

New civil jury instructions may be on the way.

On May 14, the State Bar Board of Governors granted conditional approval of the Civil Jury Instruction Committee's final draft of the Revised Arizona Jury Instructions (RAJI), (CIVIL) Fourth Edition. Known as RAJI 4th, these instructions are the result of the Committee's multi-year effort to replace, revise and expand the current instructions, RAJI (CIVIL) Third Edition (RAJI 3d).

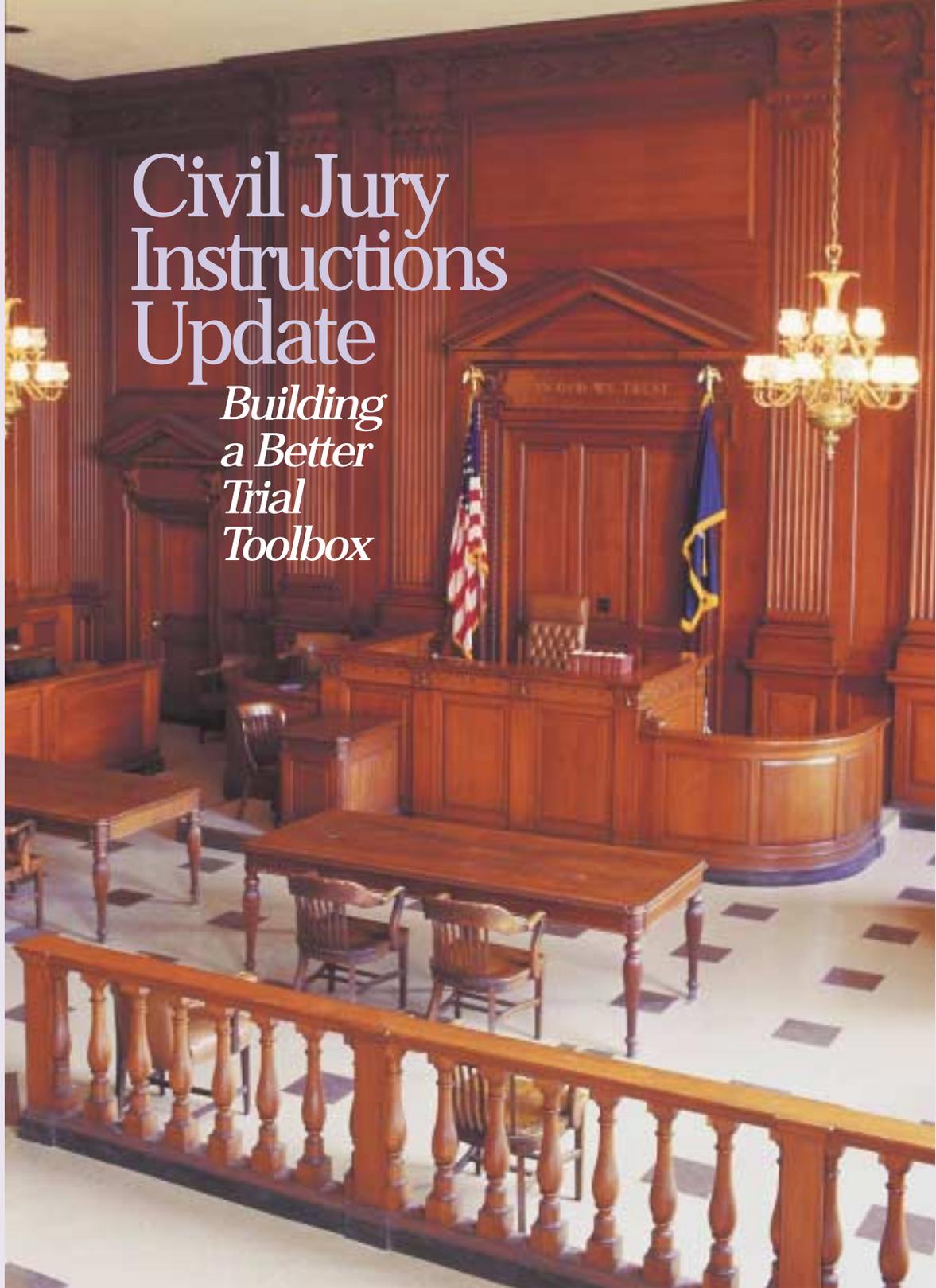
You may even have played a role in the creation of RAJI 4th. The new instructions were presented to Arizona attorneys at the 2004 annual convention; public comment was received before and after that event.

The Board's conditional approval is subject to an additional comment period ending October 15. During that time, litigators will have the opportunity both to review the final draft and use the instructions in the courtroom. (Read the sidebar on page 30 on how to review the instructions and send your comments.) Assuming there are no substantial changes, final Board approval should occur in November or December 2004.

These instructions differ in significant ways from RAJI 3d. Numerous individual instructions have been revised in light of recent appellate court rulings. New sets of instructions have completely replaced current instructions (Preliminary, Employment Law) and other sets of instructions

# Civil Jury Instructions Update

## *Building a Better Trial Toolbox*



(Eminent Domain, Commercial Torts) have been substantially revised. A new set of instructions, Intentional Torts, has been added.

This article surveys the major civil jury instruction revisions. The authors do not intend to examine comprehensively every change contained within RAJI 4th. Rather, the article focuses on only the most sub-

stantial revisions to RAJI 3d. Trial lawyers are strongly advised to review the new RAJI 4th to determine what changes have been made to the civil jury instructions that may be relevant to their particular practice.

### Preliminary Instructions

During the drafting process, the Committee found that many superior court judges have

a preference for the preliminary instructions contained in the Judicial College of Arizona's Civil/Criminal Benchbook (JCA), rather than the RAJI 3d Preliminary Instructions. The two sets of instructions are quite similar, and many of the instructions are identical. Nevertheless, the committee believed it was preferable to adopt the Preliminary Instructions that Arizona trial judges actually use. Placing these Benchbook instructions in RAJI 4th will make them available for use by trial practitioners, who may not have copies of the Benchbook.<sup>2</sup>

The following are the most significant differences between the RAJI 3d Preliminary Instructions and the Benchbook instructions contained in RAJI 4th.

**Throughout**—There is one general change throughout the instructions. The committee encourages the use of the actual names of the parties, rather than using the terms “plaintiff” or “defendant,” and the instructions are drafted to reflect this approach. Use of personal names will make the instructions easier to understand and apply.

**Preliminary 3, Evidence**—This instruction gives more detail on what is and is not evidence than does the current RAJI 3d. It discusses the difference between direct and circumstantial evidence.

**Preliminary 9, The Admonition**—This revised instruction addresses Internet research by jurors and jurors' use of other electronic devices to obtain information. Using the Internet, a juror can conduct medical research, access court records, including previous rulings by the court in a particular case, and investigate other litigation by the parties and similar matters. The admonition reminds jurors that they cannot conduct such research but must make their decision based solely on the evidence produced in court.

**Preliminary 15, Claims Made and Issues to be Proved**—Trial judges frequently request that the parties provide a jointly agreed-upon statement of the case that can be read to prospective jurors or the jury panel. This instruction allows the court to describe briefly the

claims of the parties and the issues to be determined by the jury during the trial.

**Preliminary 16, Exclusion of Witnesses**—Although parties frequently invoke “The Rule,” the current RAJI does not include an instruction addressing the exclusion of witnesses. The RAJI 4th provides this preliminary instruction.

## Standard Instructions

The main change in these instructions was the addition of Standard Instruction 9, Insurance. Some standard instructions appearing in RAJI 3d were moved to Preliminary Instructions or eliminated.

**Standard Instruction 9, Insurance**—

This new instruction provides that “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.” When an instruction on insurance is given, the committee believes that this language is a correct statement of the law. Some Arizona trial judges want routinely to use an insurance instruction in the Preliminary Instructions and/or in the final instructions where applicable.

The instruction is a modified version of the insurance instruction proposed in 87 VA. L. REV. 1857, at 1910 (Dec. 2001). The committee suggests that the 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. As discussed in the Virginia Law Review article, given the high frequency of insurance talk among jurors, and the reluctance of some of them to ask the court about insurance, simply ignoring the topic typically will not prevent it from being raised.

## Fault Instructions

Except for minor modifications, the Committee did not change the Fault Instructions.

**Fault 6, Definition of Causation (Comparative Fault)**—This instruction has been modified to state that there may be more than one cause

of an injury.<sup>3</sup>

## Negligence Instructions

The major substantive change to the RAJI 4th Negligence Instructions is in Negligence 3, conforming it to the revised, lower 0.08 statutory presumption of intoxication.

**Negligence 6, Sudden Emergency**—In light of *Myhaver v. Knutson*,<sup>4</sup> this instruction has been modified to state that the existence of a sudden emergency and a person's reaction to it are only some of the factors that a juror must consider in determining what is reasonable conduct under the circumstances.

**Negligence 8, Negligent Infliction of Emotional Distress**—This instruction's revised Note includes an interesting discussion of whether recovery will be allowed for a non-family member witnessing an injury to another, a question that remains unresolved by the appellate courts. See *Keck v. Jackson*, 593 P.2d 668, 669-70 (Ariz. 1979).

**Negligence 10, Willful or Wanton Conduct**—This instruction has undergone significant modification. The instruction now provides that even if the jury should find that the plaintiff willfully or wantonly caused plaintiff's injury and the defendant was at fault, but did not willfully or wantonly cause plaintiff's injury, the jury should not determine relative degrees of fault but may still find for either plaintiff or the defendant. The Arizona Supreme Court in *Williams v. Thude*<sup>5</sup> approved this language. The *Williams* decision expressly disapproved the instruction adopted by the Court of Appeals in *Bauer v. Crotty*<sup>6</sup> and incorporated the previous RAJI 3d instruction. *Bauer* held that the jury must be instructed that if it finds the plaintiff guilty of willful or wanton contributory negligence, it must choose either to award the plaintiff full damages or render a verdict for defendant.<sup>7</sup> The Supreme Court rejected this “all-or-nothing” approach in favor of advising the jurors that they should not compare fault, while leaving them “to do whatever they choose with respect to the plaintiff's conduct.”<sup>8</sup>

## Medical Negligence

No significant changes have been made to the medical negligence instructions.

## Product Liability

Except for the following modifications, the product liability instructions have not been revised significantly. The following minor modifications were made.

*Product Liability 1, Statement of Claims, Definition of Fault; Causation*—This instruction has been revised to provide that before the jury can find the defendant at fault on a product liability claim, the jury must find that the defendant manufactured or sold a product that was defective and unreasonably dangerous *at the time it left the defendant's control*, reflecting the decision in *Jimenez v. Sears, Roebuck & Co.*, 904 P.2d 861 (Ariz. 1995).

## Read and Comment on the Draft Instructions

The draft of the revised civil jury instructions is available for review and use at the State Bar Web site: [www.myazbar.org](http://www.myazbar.org).

Send your comments directly to [civraji@azbar.org](mailto:civraji@azbar.org) or Civil Jury Instruction Committee, c/o Nedra Brown, State Bar of Arizona, 111 W. Monroe, Suite 1800, Phoenix, AZ 85003.

*Product Liability 7, State of the Art Defense*—The definition of “state of the art” has been rewritten for clarity purposes; however, the definition remains substantively unchanged.

## Bad Faith

These instructions are not materially changed from RAJI 3d. We provide here those that are most important.

*Bad Faith 3, (First Party), Definition of Intentional*—This instruction has been substantively revised to reflect *Zilisch v. State Farm Mutual Automobile Ins. Co.*,<sup>9</sup> which holds that a defendant's conduct is not intentional if it is inadvertent or due to a *good faith* mistake.

*Bad Faith 6 (First Party), Statement of Liability Issues*—Also reflecting the

*Zilisch* decision, this instruction has been revised to state that where the jury finds that the defendant breaches the duty of good faith and fair dealing and that the defendant's breach is a cause of plaintiff's damages, the jury must enter a verdict on the bad faith claim in favor of plaintiff. The plaintiff is entitled to that verdict even if the defendant correctly denied, failed to pay or delayed payment of plaintiff's claim for benefits.<sup>10</sup>

## Premises Liability

The Premises Liability instructions are generally unchanged.

*Premises Liability 1, 1A, and 2*—These instructions have been revised to reflect that liability is only imposed for an *unreasonably* dangerous condition. RAJI 3d did not include the word “unreasonably” because there had been a concern that use of the phrase “unreasonably” along with the term “dangerous” would be redundant or confusing. The committee believes that jurors understand the difference between those conditions that are dangerous but do not impose liability and those that are unreasonably dangerous; it is conceivable that harm could arise from almost any object or

condition. Negligence, however, is the failure to correct or warn of an *unreasonably dangerous condition*.<sup>11</sup>

## Personal Injury Damages

The personal injury damage instructions have only limited revisions.

*Personal Injury Damages 1, Measure of Damages*—*Ogden v. J. M. Steel Erecting, Inc.*<sup>12</sup> holds that hedonic damages, which are damages to plaintiff for the loss of enjoyment of life's activities, are part of a general damages claim and are not duplicative of claims for pain and suffering. In light of that decision, the instruction on measure of damages has been expanded to include a new, sixth element: “*loss of enjoyment of life, that is, the participation in life's activities to the*

*quality and extent normally enjoyed before the injury.*”

*Personal Injury Damages 4, Punitive Damages*—Some members of the committee believe that Arizona's punitive damage civil jury instruction may require complete revision. The committee spent substantial time and effort debating whether the RAJI 3d Personal Injury Instruction 4, Punitive Damages, was still good law in light of the United States Supreme Court's recent decision in *State Farm Mut. Auto. Ins. Co. v. Campbell*.<sup>13</sup> Unable to reach any consensus on whether the RAJI 3d instruction should be revised, the committee decided to footnote the *State Farm* decision and await guidance from the Arizona appellate courts.

Practitioners should review the revised use note referencing the Arizona Supreme Court's recent decision in *Saucedo v. Salvation Army*.<sup>14</sup> *Saucedo* holds that a necessary element of causation for punitive damages is that the plaintiff prove that the defendant's conduct was a cause of or contributed to the injury.

*Personal Injury Damages 5, Mortality Tables and Life Expectancy*—The 1999 National Vital Statistics Report (mortality table) has been adopted, replacing the 1988 version.<sup>15</sup>

## Verdict Forms

The RAJI verdict forms, which are otherwise unchanged, are modified so that the actual names of the parties will be used, rather than “plaintiff” and “defendant.”

## Contracts

The contract instructions have not undergone significant substantive changes from RAJI 3d. No instructions were added. Some changes were made by the committee to simplify and clarify the language of the instructions.

*Contract 5, Revocation of Offer*—Although this instruction has not been substantively modified, it has been rewritten to clarify when a revocation occurs.

Once the Civil RAJIs have been finalized, complete print and searchable CD versions of them will be available through the State Bar CLE Publications Department. To reserve your copy, send your request to [IlonaKukan@staff.azbar.org](mailto:IlonaKukan@staff.azbar.org)

*Contract 12, Waiver of Condition—*

The instruction's language has been revised to reflect that conduct that is inconsistent with intent to assert a known right waives the condition.<sup>16</sup> The RAJI 3d instruction does not address waiver by inconsistent conduct.

*Contract 12, Waiver—*The instruction has been modified to state that by accepting performance known to be deficient, a party has waived the right to reject the contract on the basis of that performance. The language clarifies the RAJI 3d instruction on this issue.

*Contract 15, Third Party Beneficiary—*This instruction was revised to reflect that a person may be a third-party beneficiary of a contract if he or she is within the "class of persons" identified as a beneficiary of the contract.

*Contract 19, Damages for Lost Profits—*This instruction has been rewritten to reflect that the loss of profits must be the direct and natural consequence of the breach and that it is reasonably probable that the profits would have been earned except for the breach.<sup>17</sup> The instruction's new language also states that if future lost profits are reasonably certain, any reasonable basis for determining the amount of the probable profits is acceptable, reflecting the holding of *Rancho Pescadero v. Northwestern Mut. Life Ins. Co.*<sup>18</sup>

*Contract 28, Promissory Estoppel—*The instruction has been modified to reflect that plaintiff must justifiably rely, not merely rely, on the promise. The recent *Higginbottom v. State*<sup>19</sup> decision specifically notes that reliance must be reasonable; reliance is not justified where knowledge to the contrary exists.<sup>20</sup> The RAJI 3d instruction only references reliance upon the promise.

*Contract 29, Impracticability (Commercial Frustration)*—The revised instruction clarifies that in terms of impracticability, the contract performance must have become impractical *due to circumstances beyond the party's control*.

## Eminent Domain

The RAJI 3d Eminent Domain instructions have been substantially rewritten and expanded. For example, two separate instructions are provided for market value depending on whether the case is a non-ADOT case filed before Aug. 22, 2002, or an ADOT or non-ADOT case filed after Aug. 22, 2002. Ten additional instructions have been added, including instructions on highest and best use, zoning, project influence, value of easement, special benefits, project construction, cost of care and information discovered after the date of valuation.

## Employment Contracts

Because of numerous changes in employment law since the promulgation of RAJI 3d, the employment contract jury instructions have been substantially rewritten. Some instructions, including instructions for sexual harassment, have been eliminated, with the ABA and Ninth Circuit Model Instructions on Employment Law being recommended. Few of the RAJI 3d instructions are incorporated in the RAJI 4th. Because the revisions to RAJI 3d instructions have been so complete, practitioners should review the new instructions in detail.

## Commercial Torts

The Commercial Tort instructions that apply to cases involving fiduciary duties have not been substantially modified. Two revisions are worth noting.

*Commercial Torts 23, Negligent Misrepresentation*—This instruction has been modified to indicate that plaintiff must prove that defendant either provided plaintiff with false or incorrect information or omitted or failed to disclose material information.<sup>21</sup> This modification results from the Arizona

Supreme Court's approval of the definition of the tort of negligent misrepresentation in the RESTATEMENT (SECOND) OF TORTS § 552(1), which includes "failure to exercise reasonable care or competence in obtaining or communicating the information."<sup>22</sup>

*Commercial Torts (Common Law Fraud)*—A footnote has been added to explain the consequences of failure to disclose material information.

## Intentional Torts

The committee adopted a new series of jury instructions on intentional torts; intentional torts are not addressed in RAJI 3d. The common thread that ties these instructions together is that liability is predicated upon intentional rather than negligent conduct. A total of 23 intentional tort instructions have been added, including assault, battery, false imprisonment, intentional infliction of emotional distress, false imprisonment and abuse

of process. Instructions for various defenses, including justification for self-defense, defense of property and use of deadly force in law enforcement, are also included.

## Conclusion

RAJI 4th represents the collective multi-year effort of numerous lawyers and judges, both committee members and others. The Civil Jury Instruction Committee believes that RAJI 4th is a significant expansion and improvement on RAJI 3d but looks forward to hearing from the trial bar and bench on how well these instructions actually work "on the ground."<sup>23</sup> If RAJI 4th brings more certainty and celerity to the trial process, the committee's efforts will have been worthwhile. ▀

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## endnotes

1. The authors gratefully acknowledge the hard work of all the committee members, including Aaron Kizer, Chair; James Tilker, Vice-Chair; William F. Auther; Judith Berman; Hon. Robert J. Corcoran, Arizona Supreme Court, Retired; Richard A. Halloran; Christopher W. Kramer; Jeanne Garcia-Riley; Louis T. Seletos; Hon. Paul Katz, Maricopa County Superior Court; Stephen M. Hopkins; Hon. Kenneth Lee, Pima County Superior Court; Garrett Olexa; Stephanie Quincy; Michael S. Rubin; Hon. Mark R. Santana, Maricopa County Superior Court; Joseph A. Schenk; Donald Spyeck; Hon. Roland Steinle, Maricopa County Superior Court; James J. Trimble; Jeffrey Willis; V. Michele Gámez, RAJI 4th Editor; and Alex Carpio, the Committee's research assistant. Each of these individuals provided invaluable assistance. The project would not have been completed without their contributions.
2. The committee hopes that JCA will revise the current benchbook to include the new RAJI 4th Preliminary Instructions so that coordination of the two sets of instructions will be seamless.
3. *Ontiveros v. Borak*, 667 P.2d 200, 205 (Ariz. 1983).
4. 942 P.2d 445 (Ariz. 1997).
5. 934 P.2d 1349 (Ariz. 1997).
6. 805 P.2d 392 (Ariz. Ct. App. 1991).
7. *Id.* at 401.
8. *Williams*, 934 P.2d at 1352.
9. 995 P.2d 276 (Ariz. 2000).
10. *Id.* at 280-81.
11. RESTATEMENT (SECOND) OF TORTS § 343.
12. 31 P.3d 806 (Ariz. Ct. App. 2001).
13. 538 U.S. 408 (2003).
14. 24 P.3d 1274 (Ariz. Ct. App. 2001).
15. National Vital Statistics Report, Vol. 50, No. 6, Mar. 21, 2002.
16. *American Continental Life Ins. Co. v. Ranier Constr. Co. Inc.*, 607 P.2d 372 (Ariz. 1980).
17. *Short v. Riley*, 724 P.2d 1252, 1254 (Ariz. Ct. App. 1986).
18. 680 P.2d 1235, 1245-47 (Ariz. Ct. App. 1984).
19. 51 P.3d 972 (Ariz. Ct. App. 2002).
20. *Id.* at 977, quoting *Carondolet Health Serv. v. Arizona Health Care Cost Containment Sys.*, 930 P.2d 544, 547 (Ariz. Ct. App. 1996).
21. *St. Joseph's Hosp. & Med. Ctr. v. Founders Title Co.*, 742 P.2d 808 (Ariz. 1987).
22. *Id.* at 816.
23. Recent changes in Arizona's juvenile law create a right to a jury trial before terminating parental rights. The committee will begin drafting a set of juvenile jury instructions in the near future.