCE: RAJI (CIVIL) 3d Standard 9.

COMMENT: This instruction was subtitled "Preponderance" in RAJI (Civil), although that word did not appear in the instruction. The subtitle has been changed to use the words that do appear in the instruction.

STANDARD 3

Burden of Proof
(Clear and Convincing)

Some of the claims in this case require proof by clear and convincing evidence.

A party who has the burden of proof by clear and convincing evidence must persuade you by the evidence that the claim is highly probable. This standard is more exacting than the standard of more probably true than not true, but it is less exacting than the standard of proof beyond a reasonable doubt.

You are to use the standard of more probably true than not true for all claims in this case except for those on which you are specifically instructed that the burden of proof is the standard of clear and convincing evidence.

In determining whether a party has met any burden of proof, you will consider all the evidence, whether presented by [*name of plaintiff*] or [*name of defendant*].

SOURCE: *Matter of Neville*, 147 Ariz. 106 (1985); *Matter of Weiner*, 120 Ariz. 349 (1978); *State v. Renforth*, 155 Ariz. 385 (App. 1987), *rev. denied*, 158 Ariz. 487 (1988); *State v. King*, 158 Ariz. 419, 422 (1988) *See also United States v. Owens*, 854 F.2d 432, 436 (11th Cir. 1988), which accepted the *Renforth* definition of the clear and convincing standard of proof.

USE NOTE: Use with Standard 2 where there are claims in the case, other than punitive damage claims, requiring proof by clear and convincing evidence. Do not use if the only kind of claim in the case requiring proof by clear and convincing evidence is for punitive damages; in that event, use only Standard 2 and the burden of proof paragraph provided in the punitive damages instruction, Personal Injury Damages 4.

STANDARD 4

Corporate Party

A corporation is a party in this lawsuit. Corporations and individuals are entitled to the same fair and impartial consideration and to justice reached by the same legal standards.

When I use the word "person" in these instructions, or when I use any personal pronoun referring to a party, those instructions also apply to [*name of corporation*].

COMMENT: Modify as necessary for partnerships or other entities.

STANDARD 5

Respondeat Superior Liability

[[*Name of defendant*] [employer] [principal] is responsible for the actions of its [employee] [agent] if the [employee] [agent] was acting within the scope of [his] [her] [employment] [authority].

[In this case, [*name of defendant*] [employer] [principal] is responsible for the actions of its [employee] [agent].][1]

[[*Name of plaintiff*] claims that [*name of defendant*] [employer] [principal] is responsible for the actions of its [employee] [agent]. To establish this claim, [*name of plaintiff*] must prove that:

1. The act was the kind that the [employee] [agent] was [employed] [authorized] to perform;
2. The act occurred substantially within the authorized time and space limit of the [employment] [authority]; and
3. The act was motivated at least in part by a purpose to serve the [employer] [principal].][2]

SOURCE: *Stone v. Arizona Highway Comm'n*, 93 Ariz. 384 (1963); *Love v. Liberty Mut. Ins. Co.,* 158 Ariz. 36 (App. 1988); *Duncan v. State,* 157 Ariz. 56 (App. 1988); *Nava v. Truley Nolen Exterminating,* 140 Ariz. 497 (App. 1984); *Robarge v. Bechtel Power Corp.,* 131 Ariz. 280 (App. 1982); *Scott v. Allstate Ins. Co.,* 27 Ariz. App. 236 (1976); *Olson v. Staggs-Bilt Homes, Inc.,* 23 Ariz. App. 574 (1975); RESTATEMENT (SECOND) OF AGENCY § 228 (1958).

USE NOTE: [1] Use the bracketed language if there is no dispute about the existence of respondeat superior liability.

[2] Use bracketed language if there is a dispute about the existence of respondeat superior liability.

COMMENT: If the defendant disputes that an agency or employment relationship existed, additional instructions may be necessary. If an agency but not an employment relationship existed, this instruction may need to be modified to instruct the jury on issues of ratification and apparent authority. An employer may also be liable for the torts of its agents acting outside the scope of their employment if: (a) the employer intended the conduct or the consequences; (b) the employer was negligent or reckless;

(c) the conduct violated a nondelegable duty of the employer; or (d) the employee purported to act or to speak on behalf of the employer and there was reliance upon apparent authority, or the employee was aided in accomplishing the tort by the existence of the agency relationship. RESTATEMENT (SECOND) OF AGENCY § 219(2).

STANDARD 6

Impasse in Jury Deliberations

I have been informed you are having difficulty reaching a verdict. This instruction is offered to help you, not to force you to reach a verdict.

You may want to identify areas of agreement and disagreement and discuss the law and the evidence as they relate to the areas of disagreement.

If you still disagree, you may wish to tell the attorneys and me which issues, questions, law or facts you would like us to assist you with. If you decide to follow these steps, please write down the areas of disagreement and give the note to the bailiff. We will then discuss your note and try to help you.

SOURCE: Ariz. R. Civ. P. 39(h) and Comment to 1995 Amendment.

USE NOTE: This instruction should not be routinely given. However, the instruction should be used only if the jury indicates it is at an impasse.

The options for helping the jury identified in the Comment to Rule 39(h) include giving additional instructions, clarifying earlier instructions, directing the attorneys to give additional closing argument, reopening the evidence for limited purposes, or a combination of these measures. The list is not exclusive.

STANDARD 7

Excused Alternate Jurors

Recall that the law provides for a jury of [*twelve, six*] in this trial. We seated [*an*] additional juror(s) just in case a juror member became ill or otherwise could not continue. At this time, the Clerk will draw the number(s) of the [*one, two*] juror(s) who will serve as [*the*] alternate(s).

Juror [_____], your name has been drawn as an alternate juror. While you will be physically excused from your service as a juror in just a moment, there remains a possibility you may be called back to deliberate should one of the other jurors be unable to continue. The bailiff will retain your notes [and notebook] for your use if you are called back.

The admonition that I gave you at the beginning of the case continues to apply to you. I remind you that you must not do any research or attempt to conduct any type of investigation about the matters involved, or the parties, witnesses, attorneys or any individual or corporation related to the case. Do not consult any individuals, newspapers, books, dictionaries, or look for information using any other reference materials. This means that you should not search the internet, or use any other electronic tools to obtain information about this case or help you decide the case should you be recalled to deliberate.

Do not talk to anyone about the case, or about anyone who has anything to do with the case, and do not let anyone talk to you about anything having to do with the case until you have been notified a verdict has been reached or the jury has been discharged. Particularly if you are not called back, I want to thank you for your service on this jury
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SOURCE: Ariz. R. Civ. P. 47(f).

USE NOTE: This instruction should not be given in cases where the parties have stipulated the alternates may deliberate.

The bracketed language regarding the retention of a notebook should be used if the court, in its discretion, has authorized their use pursuant to Ariz. R. Civ. P. 47(g).

STANDARD 8

Closing Instruction

The case is now submitted to you for decision. When you go to the jury room you will choose a foreman. He or she will preside over your deliberations.

At least six of you must agree on a verdict. If all eight agree on a verdict, only the foreman need sign it, on the line marked "Foreman." If six or seven agree on a verdict, all those who agree, and only those who agree, must sign the verdict on the numbered lines provided, leaving the line marked "Foreman" blank. Please print your name under your signature.

You will be given _____ forms of verdict. They read as follows (there is no significance to the order in which they are read):

SOURCE: RAJI (CIVIL) 3d Standard 15.

USE NOTE: The court could type onto this instruction the substance of the verdict forms; however, it seems preferable to read the verdict possibilities from the original verdict forms themselves, and to send only the original verdict forms to the jury, with no copies or paraphrasing.

COMMENT: The Committee recognizes a gender issue in the use of the word "foreman." There are various ways to instruct on this point; *i.e.,* "presiding juror," "foreperson," "foreman, who may be a man or a woman," etc. The Committee considered the alternatives and decided that the traditional "foreman" was the best and least strained way to say it, but that "foreman" should be followed by "he or she" in the next sentence so there could be no doubt that the foreman could be anybody on the jury. If the trial court uses some word other than "foreman," use that same other word in the verdict forms.

STANDARD 9

Insurance

In reaching your verdict, you should not consider [or discuss] whether a party was or was not covered by insurance. Insurance or the lack of insurance has no bearing on whether or not a party was at fault, or the damages, if any, a party has suffered.

SOURCE: Modified version of the insurance instruction proposed in 87 VA. L. REV. 1857, at 1910 (Dec. 2001). *See also* JUDICIAL COUNCIL OF CALIFORNIA CIVIL JURY INSTRUCTIONS (2003-04), CACI No. 105.

USE NOTE: 87 VA. L. REV. 1857, at 1911 states that: "The proposed instruction could be offered to jurors on a routine basis as part of the ordinary jury instructions, or it could be reserved for occasions on which a jury asks a question about insurance. The latter strategy would avoid introducing the topic of insurance to a jury that had previously not considered it. In light of the high frequency of insurance talk among jurors in the Arizona Jury Project and the reluctance of some of them to ask the court about insurance, however, simply ignoring the topic generally will not prevent it from being raised. The alternative strategy of routinely incorporating the instruction in the jurors' normal instruction package promises to be the most effective way to combat misinformation about, and inappropriate influence from, jury discussions about insurance."

This instruction may need to be modified or omitted in those cases where the collateral source rule has been abrogated by statute. *See, e.g.,* A.R.S. § 12-565.

Arizona Superior Court judges have differing views as to whether to use the insurance instruction just situationally or routinely.

STANDARD 10

Spoliation – Lost, Destroyed or Unpreserved Evidence

[*Name of party*] failed to preserve evidence regarding [*describe unpreserved evidence*] that [he] [she] [it] was required to preserve. Because [*name of party*] failed to preserve the evidence, you may, but are not required to, assume that the evidence would have been unfavorable to [*name of party*].

SOURCE: *Souza v. Fred Carries Contracts, Inc.,* 191 Ariz. 247 (App. 1997); *Smyser v. City of Phoenix,* 215 Ariz. 428 (App. 2007); *McMurtry v. Weatherford Hotel, Inc.,* 231 Ariz. 244 (App. 2013).

USE NOTE 1: The law imposes on parties a duty to preserve evidence if they know or reasonably should know that the evidence is relevant to a case or which they reasonably should anticipate will be relevant in a future case. *Souza,* 191 Ariz. at 250. If the court determines that a party has failed to preserve evidence, the trial judge has discretion to determine if a party's conduct warrants sanctions, and if so, what type of sanction would be appropriate under the circumstances. *Souza,* 191 Ariz. at 250; *McMurtry,* 231 Ariz. at 260. In deciding what sanction is appropriate, the court is to consider all relevant information including the degree of culpability and the prejudice to the opposing party. *Souza,* 191 Ariz. at 250; *Smyser,* 215 Ariz. at 440; *McMurtry,* 231 Ariz. at 260. The range of permissible sanctions include: (1) monetary sanctions, (2) precluding the offending party from opposing a claim or defense, or (3) allowing the offending party to dispute the claim or defense, but instructing the jury that because the offending party failed to preserve evidence, the jury may draw an adverse inference regarding the unpreserved evidence. *Souza,* 191 Ariz. at 249; *McMurtry,* 231 Ariz. at 260. This instruction is to be used when the court has determined that the jury should be instructed regarding an adverse inference that may be drawn because of a party's failure to preserve evidence.

USE NOTE 2: In some cases, the court may conclude that a party intentionally destroyed evidence for the purpose of preventing the opposing party to establish a claim or a defense. In such situations the court may conclude that stronger language is needed to accurately describe the court's findings. In such cases the word "destroyed" (or other similar phrase suggesting intent) may be substituted for the phrase "failed to preserve."

COMMENT 1: RAJI Criminal Standard Instruction No. 42 includes language giving the jury the power to evaluate whether the offending party's conduct was sufficient to conclude that spoliation had occurred ("If you find that the State has lost, destroyed, or failed to preserve evidence . . . ."). While there is language in *State v. Willits,* 96 Ariz. 184 (1964), to support this provision in the criminal context, there is no similar law in the civil context. The committee concluded that in the civil context, the court in pretrial proceedings would determine whether the offending party's conduct was sufficiently egregious to warrant sanctions. If the court has determined that the offending party's conduct was sanctionable and that the appropriate sanction is an adverse inference instruction to the jury, the committee concluded that it would make no sense to instruct the jury to re-evaluate the judge's determination that the offending party's conduct was sufficiently egregious to warrant sanctions.

Continued

STANDARD 10

Spoliation – Lost, Destroyed or Unpreserved Evidence

Continued

COMMENT 2: RAJI Criminal Standard Instruction No. 42 also includes language giving the sanctioned party the opportunity to rebut the adverse inference by presenting evidence that its failure to preserve the evidence was excusable. ("If you find . . . , then you should weigh the explanation given for the loss or unavailability of the evidence.") The criminal instruction allows the jury to make an adverse inference "unless [the jury] accepts the party's explanation" regarding the reason why the evidence was not preserved. The committee could not find any legal support for this language in the civil context. As set forth above, the committee concluded that in the civil context the court in pretrial proceedings would determine whether the offending party's conduct was sufficiently egregious to warrant sanctions, and the court's evaluation at that hearing would necessarily include the court's consideration of the alleged offending party's explanation of why the evidence was not preserved. The committee is not aware of any case law which either permits or prohibits the offending party from offering evidence and argument to the jury to explain its failure to preserve evidence. Accordingly, the committee takes no position on whether the court may allow such evidence and argument to the jury in its consideration of whether to assume the adverse inference allowed by the instruction.

COMMENT 3: This instruction is based on the common law rule regarding spoliation. Ariz. R. Civ. P. 37(g) was substantially amended in 2016 to add new rules regarding the preservation of electronically stored information. The amended rule sets forth requirements that are similar to, but different from, the common law rule applicable to tangible and documentary evidence. Rule 37(g)(1) sets forth the duty to preserve electronic evidence. Rule 37(g)(2) identifies the remedies and sanctions that are available if the court determines that a party has failed to properly preserve electronic evidence. Rule 37(g)(2)(B) provides that a court may instruct the jury regarding an adverse inference only if the court finds that a party intended to deprive another party of the opportunity to use electronic information.