# FEDERAL CIVIL
# JURY INSTRUCTIONS
# OF THE
# SEVENTH CIRCUIT

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**Prepared By**
**The Committee on Pattern Civil Jury Instructions**
**of the Seventh Circuit**

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## INTRODUCTION

The Committee on Federal Civil Jury Instructions for the Seventh Circuit drafted these proposed pattern jury instructions. The Circuit Council has approved the publication of these instructions, but has not approved their content.

These are pattern instructions, no more, no less. No trial judge is required to use them, and the Committee, while hopeful that they will provide an effective template in most trials, strongly recommends that each judge review the instructions to be sure each fits the case on trial. The Committee hopes this work will ease the burden on trial counsel in proposing jury instructions and the burden on trial judges in preparing them. Briefer instruction conferences allow more efficient use of jurors' time.

The Committee set about its task with two primary goals: 1) to state accurately the law as understood in this circuit; 2) to help judges communicate more effectively with juries through the use of simple language in short declarative sentences in the active voice. We tried to keep the instructions as brief as possible and avoid instructions on permissive inferences. The Committee strongly endorses the practice of providing the jurors with written copies of the instructions as given, without notations identifying the source of any instruction.

The Committee's intent was to address the areas of federal law most frequently covered in jury trials in this circuit — broadly speaking, employment discrimination and constitutional torts. The Committee thought it inappropriate to venture instructions on substantive state law, and urges the user faced with a diversity case to consult the pattern instructions of the state whose law produces the rule of decision. Even in diversity cases, though, the Committee recommends use of the general and in-trial instructions in Chapters 1 and 2 of these pattern instructions. The Committee chose not to attempt to include instructions for the less common federal question cases (e.g., FELA, intellectual property, antitrust) lest completion of the first edition be delayed. The Committee anticipates including FELA instructions in subsequent revisions.

The instructions were drafted with the expectation that certain modifications will be made routinely. The instructions use the capitalized terms "Plaintiff" and "Defendant" to refer to the parties; the Committee recommends that the parties' names be substituted in each case. The same is true when other descriptive terms are used (i.e., Witness, Employer, Supervisor, etc.). The Committee generally has used masculine pronouns rather than the clumsier his/her, he/she, or him/her in these instructions to make it easier to scan the text; the user should exercise special care to make each instruction gender-appropriate for a particular case. Phrases and sentences that appear in brackets are alternatives or additions

to instructions, to be used when relevant to the particular case on trial. The introductory instructions in Chapter 1 provide some definitions for terms used in the substantive instructions.

The committee consisted of Chief District Judge Robert L. Miller, Jr. (N.D. Ind.) (Chair), Circuit Judge Terence T. Evans, District Judge Jeanne E. Scott (C.D. Ill.), District Judge Matthew F. Kennelly (N.D. Ill.), District Judge Philip G. Reinhard (N.D. Ill.), Joel Bertocchi (Mayer, Brown, Rowe & Maw, Chicago), Lory Barsdate Easton (Sidley Austin Brown & Wood, Chicago), Max W. Hittle (Krieg Devault Alexander & Capehart, Indianapolis), Iain Johnston (Holland & Knight, Chicago), Dennis R. McBride (U.S. Equal Employment Opportunity Commission, Milwaukee), Howard A. Pollack (Godfrey & Kahn, Milwaukee), Richard H. Schnadig and Michael Cleveland (Vedder Price Kaufman & Kammholz, Chicago), Thomas Walsh (US Attorney's Office, Chicago), and Don Zoufal (City of Chicago). The reporter was Andrew R. Klein, Associate Dean for Academic Affairs and Paul E. Beam Professor of Law at Indiana University School of Law - Indianapolis.

Several subcommittees provided enormous assistance to the Committee through work in discrete areas. Without the work of those attorneys, the Committee's work would have taken far longer. The Committee and all users of these pattern instructions owe a large debt of gratitude to the members of those subcommittees who did not also serve on the Committee: Magistrate Judge Sidney Schenkier, Mr. James P. Baker, Ms. Sharon Baldwin, Mr. James P. Chapman, Ms. Sally Elson, Mr. William Hooks, Ms. Mary Lee Leahy, Mr. Patrick J. Londrigan, Ms. Karen McNaught, Ms. Patricia Mendoza, Mr. Paul W. Mollica, Mr. John Ouska, Mr. Thomas Peters, Mr. L. Steven Platt, Mr. Joseph Polick, and Mr. Ronald Stearney.

The Committee also thanks the law firms that hosted the Committee's working sessions — Mayer, Brown, Rowe & Maw; Sidley Austin Brown & Wood; Vedder Price Kaufman & Kammholz; and Holland & Knight. Their hospitality allowed the Committee to use its meeting time as efficiently as possible.

The Committee also wishes to thank the judges, attorneys, and organizations that offered comments on the draft the Committee caused to be posted on the Internet. Those people and organizations include attorneys Terrill Albright (Indianapolis, IN), Dmitry Feofanov (Dixon, IL), Mara Georges (City of Chicago Corporation Counsel), William Goren (Naperville, IL), Deborah Hamilton (Chicago, IL), John Hamilton (South Bend, IN), Thomas Hurka (Chicago, IL), John Maley (Indianapolis, IN), Gordon Waldron (Chicago, IL), Jeffrey Wrage (Valparaiso, IN); District Judges Milton Shadur, John Grady, and Barbara Crabb, Magistrate Judge Nan Nolan; the Chicago Lawyers' Committee for Civil Rights Under the Law, the Illinois State Bar Association, NELA-Illinois (National Employment Lawyers

Association), Northwest Suburban NOW (National Organization for Women), the pro se law clerks of the United States District Court for the Northern District of Indiana, and Seyfarth Shaw LLP. Every comment triggered discussion and re-evaluation; many comments produced change. We deeply appreciate the time and thought those people and organizations contributed to the Committee's work.

Finally, the Committee offers its thanks to Chief Judge Joel M. Flaum, who initiated this project and gave the Committee members the privilege of making this contribution to the handling of civil trials in this circuit. The Committee will continue its work, regularly modifying the instructions and comments as made necessary by evolving case law, and expanding the topics covered by this work. We are grateful to Chief Judge Flaum for this continuing honor of serving.

# 1. GENERAL INSTRUCTIONS

## 1.01 FUNCTIONS OF THE COURT AND THE JURY

Members of the jury, you have seen and heard all the evidence and arguments of the attorneys. Now I will instruct you on the law.

You have two duties as a jury. Your first duty is to decide the facts from the evidence in the case. This is your job, and yours alone.

Your second duty is to apply the law that I give you to the facts. You must follow these instructions, even if you disagree with them. Each of the instructions is important, and you must follow all of them.

Perform these duties fairly and impartially. [Do not allow [sympathy/prejudice /fear/public opinion] to influence you.] [You should not be influenced by any person's race, color, religion, national ancestry, or sex.]

Nothing I say now, and nothing I said or did during the trial, is meant to indicate any opinion on my part about what the facts are or about what your verdict should be.

### Committee Comments

The bracketed material in the fourth paragraph should not be given unless a party has a legitimate concern about the possibility of influence by one or more of these factors. The Committee does not recommend that these issues be addressed routinely in every case. The list of improper factors in the last sentence of the fourth paragraph is not intended to be exclusive, and may be modified to reflect the circumstances of a particular case.

## 1.02 NO INFERENCE FROM JUDGE'S QUESTIONS

During this trial, I have asked a witness a question myself. Do not assume that because I asked questions I hold any opinion on the matters I asked about, or on what the outcome of the case should be.

### Committee Comments

A trial judge, of course, may interrogate witnesses. FED. R. EVID. 614(b); *see Ross v. Black & Decker, Inc.*, 977 F.2d 1178, 1187 (7th Cir. 1992) ("A trial judge may not advocate on behalf of a plaintiff or a defendant, nor may he betray even a hint of favoritism toward either side. This scrupulous impartiality is not inconsistent with asking a question of a witness in an effort to make the testimony crystal clear for the jury. The trial judge need not sit on the bench like a mummy when his intervention would serve to clarify an issue for the jurors. The brief, impartial questioning of the witness by the judge, as the record reflects, to make the witness' testimony clearer was entirely proper . . .."); *Beetler v. Sales Affiliates, Inc.*, 431 F.2d 651, 654 (7th Cir. 1970)(trial judge, in aid of truth and in furtherance of justice, may question a witness in an impartial manner) (*citing United States v. Miller*, 395 F.2d 116 (7th Cir. 1968)).

An instruction reminding the jury that the judge has not intended to give any opinion or suggestion as to what the verdict should be may be helpful. *See United States v. Siegel,* 587 F.2d 721, 726 (5th Cir. 1979) (no interference with right of fair trial where questions asked by judge, for clarification, were coupled with cautionary instructions to jury); *United States v. Davis*, 89 F.3d 836 (6th Cir. 1996) (per curiam, unpublished) (no plain error where judge's statements were factually correct and jury was instructed not to consider the judge's comments, questions and rulings as evidence); EIGHTH CIRCUIT MANUAL OF MODEL CIVIL JURY INSTRUCTIONS 3.02 (2001); *but see United States v. Tilghman*, 134 F.3d 414, 421 (D.C. Cir. 1998) ("Although jury instructions can cure certain irregularities . . . [where] the trial judge asked questions, objected to by counsel, that could have influenced the jury's assessment of the defendant's veracity, such interference with jury factfinding cannot be cured by standard jury instructions."); *United States v. Hoker*, 483 F.2d 359, 368 (5th Cir. 1973) ("No amount of boiler plate instructions to the jury – not to draw any inference as to the judge's feelings" can be expected to remedy extensive and prosecutorial questioning by judge.).

## 1.03 ALL LITIGANTS EQUAL BEFORE THE LAW

In this case [one/some] [of] the [defendants/plaintiffs/parties] [is a/are] corporation[s]. All parties are equal before the law. A corporation is entitled to the same fair consideration that you would give any individual person.

### Committee Comments

A court may choose to modify the first and third sentences of this instruction for other types of litigants.

## 1.04 EVIDENCE

The evidence consists of the testimony of the witnesses [,] [and] the exhibits admitted in evidence [, and stipulation[s]]

[A stipulation is an agreement between both sides that [certain facts are true] [that a person would have given certain testimony].]

[I have taken judicial notice of certain facts. You must accept those facts as proved.]

### Committee Comments

Rule 201 of the Federal Rules of Evidence governs judicial notice of adjudicative facts. Judicial notice may be taken at any stage of the proceedings, but generally only after the parties have been afforded an opportunity to be heard on the matter. Rule 201(g) requires the court in civil cases to "instruct the jury to accept as conclusive any fact judicially noticed." It may be advisable to explain the reasoning behind the taking of judicial notice in a particular instance (such as "matters of common knowledge") if it is thought necessary to reinforce the command of the instruction. *See Shapleigh v. Mier*, 299 U.S. 468, 475 (1937) ("To say that a court will take judicial notice of a fact, whether it be an event or a custom or a law of some other government, is merely another way of saying that the usual forms of evidence will be dispensed with if knowledge of the fact can otherwise be acquired …. But the truth, of course, is that judicial notice and judicial knowledge are far from being one."). If the jury has not been informed of the facts judicially noticed, those facts should be described when this instruction is given.

## 1.05 DEPOSITION TESTIMONY

During the trial, certain testimony was presented to you by [the reading of a deposition/depositions] [and video]. You should give this testimony the same consideration you would give it had the witness[es] appeared and testified here in court.

### Committee Comments

*See generally Sandridge v. Salen Offshore Drilling Co.*, 764 F.2d 252, 259 (5th Cir. 1985) (noting that "[a] trial court may not properly instruct a jury that a written deposition is entitled to less weight than live testimony" and, by analogy, improper to instruct a jury that a written deposition is entitled to less weight than a videotaped deposition); *In re Air Crash Disaster*, 635 F.2d 67, 73 (2d Cir. 1980) (by implication, approving instruction that deposition testimony "is entitled to the same consideration and is to be judged as to credibility and weighted and otherwise considered by you in the same way as if the witness has been actually present in court"); *Wright Root Beer Co. v. Dr. Pepper Co.*, 414 F.2d 887, 889-891 (5th Cir. 1969) (prejudicial and erroneous to instruct jury that "discovery" depositions are entitled to less weight than testimony of live witness). The Committee recommends that Instruction 2.08 also be given at the time the deposition testimony is presented to the jury.

## 1.06 WHAT IS NOT EVIDENCE

Certain things are not to be considered as evidence. I will list them for you:

First, if I told you to disregard any testimony or exhibits or struck any testimony or exhibits from the record, such testimony or exhibits are not evidence and must not be considered.

Second, anything that you may have seen or heard outside the courtroom is not evidence and must be entirely disregarded. [This includes any press, radio, Internet or television reports you may have seen or heard. Such reports are not evidence and your verdict must not be influenced in any way by such publicity.]

Third, questions and objections or comments by the lawyers are not evidence. Lawyers have a duty to object when they believe a question is improper. You should not be influenced by any objection, and you should not infer from my rulings that I have any view as to how you should decide the case.

Fourth, the lawyers' opening statements and closing arguments to you are not evidence. Their purpose is to discuss the issues and the evidence. If the evidence as you remember it differs from what the lawyers said, your memory is what counts.

### Committee Comments

An instruction that arguments, statements and remarks of counsel are not evidence is helpful in curing potentially improper remarks. *See Mayall v. Peabody Coal Company*, 7 F.3d 570, 573 (7th Cir. 1993); *Valbut v. Pass*, 866 F.2d 237, 241-242 (7th Cir. 1989).

With regard to publicity, this instruction tracks SEVENTH CIRCUIT FEDERAL CRIMINAL JURY INSTRUCTIONS § 1.06 (1999), which is in accord with that approved in *United States v. Coduto*, 284 F.2d 464, 468 (7th Cir. 1961). While the criminal precedents relating to publicity have their origins in the Sixth Amendment, *see Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991); *U.S. v. Thomas*, 463 F.2d 1061, 1063-1064 (7th Cir. 1972), parallel protection under the Seventh Amendment may be available to civil litigants. *See Gutierrez-Rodrigues v. Cartagena et al.*, 882 F.2d 553, 570 (1st Cir. 1989) (implying that trial publicity can lead to a mistrial if it interferes with "the Seventh Amendment right to a civil trial by an impartial jury."); *see generally Haley v. Blue Ridge Transfer Co.*, 802 F.2d 1532, 1535 n.4 (4th Cir. 1986), citing *McCoy v. Goldston* 652 F.2d 654, 656 (6th Cir. 1981) ("The right to an impartial jury in civil cases is inherent in the Seventh Amendment's preservation of a 'right to trial by jury' and the Fifth Amendment's guarantee that 'no person shall be denied of life, liberty or property without due process of law.'"); *but cf. Chicago Council of Lawyers v. Bauer et*

*al.*, 522 F.2d 242, 258 (7th Cir. 1975) (in context of restrictions on attorney comments outside the courtroom in a civil trial, Sixth Amendment "impartial jury" guarantee requires greater insularity against unfairness than Seventh Amendment "trial by jury" guarantee.).

## 1.07 NOTE-TAKING

Any notes you have taken during this trial are only aids to your memory. The notes are not evidence. If you have not taken notes, you should rely on your independent recollection of the evidence and not be unduly influenced by the notes of other jurors. Notes are not entitled to any greater weight than the recollections or impressions of each juror about the testimony.

### Committee Comments

To the extent note-taking is permitted, a cautionary instruction on these issues at the commencement of trial would be advisable. *See United States v. Rhodes*, 631 F.2d 43, 46 (5th Cir. 1980). *See also* NINTH CIRCUIT MANUAL OF MODEL CIVIL JURY INSTRUCTIONS 4.2 (2001); FIFTH CIRCUIT PATTERN JURY INSTRUCTIONS (CIVIL) 2.21 (2004). *Cf. Winters v. United States*, 582 F.2d 1152, 1154 (7th Cir. 1978) (foreman reading another juror's notes to jury did not constitute impermissible extraneous influence on jury).

## 1.08 CONSIDERATION OF ALL EVIDENCE REGARDLESS OF WHO PRODUCED

In determining whether any fact has been proved, you should consider all of the evidence bearing on the question regardless of who introduced it.

## 1.09 LIMITED PURPOSE OF EVIDENCE

You will recall that during the course of this trial I instructed you that I admitted certain evidence for a limited purpose. You must consider this evidence only for the limited purpose for which it was admitted.

### Committee Comments

The court should instruct the jury on any limited purpose of evidence at the time the evidence is presented. That instruction may be in the following form: "The [following] [preceding] evidence concerning [*describe evidence*] is to be considered by you [*describe purpose*] only and for no other purpose."

*See Berry v. Deloney*, 28 F.3d 604, 608 (7th Cir. 1994) (in §1983 suit against truant officer with whom student plaintiff had sexual relationship, limiting instruction on evidence, offered solely for purpose of determining damages, of plaintiff's other sexual activity "dispelled any potential prejudice against the plaintiff"); *see also Miller v. Chicago & N.W. Transport. Co.*, 925 F. Supp. 583, 588 (N.D. Ill. 1996) (in FELA case, adopting limiting instruction regarding evidence of regulatory standards suggesting noise level guidelines where standards were not binding on the defendant).

If practicable, the court may wish to remind the jury of the specific evidence so admitted and the specific purpose for which it was admitted.

## 1.10 EVIDENCE LIMITED TO CERTAIN PARTIES

Each party is entitled to have the case decided solely on the evidence that applies to that party. You must consider the evidence concerning [*describe evidence if practicable*] only in the case against [P*arty*]. You must not consider it against any other party.

### Committee Comments

*See* FED. R. EVID. 105; NINTH CIRCUIT MANUAL OF MODEL CIVIL JURY INSTRUCTIONS 3.11 (2001); EIGHTH CIRCUIT MANUAL OF MODEL CIVIL JURY INSTRUCTIONS 2.08A (2001); *United States v. Cochran*, 955 F.2d 1116, 1120-1121 (7th Cir. 1992) (district court's limiting instructions sufficient to "counter any potential 'spillover effect' of the evidence" against co-defendants).

## 1.11 WEIGHING THE EVIDENCE

You should use common sense in weighing the evidence and consider the evidence in light of your own observations in life.

In our lives, we often look at one fact and conclude from it that another fact exists. In law we call this "inference." A jury is allowed to make reasonable inferences. Any inference you make must be reasonable and must be based on the evidence in the case.

### Committee Comments

While the term "inference" is not used in common parlance, it was retained here, and defined, as a shorthand in order to avoid the need to repeat the same point elsewhere in the instructions. This instruction may not be needed in certain technical types of cases or cases that rely heavily on expert testimony.

## 1.12 DEFINITION OF "DIRECT" AND "CIRCUMSTANTIAL" EVIDENCE

You may have heard the phrases "direct evidence" and "circumstantial evidence." Direct evidence is proof that does not require an inference, such as the testimony of someone who claims to have personal knowledge of a fact. Circumstantial evidence is proof of a fact, or a series of facts, that tends to show that some other fact is true.

As an example, direct evidence that it is raining is testimony from a the witness who says, "I was outside a minute ago and I saw it raining." Circumstantial evidence that it is raining is the observation of someone entering a room carrying a wet umbrella.

The law makes no distinction between the weight to be given to either direct or circumstantial evidence. You should decide how much weight to give to any evidence. In reaching your verdict, you should consider all the evidence in the case, including the circumstantial evidence.

### Committee Comments

The phrase "circumstantial evidence" is addressed here because of its use in common parlance and the likelihood that jurors may have heard the term outside the courtroom.

## 1.13 TESTIMONY OF WITNESSES (DECIDING WHAT TO BELIEVE)

You must decide whether the testimony of each of the witnesses is truthful and accurate, in part, in whole, or not at all. You also must decide what weight, if any, you give to the testimony of each witness.

In evaluating the testimony of any witness, [including any party to the case,] you may consider, among other things:

- the ability and opportunity the witness had to see, hear, or know the things that the witness testified about;
- the witness's memory;
- any interest, bias, or prejudice the witness may have;
- the witness's intelligence;
- the manner of the witness while testifying;
- [the witness's age];
- and the reasonableness of the witness's testimony in light of all the evidence in the case.

### Committee Comments

The portion of the instruction relating to age should be given only when a very elderly or a very young witness has testified.

## 1.14 PRIOR INCONSISTENT STATEMENTS [OR ACTS]

You may consider statements given by [*Party*] [*Witness under oath*] before trial as evidence of the truth of what he said in the earlier statements, as well as in deciding what weight to give his testimony.

With respect to other witnesses, the law is different. If you decide that, before the trial, one of these witnesses made a statement [not under oath] [or acted in a manner] that is inconsistent with his testimony here in court, you may consider the earlier statement [or conduct] only in deciding whether his testimony here in court was true and what weight to give to his testimony here in court.

[In considering a prior inconsistent statement[s] [or conduct], you should consider whether it was simply an innocent error or an intentional falsehood and whether it concerns an important fact or an unimportant detail.]

### Committee Comments

a. **Statements Under Oath and Admissions by Party-Opponents:** Where prior inconsistent statements have been admitted only for impeachment, FED. R. EVID. 105 gives a party the right to a limiting instruction explaining that use of the prior inconsistent statement is limited to credibility. *See United States v. Hall*, 109 F.3d 1227, 1237 (7th Cir. 1997) (instruction on impeachment need be given only if impeachment was reasonably raised by the evidence). A court should not give such a limiting instruction, however, if the prior inconsistent statement was "given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding or in a deposition," FED. R. EVID. 801(d)(1)(A), or if the prior statement is considered an admission by a party-opponent under FED. R. EVID. 801(d)(2). These statements are not hearsay and may be used to prove the truth of the matters asserted. This instruction should be adapted to fit the situation in which the prior inconsistent statements have been admitted.

b. **Prior Inconsistent Conduct:** Bracketed material in the second paragraph regarding inconsistent conduct is used by state courts in Indiana and Illinois and is consistent with Seventh Circuit standards. *See* ILLINOIS PATTERN INSTRUCTIONS (CIVIL) § 1.01(4) (2000); INDIANA PATTERN JURY INSTRUCTIONS—CIVIL 2D 3.05 (2003); *see also Molnar v. Booth*, 229 F.3d 593, 604 (7th Cir. 2000) (evidence of prior inconsistent conduct of defendant in sexual harassment case admissible for impeachment of defendant's testimony that he had never asked out a person under his supervision).

c. **Weighing the Effect of a Discrepancy:** The third paragraph of this instruction regarding how the jury should weigh the effect of a discrepancy is based on the general principle that jurors are free to credit or discredit evidence in light of what they observe at trial and their own experience. *See U.S. v. Boykins*, 9 F.3d 1278, 1286 n.1 (7th Cir. 1993) (approving an instruction

which included the following language: "In weighing the effect of discrepancy [in evidence], always consider whether it pertains to a matter of importance or an unimportant detail, and whether the discrepancy results from innocent error or intentional falsehood."); *United States v. Baron*, 602 F.2d 1248, 1254 (7th Cir. 1979) (finding no prejudicial error where court did not instruct that jury may reject all testimony of a witness shown to testify falsely regarding any material matter where court "told the jurors that they could find from inconsistencies in [the] testimony and failures of recollection as well from other facts that [the] testimony was totally unworthy of belief, but that they were not required to find that he was lying solely on the basis of differences in recollections over details"); *see also United States v. Monzon*, 869 F.2d 338, 346 (7th Cir. 1989) (disapproving of *falsus in uno, falsus in omnibus* instruction and upholding 7th Cir. Crim. Instruction; defendant has right only to instruction that jury should consider inconsistencies in witness testimony in determining witness credibility).

## 1.15 IMPEACHMENT OF WITNESS — CONVICTIONS

You have heard evidence that [*Name*] has been convicted of a crime. You may consider this evidence only in deciding whether [*Name's*] testimony is truthful in whole, in part, or not at all. You may not consider this evidence for any other purpose.

### Committee Comments

The admissibility of prior convictions to impeach a witness's credibility is governed by FED. R. EVID. 609. *See* Committee Comment accompanying SEVENTH CIRCUIT FEDERAL CRIMINAL JURY INSTRUCTIONS § 3.05 (1999) ("Impeachment - Defendant - Convictions"); see also *Young v. James Green Management, Inc.*, 327 F.3d 616, 625-626 (7th Cir. 2003) (suit for wrongful termination based on race); *Wilson v. Williams*, 182 F.3d 562 (7th Cir. 1999) (en banc) (§1983 claim against prison guard) ; *Campbell v. Green*, 831 F.2d 700 (7th Cir. 1987) (§1983 claim against prison guards) for use of prior convictions in civil cases.

This instruction differs from the cautionary Instruction 2.11, which avoids reference to truthfulness while the witness is on the stand.

## 1.16 LAWYER INTERVIEWING WITNESS

It is proper for a lawyer to meet with any witness in preparation for trial.

### Committee Comments

This instruction should be given where evidence regarding an attorney's meeting with a witness has been the subject of trial testimony.

## 1.17 NUMBER OF WITNESSES

You may find the testimony of one witness or a few witnesses more persuasive than the testimony of a larger number. You need not accept the testimony of the larger number of witnesses.

## 1.18 ABSENCE OF EVIDENCE

The law does not require any party to call as a witness every person who might have knowledge of the facts related to this trial. Similarly, the law does not require any party to present as exhibits all papers and things mentioned during this trial.

### Committee Comments

This language is generally consistent with second sentence of the SEVENTH CIRCUIT FEDERAL CRIMINAL JURY INSTRUCTIONS § 3.24 (1999).

## 1.19 ADVERSE INFERENCE FROM MISSING WITNESS

[*Witness*] was mentioned at trial but did not testify. You may, but are not required to, assume that [*Witness's*] testimony would have been unfavorable to [Plaintiff] [Defendant].

### Committee Comments

This instruction should be given only if there is evidence from which the jury could find (1) that the missing witness was physically available only to the party against whom the inference would be drawn, or (2) that the missing witness has a relationship with that party that practically renders the testimony unavailable to that party's adversary. *Oxman v. WLS-TV*, 12 F.3d 652, 661 (7th Cir. 1993); *Chicago Coll. of Osteopathic Med. v. George A. Fuller Co.*, 719 F.2d 1335, 1353 (7th Cir. 1983); *see also Fey v. Walston & Co.*, 493 F.2d 1036, 1053 (7th Cir. 1974) (where missing witness was beyond subpoena power of defendants and there was evidence both that missing witness was available to adverse party and that missing witness's testimony could have thrown significant light on crucial question in case, it was error to instruct that jury may infer missing witness's testimony would be merely "of no aid" rather than "adverse" to non-producing party's case). Note that the Seventh Circuit appears to require more than mere "reasonable availability" of the witness to the party against whom the adverse inference is permitted. *Compare* 3 KEVIN F. O'MALLEY, JAY E. GRENIG & HON. WILLIAM C. LEE, FEDERAL JURY PRACTICE AND INSTRUCTIONS § 104.25 (5th ed. 2000) (adverse inference may be applied to missing witness "who has knowledge about the facts in issue, and who is reasonably available to the party, and who is not equally available to the other party"), *with Oxman v. WLS-TV*, 12 F.3d at 661 (complaining party must establish that missing witness "was peculiarly in the power of the other party to produce").

The court has broad discretion in determining whether to give a missing witness instruction and in supervising closing arguments to ensure that counsel does not make reference to matters not in evidence. *Hoffman v. Caterpillar, Inc.*, 368 F.3d 709, 716-717 (7th Cir. 2004); *cf.* SEVENTH CIRCUIT FEDERAL CRIMINAL JURY INSTRUCTIONS § 3.24 (1999) Committee Comment (explaining that trial court must make advance ruling before missing witness instruction may be given or inference argued to jury, and noting particular issues with inference in criminal context). The court may decline a missing witness instruction, and may refuse argument on the adverse inference, if the party against whom the inference would be drawn offers a sufficient explanation for the decision not to call the witness and/or if the testimony would be unnecessarily duplicative. *Hoffman v. Caterpillar*, 368 F.3d at 716-717. Some authorities (citing decisions from other circuits) suggest that these questions may be submitted to the jury. *See* LEONARD B. SAND, JOHN S. SIFFERT, WALTER P. LOUGHLIN, STEVEN A. REISS, NANCY BATTERMAN, MODERN FEDERAL JURY INSTRUCTIONS, Form Instruction 75-3 (2004) ("In deciding whether to draw this inference, you should consider whether the witness' testimony would merely have repeated other testimony and evidence already before you. You may also consider whether the defendant had a reason for not calling this witness which was explained to your

satisfaction.").

A curative instruction may be appropriate where the issue arises during closing argument or at some other time in trial and the necessary prerequisites for an adverse inference have not been established. *See* FIFTH CIRCUIT PATTERN JURY INSTRUCTIONS (CIVIL) § 2.9 (2004) ("(Name of Witness) ____ was available to both sides. Thus [the plaintiff] [the defendant] cannot complain that (Witness) was not called to testify, because (Party) could have called (Witness)."). *See also* Instruction 1.18 on absence of witness and/or evidence (not all available evidence must be presented).

As to missing or destroyed evidence, see Instruction 1.20.

## 1.20 SPOLIATION/DESTRUCTION OF EVIDENCE

[*Party*] contends that [*Other Party*] at one time possessed [*describe evidence allegedly destroyed*]. However, [*Other Party*] contends that [*evidence never existed, evidence was not in its possession, evidence was not destroyed, loss of evidence was accidental, etc.*].

You may assume that such evidence would have been unfavorable to [*Other Party*] only if you find by a preponderance of the evidence that:

(1) [*Other Party*] intentionally [destroyed the evidence] [caused the evidence to be destroyed]; and

(2) [*Other Party*] [destroyed the evidence] [caused the evidence to be destroyed] in bad faith.

### Committee Comments

*See Miksis v. Howard*, 106 F.3d 754, 762-763 (7th Cir. 1997) (party seeking adverse inference must prove that other party intentionally destroyed evidence in bad faith). The Seventh Circuit "requires a showing of an intentional act by the party in possession of the allegedly lost or destroyed evidence" to support a missing or destroyed evidence instruction. *Spesco, Inc. v. General Elec. Co.*, 719 F.2d 233, 239 (7th Cir. 1983); *see also Adkins v. Mid-America Growers, Inc.*, 141 F.R.D. 466, 473 (N.D. Ill. 1992) ("In cases where evidence has been intentionally destroyed, it may be presumed that the materials were relevant."). If the facts are not in dispute, the court ordinarily will decide the sanction for an intentional and bad faith spoliation, which might include an instruction with an inference such as that set forth in this instruction.

## 1.21 EXPERT WITNESSES

You have heard [a witness] [witnesses] give opinions about matters requiring special knowledge or skill. You should judge this testimony in the same way that you judge the testimony of any other witness. The fact that such person has given an opinion does not mean that you are required to accept it. Give the testimony whatever weight you think it deserves, considering the reasons given for the opinion, the witness's qualifications, and all of the other evidence in the case.

### Committee Comments

*See* FED. R. EVID. 602, 701-705. *See generally United States v. Mansoori*, 304 F.3d 635, 654 (7th Cir. 2002), *cert. denied* 538 U.S. 967, 123 S. Ct. 1761, 155 L.Ed.2d 522 (2003) (approving instruction to jury that "the fact an expert has given an opinion does not mean that it is binding upon you" and finding no prejudice where witness testified as both expert and fact witness); *United States v. Serafino*, 281 F.3d 327, 330-331 (1st Cir. 2002) (court mitigated "whatever special aura the jury might otherwise have attached to the term 'expert'" by instructing that expert testimony should be considered just like other testimony); *United States v. Brown*, 7 F.3d 648, 655 (7th Cir. 1993) (recognizing that in close case danger of unfair prejudice may be heightened by "aura of special reliability" of expert testimony, but concluding that instruction to jury that expert opinion was not binding and that jury should consider expert opinion in light of all evidence mitigated any danger of unfair prejudice); *Coal Resources, Inc. v. Gulf & Western Indus., Inc.*, 865 F.2d 761, 775 (6th Cir. 1989) (no error in failing to give jury instruction regarding speculative testimony by expert witness where jury was instructed that it must decide how much weight and credibility to give to expert opinion).

## 1.22 TRANSLATED LANGUAGE

You should consider only the evidence provided through the official interpreter. Although some of you may know [*language(s) used*], it is important that all jurors consider the same evidence. Therefore, you must base your decision on the evidence presented in the English translation.

### Committee Comments

*See* NINTH CIRCUIT MANUAL OF MODEL CIVIL JURY INSTRUCTIONS §§ 2.9, 3.4 (2001).

## 1.23 SUMMARIES

*Stipulated*

The parties agree that [*describe summary in evidence*] accurately summarizes the contents of documents, records, or books. You should consider these summaries just like all of the other evidence in the case.

*Not Stipulated*

Certain [*describe summary in evidence*] is/are in evidence. [The original materials used to prepare those summaries also are in evidence.] It is up to you to decide if the summaries are accurate.

**Committee Comments**

*See* FED. R. EVID. 1006. *See also United States v. Stoecker*, 215 F.3d 788, 792 (7th Cir. 2000) (court properly instructed jury to analyze underlying evidence on which charts were based); *United States v. Swanquist*, 161 F.3d 1064, 1073 (7th Cir. 1998) (court instructed jury that summary charts were not evidence and were admitted simply to aid jurors in evaluating evidence and that it was for jurors to decide whether evidence supported the summaries); *AMPAT/Midwest Inc. v. Illinois Tool Works, Inc.*, 896 F.2d 1035, 1045 (7th Cir. 1990) (where underlying data is admissible, summaries are admissible); *United States v. Bishop*, 264 F.3d 535, 548 (5th Cir. 2001) (holding the following instruction sufficient: "You are to give no greater consideration to these schedules and summaries than you would give to the evidence upon which they are based. It is for you to decide the accuracy of the summary charts."); *United States v. Diez*, 515 F.2d 892, 905 (5th Cir. 1975) ("The court should instruct the jury that summaries do not, of themselves, constitute evidence in the case but only purport to summarize the documented and detailed evidence already submitted.").

"Charts" or "schedules" may be substituted for "summaries" in this instruction. The bracketed language should be used only if there are both stipulated and disputed summaries in the case.

## 1.24 DEMONSTRATIVE EXHIBITS

Certain [*describe demonstrative exhibit, e.g., models, diagrams, devices, sketches*] have been shown to you. Those [*short description*] are used for convenience and to help explain the facts of the case. They are not themselves evidence or proof of any facts.

### Committee Comments

*See* FED. R. EVID. 1006; FED. R. EVID. 611(a)(1); FED. R. EVID. 403; *United States v. Salerno*, 108 F.3d 730, 744 (7th Cir. 1997) ("Demonstrative aids are regularly used to clarify or illustrate testimony.").

While there is no requirement that demonstrative evidence be completely accurate, the jury must be alerted to perceived inaccuracies in the demonstrative evidence. *See Roland v. Langlois*, 945 F.2d 956, 963 (7th Cir. 1991) (benefits outweighed danger of unfair prejudice when plaintiffs introduced inaccurate life-sized model of amusement park ride in personal injury suit against carnival operator and jury was alerted to perceived inaccuracies). *See also* FED. R. EVID. 403. Limiting instructions are strongly suggested, and in some cases it may be better practice to exclude demonstrative evidence from the jury room in order to reduce the potential for unfair prejudice. *United States v. Salerno*, 108 F.3d at 745 (holding that prosecution's scale model of crime scene was properly allowed to go back to jury room). The court may advise the jury that demonstrative evidence will not be sent back to the jury room.

## 1.25 MULTIPLE CLAIMS; MULTIPLE PLAINTIFFS/DEFENDANTS

You must give separate consideration to each claim and each party in this case. [Although there are [*number*] defendants, it does not follow that if one is liable, any of the others is also liable.] [Although there are [*number*] plaintiffs, it does not follow that if one is successful, the others are, too.][1]

*[If evidence was admitted only as to fewer than all defendants or all claims:]* In considering a claim against a defendant, you must not consider evidence admitted only against other defendants [or only as to other claims].

### Committee Comments

The bracketed language in the third sentence should not be used in cases in which no plaintiff can recover unless all plaintiffs recover. In addition, the bracketed language in the second sentence of the first paragraph should not be used or should be modified when principles of vicarious liability make it inappropriate. *See Watts v. Laurent*, 774 F.2d 168, 175 (7th Cir. 1985) (in context of Civil Rights Act suit in which each actor will be held jointly and severally liable for a single indivisible injury, instruction to "decide each defendant's case separately as if it were a separate lawsuit" in conjunction with separate verdict forms for each defendant led to ambiguous verdict on damages award). Where evidence has been admitted as to one party only, see Instruction No. 1.10.

[1] The Committee suggests identifying each party by name in this paragraph when feasible.

## 1.26 DISMISSED/WITHDRAWN DEFENDANT

[*Former Party*] is no longer a defendant in this case. You should not consider any claims against [*Former Party*]. Do not speculate on the reasons. You should decide this case as to the remaining parties.

## 1.27 BURDEN OF PROOF

When I say a particular party must prove something by "a preponderance of the evidence," or when I use the expression "if you find," or "if you decide," this is what I mean: When you have considered all the evidence in the case, you must be persuaded that it is more probably true than not true.

### Committee Comments

*See In re Winship*, 397 U.S. 358, 371 (1970) (Harlan, J., concurring) ("preponderance of the evidence . . . simply requires the trier of fact to believe that the existence of a fact is more probable than its nonexistence"); *Crabtree v. Nat'l Steel Corp.*, 261 F.3d 715, 722 (7th Cir. 2001) (finding explanation of burden of proof sufficient where judge gave "more probably true than not true" definition of preponderance but failed to state that he was defining "preponderance of the evidence," even where subsequent instruction referred to "preponderance"); *Odekirk v. Sears Roebuck & Co.*, 274 F.2d 441, 445-446 (7th Cir. 1960) (as a general rule, it is better to avoid such words as "satisfy," "convince," "convincing," and "clear preponderance" in instruction on general civil burden of proof; nonetheless accepting instruction that "preponderance of the evidence" means "evidence which possesses greater weight or convincing power").

## 1.28 CLEAR AND CONVINCING EVIDENCE

When I say that a particular party must prove something by "clear and convincing evidence," this is what I mean: When you have considered all of the evidence, you [are convinced that it is highly probable that it is true] [have no reasonable doubt that it is true].

[This is a higher burden of proof than "more probably true than not true." Clear and convincing evidence must persuade you that it is "highly probably true."]

### Committee Comments

The meaning of the "clear and convincing" standard of proof depends on the substantive law being applied. In some contexts, the Seventh Circuit has held that "clear and convincing evidence" requires proof which leaves "no reasonable doubt" in the mind of the trier of fact as to the truth of the proposition. It appears that those cases turn on state law standards and that, in other contexts, the quantum of proof for "clear and convincing evidence" does not quite approach the degree of proof necessary to convict a person of a criminal offense. *Compare Parker v. Sullivan*, 891 F.2d 185, 188 (7th Cir. 1989) (per curiam) (in context of Illinois law of intestate succession, "clear and convincing" evidence is "the quantum of proof which leaves no reasonable doubt in the mind of the trier of fact as to the truth of the proposition in question") *and Davis v. Combes*, 294 F.3d 931, 936-937 (7th Cir. 2002) (in context of Illinois constructive trust law, "clear and convincing" requires "no reasonable doubt in the mind of the trier of fact as to the truth of the proposition," citing *Parker*) *with Binion v. Chater*, 108 F.3d 780, 783 (7th Cir. 1997) (citing Illinois paternity law and noting spectrum of degrees of proof, with "clear and convincing" still lesser than "beyond a reasonable doubt" and requiring that proposition be "highly probably true" as opposed to "almost certainly true"); *McNair v. Coffey*, 234 F.3d 352, 355 (7th Cir. 2000), *vacated on other grounds by* 533 U.S. 925 (2001) *remanded to McNair v. Coffey*, 279 F.3d 463 (7th Cir. 2002) (in dicta, distinguishing preponderance "where the plaintiff can win a close case" from clear and convincing "where all close cases go to the defendant") *and United States v. Dowell*, 257 F.3d 694, 699 (7th Cir. 2001) (differentiating between standards of proof in contempt proceedings and concluding that "unlike criminal contempt, in civil contempt the proof need only be clear and convincing."); *see also Colorado v. New Mexico*, 467 U.S. 310, 316 (1984) (clear and convincing evidence standard requires that factfinder have "an abiding conviction that the truth of [the party's] factual contentions are 'highly probable'"); *Cruzan v. Director, Missouri Department of Health*, 497 U.S. 261, 282 (1990) (describing "clear and convincing" as intermediate standard of proof).

Where possible, the "clear and convincing" evidence standard should be explained in conjunction with the instructions regarding the specific element requiring proof by clear and convincing evidence. Where the claim requiring clear and convincing evidence is the sole issue to be decided by the jury, the instruction should be given in the form of Instruction 1.11 with the appropriate standard of proof inserted. The second paragraph of the instruction should be used where

multiple claims require instruction on both a "preponderance of the evidence" standard and a "clear and convincing" standard.

## 1.29 BURDEN FOR AFFIRMATIVE DEFENSE/ BURDEN-SHIFTING THEORY

### Committee Comments

The Committee included no general instruction regarding the burden of proof for affirmative defenses under the view that a court should explain such burdens in the elements instruction for each claim. *See Stone v. City of Chicago*, 738 F.2d 896, 901 (7th Cir. 1984) (no error where early instruction on burden of proof signaled to jury that on particular defenses, explained in later instructions, burden of proof shifted to defendants).

## 1.30 PROXIMATE CAUSE

### Committee Comments

The Committee included no general instruction regarding "proximate cause" or "legal cause" because these terms are not uniformly defined. Therefore, a court must use only the correct definition for the issues before it. *See Cooper v. Carl A. Nelson & Co.*, 211 F.3d 1008, 1015 (7th Cir. 2000) (en banc) ("Although the existence of a duty must be determined as a matter of law, the question of whether there was a breach of that duty and an injury proximately caused by that breach are questions of fact for the jury. . . . An error in jury instructions therefore can be reversible error if it misinforms the jury about the applicable law.") There is no consistent causation standard for either federal or state claims. The state law standards on causation vary widely and are subject to change. *See, e.g.,* NINTH CIRCUIT MANUAL OF MODEL CIVIL JURY INSTRUCTIONS § 3.8 (2001); *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1303 (7th Cir. 1995) (noting that some states make foreseeability, a concept that overlaps the concept of proximate cause, an explicit ingredient of negligence); 57A Am. Jur. 2d *Negligence* § 424 ("It has been said of the law of "proximate cause" that there is perhaps nothing in the entire field of law which has called forth more disagreement, or upon which the opinions are in such a welter of confusion…"); *see also In re: Bridgestone/Firestone Inc. Tires Products Liability Litig.,* 288 F.3d 1012, 1016-1018 (7th Cir. 2002) (although "no injury, no tort" is an ingredient of every state's law, differences in state laws preclude a nationwide class). Accordingly, these Instructions do not include a "model" instruction on proximate cause.

## 1.31 NO NEED TO CONSIDER DAMAGES INSTRUCTION

If you decide for the defendant[s] on the question of liability, then you should not consider the question of damages.

## 1.32 SELECTION OF PRESIDING JUROR; GENERAL VERDICT

Upon retiring to the jury room, you must select a presiding juror. The presiding juror will preside over your deliberations and will be your representative here in court.

Forms of verdict have been prepared for you.

[Forms of verdict read.]

(Take these forms to the jury room, and when you have reached unanimous agreement on the verdict, your presiding juror will fill in, date, and sign the appropriate form.)

OR

(Take these forms to the jury room, and when you have reached unanimous agreement on the verdict, your presiding juror will fill in and date the appropriate form, and all of you will sign it.)

## 1.33 COMMUNICATION WITH COURT

I do not anticipate that you will need to communicate with me. If you do need to communicate with me, the only proper way is in writing. The writing must be signed by the presiding juror, or, if he or she is unwilling to do so, by some other juror. The writing should be given to the marshal, who will give it to me. I will respond either in writing or by having you return to the courtroom so that I can respond orally.

[If you do communicate with me, you should not indicate in your note what your numerical division is, if any.]

## 1.34 DISAGREEMENT AMONG JURORS

The verdict[s] must represent the considered judgment of each juror. Your verdict[s], whether for or against the parties, must be unanimous.

You should make every reasonable effort to reach a verdict. In doing so, you should consult with one another, express your own views, and listen to the opinions of your fellow jurors. Discuss your differences with an open mind. Do not hesitate to reexamine your own views and change your opinion if you come to believe it is wrong. But you should not surrender your honest beliefs about the weight or effect of evidence solely because of the opinions of other jurors or for the purpose of returning a unanimous verdict.

All of you should give fair and equal consideration to all the evidence and deliberate with the goal of reaching an agreement that is consistent with the individual judgment of each juror. You are impartial judges of the facts.

### Committee Comments

This instruction is taken from the form that the court set out in *United States v. Silvern*, 484 F.2d 879, 883 (7th Cir. 1973) (en banc). The court in that criminal case instructed that this instruction should be used in civil cases as well and directed that no other form of supplemental instruction be used in dealing with deadlock issues. *Id*. at 882. Since that time, its use has been discussed in a civil case in only one published opinion of the Seventh Circuit: *General Leaseways, Inc. v. National Truck Leasing Assoc.*, 830 F.2d 716, 730 (7th Cir. 1987).

## 2. IN-TRIAL INSTRUCTIONS; CAUTIONARY INSTRUCTIONS

### Committee Note

While these instructions are written for use during trial, they may be repeated as part of the final instructions when necessary and appropriate.

## 2.01. CAUTIONARY INSTRUCTION BEFORE RECESS

We are about to take our first break during the trial, and I want to remind you of the instruction I gave you earlier. Until the trial is over, you are not to discuss this case with anyone, including your fellow jurors, members of your family, people involved in the trial, or anyone else. If anyone approaches you and tries to talk to you about the case, do not tell your fellow jurors but advise me about it immediately. Do not read or listen to any news reports of the trial. Finally, remember to keep an open mind until all the evidence has been received and you have heard the views of your fellow jurors.

I may not repeat these things to you before every break that we take, but keep them in mind throughout the trial.

### Committee Comments

This is FIFTH CIRCUIT PATTERN JURY INSTRUCTIONS (CIVIL) § 2.1 (1999), with the second paragraph omitted.

The Committee recommends that this instruction not be given if the first recess comes immediately after the preliminary instructions, when it would be repetitive — but the judge might wish to summarize the content (*e.g.*, "Remember — don't talk about the case, and keep an open mind.").

## 2.02. IN-TRIAL INSTRUCTION ON NEWS COVERAGE

I understand that reports about this trial [or about this incident] are appearing in the newspapers and [or] on radio and television [and the internet]. The reporters may not have heard all the testimony as you have, may be getting information from people whom you will not see here under oath and subject to cross examination, may emphasize an unimportant point, or may simply be wrong.

You must not read anything or listen to anything or watch anything with regard to this trial. It would be a violation of your oath as jurors to decide this case on anything other than the evidence presented at trial and your common sense. You must decide the case solely and exclusively on the evidence that will be received here in court.

### Committee Comments

This is 3 KEVIN F. O'MALLEY, JAY E. GRENIG & HON. WILLIAM C. LEE, FEDERAL JURY PRACTICE AND INSTRUCTIONS § 102.12 (5th ed. 2000), with some style revision and greater emphasis. When necessary, a similar instruction should be given as to demonstrations, public gatherings, or public interest in the case.

## 2.03. EVIDENCE ADMITTED ONLY AGAINST ONE PARTY

Some of the evidence in this case is limited to one of the parties, and cannot be considered against the others. Each party is entitled to have the case decided solely on the evidence which applies to that party.

The evidence you [are about to hear] [just heard] can be considered only in the case against [*name party*].

### Committee Comments

This is drawn from EIGHTH CIRCUIT MANUAL OF MODEL CIVIL JURY INSTRUCTIONS § 2.08 (2001). If evidence is admitted as to only party, the court may wish to give Instruction No. 1.10 as part of the final instructions.

## 2.04. STIPULATED TESTIMONY

The parties have stipulated or agreed what *[name's*] testimony would be if *[name]* were called as a witness. You should consider that testimony in the same way as if *[name]* had given the testimony here in court.

### Committee Comments

This is 3 KEVIN F. O'MALLEY, JAY E. GRENIG & HON. WILLIAM C. LEE, FEDERAL JURY PRACTICE AND INSTRUCTIONS § 102.10 (5th ed. 2000).

If this instruction is repeated as a final instruction, it should be given in the witness testimony portion of the general instructions.

## 2.05. STIPULATIONS OF FACT

The parties have stipulated, or agreed, that [*stipulated fact*]. You must now treat this fact as having been proved for the purpose of this case.

### Committee Comments

This is drawn from 3 KEVIN F. O'MALLEY, JAY E. GRENIG & HON. WILLIAM C. LEE, FEDERAL JURY PRACTICE AND INSTRUCTIONS § 102.11 (5th ed. 2000). There is a disagreement between other sets of pattern instructions as to whether the jury is told it *must* treat the fact as proven (Fifth Circuit and O'Malley, Grenig & Lee ) or *should* treat the fact as proven (Eighth and Ninth Circuits). The Committee suggests using the word "must" so the court can exclude evidence that goes only to a fact that the jury must take as proven because of a stipulation.

If this instruction is repeated as a final instruction, it should be given in the "particular types of evidence" portion of the general instructions.

## 2.06. JUDICIAL NOTICE

I have decided to accept as proved the fact that [*e.g., the city of Milwaukee is north of the city of Chicago*]. You must now treat this fact as having been proved for the purpose of this case.

### Committee Comments

This is NINTH CIRCUIT MANUAL OF MODEL CIVIL JURY INSTRUCTIONS § 2.5 (2001), modified as to style.

If this instruction is repeated as a final instruction, it should be given in the "particular types of evidence" portion of the general instructions.

## 2.07. TRANSCRIPT OF RECORDING

You are about to hear a recording that has been received in evidence. This recording is proper evidence and you may consider it, just as any other evidence.

You will be given a transcript to use as a guide to help you follow as you listen to the recording. The transcript is not evidence of what was actually said or who said it. It is up to you to decide whether the transcript correctly reflects what was said and who said it. If you notice any difference between what you heard on the recording and what you read in the transcript, you must rely on what you heard, not what you read. And if after careful listening, you cannot hear or understand certain parts of the recording, you must ignore the transcript as far as those parts are concerned.

[You may consider the actions of a person, facial expressions and lip movements that you can observe on videos to help you to determine what was actually said and who said it.]

### Committee Comments

This is a modification of SEVENTH CIRCUIT FEDERAL CRIMINAL JURY INSTRUCTIONS § 3.17 (1999).

Some judges may prefer not to allow the jury to take all of the transcripts along with the exhibits admitted in evidence. No particular practice is prescribed in this regard.

If this instruction is repeated as a final instruction, it should be given in the "particular types of evidence" portion of the general instructions.

## 2.08. DEPOSITION AS SUBSTANTIVE EVIDENCE

A deposition is the sworn testimony of a witness taken before trial. The witness is placed under oath to tell the truth and lawyers for each party may ask questions. The questions and answers are recorded.

The deposition of [*Witness*], which was taken on [*date*], is about to be presented to you. Deposition testimony is entitled to the same consideration and is to be judged, insofar as possible, in the same way as if the witness had been present to testify.

[Do not place any significance on the behavior or tone of voice of any person reading the questions or answers.]

### Committee Comments

This is NINTH CIRCUIT MANUAL OF MODEL CIVIL JURY INSTRUCTIONS § 2.6 (2001), deleting the opening sentence, which began, "When a person is unavailable to testify at trial, the deposition of that person may be used at the trial."

## 2.09. USE OF INTERROGATORIES (TO BE USED ONLY WHEN INTERROGATORIES ARE READ WITHOUT ADMISSION INTO EVIDENCE)

Evidence will now be presented to you in the form of written answers of one of the parties to written interrogatories submitted by the other side. These answers were given in writing and under oath before this trial in response to written questions.

You must give the answers the same consideration as if the answers were made from the witness stand.

### Committee Comments

This is 3 KEVIN F. O'MALLEY, JAY E. GRENIG & HON. WILLIAM C. LEE, FEDERAL JURY PRACTICE AND INSTRUCTIONS § 102.24 (5th ed. 2000).

## 2.10. CROSS-EXAMINATION OF CHARACTER WITNESS

The questions and answers you have just heard were permitted only to help you decide what this witness really knew about the reputation of *[Name]* for truthfulness. You may not use the questions and answers you have just heard for any other purpose.

### Committee Comments

This is drawn from 3 KEVIN F. O'MALLEY, JAY E. GRENIG & HON. WILLIAM C. LEE, FEDERAL JURY PRACTICE AND INSTRUCTIONS § 102.43 (5th ed. 2000). *See* FED. R. EVID. 404(a)(3).

The Committee recommends that this instruction be given only upon a party's request. *See* FED.R.EVID. 105.

## 2.11. IMPEACHMENT BY CONVICTION OF CRIME

You have heard evidence that witness [*Name*] has been convicted of [a crime] [crimes]. You may use that evidence only to help you decide whether to believe the witness and how much weight to give [his] [her] testimony.

### Committee Comments

This is EIGHTH CIRCUIT MANUAL OF MODEL CIVIL JURY INSTRUCTIONS § 2.09 (2001), chosen in preference as a limiting instruction over Instruction 1.15, which speaks in terms of whether the witness's testimony is truthful. The Committee disfavors allusion to the truthfulness of a particular witness while that witness is still on (or has just left) the witness stand. This instruction should be given only if a party requests it, *see* FED.R.EVID. 105, unless the FED.R.EVID. 403 balancing test would tip the other way without the instruction.

## 2.12. SUMMARIES OF RECORDS AS EVIDENCE

*Stipulated*

The parties agree that [*Describe summary in evidence*] accurately summarize the contents of documents, records, or books. You should consider these summaries just like all of the other evidence in the case.

*Not Stipulated*

Certain [*describe summary in evidence*] is/are in evidence. [The original materials used to prepare those summaries also are in evidence.] It is up to you to decide if the summaries are accurate.

**Committee Comments**

This is Instruction 1.23.

## 2.13. WITHDRAWAL OF CLAIMS

[*Former Party*] is no longer a defendant in this case. You should not consider any claims against [*Former Party*]. Do not speculate on the reasons. Your focus must be on the remaining parties.

### Committee Comments

This is Instruction 1.26, modified as to style to reflect that the jury likely will hear more evidence after this limiting instruction is given.

## 2.14. JUDGE'S COMMENTS TO LAWYER

I have a duty to caution or warn an attorney who does something that I believe is not in keeping with the rules of evidence or procedure. You are not to draw any inference against the side whom I may caution or warn during the trial.

### Committee Comments

This is 3 KEVIN F. O'MALLEY, JAY E. GRENIG & HON. WILLIAM C. LEE, FEDERAL JURY PRACTICE AND INSTRUCTIONS § 102.70 (5th ed. 2000), with modification as to style.

# 3. EMPLOYMENT DISCRIMINATION: TITLE VII, § 1981, ADEA

## 3.01 GENERAL EMPLOYMENT DISCRIMINATION INSTRUCTIONS

Plaintiff claims that he was [*adverse employment action*] by Defendant because of [*protected class*]. To succeed on this claim, Plaintiff must prove by a preponderance of the evidence that he was [*adverse employment action*] by Defendant because of his [*protected class*]. To determine that Plaintiff was [*adverse employment action*] because of his [*protected class*], you must decide that Defendant would not have [*adverse employment action*] Plaintiff had he been [*outside protected class*] but everything else had been the same.

If you find that Plaintiff has proved this by a preponderance of the evidence, then you must find for Plaintiff. However, if you find that Plaintiff did not prove this by a preponderance of the evidence, then you must find for Defendant.

### Committee Comments

a. **Scope:** This instruction is to be used in Title VII, § 1981, and ADEA cases.

b. **Authority:** *See Gehring v. Case Corp.*, 43 F.3d 340, 344 (7th Cir.1994); *see also Achor v. Riverside Golf Club*, 117 F.3d 339, 340 (7th Cir. 1997); *Hennessy v. Penril Datacomm Networks, Inc.*, 69 F.3d 1344, 1350 (7th Cir.1995); *Hahm v. Wisconsin Bell, Inc.*, 983 F. Supp. 807, 809 (E.D. Wis. 1997).

The Committee recognizes that other circuits' instructions employ the "motivating factor" language of *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 94 (2003) in all Title VII cases. *See* EIGHTH CIRCUIT MODEL CIVIL JURY INSTRUCTIONS § 5.01 (2001) (essential element in all disparate treatment cases is proof that protected trait was "a motivating factor in defendant's decision"); NINTH CIRCUIT MODEL CIVIL JURY INSTRUCTIONS § 12.1 & Comment (1991 Act clarified that defendant is liable if plaintiff shows discrimination was "a motivating factor" regardless of whether the case is one of "pretext" or "mixed motives"); ELEVENTH CIRCUIT PATTERN JURY INSTRUCTIONS (CIVIL CASES) § 1.2.1 (2000) (plaintiff's burden under Title VII is to prove protected trait "was a substantial or motivating factor"); AMERICAN BAR ASSOCIATION, MODEL JURY INSTRUCTIONS, EMPLOYMENT LITIGATION § 1.02[1] (1994) (using "a motivating factor" standard in circumstantial/indirect evidence cases); 3C KEVIN F. O'MALLEY, JAY E. GRENIG, HON. WILLIAM C. LEE, FEDERAL JURY PRACTICE & INSTRUCTIONS § 171.20 (5th ed. 2001) (essential element of disparate treatment claim is that plaintiff prove protected trait was "a motivating factor," not "the sole motivation or even the primary motivation for the defendant's decision"). Two circuits have found that the "motivating factor" requirement applies only in mixed motive cases. *Watson v. Southeastern Penn. Transp. Auth.*, 207 F.3d 207, 214-220 (3rd Cir. 2000); *Fields v. New York State Office of Mental Retardation & Developmental Disabilities*, 115 F.3d 116, 121-124 (2d Cir. 1997).

The Committee drafted these instructions with the understanding that the "motivating factor"

language is appropriate in mixed motive cases (see comment c below). However, the Committee assumed the continuing viability of the *Gehring* approach in non-mixed motive cases in the Seventh Circuit. *Cf. Boyd v. Illinois State Police*, 384 F.3d 888, 894-895 (7th Cir. 2004). If a court deems it appropriate to instruct on "motivating factor" as an element of a party's burden of proof in a particular case, the committee recommends the following language:

> Plaintiff must prove by a preponderance of the evidence that his [*protected class*] . . . contributed to Defendant's decision.

c. **Mixed Motive:** The Committee expects that the pattern instruction, which has the advantage of streamlining the jury's task into a single and easily understood sentence, will be appropriate in most cases. In some cases, however, the pattern instruction would amount to a confusing oversimplification of the issues the jury must decide. For example, Title VII recognizes that employers can have mixed motives for employment decisions. *See* 42 U.S.C. § 2000e-5(g)(2)(B); *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003); *see also Akrabawi v. Carnes Co.*, 152 F.3d 688, 694 (7th Cir. 1998) ("The thrust of § 2000e-5(g)(2)(B) is that employers may make decisions out of mixed motives. The statute addresses the complex nature of employment decisions by recognizing that a discriminatory employer might make exactly the same employment decisions absent improper bias because of legitimate considerations.") In such cases, the statute provides for certain types of relief if discrimination constituted a motivating factor in the employment decision. *Id*. For this reason, other circuits have suggested a separate "mixed motive" instruction in some employment discrimination cases. *See, e.g.*, EIGHTH CIRCUIT MODEL CIVIL JURY INSTRUCTIONS §§ 5.11, 5.21, 5.31 (2001). These instructions permit defendants to limit liability if they can prove that they would have made the adverse employment decision regardless of the plaintiff's protected class.

In such a case, the pattern instruction (drawn from *Gehring v. Case Corp.*, 43 F.3d 340, 344 (7th Cir. 1994), which did not address a mixed motive issue), would call upon the jury to decide whether the plaintiff had disproved the mixed motive, after which the jury would decide whether the defendant had proven it. Under such circumstances, the Committee recommends the following language instead of the pattern instruction:

> Plaintiff must prove by a preponderance of the evidence that his [*protected class*] was a motivating factor in Defendant's decision to [*adverse employment action*] him. A motivating factor is something that contributed to Defendant's decision.
>
> If you find that Plaintiff has proved that his [*protected class*] contributed to Defendant's decision to [*adverse employment action*] him, you must then decide whether Defendant proved by a preponderance of the evidence that it would have [*adverse employment action*] him even if Plaintiff was not [*protected class*]. If so, you must enter a verdict for the Plaintiff but you may not award him damages.

The Committee recommends use of a verdict form that makes clear, if no damages are awarded, whether the jury decided the plaintiff had not proven her claim or decided that the

defendant had met its burden on the mixed motive issue. Without clear guidance in the circuit case law, the Committee cannot offer assistance in determining when a "mixed motive" instruction is appropriate.

d. **Constructive Discharge:** If the adverse employment action alleged by plaintiff is constructive discharge, the Committee suggests altering the instruction as follows:

> Plaintiff claims that he quit his job because Defendant made his working conditions intolerable. This is called a 'constructive discharge'. To succeed on this claim, Plaintiff must prove two things by a preponderance of the evidence.
>
> 1. Defendant made Plaintiff's working conditions so intolerable that a reasonable person in Plaintiff's position would have had to quit; and
>
> 2. Defendant would not have made Plaintiff's working conditions so intolerable had Plaintiff not been [*protected class*] but everything else had been the same.

*See Pennsylvania State Police v. Suders*, ___ U.S. ___, 124 S.Ct. 2342 (2004); *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 616-617 (1993); *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 134-135, (1988); *McPherson v. City of Waukegan*, 379 F.3d 430, 440 (7th Cir. 2004).

The nature of the claimed constructive discharge may require some modification of the pattern instruction. *See, e.g., EEOC v. University of Chicago Hospitals*, 276 F.3d 326, 331 (7th Cir. 2002) ("[w]hen an employer acts in a manner so as to have communicated to a reasonable employee that she will be terminated, and the plaintiff employee resigns, the employer's conduct may amount to constructive discharge").

e. **Materially Adverse Employment Action:** In rare cases, a fact issue might arise about whether the plaintiff actually suffered a "materially adverse employment action." In such cases, a court should modify the instructions to provide the jury with guidance as to what this term means. The Committee suggests the following language:

> Plaintiff must prove that his [*alleged consequence of Defendant's conduct*] was a "materially adverse employment action." Not everything that makes an employee unhappy is a materially adverse employment action. It must be something more than a minor or trivial inconvenience. For example, a materially adverse employment action exists when someone's pay or benefits are decreased; when his job is changed in a way that significantly reduces his career prospects; or when job conditions are changed in a way that significantly changes his work environment in an unfavorable way.

*See Herrnreiter v. Chicago Housing Auth.*, 315 F.3d 742 (7th Cir. 2002); *see also Crady v. Liberty*

*Nat'l Bank & Trust Co.*, 993 F.2d 132, 136 (7th Cir. 1993); *Smart v. Ball State Univ.*, 89 F.3d 437, 441 (7th Cir. 1996).

## 3.02 RETALIATION

Plaintiff claims that he was [*adverse action*] by Defendant because of [*protected activity*]. To succeed on this claim, Plaintiff must prove by a preponderance of the evidence that Defendant [*adverse action*] him because of his [*protected activity*]. To determine that Plaintiff was [*adverse action*] because of his [*protected activity*], you must decide that Defendant would not have [*taken adverse action against*] Plaintiff if he had [*not engaged in protected activity*] but everything else had been the same.

If you find that Plaintiff has proved this by a preponderance of the evidence, then you must find for Plaintiff. However, if you find that Plaintiff did not prove this by a preponderance of the evidence, then you must find for Defendant.

### Committee Comments

a. **Scope**: This instruction is to be used in Title VII, § 1981, and ADEA cases after the general instruction.

b. **Authority**: *Schobert v. Illinois Dept. of Transportation*, 304 F.3d 725 (7th Cir. 2002) ("Yet IDOT has not offered a reason why McDonnell Douglas burden-shifting should apply in cases of retaliation during trial proceedings . . . but not in straightforward discrimination trials."); *Stone v. City of Indianapolis Public Utilities Div.*, 281 F.3d 640 (7th Cir. 2002).

c. **Good Faith Belief:** In many cases, the question of what constitutes a protected activity will not be contested. Where it is, however, the instruction should be revised as follows:

> Plaintiff claims that he was [*adverse employment action*] by Defendant because of [*protected activity*]. To succeed in this claim, Plaintiff must prove two things by a preponderance of the evidence:
>
> 1. His [*protected activity*] was based on a reasonable, good faith belief that [*describe Plaintiff's belief regarding his protected activity, e.g., that he was fired because of his race*]. This does not, however, require Plaintiff to show that what he believed was correct.
>
> 2. Defendant would not have [*adverse employment action*] Plaintiff if he had [*not engaged in protected activity*] but everything else had been the same.

*See Fine v. Ryan Int'l Airlines*, 305 F.3d 746, 752 (7th Cir. 2002). *See also Mattson v. Caterpillar, Inc.*, 359 F.3d 885, 891 (7th Cir. 2004) (underlying claim "must not be utterly baseless").

**d. Adverse Action:** What constitutes an "adverse employment action" in the context

of a retaliation claim is not entirely clear. *See Herrnreiter v. Chicago Housing Auth.*, 315 F.3d 742, 746 (7th Cir. 2002). The Committee does not use "adverse action" in this instruction as a term of art, but merely as a placeholder for the specific act alleged.

## 3.03 PATTERN OR PRACTICE

Plaintiff claims that Defendant had a pattern or practice of discriminating against [*protected class*]. To succeed on this claim, Plaintiff must prove by a preponderance of the evidence that [*protected class*] discrimination was Defendant's regular practice, rather than something unusual. If you find that Plaintiff has not proved this, you must find for Defendant.

If you find that Plaintiff has proved that Defendant had a pattern or practice of discriminating, then you must answer another question: Did Defendant prove by a preponderance of the evidence that it would have [*adverse employment action*] Plaintiff even if it had not made a regular practice of [*protected class*] discrimination? If you find that Defendant has proved this by a preponderance of the evidence, your verdict should be for Defendant. If you find that Defendant has not proved this, your verdict should be for Plaintiff.

### Committee Comments

a. **Authority:** *Adams v. Ameritech Services, Inc.*, 231 F.3d 414, 422 (7th Cir. 2000) (quoting *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 336 (1977)); *King v. General Elec. Co.*, 960 F.2d 617 (7th Cir. 1992).

b. **Class Actions:** In a class action claim, a court should provide only the first paragraph, as the second paragraph will be provided during the damages phase of the trial. If this is an individual pattern or practice claim, then the court should provide both paragraphs to the jury.

## 3.04 HARASSMENT BY CO-EMPLOYEE OR THIRD PARTY

In this case, Plaintiff claims that he was [*e.g., racially/sexually*] harassed at work. To succeed on this claim, Plaintiff must prove seven things by a preponderance of the evidence:

1. Plaintiff was subjected to [*alleged conduct*];

2. The conduct was unwelcome;

3. The conduct occurred because Plaintiff was [*e.g., race/sex*];

4. The conduct was sufficiently severe or pervasive that a reasonable person in plaintiff's position would find plaintiff's work environment to be hostile or abusive;

5. At the time the conduct occurred, Plaintiff believed that the conduct made his work environment hostile or abusive;

6. Defendant knew or should have known about the conduct; and

7. Defendant did not take reasonable steps to [correct the situation] / [prevent harassment from recurring].

If you find that Plaintiff has proved by a preponderance of the evidence each of the things required of him, then you must find for Plaintiff. However, if Plaintiff did not prove by a preponderance of the evidence each of the things required of him, then you must find for Defendant.

### Committee Comments

a. **Authority:** *See Kriescher v. Fox Hills Golf Resort and Conf. Ctr. FHR, Inc.*, 384 F.3d 912, 915 (7th Cir. 2004); *Rizzo v. Sheahan*, 266 F.3d 705, 711-712 (7th Cir. 2001); *Hostetler v. Quality Dining, Inc.*, 218 F.3d 798, 806-807 (7th Cir. 2000); *Pryor v. Seyfarth, Shaw, Fairweather & Geraldson*, 212 F.3d 976 (7th Cir. 2000); *Parkins v. Civil Contractors, Inc.*, 163 F.3d 1027, 1032 (7th Cir. 1998); *Tutman v. CBS, Inc.*, 209 F.3d 1044, 1048 (7th Cir.2000); *Berry v. Delta Airlines, Inc.*, 260 F.3d 803, 811 (7th Cir. 2001) ("An employer's response to alleged instances of employee harassment must be reasonably calculated to prevent further harassment under the particular facts and circumstances of the case at the time the allegations are made.").

b. **No Dispute as to Alleged Conduct:** If no dispute exists that the defendant's alleged conduct took place, a court should simplify the instruction by changing the beginning of the

instruction as follows:

> In this case, Plaintiff claims that she was [*e.g., racially/sexually*] harassed at work [*describe conduct*]. To succeed in her claim, Plaintiff must prove six things by a preponderance of the evidence:
>
> 1. The conduct was unwelcome;
>
> 2. Plaintiff was subjected to this conduct because she was [*e.g., race/sex*];

The remainder of the instruction should remain the same.

c. **Hostile or Abusive Work Environment:** In some cases, a court may want to give the jury more guidance on what constitutes a hostile or abusive work environment. If so, the Committee suggests the following language:

> To decide whether a reasonable person would find Plaintiff's work environment hostile or abusive, you must look at all the circumstances. These circumstances may include the frequency of the conduct; its severity; its duration; whether it was physically threatening or humiliating, and whether it unreasonably interfered with the plaintiff's work performance. No single factor is required in order to find a work environment hostile or abusive.

See *Faragher v. City of Boca Raton*, 524 U.S. 775, 787-788 (1998); *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23 (1993); EIGHTH CIRCUIT MODEL CIVIL JURY INSTRUCTIONS § 5.42 Committee Comments (2001). *See also Mason v. Southern Illinois University at Carbondale*, 233 F.3d 1036, 1044-1045 (7th Cir. 2000) ("If a plaintiff claims that he is suffering a hostile work environment based on the conduct of coworkers *and* supervisors, then under the Supreme Court's totality of circumstances approach . . . all instances of harassment by all parties are relevant to proving that his environment is sufficiently severe or pervasive . . . Courts should not carve up the incidents of harassment and then separately analyze each incident, by itself, to see if each rises to the level of being severe or pervasive.").

d. **Ameliorating Instruction:** As an optional addition to the instruction, the Committee suggests that a court consider including the following language:

> Conduct that amounts only to ordinary socializing in the workplace, such as occasional horseplay, sexual flirtation, sporadic or occasional use of abusive language, gender related jokes, and occasional teasing, does not constitute an abusive or hostile environment. You should consider all the circumstances and the social context in which the conduct occurred. Only conduct amounting to a material change in the terms and conditions of employment amounts to an abusive or hostile

environment.

## 3.05A. SUPERVISOR HARASSMENT WITH TANGIBLE EMPLOYMENT ACTION

Plaintiff claims that he was [*e.g., racially/sexually*] harassed by [*Alleged Supervisor*]. To succeed on this claim, Plaintiff must prove seven things by a preponderance of the evidence.

1. [*Name*] was Plaintiff's supervisor. A supervisor is someone who can affect the conditions of Plaintiff's employment. By this I mean someone who has the power to [hire, fire, demote, promote, transfer or discipline Plaintiff] [significantly change Plaintiff's benefits].

2. Plaintiff was subjected to [*alleged conduct*];

3. The conduct was unwelcome;

4. The conduct occurred because Plaintiff was [*e.g., race/sex*];

5. The conduct was sufficiently severe or pervasive that a reasonable person in Plaintiff's position would find Plaintiff's work environment to be hostile or abusive;

6. At the time the conduct occurred, Plaintiff believed that the conduct made his work environment hostile or abusive; and

7. [*Name's*] conduct caused Plaintiff [*adverse employment action*].

If you find that Plaintiff has proved by a preponderance of the evidence each of the things required of him, then you must find for Plaintiff. However, if Plaintiff did not prove by a preponderance of the evidence each of the things required of him, then you must find for Defendant.

### Committee Comments

a. **Scope:** This instruction should be used where the parties do not dispute that the plaintiff experienced a tangible employment action, such as a demotion, a discharge, or an undesirable reassignment. *See Burlington Indus. v. Ellerth,* 524 U.S. 742, 753-754 (1998). In such situations, affirmative defenses are unavailable to the defendant. *Id. See also Faragher v. City of Boca Raton,* 524 U.S. 775, 808 (1998). For cases where no tangible employment action took place, see Instruction 3.05B, below. For guidance on modifying the instruction in cases where the parties dispute whether the supervisor's conduct led to a tangible employment action, see Committee

comment d to Instruction 3.05B, below.

b. **Supervisor Definition:** *See NLRB v. Kentucky River Cmty. Care*, 532 U.S. 706, 713 (2001); *Faragher v. City of Boca Raton*, 524 U.S. 775, 798 (1998); *NLRB v. Yeshiva Univ.*, 444 U.S. 672, 682-691 (1980); *American Diversified Foods, Inc. v. NLRB*, 640 F.2d 893, 894 (7th Cir. 1981).

c. **Employer's Vicarious Liability for Supervisor Conduct:** *See Faragher v. City of Boca Raton*, 524 U.S. 775 (1998); *Burlington Indus. v. Ellerth*, 524 U.S. 742 (1998); *Hostetler v. Quality Dining, Inc.*, 218 F.3d 798, 806 (7th Cir. 2000); *Parkins v. Civil Constructors of Ill., Inc.*, 163 F.3d 1027, 1032 (7th Cir. 1998).

d. **Hostile or Abusive Work Environment:** In some cases, a court may want to give the jury more guidance on what constitutes a hostile or abusive work environment. If so, the Committee suggests the following language:

> To decide whether a reasonable person would find Plaintiff's work environment hostile or abusive, you must look at all the circumstances. These circumstances may include the frequency of the conduct; its severity; its duration; whether it was physically threatening or humiliating, and whether it unreasonably interfered with the plaintiff's work performance. No single factor is required in order to find a work environment hostile or abusive.

See *Faragher v. City of Boca Raton*, 524 U.S. 775, 787-788 (1998); *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23 (1993); EIGHTH CIRCUIT MODEL CIVIL JURY INSTRUCTIONS § 5.42 Committee Comments (2001).

e. **Constructive Discharge:** If the adverse employment action alleged by plaintiff is constructive discharge, the Committee suggests altering the instruction as follows:

> 7. Plaintiff quit his job because [*Name*]'s conduct made Plaintiff's working conditions so intolerable that a reasonable person in Plaintiff's position would have had to quit.

*See Pennsylvania State Police v. Suders*, ___ U.S. ___, 124 S.Ct. 2342 (2004); *Jordan v. City of Gary*, 396 F.3d 825, 836 (7th Cir. 2005).

f. **Facts Not in Dispute:** A court should modify the instruction to account for situations where facts are not in dispute. For example, if the parties do not dispute that the alleged harasser is the plaintiff's supervisor, a court does not need to give the first element of the instruction. Similarly, if the parties do not dispute that the defendant's alleged conduct took place, a court should describe the conduct at the beginning of the instruction and then modify the instruction by replacing the elements 2-4 with the following two elements:

2. The conduct was unwelcome;

3. Plaintiff was subjected to this conduct because he was [*e.g., race/sex*];

The remainder of the instruction should remain the same.

## 3.05B SUPERVISOR HARASSMENT WITH NO TANGIBLE EMPLOYMENT ACTION

Plaintiff claims that he was [*e.g., racially/sexually*] harassed by [*Alleged Supervisor*]. To succeed on this claim, Plaintiff must prove six things by a preponderance of the evidence.

1. [*Name*] was Plaintiff's supervisor. A supervisor is someone who can affect the conditions of Plaintiff's employment. By this I mean someone who has the power to hire, fire, demote, promote, transfer or discipline Plaintiff [significantly change Plaintiff's benefits].

2. Plaintiff was subjected to [*alleged conduct*];

3. The conduct was unwelcome;

4. The conduct occurred because Plaintiff was [*e.g., race/sex*];

5. The conduct was sufficiently severe or pervasive that a reasonable person in plaintiff's position would find plaintiff's work environment to be hostile or abusive.

6. At the time the conduct occurred, Plaintiff believed that the conduct made his work environment hostile or abusive.

If you find that Plaintiff did not prove by a preponderance of the evidence each of the things required of him, then you must find for Defendant. If, on the other hand, Plaintiff has proved each of these things, you must go on to consider whether Defendant has proved two things by a preponderance of the evidence:

1. Defendant exercised reasonable care to prevent and correct any harassing conduct in the workplace.

2. Plaintiff unreasonably failed to take advantage of opportunities provided by Defendant to prevent or correct harassment, or otherwise avoid harm.

If you find that Defendant has proved these two things by a preponderance of the evidence, your verdict should be for Defendant. If you find that Defendant has not proved both of these things, your verdict should be for Plaintiff.

## Committee Comments

a. **Scope:** This instruction should be used when a supervisor's alleged harassment has *not* led to a tangible employment action. In such cases, the affirmative defense set out in the instruction becomes available to the defendant. *See Loughman v. Malnati Organization Inc.*, 395 F.3d 404, 407 (7th Cir. 2005); *Hill v. American General Finance, Inc.*, 218 F.3d 639, 643 (7th Cir. 2000) (citing *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998) and *Burlington Indus. v. Ellerth*, 524 U.S. 742 (1998)). In cases where the defendant does not raise the affirmative defense, the beginning of the instruction should be modified as follows:

> Plaintiff claims that he was [*e.g., racially/sexually*] harassed by [*Name of Alleged Supervisor*]. To succeed on his claim against Defendant, Plaintiff must prove six things by a preponderance of the evidence.

The remainder of the instruction should remain the same, with the instruction concluding after the jury receives the sixth element of the claim.

b. **Supervisor Definition:** *See NLRB v. Kentucky River Cmty. Care*, 532 U.S. 706, 713 (2001); *Faragher v. City of Boca Raton*, 524 U.S. 775, 798 (1998); *NLRB v. Yeshiva Univ.*, 444 U.S. 672, 682-691 (1980); *American Diversified Foods, Inc. v. NLRB*, 640 F.2d 893, 894 (7th Cir. 1981).

c. **Employer's Vicarious Liability for Supervisor Conduct:** *See Faragher v. City of Boca Raton*, 524 U.S. 775 (1998); *Burlington Indus. v. Ellerth*, 524 U.S. 742 (1998); *Hostetler v. Quality Dining, Inc.*, 218 F.3d 798, 806 (7th Cir. 2000); *Parkins v. Civil Constructors of Ill., Inc.*, 163 F.3d 1027, 1032 (7th Cir. 1998).

d. **Hostile or Abusive Work Environment**: In some cases, a court may want to give the jury more guidance on what constitutes a hostile or abusive work environment. If so, the Committee suggests the following language:

> To decide whether a reasonable person would find Plaintiff's work environment hostile or abusive, you must look at all the circumstances. These circumstances may include the frequency of the conduct; its severity; its duration; whether it was physically threatening or humiliating, and whether it unreasonably interfered with the plaintiff's work performance. No single factor is required in order to find a work environment hostile or abusive.

See *Faragher v. City of Boca Raton*, 524 U.S. 775, 787-788 (1998); *Harris v. Forklift System, Inc.*, 510 U.S. 17, 23 (1993); *Dandy v. United Parcel Svc., Inc.*, 388 F.3d 263, 270 (7th Cir. 2004); EIGHTH CIRCUIT MODEL CIVIL JURY INSTRUCTIONS § 5.42 Committee Comments (2001).

e. **Tangible Employment Action Disputed:** In some cases, the parties might dispute whether the supervisor's alleged harassment led to a tangible employment action. In such situations,

a court should modify the instruction by including the following language after listing the elements:

> If Plaintiff did not prove each of these things by a preponderance of the evidence, you must find for Defendant. If you find that Plaintiff has proved all of these things by a preponderance of the evidence, you must consider whether Plaintiff can prove one additional fact: That [*Name*]'s conduct caused Plaintiff [*adverse employment action*].
>
> If so, your verdict must be for Plaintiff. If not, you must go on to consider whether Defendant has proved two things to you by a preponderance of the evidence.

The remainder of the instruction should remain the same.

f. **Facts Not in Dispute:** A court should modify the instruction to account for situations where facts are not in dispute. For example, if the parties do not dispute that the alleged harasser is the plaintiff's supervisor, a court does not need to give the first element of the instruction. Similarly, if the parties do not dispute that the defendant's alleged conduct took place, a court should describe the conduct at the beginning of the instruction and then modify the instruction by replacing the elements 2-4 with the following two elements:

> 2. the conduct was unwelcome;
>
> 3. Plaintiff was subjected to this conduct because he was [*e.g., race/sex*];

The remainder of the instruction should remain the same.

g. **Plaintiff Complaint and Defendant Response:** At the time of the Committee's work, the Seventh Circuit had not addressed the issue of whether a defendant can exculpate itself by taking immediate remedial measures after a plaintiff has complained about harassment. Other circuits are split. *Compare Indest v. Freeman Decorating, Inc.*, 164 F.3d 258, 265 (5th Cir. 1999) (defense available because "plaintiff has received the benefit Title VII was meant to confer") *with Harrison v. Eddy Potash, Inc.*, 248 F.3d 1014, 1025-1026 (10th Cir. 2001) (employer's "prompt corrective action" is not alone sufficient to avoid employer liability for supervisor harassment under Title VII).

## 3.06 WILLFULNESS: WHERE AGE DISCRIMINATION IS ALLEGED

If you find for Plaintiff, you must then decide whether Defendant willfully violated the Age Discrimination in Employment Act. To show this, Plaintiff must prove by a preponderance of the evidence that Defendant knew that it was violating the Age Discrimination in Employment Act, or was indifferent to whether its actions violated the Age Discrimination in Employment Act, and not simply that Defendant was aware that it was engaging in age discrimination.

### Committee Comments

*See Hazen Paper Co. v. Biggins*, 507 U.S. 604, 616-617 (1993); *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 134-135 (1988); *Appelbaum v. Milwaukee Metro. Sewerage Dist.*, 340 F.3d 573, 582 (7th Cir. 2003); *Mathis v. Phillips Chevrolet, Inc.*, 269 F.3d 771, 777 (7th Cir. 2001) ("A defendant's negligent mistake concerning the lawfulness of her conduct does not suffice to make that conduct 'willful,' but a reckless mistake, in the criminal law sense of indifference to whether the conduct violates the law, does.").

## 3.07 CAUTIONARY INSTRUCTION ON REASONABLENESS OF DEFENDANT'S ACTION

In deciding Plaintiff's claim, you should not concern yourselves with whether Defendant's actions were wise, reasonable, or fair. Rather, your concern is only whether Plaintiff has proved that Defendant [*adverse employment action*] him [because of race/sex] [in retaliation for complaining about discrimination].

### Committee Comments

The Committee suggests that a court give this cautionary instruction at its discretion in Title VII, § 1981, and ADEA cases.

## 3.08 DISPARATE IMPACT

### Committee Comments

The Committee did not include a disparate impact instruction because there are no jury trials under Title VII for disparate impact, 42 U.S.C. § 1981a(a)(1) & (c), and when the Committee submitted its work for promulgation, there was no viable ADEA disparate impact theory in this circuit. In Smith v. City of Jackson, Miss., 125 S. Ct. 1536 (2005), the Court held that the ADEA authorizes recovery in disparate impact cases. At the time the Circuit Council authorized publication of these instructions, too little case law existed for the Committee to draft a pattern instruction on this topic with any confidence.

## 3.09 DAMAGES: GENERAL

If you find that Plaintiff has proved [any of] his claim[s] against [any of] Defendant[s], then you must determine what amount of damages, if any, Plaintiff is entitled to recover. Plaintiff must prove his damages by a preponderance of the evidence.

If you find that Plaintiff has failed to prove [any of] his claim[s], then you will not consider the question of damages.

### Committee Comments

These pattern damage instructions are applicable, with certain limitations, to single plaintiff discrimination and retaliation claims under Title VII of the 1964 Civil Rights Act, 42 U.S.C. §2000e et seq., the Age Discrimination in Employment Act, 29 U.S.C. §621 et seq., the Americans with Disabilities Act, 42 U.S.C. §12101 et seq., and the Civil Rights Act of 1866, 42 U.S.C. §1981. Damages instructions relating to claims under the Equal Pay Act, 29 U.S.C. §206(d), are contained in the pattern instructions under that Act. *See* Instruction No. 5.11. An instruction relating to the recovery of liquidated damages under the Age Discrimination in Employment Act is contained in the pattern employment discrimination instructions. *See* Instruction No. 3.06.

## 3.10 COMPENSATORY DAMAGES

You may award compensatory damages only for injuries that Plaintiff has proved by a preponderance of the evidence were caused by Defendant's wrongful conduct.

Your award must be based on evidence and not speculation or guesswork. This does not mean, however, that compensatory damages are restricted to the actual loss of money; they include both the physical and mental aspects of injury, even if they are not easy to measure.

In calculating damages, you should not consider the issue of lost wages and benefits. The court will calculate and determine any damages for past or future lost wages and benefits. You should consider the following types of compensatory damages, and no others:

[1. The physical [and mental/emotional] pain and suffering [and disability/loss of a normal life] that Plaintiff has experienced [and is reasonably certain to experience in the future]. No evidence of the dollar value of physical [or mental/emotional] pain and suffering [or disability/loss of a normal life] has been or needs to be introduced. There is no exact standard for setting the damages to be awarded on account of pain and suffering. You are to determine an amount that will fairly compensate Plaintiff for the injury he has sustained.]

[2. The reasonable value of medical care that Plaintiff reasonably needed and actually received [as well as the present value of the care that he is reasonably certain to need and receive in the future.]]

[3. *Describe any expenses, other than lost pay, that Plaintiff reasonably incurred or will incur in the future as a direct result of the Defendant's discrimination/retaliation.*]

[4. *Describe any loss (other than lost pay) caused by Defendant in Plaintiff's future earning capacity*.]

### Committee Comments

a. **ADEA:** Compensatory damages are not available under the ADEA, except for a retaliation claim. *Pfeifer v. Essex Wire Corp.*, 682 F.2d 684, 68-688 (7th Cir. 1982); *Moskowitz v. Trustees of Purdue Univ.*, 5 F.3d 279, 283-284 (7th Cir. 1993).

b. **ADA Retaliation Claims:** Compensatory damages are not available on ADA retaliation claims. *Kramer v. Banc of Am. Sec.*, 355 F.3d 961, 965 (7th Cir. 2004).

c. **Back Pay and Front Pay:** Under Title VII and the ADA, back pay and front pay are equitable remedies to be decided by the court. However, the court may empanel the jury as an advisory jury on the issue; or the parties may, with the court's consent, agree that the jury will decide the issue. *Pals v. Schepel Buick & GMC Truck, Inc.*, 220 F.3d 495, 499-501 (7th Cir. 2000). Front pay is typically awarded in cases where the equitable remedy of reinstatement is unavailable. *Hildebrandt v. Illinois Dep't of Natural Resources*, 347 F.3d 1014, 1031 (7th Cir. 2003); *Williams v. Pharmacia Inc.*, 137 F.3d 944, 951-952 (7th Cir. 1998).

d. **Lost Future Earnings:** Compensatory damages may include "lost future earnings," *i.e.*, the diminution in expected earnings in all future jobs due to reputational or other injuries, over and above any front pay award. Where there is such evidence, the language should be drafted for use in the bracketed fourth paragraph. Care must be taken to distinguish front pay and lost future earnings, which serve different functions. *Williams v. Pharmacia, Inc.*, 137 F.3d 944, 953-954 (7th Cir. 1998):

> [T]he calculation of front pay differs significantly from the calculation of lost future earnings. Whereas front pay compensates the plaintiff for the lost earnings from her old job for as long as she may have been expected to hold it, a lost future earnings award compensates the plaintiff for the diminution in expected earnings in all of her future jobs for as long as the reputational or other injury may be expected to affect her prospects. * * * [W]e caution lower courts to take care to separate the equitable remedy of front pay from the compensatory remedy of lost future earnings. * * * Properly understood, the two types of damages compensate for different injuries and require the court to make different kinds of calculations and factual findings. District courts should be vigilant to ensure that their damage inquiries are appropriately cabined to protect against confusion and potential overcompensation of plaintiffs.

A special interrogatory may be necessary for the court to prevent a double recovery.

## 3.11 BACK PAY

If you find that Plaintiff has proven his claim of [discrimination/retaliation] by a preponderance of the evidence, you may award him as damages any lost wages and benefits he would have received from the Defendant if he had not been [*adverse employment action*] [minus the earnings and benefits that plaintiff received from other employment during that time [that he would not otherwise have received]]. [It is Plaintiff's burden to prove that he lost wages and benefits and their amount. If he fails to do so for any periods of time for which he seeks damages, then you may not award damages for that time period.]

### Committee Comments

a. **Usage:** Ordinarily, this instruction will not be given, because back pay is an equitable remedy to be decided by the court. *See, e.g., David v. Caterpillar, Inc.*, 324 F.3d 851, 866 (7th Cir. 2003). However, the court may empanel the jury as an advisory jury on the issue; or the parties may, with the court's consent, agree that the jury will decide the issue. *Pals v. Schepel Buick & GMC Truck, Inc.*, 220 F.3d 495, 499-501 (7th Cir. 2000).

b. **Limiting Subsequent Events:** Where the plaintiff's back pay damages are limited by subsequent events, the court should instruct the jury that it may not award back pay damages beyond that event. For example, such a limiting instruction may be appropriate where a plaintiff alleging unlawful discharge subsequently obtains a higher paying job or is offered reinstatement by the employer, *Ford Motor Co. v. EEOC*, 458 U.S. 219, 232-234 (1982); where a plaintiff challenging a denial of a promotion subsequently voluntarily resigns in circumstances not amounting to a constructive discharge, *Hertzberg v. SRAM Corp.*, 261 F.3d 651, 660 n.8 (7th Cir. 2001); where a plaintiff has voluntarily removed himself from the labor market, *Hunter v. Allis-Chalmers Corp.*, 797 F.2d 1417, 1428 (7th Cir. 1986); where a plaintiff becomes medically unable to work, *Flowers v. Komatsu Mining Sys., Inc.*, 165 F.3d 554, 557-558 (7th Cir. 1999); where periodic plant shutdowns limit the amount of time the plaintiff could have worked had he not been terminated, *Gaddy v. Abex Corp.*, 884 F.2d 312, 320 (7th Cir. 1989); or where plaintiff inexcusably delayed in prosecuting his case, *Kamberos v. GTE Automatic Elec. Inc.*, 603 F.2d 598, 603 (7th Cir. 1979).

c. **Burden of Proof:** The plaintiff bears the burden of presenting evidence that he had lost wages and benefits and their amount. *Horn v. Duke Homes, Div. of Windsor Mobile Homes*, 755 F.2d 599, 606-608 (7th Cir. 1985). In many cases, whether the plaintiff has presented evidence to satisfy this burden will not be in dispute. In the event it is, the instruction regarding Plaintiff's burden should be given.

d. **Mitigation:** If failure to mitigate is an issue, a separate instruction is provided. *See* Instruction 3.12.

e. **Multiple Claims:** Where a plaintiff has multiple claims that might result in separate damage determinations, for example a claim of unlawful failure to promote paired with a claim of unlawful termination, the court should instruct separately on the back pay damages determination as to each claim.

## 3.12 MITIGATION

Defendant argues that Plaintiff's claim for lost wages and benefits should be reduced by [*describe the reduction*].

If you find that

1. Plaintiff did not take reasonable actions to reduce his damages, and

2. that Plaintiff reasonably might have found comparable employment if he had taken such action,

you should reduce any amount you might award Plaintiff for [lost wages] [benefits] [other damages] by the amount Plaintiff reasonably would have earned during the period for which you are awarding [lost wages] [benefits] [other damages].

Defendant must prove both that the reduction should be made and its amount.

### Committee Comments

a. **General:** This instruction reflects the "obvious policy imported from the general theory of damages, that a victim has a duty 'to use such means as are reasonable under the circumstances to avoid or minimize the damages' that result from violations of [Title VII] . . . ." *Gawley v. Indiana University*, 276 F.3d 301, 312 (7th Cir. 2001) (internal citations omitted). The defendant bears the burden of showing that the plaintiff did or could have mitigated his damages and the amount. *Sheehan v. Donlen Corp.*, 173 F.3d 1039, 1048-1049 (7th Cir. 1999); *Horn v. Duke Homes, Div. of Windsor Mobile Homes, Inc.*, 755 F.2d 599, 606-608 (7th Cir. 1985).

b. **Interim Wages and Benefits:** Interim wages and benefits earned by the plaintiff or earnable with reasonable diligence will reduce the amount of lost wages and benefits awardable. 42 U.S.C. §2000e-5(g)(1); *Orzel v. City of Wauwatosa*, 697 F.2d 743, 756 (7th Cir. 1983) (ADEA). Additionally, the court may determine that lost wages and benefits should be reduced by other amounts as well. *Wilson v. Chrysler Corp.*, 172 F.3d 500, 511 (7th Cir. 1999) (disability benefits provided by the employer); *Flowers v. Komatsu Mining Sys., Inc.*, 165 F.3d 554, 558 (7th Cir. 1999) (Social Security disability benefits); *Chesser v. State of Illinois*, 895 F.2d 330, 337-338 (7th Cir. 1990) (wages from moonlighting jobs plaintiff could not have held had he continued to be employed); *Syvock v. Milwaukee Boiler Mfg. Co.,*, 665 F.2d 149, 161-162 (7th Cir. 1981) (unemployment benefits). In such situations, the court should instruct appropriately.

c. **Usage:** This instruction is not intended to be sufficient if the plaintiff claims non-employment-related compensatory damages.

## 3.13 PUNITIVE DAMAGES

If you find for Plaintiff, you may, but are not required to, assess punitive damages against Defendant. The purposes of punitive damages are to punish a defendant for his conduct and to serve as an example or warning to Defendant and others not to engage in similar conduct in the future.

Plaintiff must prove by a preponderance of the evidence that punitive damages should be assessed against Defendant. You may assess punitive damages only if you find that [his conduct] [the conduct of Defendant's [managerial employees, officers],] was in reckless disregard of Plaintiff's rights. An action is in reckless disregard of Plaintiff's rights if taken with knowledge that it may violate the law.

[Plaintiff must prove by a preponderance of the evidence that Defendant's [managerial employees, officers] acted within the scope of their employment and in reckless disregard of Plaintiff's right not to be [discriminated and/or retaliated] against. [In determining whether [*Name*] was a managerial employee of Defendant, you should consider the kind of authority Defendant gave him, the amount of discretion he had in carrying out his job duties and the manner in which he carried them out.] You should not, however, award Plaintiff punitive damages if Defendant proves that it made a good faith effort to implement an anti-discrimination policy.]

If you find that punitive damages are appropriate, then you must use sound reason in setting the amount of those damages. Punitive damages, if any, should be in an amount sufficient to fulfill the purposes that I have described to you, but should not reflect bias, prejudice, or sympathy toward either/any party. In determining the amount of any punitive damages, you should consider the following factors:

- the reprehensibility of Defendant's conduct;

- the impact of Defendant's conduct on Plaintiff;

- the relationship between Plaintiff and Defendant;

- the likelihood that Defendant would repeat the conduct if an award of punitive damages is not made;

[- Defendant's financial condition;]

- the relationship of any award of punitive damages to the amount of actual

harm the Plaintiff suffered.

**Committee Comments**

a. **Authority:** Title 42 U.S.C. §1981a(b)(1) states that punitive damages may be awarded where the Defendant "engaged in a discriminatory practice… with malice or with reckless indifference to the federally protected rights of an aggrieved individual." *Kolstad v. American Dental Ass'n*, 527 U.S. 526, 535 (1999), interprets "malice" or "reckless disregard" to refer to the employer's knowledge that it may be violating federal law. For cases applying this standard, *see, e.g., Hertzberg v. SRAM Corp.*, 261 F.3d 651, 661-662 (7th Cir. 2001); *Cooke v. Stefani Mgmt. Services, Inc.*, 250 F.3d 564, 568-570 (7th Cir. 2001); *Gile v. United Airlines, Inc.*, 213 F.3d 365, 375-376 (7th Cir. 2000). The same standard applicable to punitive damages claims under 42 U.S.C. §1981a(b)(1) applies under 42 U.S.C. §1981. *Lowery v. Circuit City Stores, Inc.*, 206 F.3d 431, 440-441 (4th Cir. 2000). Because including the term malice is potentially confusing in light of his interpretation, it is not used in the instruction.

b. **Governmental Entities:** Punitive damages are not available against a government, government agency, or political subdivision. 42 U.S.C. § 1981a(b)(1).

c. **ADEA:** Punitive damages are not available under the ADEA, except for a retaliation claim. *Pfeifer v. Essex Wire Corp.*, 682 F.2d 684, 687-688 (7th Cir. 1982); *Moskowitz v. Trustees of Purdue Univ.*, 5 F.3d 279, 283-284 (7th Cir. 1993).

d. **ADA Retaliation Claims:** Punitive damages are not available on ADA retaliation claims. *Kramer v. Banc of America Sec., LLC,* 355 F.3d 961, 965 (7th Cir. 2004).

e. **Managerial Capacity:** Where there is an issue as to whether an employee was acting in a managerial capacity justifying the imposition of punitive damages, the relevant bracketed portion of the instruction should be included. *Hertzberg v. SRAM Corp.*, 261 F.3d 651, 663 (7th Cir. 2001).

f. **Defendant's Financial Condition as Punitive Damages Consideration.** This element should not be included if there was no evidence of the defendant's financial condition. The Committee takes no position on whether emerging law makes this element inappropriate. *See State Farm Mut. Ins. Co. v. Campbell*, 538 U.S. 408, 427-428 (2003) ("The remaining premises for the Utah Supreme court's decision bear no relation to the award's reasonableness or proportionality to the harm. . . The wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award."); *BMW of North Am., Inc. v. Gore*, 517 U.S. 559, 573-583 (1996) (Court did not include the defendant's wealth as a relevant factor when considering punitive damages); *Zazu Designs v. L'Oreal, S.A.*, 979 F.2d 499, 508-509 (7th Cir. 1992) (noting that a corporate defendant's net worth is irrelevant to the assessment of punitive damages against it); *Pivot Point Int'l, Inc. v. Charlene Products, Inc.*, 932 F. Supp. 220, 223 (N.D. Ill. 1996)(evidence concerning financial information "has . . . [the] potential to distract the jury from the essential issues of the case.").

# 4. EMPLOYMENT DISCRIMINATION: AMERICANS WITH DISABILITIES ACT

## 4.01 NATURE OF ADA CLAIM AND DEFENSE

Plaintiff has brought this lawsuit under a federal law called the Americans with Disabilities Act, which is often referred to by its initials, "ADA." Under the ADA, it is illegal for an employer to discriminate against a person with a disability if that person is qualified to do the essential functions of his job and the employer is aware of his limitations.

In this case, Plaintiff claims that Defendant discriminated against him by [not accommodating his disability] / [not hiring/not promoting/ firing him because he had a disability]. Defendant denies that it discriminated against Plaintiff and says that [*describe Defendant's theory of defense, if applicable*].

As you listen to these instructions, please keep in mind that many of the terms I will use have a special meaning under the law. So please remember to consider the specific definitions I give you, rather than using your own opinion as to what these terms mean.

### Committee Comments

This instruction is based upon ELEVENTH CIRCUIT PATTERN JURY INSTRUCTION—CIVIL §§ 1.5.1 ("Disparate Treatment Claim") and 1.5.2 ("Reasonable Accommodation Claim") (2000). The instruction also conforms with *Weigel v. Target Stores*, 122 F.3d 461, 463-465 (7th Cir. 1997).

## 4.02 ELEMENTS OF AN ADA CLAIM – DISPARATE TREATMENT (NON-ACCOMMODATION) CASES

To succeed in this case, Plaintiff must prove four things by a preponderance of the evidence:

1. [Plaintiff had/ Defendant regarded Plaintiff as having/ Plaintiff had a record of] a disability. I will define "disability" and several other important terms for you in a few minutes;

2. Plaintiff was "qualified" to perform the job;

3. Defendant [*describe adverse employment action*] Plaintiff;

4. Defendant would not have [*taken action*] if Plaintiff had not had a disability, but everything else had been the same.

[If you find that Plaintiff has proved each of these things by a preponderance of the evidence, you should turn to the issue of Plaintiff's damages. If you find that Plaintiff has failed to prove any of these things by a preponderance of the evidence, your verdict should be for Defendant.][1]

### Committee Comments

a. **General Authority:** Parts of this instruction are drawn from 42 U.S.C. § 12111(8) (definition of "qualified individual"). The instruction conforms with Seventh Circuit authority. *See Hoffman v. Caterpillar, Inc.*, 256 F.3d 568, 572-576 (7th Cir. 2001); *Lawson v. CSX Transp., Inc.*, 245 F.3d 916, 922-923 (7th Cir. 2001); *Foster v. Arthur Andersen LLP*, 168 F.3d 1029, 1032-1033

[1] If the defendant has raised an affirmative defense, a court may replace this paragraph with the following language:

> If you find that Plaintiff has failed to prove any of these things by a preponderance of the evidence, your verdict should be for Defendant. If you find that Plaintiff has proved each of these things by a preponderance of the evidence, you must then consider Defendant's argument that [*describe affirmative defense*]. If Defendant has proved this by a preponderance of the evidence, your verdict should be for Defendant. If Defendant has not proved this by a preponderance of the evidence, you should turn to the issue of Plaintiff's damages.

A court may also wish to address these issues through the use of a special verdict form.

(7th Cir. 1999); *Duda v. Board of Educ. of Franklin Park*, 133 F.3d 1054, 1058-1059 (7th Cir. 1998). *See also* EIGHTH CIRCUIT MANUAL OF MODEL JURY INSTRUCTIONS—CIVIL § 5.51A ("ADA – Disparate Treatment – Essential Elements (Actual Disability)") and § 5.51B ("ADA – Disparate Treatment – Essential Elements (Perceived Disability)") (2001); NINTH CIRCUIT MANUAL OF MODEL JURY INSTRUCTIONS—CIVIL § 15.2 ("Elements of ADA Employment Action") (2001); ELEVENTH CIRCUIT PATTERN JURY INSTRUCTIONS—CIVIL § 1.5.1 ("Disparate Treatment Claim") (2000).

b. **Disparate Treatment:** This instruction for disparate treatment cases is separate from a similar instruction for reasonable accommodation cases because in *Bultemeyer v. Fort Wayne Cmty. Schools*, 100 F.3d 1281, 1283-1284 (7th Cir. 1996), the Seventh Circuit explained that disparate treatment and reasonable accommodation claims must be "analyzed differently":

> Bultemeyer is not complaining that FWCS treated him differently and less favorably than other, non-disabled employees. He is not comparing his treatment to that of any other FWCS employee. His complaint relates solely to FWCS' failure to reasonably accommodate his disability. Because this is not a disparate treatment case, the *McDonnell-Douglas* burden-shifting method of proof is unnecessary and inappropriate here.

*Accord, Foster v. Arthur Andersen LLP*, 168 F.3d 1029, 1032 (7th Cir. 1999) (*citing Sieberns v. Wal-Mart Stores, Inc.*, 125 F.3d 1019, 1021-1022 (7th Cir. 1997)); *Weigel v. Target Stores*, 122 F.3d 461, 464 (7th Cir. 1997) (*citing Bultemeyer v. Fort Wayne Schs.*, 100 F.3d at 1284). *See Hoffman v. Caterpillar, Inc.*, 256 F.3d 568, 574 (7th Cir. 2001) ("It would be redundant to require a plaintiff to utilize the [*McDonnell-Douglas*] burden shifting method to raise a presumption of discrimination if he or she possesses direct evidence of discrimination").

c. **Causation:** The causation requirement in the fourth element is based on *Foster v. Arthur Andersen LLP*, 168 F.3d 1029, 1032-1033 (7th Cir. 1999), and *Weigel v. Target Stores*, 122 F.3d 461, 465 (7th Cir. 1997), both citing 42 U.S.C. § 12112(a) ("No covered entity shall discriminate against a qualified individual with a disability *because of* the disability. . . .") (italics added).

d. **Mixed Motive:** As in other types of employment discrimination cases, the Committee recognizes that an employer's decision might be based on mixed motives. If a court believes that it is appropriate to instruct the jury on mixed motive, the Committee recommends replacing the fourth element with the following language:

> Plaintiff must prove by a preponderance of the evidence that his disability was a motivating factor in Defendant's decision to [*adverse action*] him. A motivating factor is something that contributed to Defendant's decision.
>
> If you find that Plaintiff has proved that his disability contributed to Defendant's decision to [*adverse action*] him, you must then decide whether Defendant proved by a preponderance of the evidence that it would have [*adverse action*] him even if

Plaintiff did not have a disability. If so, Plaintiff is not entitled to an award of damages.

*See* Instruction No. 3.01, comment c, for further discussion on mixed motive in employment discrimination cases.

e. **Constructive Discharge:** If the plaintiff alleges that the defendant constructively discharged him because of his disability, the court should replace the third and fourth elements of the instruction with the following language:

3. He was forced to quit his job because Defendant purposely made his working conditions so intolerable that a reasonable person in his position would have had to quit.

4. Defendant would not have forced him to quit if he had not had a disability, but everything else was the same.

*See EEOC v. Sears, Roebuck & Co.*, 233 F.3d 432, 440-441 (7th Cir. 2000), and *Miranda v. Wisconsin Power & Light Co.*, 91 F.3d 1011, 1017 (7th Cir. 1996); *see also* Instruction 3.01, comment d.

## 4.03. ELEMENTS OF PLAINTIFF'S CLAIM – REASONABLE ACCOMMODATION CASES

In this case, Plaintiff claims that Defendant unlawfully refused to give him a "reasonable accommodation." To succeed, Plaintiff must prove five things by a preponderance of the evidence:

1. Plaintiff had a disability. I will define "disability" and several other important terms for you in a few minutes;

2. Plaintiff was qualified to perform the job;

3. Plaintiff requested an accommodation;

4. Defendant was aware of Plaintiff's disability at the time of Plaintiff's request;

5. Defendant failed to provide Plaintiff with a reasonable accommodation.

[If you find that Plaintiff has proved each of these things by a preponderance of the evidence, you should turn to the issue of Plaintiff's damages. If you find that Plaintiff has failed to prove any of these things by a preponderance of the evidence, your verdict should be for Defendant.][2]

### Committee Comments

a. **General Authority:** This instruction is drawn from 42 U.S.C. §§ 12111(9) and 12112(a), and from NINTH CIRCUIT MANUAL OF MODEL CIVIL JURY INSTRUCTIONS § 15.2 (2001) ("Elements of ADA Employment Action"); ELEVENTH CIRCUIT PATTERN JURY INSTRUCTIONS (CIVIL

[2] If the defendant has raised an affirmative defense, a court may replace this paragraph with the following language:

> If you find that Plaintiff has failed to prove any of these things by a preponderance of the evidence, your verdict should be for Defendant. If you find that Plaintiff has proved each of these things by a preponderance of the evidence, you must then consider Defendant's argument that [*describe affirmative defense*]. If Defendant has proved this by a preponderance of the evidence, your verdict should be for Defendant. If Defendant has not proved this by a preponderance of the evidence, you should turn to the issue of Plaintiff's damages.

A court also may wish to address these issues through the use of a special verdict form.

CASES) § 1.5.2 (2000) ("Reasonable Accommodation Claim"); and EIGHTH CIRCUIT MANUAL OF MODEL CIVIL JURY INSTRUCTIONS § 5.51C (2001) ("ADA - Reasonable Accommodation Cases").

Whether a person "regarded as" having a disability is entitled to an accommodation is an open question in this circuit. *Cigan v. Chippewa Falls Sch. Dist.*, 388 F.3d 331, 335 (7th Cir. 2004) ("Because the record would not permit a reasonable trier of fact to conclude that the school district regarded Cigan as "disabled," we need not decide whether the ADA requires an employer to accommodate the demands of a person who is regarded as disabled but lacks an actual disability."). *Compare Williams v. Philadelphia Housing Auth.*, 380 F.3d 751 (3rd Cir. 2004) (requiring accommodation), *with Weber v. Strippit, Inc.*, 186 F.3d 907 (8th Cir. 1999) (holding "redarded as" disabled plaintiffs not entitled to reasonable accommodation).

b. **Employer's Awareness of Disability.** If the applicant or employee does not ask for an accommodation, the employer does not have to provide one unless it knows of the disability. *Hedberg v. Indiana Bell Tel. Co., Inc.*, 47 F.3d 928, 934 (7th Cir. 1995). If a disability and the need to accommodate it are obvious, however, the law does not always require an applicant or employee to expressly ask for a reasonable accommodation. *See Hedberg v. Indiana Bell Tel.*, 47 F.3d at 934 ("[I]t may be that some symptoms are so obviously manifestations of an underlying disability that it would be reasonable to infer that an employer actually knew of the disability. . . . [D]eliberate ignorance [should not] insulate an employer from liability."); *see also Jovanovic v. In-Sink-Erator Div. of Emerson Elec. Co.*, 201 F.3d 894, 899 (7th Cir. 2000) ("[T]here will be exceptions to the general rule that an employee must request an accommodation.") (*citing Bultemeyer v. Fort Wayne Cmty. Schs.*, 100 F.3d 1281, 1285 (7th Cir. 1996), and 29 C.F.R. § 1630.2(o)(3)).

Similarly, if the disability makes it difficult for the applicant or employee to communicate his needs, an employer must make a reasonable effort to understand those needs, even if they are not clearly communicated. For example, an employer cannot always expect a mentally-disabled employee to know that he should ask for an accommodation. Instead, the employer should start communicating with an employee if it knows that he might be mentally disabled. *See Bultemeyer v. Fort Wayne Schs.*, 100 F.3d at 1285-1286; *Jovanovic v. In-Sink-Erator Div.*, 201 F.3d at 899; *Hedberg v. Indiana Bell. Tel.*, 47 F.3d at 934 & n.7; 29 C.F.R. § 1630.2(o)(3). *See also Taylor v. Phoenixville Sch. Dist.*,184 F.3d 296, 315 (3rd Cir. 1999) ("Another reason for placing some burden on the employer is that, as the Seventh Circuit recognized in *Bultemeyer*, an employee with a mental illness may have difficulty effectively relaying medical information about his or her condition, particularly when the symptoms are flaring and reasonable accommodations are needed.").

Once the employer is aware of the possible need for an accommodation, it must discuss that possibility with the applicant or employee as part of an interactive process. *Hansen v. Henderson*, 233 F.3d 521, 523 (7th Cir. 2000); *Rehling v. City of Chicago*, 207 F.3d 1009, 1015 (7th Cir. 2000); *Beck v. University of Wisconsin Bd. of Regents*, 75 F.3d 1130, 1135 (7th Cir. 1996). *See also* Instruction 4.08, comment b. An applicant or employee, however, need not discuss a disability with an employer until he needs a reasonable accommodation.

In all of the circumstances described in this comment, a court may need to tailor the language of the elements instruction to take account of a case's particular facts.

## 4.04. DEFINITION OF "DISABILITY"

Under the ADA, the term "disability" means a [physical/mental] impairment[3] that "substantially limits" [*describe major life activity or activities involved in the case*].[4] I will now define some of these terms in more detail. Again, I remind you to consider the specific definitions I give you, and not to use your own opinion as to what these terms mean.

### *(a) Substantially Limiting*[5]

Under the ADA, an impairment "substantially limits" a person's ability to [*describe relevant activity*] if it prevents or severely restricts him from [*relevant activity*], compared to the average person in the general population.

To decide if Plaintiff's [alleged] impairment substantially limits Plaintiff's ability to [*relevant activity*], you should consider the nature and severity of the impairment, how long it is expected to last, and its expected long-term impact.

Only impairments with a permanent or long-term impact are disabilities under the ADA. Temporary injuries and short-term impairments are not disabilities. [Even so, some

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[3] If the case involves a factual dispute about whether a physical or mental impairment exists, the Committee suggests that a court include the following language after the instruction's first paragraph: "The term 'physical impairment' means any condition that prevents the body from functioning normally. The term 'mental impairment' means any condition that prevents the mind from functioning normally." If more detail is necessary to capture the particular dispute, the Committee suggests that the court borrow language from the actual regulation on this point. *See* Committee comment b (discussing 29 C.F.R. § 1630.2(h)).

[4] If the question of whether the activity at issue is a "major life activity" is contested, the Committee suggests replacing this sentence with the language in Committee comment c.

[5] If the plaintiff alleges work as the relevant major life activity, replace this paragraph of the instruction with the following:

*(a) Substantially Limiting: Work as Major Life Activity*

Let me start by telling you what I mean by "substantially limiting." An impairment substantially limits a person's ability to work if it significantly restricts him from performing a class of jobs, or a broad range of jobs in various classes, compared to someone with similar knowledge, skills, and training. Being unable to do a particular job, however, is not by itself a substantial limitation on the ability to work.

disabilities are permanent, but only appear from time to time. For example, if a person has a mental or physical disease that usually is not a problem, but flares up from time to time, that can be a disability if it substantially limits a major life activity.]

*(b) Definition of "Regarded As"*[6]

Under the ADA, a person is "regarded as" having a disability if:

1. The employer believes that the person has a physical or mental impairment that substantially limits his ability to [*describe relevant activity*]; or

2. The employer believes that an actual impairment substantially limits his ability to [*relevant activity*] when it does not, because of the attitude that others have about the impairment; or

3. The person does not have any impairment, but the employer treats him as having an impairment that substantially limits his ability to [*relevant activity*].

*(c) Definition of "Record Of"*[7]

Under the ADA, a person has "a record of a disability" if he has a record of a physical or mental impairment that substantially limits a person's ability to perform one or more major life activities. This includes someone who has had a substantially limiting impairment but is now recovered. It also includes someone whose substantially limiting impairment is currently in remission or is controlled by medication.

**Committee Comments**

a. **Format:** The basic format for this instruction is taken from the ELEVENTH CIRCUIT PATTERN JURY INSTRUCTIONS (CIVIL CASES) § 1.5.1 (2000) ("Disparate Treatment Claim"), but with modifications based on the Supreme Court's decision in *Toyota Motor Mfg., Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002), and on the Seventh Circuit cases cited below.

b. **Physical or Mental Impairments:** Regulations to the ADA define "physical impairment" as including any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, neuromuscular,

[6] Use this instruction only if "regarded as" is an issue.

[7] Use this instruction only if "record of" is an issue.

special sense organs, cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine. The term "mental impairment" includes any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities. *See* 29 C.F.R. § 1630.2(h); *see also Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 479-480 (1999); *DePaoli v. Abbott Labs.*, 140 F.3d 668, 671 (7th Cir. 1998). The Committee suggests that courts can borrow language from these definitions when it would be helpful to a jury in resolving a dispute regarding whether a physical or mental impairment exists.

c. **Major Life Activities:** In rare cases, the question of whether a "major life activity" is implicated may arise. In such cases, the Committee suggests that a court include the following language in the first paragraph of the instruction:

> Under the ADA, the term "disability" includes a [physical/mental] impairment[8] that "substantially limits" a "major life activity." Major life activities are activities that are of central importance to everyday life. They are activities that an average person can do without much difficulty. Examples include: caring for yourself, doing manual tasks (such as household chores), bathing, brushing teeth, walking, talking, seeing, hearing, breathing, learning, and working.

This definition of "major life activity" conforms to *Toyota Motor v. Williams*, 534 U.S. at 195; *Sutton v. United Air Lines*, 527 U.S. at 479-480, *citing* 29 C.F.R. §§ 1630.2(h)-(j); *Lawson v. CSX Transp., Inc.*, 245 F.3d 916, 923-924 (7th Cir. 2001); and *Sinkler v. Midwest Property Mgmt. Ltd. Partnership*, 209 F.3d 678, 683-684 (7th Cir. 2000). *See also Furnish v. SVI Sys., Inc.*, 270 F.3d 445 (7th Cir. 2001) (liver function is not a major life activity).

d. **Substantially Limiting:** The "substantial limitation" definition conforms to 42 U.S.C. § 12101(2) (definition of "disability"); *Toyota Motor v. Williams*, 534 U.S. at 195-197; *Sutton v. United Air Lines*, 527 U.S. at 488-492; *Murphy v. United Parcel Serv., Inc.*, 527 U.S. 516 (1999); *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555 (1999); *EEOC v. Sears, Roebuck & Co.*, 233 F.3d 432, 438-439 (7th Cir. 2000); *Haschmann v. Time Warner Entertainment Co.*, 151 F.3d 591, 599-600 (7th Cir. 1998) (*citing Vande Zande v. Wisconsin Dep't of Admin.*, 44 F.3d 538, 544 (7th Cir.1995)); *Dalton v. Subaru-Isuzu Automotive, Inc.*, 141 F.3d 667, 675-676 (7th Cir. 1998); *DePaoli v. Abbott Labs.*, 140 F.3d at 671-672.

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[8] If the case involves a factual dispute about whether a physical or mental impairment exists, the Committee suggests that a court include the following language after the instruction's first paragraph: "The term 'physical impairment' means any condition that prevents the body from functioning normally. The term 'mental impairment' means any condition that prevents the mind from functioning normally." If more detail is necessary to capture the particular dispute, the Committee suggests that the court borrow language from the actual regulation on this point. *See* Committee comment b (discussing 29 C.F.R. § 1630.2(h)).

e. **Devices or Medication:** If a plaintiff uses a device or medication that arguably prevents him from being substantially limited in a major life activity, a court might add the following language to the end of the section on the definition of "substantially limiting":

> You also should consider any devices or medication used by Plaintiff for his impairment. Under the ADA, a person is not disabled if he uses a device or medication that prevents him from being substantially limited in a major life activity. For example, a person with high blood pressure is not disabled if, when he is medicated, his high blood pressure does not substantially limit him in a major life activity. However, a person who uses a device or takes medication is disabled if he is still substantially limited in a major life activity despite using a device or taking medication, or if the device or medication itself substantially limits him in that activity.

f. **Work as a Major Life Activity:** The footnote on working as a major life activity conforms to *Toyota Motor v. Williams*, 534 U.S. at 197-201; *Sutton v. United Air Lines*, 527 U.S. at 491-494; *Patterson v. Chicago Ass'n for Retarded Citizens*, 150 F.3d 719, 725-726 (7th Cir. 1998); and *DePaoli v. Abbott Labs.*, 140 F.3d at 671.

g. **Regarded As:** This instruction is taken from ELEVENTH CIRCUIT PATTERN JURY INSTRUCTIONS (CIVIL CASES) § 1.5.1 (2000) ("Disparate Treatment Claim") and NINTH CIRCUIT MANUAL OF MODEL CIVIL JURY INSTRUCTIONS § 15.2 (2001) ("Corrected or Mitigated Disability"), and conforms with 42 U.S.C. § 12102(2)(c)); *Sutton v. United Air Lines*, 527 U.S. at 489, *citing* 29 C.F.R. §§ 1630.2(l); *Murphy v. United Parcel Serv.*, 527 U.S. at 521-525; *Albertson's v. Kirkingburg*, 527 U.S. at 563; *Bragdon v. Abbott*, 524 U.S. 624, 637-638 (1998); *Kupstas v. City of Greenwood*, 398 F.3d 609, 613 (7th Cir. 2005) ("even if the city had viewed this as an impairment that prevented Kupstas from performing his duties, we have held that more serious restrictions do not substantially limit one's general ability to work."); *Mattice v. Memorial Hosp. of South Bend, Inc.*, 249 F.3d 682, 684-685 (7th Cir. 2001) (allegation that hospital perceived anesthesiologist as having suffered impairment in major life activity of cognitive thinking stated ADA claim); *Amadio v. Ford Motor Co.*, 238 F.3d 919, 925 (7th Cir. 2001); *Bay v. Cassens Transport Co.*, 212 F.3d 969, 973 (7th Cir. 2000); *Sinkler v. Midwest Property Mgmt. Ltd. Partnership*, 209 F.3d at 686; *Dalton v. Subaru-Isuzu Automotive*, 141 F.3d at 675; *DePaoli v. Abbott Labs.*, 140 F.3d at 671; *see also* 29 C.F.R. § 1630.2(l). The purpose of the "regarded as" definition of a disability is to "cover individuals 'rejected from a job because of myths, fears and stereotypes' associated with disabilities." *Amadio v. Ford Motor Co.*, 238 F.3d 919, 925 (7th Cir. 2001) (*citing Sutton v. United Air Lines, Inc.*, 527 U.S. at 489-490 (*quoting* 29 C.F.R. pt. 1630, app. § 1630.2(1)).

h. **Record Of:** This instruction conforms to 42 U.S.C. § 12101(2)(B); 29 C.F.R. § 1630.2(k); and *Mattice v. Memorial Hosp.*, 249 F.3d at 686 (anesthesiologist's alleged record of impairment in the major life activities of sleeping, eating, thinking, and caring for himself stated ADA claim); *Duda v. Board of Educ. of Franklin Park*, 133 F.3d 1054, 1058 n.6 (7th Cir. 1998) (*quoting* 29 C.F.R. § 1630.2(I)); *EEOC Compliance Manual* § 902.7(b)). *See School Bd. of Nassau County*

*v. Arline*, 480 U.S. 273, 281 (1987) (plaintiff's hospitalization for acute form of tuberculosis established record of substantially limiting impairment for Rehabilitation Act purposes).

## 4.05. DEFINITION OF "QUALIFIED"

Under the ADA, Plaintiff was "qualified" if he had the skill, experience, education, and other requirements for the job and could do the job's essential functions, either with or without [*describe requested accommodation*]. You should only consider Plaintiff's abilities at the time when [*describe challenged employment decision*].

Not all job functions are "essential." Essential functions are a job's fundamental duties. In deciding whether a function is essential, you may consider the reasons the job exists, the number of employees Defendant has to do that kind of work, the degree of specialization the job requires, Defendant's judgment about what is required, the consequences of not requiring an employee to satisfy that function, and the work experience of others who held position.

[In addition to specific job requirements, an employer may have general requirements for all employees. For example, the employer may expect employees to refrain from abusive or threatening conduct toward others, or may require a regular level of attendance.]

### Committee Comments

a. **General Authority:** *See* 42 U.S.C. §§ 12111(8) (definition of "qualified individual with a disability") and 12111 (employment-related definitions); 29 C.F.R. pt. 1630, App. § 1630.2(m) (qualified individual). *See also* NINTH CIRCUIT MANUAL OF MODEL CIVIL JURY INSTRUCTIONS §§ 15.6, 15.7 (2001) ("Qualified Individual" and "Ability to Perform Essential Functions – Factors"); ELEVENTH CIRCUIT PATTERN JURY INSTRUCTIONS (CIVIL CASES) §§ 1.5.1, 1.5.2 (2000) ("Disparate Treatment Claim" and "Reasonable Accommodation Claim").

b. **Skill, Experience, Education:** *See Ozlowski v. Henderson*, 237 F.3d 837, 841 (7th Cir. 2001); *citing* 29 C.F.R. pt. 1630, app.; *Bay v. Cassens Transport Co.*, 212 F.3d 969, 973-974 (7th Cir. 2000); *Haschmann v. Time Warner Entertainment Co.*, 151 F.3d 591, 599 (7th Cir. 1998); *Dalton v. Subaru-Isuzu Automotive, Inc.*, 141 F.3d 667, 675 (7th Cir. 1998) (*citing Bombard v. Fort Wayne Newspapers, Inc.*, 92 F.3d 560, 563 (7th Cir. 1996), and 29 C.F.R. pt. 1630 App. § 1630.2(m)); *Duda v. Board of Educ. of Franklin Park*, 133 F.3d 1054, 1058-1059 (7th Cir. 1998); and *Bultemeyer v. Fort Wayne Cmty. Schs.*, 100 F.3d 1281, 1284-1285 (7th Cir. 1996).

c. **Time of Relevant Employment Decision:** *See Bay v. Cassens Transport Co.*, 212 F.3d 969, 974 (7th Cir. 2000) ("Whether or not an individual meets the definition of a qualified individual with a disability is to be determined as of the time the employment decision was made.") (*citing Weiler v. Household Fin. Corp.*, 101 F.3d 519, 524 (7th Cir. 1996).

d. **Determining Essential Job Functions:** *See Winfrey v. City of Chicago*, 259 F.3d

610, 615-617 (7th Cir. 2001); *Ozlowski v. Henderson*, 237 F.3d 837, 841 (7th Cir. 2001); *Hansen v. Henderson*, 233 F.3d 521, 523-524 (7th Cir. 2000); *Malabarba v. Chicago Tribune Co.*, 149 F.3d 690, 700 (7th Cir. 1998); *Duda v. Board of Educ. of Franklin Park*, 133 F.3d 1054, 1058-1059 (7th Cir. 1998); *Miller v. Illinois Dep't of Corrections*, 107 F.3d 483, 485 (7th Cir. 1997); *Cochrum v. Old Ben Coal Co.*, 102 F.3d 908, 912 (7th Cir. 1996). Under 29 C.F.R. § 1630.2(n), evidence of whether a particular function is essential can include – but is not limited to – the employer's own judgment about which functions are essential; a job description written before the employer advertised or interviewed applicants for the job; how much time was spent on the job performing the function; the consequences of not requiring the person in the job to perform the function; the terms of a union contract, if there was one; the work experience of employees who held the job in the past; and the current work experience of persons holding similar jobs. *See Winfrey v. City of Chicago*, 259 F.3d at 615-617 (showing that not all employees perform at a particular time all the essential job functions does not make those functions non-essential); *Malabarba v. Chicago Tribune Co.*, 149 F.3d at 700 (same); *Miller*, 107 F.3d at 485 ("if an employer has a legitimate reason for specifying multiple duties for a particular job classification, duties the occupant of the position is expected to rotate through, a disabled employee will not be qualified for the position unless he can perform enough of these duties to enable a judgment that he can perform its essential duties").

e. **General Job Requirements:** The optional language in brackets about general job requirements conforms with *Waggoner v. Olin Corp.*, 169 F.3d 481, 484-485 (7th Cir. 1999), and *Nowak v. St. Rita High School*, 142 F.2d 999, 1003 (7th Cir. 1998).

## 4.06. REASONABLE ACCOMMODATION: GENERAL INSTRUCTION

Under the ADA, to "accommodate" a disability is to make some change that will let a person with a disability [perform/apply for/be eligible for] the job. An accommodation is "reasonable" if it is effective and its costs are not clearly disproportionate to the benefits that it will produce.

A reasonable accommodation may include a change in such things as ordinary work rules, facilities, conditions, or schedules, but does not include elimination or change of essential job functions, assignment of essential job functions to other employees, or lower productivity standards.

### Committee Comments

a. **General Authority:** *See Gile v. United Airlines, Inc.*, 213 F.3d 365, 373-374 (7th Cir. 2000); *Haschmann v. Time Warner Entertainment Co.*, 151 F.3d 591, 601-602 (7th Cir. 1998); *Malabarba v. Chicago Tribune Co.*, 149 F.3d 690, 697, 699 (7th Cir. 1998); *Steffes v. Stepan Co.*, 144 F.3d 1070, 1072-1073 (7th Cir. 1998); *Dalton v. Subaru-Isuzu Automotive, Inc.*, 141 F.3d 667, 677-680 (7th Cir. 1998); *DePaoli v. Abbott Labs.*, 140 F.3d 668, 674-675 (7th Cir. 1998); *Duda v. Board of Ed. of Franklin Park Public School Dist.*, 133 F.3d 1054, 1058 (7th Cir. 1998); *Miller v. Illinois Dep't of Corrections*, 107 F.3d 483, 486 (7th Cir. 1997); *Weiler v. Household Fin. Corp.*, 101 F.3d 519, 525-526 (7th Cir. 1996); *Bultemeyer v. Fort Wayne Cmty. Schs.*, 100 F.3d 1281, 1283-1286 (7th Cir. 1996); *Eckles v. Consolidated Rail Corp.*, 94 F.3d 1041, 1045-1051 (7th Cir. 1996), *cert. den.* 117 S. Ct. 1318 (1997); *Miranda v. Wisconsin Power & Light Co.*, 91 F.3d 1011, 1017 (7th Cir. 1996); *Schmidt v. Methodist Hosp. of Indiana, Inc.*, 89 F.3d 342, 344 (7th Cir. 1996); *Beck v. University of Wis. Bd. of Regents*, 75 F.3d 1130, 1134 (7th Cir. 1996); *Vande Zande v. Wisconsin Dep't of Admin.*, 44 F.3d 538, 543, 545 (7th Cir. 1995). *See also* ELEVENTH CIRCUIT PATTERN JURY INSTRUCTIONS (CIVIL CASES) § 1.5.2 (2000) ("Reasonable Accommodation Claim"); 5 LEONARD B. SAND, JOHN S. SIFFERT, WALTER P. LOUGHLIN, STEVEN A. REISS, NANCY BATTERMAN, MODERN FEDERAL JURY INSTRUCTIONS, Form Instruction 88A-16 (2001).

b. **Cost of Accommodation and Relationship to Undue Hardship Defense**: An accommodation's costs are relevant to reasonableness. The relation of these costs to a defendant's particular financial circumstances, however, is more appropriate to the jury's consideration of whether the accommodation is an "undue hardship". *See* Instruction 4.08, *infra*. Because undue hardship is an affirmative defense on which the defendant bears the burden of proof, the Committee did not include reference to the defendant's individual economic condition in this instruction. The Committee based its view on the Seventh Circuit's decision in *Vande Zande v. Wisconsin Dep't Of Admin.,* 44 F.3d 538 at 543:

> [I]t seems that costs enter at two points in the analysis of claims to an accommodation to a disability. The employee must show that the accommodation

> is reasonable in the sense both of efficacious and of proportional to costs. Even if the prima facie case is made, the employer has an opportunity to prove that upon more careful consideration the costs are excessive in relation either to the benefits of the accommodation or to the employer's financial survival or health. . . . One interpretation of 'undue hardship' is that it permits an employer to escape liability if he can carry the burden of proving that a disability accommodation reasonable for a normal employer would break him.

The Committee, however, could not reach agreement on how to incorporate the above language into a definition of when an accommodation is "reasonable." A majority of the Committee preferred the language set forth in the instruction's first paragraph: "An accommodation is 'reasonable' if it is effective and its costs are not clearly disproportionate to the benefits that it will produce." Other Committee members preferred the following alternative language: "An accommodation is 'reasonable' if it is feasible and would be effective." *See US Airways, Inc. v. Barnett*, 535 U.S. 391, 401-402 (2002).

c. **Impact of Accommodation on Other Employees:** In cases where the court believes that the impact of a proposed accommodation on a defendant's other employees is relevant to the prima facie case (as opposed to the undue hardship defense), the Committee recommends adding the following language to the instruction: "In making this determination, you may consider, among other things, the impact of the accommodation on Defendant's other employees."

## 4.07. REASONABLE ACCOMMODATION: SUPPLEMENTAL INSTRUCTIONS FOR SPECIFIC ACCOMMODATION ISSUES

*(a) Choice between Alternate Accommodations*

[Plaintiff may not insist on a particular accommodation if another reasonable accommodation was offered.]

*(b) Effect of Continuing Duty; Past Attempts to Accommodate*

[Defendant's duty to provide a reasonable accommodation is a continuing one. You must evaluate the reasonableness of an accommodation as of the time [it was requested] [the need became apparent to Defendant].]

*(c) Reassignment As A Reasonable Accommodation*

[If no reasonable accommodation was available in Plaintiff's present job, the ADA requires Defendant to try to assign him to a vacant position for which he is qualified. If the reassignment was practical and did not require Defendant to turn away a more qualified applicant, Defendant must have made the reassignment. Defendant was not required to create a new job or give a promotion to Plaintiff.]

*(d) Reassignment Where There Is a Union Contract or Seniority System*

[An accommodation is not reasonable if it conflicts with an established seniority system, unless Plaintiff proves by a preponderance of the evidence that "special circumstances" make an exception reasonable. For example, an exception might be reasonable if exceptions were often made to the seniority policy. Another example might be where the seniority system already contains its own exceptions so that, under the circumstances, one more exception is not significant.]

*(e) Reallocating Job Duties*

[A reasonable accommodation may include transferring non-essential job duties to another employee. However, Defendant does not have to transfer essential job duties.]

## Committee Comments

a. **Choice Between Alternate Accommodations:** These instructions conform with *Hoffman v. Caterpillar, Inc.*, 256 F.3d 568, 577 (7th Cir. 2001); *Emerson v. Northern States Power Co.*, 256 F.3d 506, 515 (7th Cir. 2001) (*citing Gile v. United Airlines, Inc.*, 95 F.3d 492, 499 (7th Cir. 1996)); *Miller v. Illinois Dep't of Corrections*, 107 F.3d 483, 486 (7th Cir. 1997); and *Vande Zande v. Wisconsin Dep't of Admin.*, 44 F.3d 538, 542, 546 (7th Cir. 1995).

b. **Effect of Continuing Duty: Past Attempts to Accommodate:** This instruction conforms with *Winfrey v. City of Chicago*, 259 F.3d 610, 616 (7th Cir. 2001) (*citing Amadio v. Ford Motor Co.*, 238 F.3d 919, 929 (7th Cir. 2001)); *Haschmann v. Time Warner Entertainment Co.*, 151 F.3d 591, 600-602 (7th Cir. 1998); *Bultemeyer v. Fort Wayne Community Schools*, 100 F.3d 1281, 1284-1286 (7th Cir. 1996); *Vande Zande v. Wisconsin Dep't of Admin.*, 44 F.3d at 545.

c. **Reassignment as a Reasonable Accommodation:** This instruction conforms with 42 U.S.C. §§ 12111(9)(B), 12112(b)(5)(A); *US Airways, Inc. v. Barnett*, 535 U.S. 391, 403-404 (2002); *Winfrey v. City of Chicago*, 259 F.3d at 618; *EEOC v. Humiston-Keeling, Inc.*, 227 F.3d 1024, 1026-1027 (7th Cir. 2000) (*citing* 42 U.S.C.A. § 12111(9)(B)); *Malabarba v. Chicago Tribune Co.*, 149 F.3d 690, 697-700 (7th Cir. 1998); *Baert v. Euclid Beverage Co.*, 149 F.3d 626, 633 (7th Cir. 1998) (*citing Gile v. United Airlines*, 95 F.3d at 499; 42 U.S.C. § 12112(b)(5)(A); 29 C.F.R. pt. 1630, App.

d. **Reassignment Where There Is a Union Contract or Seniority System:** This instruction conforms with *US Airways v. Barnett*, 535 U.S. at 405 (*citing Borkowski v. Valley Central School Dist.*, 63 F.3d 131, 137 (2nd Cir. 1995) ("an accommodation that imposed burdens that would be unreasonable for most members of an industry might nevertheless be required of an individual defendant in light of that employer's particular circumstances")); *Eckles v. Consolidated Rail Corp.*, 94 F.3d 1041 (7th Cir. 1996). *See Ozlowski v. Henderson*, 237 F.3d 837, 841 n.2 (7th Cir. 2001) (employer not required to bump current employee to provide reasonable accommodation) (*citing Gile v. United Airlines*, 95 F.3d at 499); *Baert v. Euclid Beverage*, 149 F.3d at 633.

e. **Reallocating Job Duties:** This instruction conforms with *US Airways v. Barnett*, 535 U.S. at 403, and *Ozlowski v. Henderson*, 237 F.3d at 841. In *Ozlowski*, the Seventh Circuit held that "[w]hile it is true that an employer may redistribute marginal functions of a job to other employees, an employer is not required to reallocate essential functions 'that the individual who holds the job would have to perform, with or without reasonable accommodation, in order to be considered qualified for the position.'" 237 F.3d at 841 (*citing* 29 C.F.R. pt. 1630, App.).

## 4.08. INTERACTIVE PROCESS

Once an employer is aware of an [employee's/applicant's] disability and an accommodation has been requested, the employer must discuss with the [employee/applicant] [or, if necessary, with his doctor] whether there is a reasonable accommodation that will permit him to [perform/apply for] the job. Both the employer and the [employee/applicant] must cooperate in this interactive process in good faith.

Neither party can win this case simply because the other did not cooperate in this process, but you may consider whether a party cooperated in this process when deciding whether [a reasonable accommodation existed] [to award punitive damages].

### Committee Comments

a. **Usage:** Courts should use this instruction only in cases where the "interactive process" is at issue. The instruction conforms with *Hansen v. Henderson*, 233 F.3d 521, 523 (7th Cir. 2000); *Gile v. United Airlines, Inc.*, 213 F.3d 365, 373 (7th Cir. 2000) (*quoting Hendricks-Robinson v. Excel Corp.*, 154 F.3d 685, 693 (7th Cir. 1998), and *citing Miller v. Illinois Dept. of Corrections*, 107 F.3d 483, 486-487 (7th Cir. 1997); *Rehling v. City of Chicago*, 207 F.3d 1009, 1015 (7th Cir. 2000); *Haschmann v. Time Warner Entertainment, L.P.*, 151 F.3d 591, 601 (7th Cir. 1998) (*quoting Bombard v. Fort Wayne Newspapers*, 92 F.3d 560, 563 (7th Cir. 1996)); *Bultemeyer v. Fort Wayne Cmty. Schs.*, 100 F.3d 1281, 1285-1286 (7th Cir. 1996); *Beck v. University of Wis. Bd. of Regents*, 75 F.3d 1130, 1135 (7th Cir. 1996); 29 C.F.R. § 1630.2(o)(3); 29 C.F.R. pt. 1630.2, App. § 1630.9. By itself, the interactive process requirement is not an element of an ADA claim, and "a plaintiff cannot base a reasonable accommodation claim solely on the allegation that the employer failed to engage in an interactive process." *Rehling v. City of Chicago*, 207 F.3d at 1016. "[T]he interactive process is a means and not an end in itself." *Rehling v. City of Chicago*, 207 F.3d at 1016 (quoting *Sieberns v. Wal-Mart Stores, Inc.*, 125 F.3d 1019, 1023 (7th Cir. 1997)). Nonetheless, the Seventh Circuit has made it clear that "[t]he appropriate reasonable accommodation is best determined through a flexible, interactive process that involves both the employer and the [employee] with a disability." *Bultemeyer v. Fort Wayne Schs.*, 100 F.3d at 1285-1286 (*citing* 29 C.F.R. pt.1630, app.; *Beck v. University of Wis. Bd. of Regents*, 75 F.3d at 1135). *Accord, Gile v. United Airlines*, 213 F.3d at 373 (once employer is aware of individual's disability, employer must seek out the individual and engage in an interactive process to determine a reasonable accommodation).

b. **Employer's Awareness of Disability:** In the unusual case where an employer contends that it was not aware of a disability, and the plaintiff alleges that the employer knew or should have known, the court should consider adding the following language to the instruction:

> If the employer has reason to know that the [applicant/employee] has a disability and the [applicant] [employee] is having problems [at work/applying for the job] because

> of the disability, it must engage in discussions with him and, if necessary, with his doctor, to decide if he is actually disabled.

For further elaboration on the importance of a defendant's awareness a plaintiff's disability, see Instruction 4.03, comment b.

## 4.09 UNDUE HARDSHIP DEFENSE

Under the ADA, Defendant does not need to accommodate Plaintiff if it would cause an "undue hardship" to its business. An "undue hardship" is something too costly or something that is so disruptive that it would fundamentally change the nature of Defendant's business or how Defendant runs its business.

Defendant must prove to you by a preponderance of the evidence that Plaintiff's proposed accommodation would be an "undue hardship." In deciding this issue, you should consider the following factors:

1. The nature and cost of the accommodation;

2. Defendant's overall financial resources. This might include the size of its business, the number of people it employs, and the types of facilities it runs;

3. The financial resources of the facility where the accommodation would be made. This might include the number of people who work there and the impact that the accommodation would have on its operations and costs; and

4. The way that Defendant conducts its operations. This might include its workforce structure; the location of its facility where the accommodation would be made compared to Defendant's other facilities; and the relationship between these facilities.

### Committee Comments

a. **General Authority:** This instruction is derived from EIGHTH CIRCUIT MANUAL OF MODEL CIVIL JURY INSTRUCTIONS § 5.53A (2001) ("'Undue Hardship' – Statutory Defense") and NINTH CIRCUIT MANUAL OF MODEL CIVIL JURY INSTRUCTIONS § 15.9 (2001) ("Undue Hardship"), which, in turn, conform to 42 U.S.C. §§ 12111(9) and (10), 29 C.F.R. § 1630.2(p), and 29 C.F.R. pt. 1630, App. § 1630.2(p); *US Airways, Inc. v. Barnett*, 535 U.S. 391, 403-404 (2002). The instruction also conforms to 42 U.S.C. § 12112(b)(5)(A); *Hoffman v. Caterpillar, Inc.*, 256 F.3d 568, 577 (7th Cir. 2001); *Malabarba v. Chicago Tribune Co.*, 149 F.3d 690, 699 (7th Cir. 1998); *Baert v. Euclid Beverage Co.*, 149 F.3d 626, 633 (7th Cir. 1998); *Gile v. United Airlines, Inc.*, 95 F.3d 492, 499 (7th Cir. 1996); *Miranda v. Wisconsin Power & Light Co.*, 91 F.3d 1011, 1016-1017 (7th Cir. 1996); *Vande Zande v. Wisconsin Dept. of Admin.*, 44 F.3d 538, 542-543 (7th Cir. 1995); 29 C.F.R. § 1630.9(a).

b. **Relationship to Determination of Accommodation's Reasonableness:** See Instruction 4.06, comment b, concerning the relationship between the undue hardship defense and

a determination of whether an accommodation is reasonable.

## 4.10 DIRECT THREAT DEFENSE

In this case, Defendant says that it [did not accommodate/did not hire/fired] Plaintiff because [accommodating/hiring/retaining] him would have created a significant risk of substantial harm to [Plaintiff and/or others in the workplace]. [Defendant must have based this decision on a reasonable medical judgment that relied on [the most current medical knowledge] [the best available objective evidence] about whether Plaintiff could safely perform the essential functions of the job at the time.] If Defendant proves this to you by a preponderance of the evidence, you must find for Defendant.

In deciding if this is true, you should consider the following factors: (1) how long the risk will last; (2) the nature and severity of the potential harm; (3) how likely it is that the harm will occur; and (4) whether the potential harm is likely to occur in the near future.

[Defendant must prove that there was no reasonable accommodation that it could make which would eliminate the risk or reduce it so that it was no longer a significant risk of substantial harm.]

### Committee Comments

The format of the instruction is taken from EIGHTH CIRCUIT MANUAL OF MODEL CIVIL JURY INSTRUCTIONS § 5.53B (2001) ("'Direct Threat' – Statutory Defense") and NINTH CIRCUIT MANUAL OF MODEL CIVIL JURY INSTRUCTIONS § 15.12 (2001) ("Defenses – Direct Threat"). The instruction conforms with 42 U.S.C. § 12111(3) (definition of direct threat), 42 U.S.C. § 12113(b) (a qualification standard can include a condition that a person not pose a direct threat), and *Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73 (2002) ("direct threat" includes a threat to the employee himself); *School Bd. of Nassau County v. Arline*, 480 U.S. 273 (1987) (criteria for direct threat under analogous Rehabilitation Act of 1973); *Emerson v. Northern States Power Co.*, 256 F.3d 506, 513-514 (7th Cir. 2001); *Bekker v. Humana Health Plan, Inc.*, 229 F.3d 662, 671-672 (7th Cir. 2000); and *EEOC v. AIC Security Investigations, Ltd.*, 55 F.3d 1276, 1283-1284 (7th Cir. 1995).

As to the burden of proof, see *Branham v. Snow*, 392 F.3d 896, 905-907 (7th Cir. 2004).

## 4.11 DAMAGES: BACK PAY

See Instruction No. 3.11.

## 4.12 DAMAGES: MITIGATION

See Instruction No. 3.12.

## 4.13 COMPENSATORY DAMAGES

See Instruction No. 3.10.

## 4.14 PUNITIVE DAMAGES

See Instruction No. 3.13.

## 4.15. SPECIAL VERDICT FORM

1) Did Plaintiff have a disability?

Answer Yes or No:

*(If you answered "Yes," answer Question 2; otherwise, sign, and return this verdict form)*

2) Was Plaintiff qualified to perform [his job] [the job he sought]?

Answer Yes or No:

*(If you answered "Yes," then answer Question 3; otherwise, sign and return this verdict form.)*

3) Did Plaintiff request an accommodation?

Answer Yes or No:

*(If you answered "Yes," then answer Question 4; otherwise, sign and return this verdict form.)*

4) Was Defendant aware of Plaintiff's disability at the time of Plaintiff's request?

Answer Yes or No:

*(If you answered "Yes," then answer Question 5; otherwise, sign and return this verdict form.)*

5) Did Defendant fail to provide Plaintiff with a reasonable accommodation?

Answer Yes or No:

*(If you answered "Yes," then answer Question 6; otherwise, sign and return this verdict form.)*

6) Would giving Plaintiff a reasonable accommodation have been an undue hardship on Defendant's business?

Answer Yes or No:

*(If you answered "Yes," sign and return this verdict form; otherwise, answer Question 7.)*

7) Has Plaintiff suffered a net loss of wages and benefits as a result of [*describe adverse action*]?

Answer Yes or No:

*(If you answered "Yes," then answer Question 8; otherwise sign, and return this verdict form.)*

8) What was the amount of net wages and benefits that Plaintiff lost up to the time of trial?

Answer: $

*(Answer Question 9.)*

9) Has Plaintiff suffered emotional pain and mental anguish as a result of [*describe adverse action*]?

Answer Yes or No:

*(If you answered "Yes," then answer Question 10; if you answered "No," to this question, then answer Question 11.)*

10) What amount will fairly compensate Plaintiff for his emotional pain and mental anguish as a result of [*describe adverse action*]?

Answer: $

*(Answer Question 11.)*

11) Did [*Name*] act with reckless disregard of Plaintiff's rights under ADA?

Answer Yes or No:

*(If you answered "Yes," then answer Question 10; otherwise, sign and return this verdict form.)*

12) Did Defendant itself act in good faith to attempt to comply with ADA by implementing policies and procedures to prohibit discrimination in violation of ADA?

Answer Yes or No:

*(If you answered "Yes," sign and return this verdict form; otherwise, answer Question 13.)*

13) What amount of punitive damages, if any, should be assessed against Defendant?

Answer: $

Dated this _____ day of _____, 20__.

_____

Presiding Juror

**Committee Comments**

a. **General Authority:** This special verdict form is designed to track the elements of a reasonable accommodations claim, to which an undue hardship affirmative defense has been asserted. *See* Instructions 4.03 and 4.08, above. The court should modify this form to track the issues in each particular case.

b. **Disparate Treatment Cases:** In a disparate treatment case involving a perceived

disability or a record of disability, Question 1 must be modified to reflect Instruction 2. In a disparate treatment case not involving a mixed motive, Questions 3-5 should be replaced with the following two questions:

> 3. Did Defendant [*describe adverse employment action*] Plaintiff?
>
> 4. Would Defendant would have [*describe adverse employment action taken*] if Plaintiff had not had a disability, but everything else remained the same.

c. **Mixed Motive Cases:** For mixed motive cases, see Instruction 4.02, comment d.

d. **Request for Accommodation.** Where appropriate, Question 3 may be modified to read, "Was Defendant aware that Plaintiff required an accommodation?" *See* Instruction 4.08, comment b.

e. **Punitive Damages.** This form assumes punitive damages are available in ADA cases in the absence of compensatory damages, an issue the Seventh Circuit has not directly addressed. *See generally Timm v. Progressive Steel Treating, Inc.*, 137 F.3d 1008, 1010 (7th Cir. 1998) ("No reason comes to mind for reading a compensatory-punitive link into § 1981a or Title VII but not § 1983."); *Paciorek v. Michigan Consolidated Gas Co.*, 179 F.R.D. 216, 220-222 (E.D. Mich. 1998) (concluding "the plain language of § 1981a(b)(1) of the 1991 Civil Rights Act" controls an ADA plaintiff's access to punitive damages).

If the parties dispute whether the person was a managerial employee within the meaning of Instruction 3.13, the following question should be inserted between interrogatories 10 and 11: "Was [*Name*] a managerial employee of Defendant?"

# 5. EQUAL PAY ACT

## 5.01 ESSENTIAL ELEMENTS OF A CLAIM

Plaintiff claims that Defendant violated a law called the "Equal Pay Act." This law is designed to prevent wage discrimination by employers based on sex. To succeed on this claim, Plaintiff must prove three things by a preponderance of the evidence:

1. Plaintiff did work that was "substantially equal" to male employees at [*Defendant's workplace*];

2. Plaintiff and a male employee did their jobs under similar working conditions;

3. Defendant paid Plaintiff less money than a male employee doing substantially equal work.

### Committee Comments

*See* 29 U.S.C. § 206(d); *Corning Glass Works v. Brennan*, 417 U.S. 188, 195 (1973); *Fallon v. State of Illinois*, 882 F.2d 1206, 1208 (7th Cir. 1989); *EEOC v. Madison Cmty. Unit Sch. Dist. No. 12*, 818 F.2d 577, 580-583 (7th Cir.1987).

## 5.02 SUBSTANTIALLY EQUAL

In deciding whether jobs are "substantially equal," you should compare the skill, effort, and responsibility needed to do the work. The jobs do not need to be identical in these areas, so you should ignore minor differences between them.

### Committee Comments

*See* 29 C.F.R. § 1620.14(a); *Cullen v. Indiana Univ. Bd. of* Tr., 338 F.3d 693, 698-700 (7th Cir. 2003); *Stopka v. Alliance of Am. Insurers*, 141 F.3d 681, 685-686 (7th Cir. 1998); *see also EEOC v. Sears, Roebuck & Co.*, 839 F.2d 302, 306 (7th Cir. 1988); *Hunt v. Nebraska Public Power Dist*., 282 F.3d 1021 (8th Cir. 2002); *Brennan v. South Davis Cmty. Hosp.*, 538 F.2d 859 (10th Cir. 1976); *Klimiuk v. ESI Lederle, Inc.*, 2000 WL 1599251, 84 Fair Empl.Prac.Cas. (BNA) 971 (E.D.Pa., Oct 25, 2000); *Brennan v. Prince William Hosp. Corp.*, 503 F.2d 282 (4th Cir. 1974).

## 5.03 EQUAL SKILL

In deciding whether jobs require "equal skill," you should consider whether people need essentially the same [experience/training/education/ability to do the work]. Jobs may require "equal skill" even if one job does not require workers to use these skills as often as another job.

### Committee Comments

*See* 29 C.F.R. § 1620.15(a); *Stopka v. Alliance of Am. Insurers*, 141 F.3d 681, 685-686 (7th Cir.1998).

## 5.04 EQUAL EFFORT

In deciding whether jobs require "equal effort," you should consider the physical or mental energy that a person must use at work. "Equal effort" does not require people to use effort in exactly the same way. If there is no substantial difference in the amount or degree of effort needed to do the jobs, they require "equal effort."

### Committee Comments

*See* 29 C.F.R. § 1620.16; *Jenkins v. U.S.*, 46 Fed. Cl. 561 (Fed. Cl. 2000); *Cullen v. Indiana Univ. Bd. of Tr.*, 338 F.3d 693, 699 (7th Cir. 2003); *Boriss v. Addison Farmers Ins. Co.*, No. 91-C-3144, 1993 WL 284331 (N.D. Ill., Jul 26, 1993).

## 5.05 EQUAL RESPONSIBILITY

In deciding whether jobs involve "equal responsibility," you should consider how accountable someone is in doing his or her job, including how much authority an employee has and the importance of his or her job.

### Committee Comments

*See* 29 C.F.R. § 1620.17; *Jenkins v. U.S.*, 46 Fed.Cl. 561 (Fed. Cl. 2000); *Krenik v. County of Le Sueur*, 47 F.3d 953 (8th Cir. 1995); *Dean v. United Food Stores, Inc.*, 767 F. Supp. 236 (D.N.M..1991).

## 5.06 JOB TITLES

In deciding whether two jobs are "substantially equal," you should consider the actual job requirements. Job classifications, descriptions, and titles are not controlling.

### Committee Comments

*See 29* C.F.R. § 1620.13(e); *EEOC v. Sears, Roebuck & Co.*, 839 F.2d 302, 345-348 (7th Cir. 1988); *Epstein v. Secretary, United States Dep't of the Treasury*, 739 F.2d 274, 277 (7th Cir. 1984).

## 5.07 RATES OF PAY

In deciding whether Plaintiff was paid less than her male co-worker[s] for equal work, you can consider evidence about how much Plaintiff's co-workers earned, even if the co-workers worked in different departments.

### Committee Comments

*See* 29 C.F.R. § 1620.19; *Mulhall v. Advance Sec., Inc.*, 19 F.3d 586 (11th Cir. 1994); *see also Power v. Barry County*, 539 F. Supp. 721, 722 (W.D. Mich.1982) (defining comparable worth theory).

## 5.08 COMPARABLE TIME PERIODS

Plaintiff must prove that at least one male employee received more pay than Plaintiff for substantially equal work. In comparing Plaintiff's work and pay with other employees, you can look at the work and pay of employees who did substantially equal work before or after the Plaintiff.

### Committee Comments

*See* 29 C.F.R.§ 1620.13(b)(4); *Patkus v. Sangamon-Cass Consortium,* 769 F.2d 1251 (7th Cir. 1985); *Taylor v. Philips Indus., Inc.*, 593 F.2d 783 (7th Cir.1979).

## 5.09 INTENT

Plaintiff does not have to prove that Defendant meant to discriminate against Plaintiff because she was female.

### Committee Comments

A plaintiff need not prove an intent to discriminate in an Equal Pay Act case. *See Varner v. Illinois State Univ.*, 226 F.3d 927, 932 (7th Cir. 2000) ("Under the Equal Pay Act, an employer is potentially subject to liability without a showing of discriminatory intent."); *Patkus v. Sangamon-Cass Consortium*, 769 F.2d 1251, 1260 n. 5 (1985) ("the Equal Pay Act creates a type of strict liability in that no intent to discriminate need be shown"). The Committee, therefore, views this instruction as helping to avoid confusion, particularly in cases that contain both an Equal Pay Act claim and a Title VII claim, where a plaintiff normally must prove intent. *See Fallon v. State of Illinois*, 882 F.2d 1206, 1213 (7th Cir. 1989).

## 5.10 AFFIRMATIVE DEFENSES

Even if Defendant paid Plaintiff less than male employees for substantially equal work, you should find in favor of Defendant if it proves by a preponderance of the evidence that the difference was because of:

1. A seniority system, or a merit-based system, that is not based on an employee's sex; or

2. A system based on the quality or quantity of each employee's production; or

3. [*describe any factor other than sex on which Defendant claims its pay differential was based*].

### Committee Comments

*See* 29 U.S.C. § 206(d)(1); 29 C.F.R. § 1620.20. The Committee does not anticipate that a court would charge the jury on each of the three factors. Instead, the court should instruct the jury on only those factors that are relevant to the case. *See Fallon v. State of Illinois*, 882 F.2d 1206, 1211 (7th Cir. 1989).

## 5.11 DAMAGES

If you find in favor of Plaintiff, then you should award Plaintiff damages consisting of the difference between Plaintiff's pay and the pay of the male employee(s) who did substantially equal work during comparable time periods.

If you award damages, they are limited to the following time period: [*Relevant dates*]

### Committee Comments

*See* 29 U.S.C. § 206(d)(3).

## 5.12 WILLFULNESS

If you find for Plaintiff, you must then decide whether Defendant willfully violated the Equal Pay Act. To show this, Plaintiff must prove by a preponderance of the evidence that Defendant knew that it was violating the Equal Pay Act, or was indifferent to whether its actions violated the Equal Pay Act, and not simply that Defendant was aware that it was discriminating in pay.

### Committee Comments

*See* EIGHTH CIRCUIT MANUAL OF MODEL JURY INSTRUCTIONS—CIVIL § 5.14 (2000); *Mathis v. Phillips Chevrolet, Inc.*, 269 F.3d 771, 777 (7th Cir. 2001) ("A defendant's negligent mistake concerning the lawfulness of her conduct does not suffice to make that conduct 'willful', but a reckless mistake, in the criminal law sense of indifference to whether the conduct violates the law, does.").

# 6. PUBLIC EMPLOYEE AND PRISONER RETALIATION

## 6.01 PUBLIC EMPLOYEE'S FIRST AMENDMENT RETALIATION CLAIM

In this case, Plaintiff claims that Defendant violated his constitutional right to free speech by [*alleged retaliatory conduct*] because he [*describe protected speech or conduct*].

To succeed on this claim, Plaintiff must prove several things by a preponderance of the evidence:

1. Plaintiff [*describe protected speech or conduct*];

2. Defendant intentionally [*alleged retaliatory conduct*] (while acting "under color of law." By this I mean that a person performs, or claims to perform, official duties under any state, county, or municipal law, ordinance, or regulation);

3. Plaintiff's [*protected speech or conduct*] was a reason, alone or with other reasons, that Defendant relied on when it [*alleged retaliatory conduct*], or that moved Defendant toward its decision to [*alleged retaliatory conduct*];

4. Plaintiff was harmed [*describe harm*].

If Plaintiff has proved each of these things by a preponderance of the evidence, then you must consider Defendant's claim that it would have [*alleged retaliatory conduct*] anyway. To succeed on this claim, Defendant must prove by a preponderance of the evidence that even though Plaintiff's [*protected speech or conduct*] was a reason for its decision to [*alleged retaliatory conduct*], there were other reasons which would have led Defendant to [*alleged retaliatory conduct*] even if Plaintiff had not [*protected speech or conduct*].

If you find that Plaintiff has proved by a preponderance of the evidence each of the things required of him, and that Defendant has not proved its claim by a preponderance of the evidence, then you must find for Plaintiff. However, if you find that Plaintiff did not prove by a preponderance of the evidence each of the things required of him, or if you find that Defendant proved its claim, then you must find for Defendant.

### Committee Comments

a. **Under Color of Law:** The bracketed portion of the second paragraph should be eliminated if the "color of law" issue is not in dispute.

b. ***Pickering* Balancing Test:** The Committee contemplates that the *Pickering* balancing test will be done by the Court. *Pickering v. Board of Educ.*, 391 U.S. 563 (1968); *see Connick v. Myers*, 461 U.S. 138, 147-148 & n.7 (1983) (indicating that the question of whether speech is protected is an issue of law). *Carreon v. Illinois Dept. of Human Services*, 395 F.3d 786, 791 (1/21/05) ("Whether speech is constitutionally protected under this two-part test is a question of law for the court.") (*citing Sullivan v. Ramirez*, 360 F.3d 692, 698, 701 (7th Cir. 2004). In cases in which a factual issue bears on the Court's determination, the Committee recommends that a special interrogatory be submitted to the jury on the issue.

c. **"Substantial or Motivating Factor"**: A plaintiff must prove that his protected speech or conduct was a "substantial" or "motivating" factor in the defendant's decision to retaliate against him. *See Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977); *Carreon v. Illinois Dept. of Human Services*, 395 F.3d 786, 791 (7th Cir. 2005); *Spiegla v. Hull*, 371 F.3d 928, 942 (7th Cir. 2004); *Vukadinovich v. Board of Sch. Tr. of North Newton Sch. Corp.*, 278 F.3d 693, 699 (7th Cir. 2002). To simplify the instruction, the Committee chose not to use the technical words "substantial or motivating". Instead, the Committee recommends that the instruction simply ask jurors to consider whether the plaintiff's protected speech or conduct "was a reason, alone or with other reasons" upon which the defendant relied when it decided to take action against the plaintiff.

## 6.02 PRISONER'S RIGHT OF ACCESS RETALIATION CLAIM

In this case, Plaintiff claims that Defendant retaliated against him for seeking access to the legal system by [*filing a lawsuit, seeking materials from the library, seeking counsel, etc.]*

To succeed on this claim, Plaintiff must prove several things by a preponderance of the evidence:

1. Plaintiff [*attempt to access legal system*];

2. Defendant intentionally [*alleged retaliatory conduct*] [while acting "under color of law." By this I mean that a person uses or misuses authority that he has because of his official position.];

3. Plaintiff's [*attempt to access legal system*] was a reason, alone or with other reasons, that Defendant relied on when it [*alleged retaliatory conduct*], or that moved Defendant toward its decision to [*alleged retaliatory conduct*];

4. Plaintiff [*describe loss of claim or actionable harm*].

If Plaintiff has proved each of these things by a preponderance of the evidence, then you must consider Defendant's claim that it would have [*alleged retaliatory conduct*] anyway. To succeed on this claim, Defendant must prove by a preponderance of the evidence that even though Plaintiff's [*protected speech or conduct*] was a reason in its decision to [*alleged retaliatory conduct*], there were other reasons which would have led Defendant to [*alleged retaliatory conduct*] even if Plaintiff had not [*attempt to access legal system*].

If you find that Plaintiff has proved by a preponderance of the evidence each of the things required of him, and that Defendant has not proved its claim by a preponderance of the evidence, then you must find for Plaintiff. However, if you find that Plaintiff did not prove by a preponderance of the evidence each of the things required of him, or if you find that Defendant proved its claim, then you must find for Defendant.

### Committee Comments

The Committee drafted this instruction to be consistent with Instruction 6.01 regarding public employees' First Amendment retaliation claims.

## 6.03 DAMAGES

Use Instructions 7.22, 7.23 and 7.24, as appropriate, listing those elements of damages relevant to the case.

# 7. CONSTITUTIONAL TORTS: 42 U.S.C. §1983

## 7.01 GENERAL: POLICE DEPARTMENT/MUNICIPALITY NOT A PARTY

Defendant(s) [is/are] being sued as [an] individual[s]. Neither the [*State or county police department or correctional agency*] nor [*State, county, or city*] is a party to this lawsuit.

### Committee Comments

*Monell v. City of New York Dep't of Soc. Svcs.*, 436 U.S. 658, 691, 694 (1970); *Duckworth v. Franzen*, 780 F.2d 645, 650-651 (7th Cir. 1985). This instruction may not be needed when both the governmental entity and the individual are defendants.

## 7.02 GENERAL: REQUIREMENT OF PERSONAL INVOLVEMENT

Plaintiff must prove by a preponderance of the evidence that [*Name of Individual Defendant*] was personally involved in the conduct that Plaintiff complains about. You may not hold [*Name*] liable for what other employees did or did not do.

### Committee Comments

*Walker v. Rowe*, 791 F.2d 507, 508 (7th Cir. 1986); *Duckworth v. Franzen*, 780 F.2d 645, 650 (7th Cir. 1985).

If the jury will be considering a "failure to intervene" claim under Instruction No. 7.16, the court may wish to preface Instruction No. 7.16 with "However," and give it immediately after this instruction, or take other steps to avoid jury confusion.

If the case involves a supplemental state law claim involving *respondeat superior* liability, this instruction should be modified to limit it to the federal law claim.

## 7.03 GENERAL: "UNDER COLOR OF LAW"

When I say that a person acts "under color of law," I mean that a person uses or misuses authority that he has because of his official position.

### Committee Comments

*Honaker v. Smith*, 256 F.3d 477, 484-485 (7th Cir. 2001).

If the "under color of law" issue is undisputed, this instruction should be eliminated. If a private party is alleged to have acted under color of law, an appropriate instruction will be needed.

## 7.04 LIMITING INSTRUCTION CONCERNING EVIDENCE OF STATUTES, ADMINISTRATIVE RULES, REGULATIONS, AND POLICIES

You have heard evidence about whether Defendant's conduct [complied with/violated] [a state statute/administrative rule/locally-imposed procedure or regulation]. You may consider this evidence in your deliberations. But remember that the issue is whether Defendant [*describe constitutional violation claimed, e.g., "falsely arrested Plaintiff," "used excessive force on Plaintiff"*], not whether a [statute/rule/procedure/regulation] might have been [complied with / violated].

### Committee Comments

This instruction should be given only if evidence was admitted at trial about compliance with a statute, rule, or regulation. The Committee takes no position on whether or when such evidence should be admitted or excluded. For general authority, see *Shango v. Jurich*, 681 F.2d 1091, 1101 (7th Cir. 1982); *Doe v. Milwaukee County*, 903 F.2d 499, 502 (7th Cir. 1990).

## 7.05 FOURTH AMENDMENT: FALSE ARREST - ELEMENTS

In this case, Plaintiff claims that Defendant falsely arrested him. To succeed on this claim, Plaintiff must prove each of the following things by a preponderance of the evidence:

1. Defendant arrested Plaintiff;

2. Defendant did not have probable cause to arrest Plaintiff; and

3. Defendant was acting under color of law.

If you find that Plaintiff has proved each of these things by a preponderance of the evidence, then you should find for Plaintiff, and go on to consider the question of damages.

If, on the other hand, you find that Plaintiff has failed to prove any one of these things by a preponderance of the evidence, then you should find for Defendant, and you will not consider the question of damages.

### Committee Comments

a. **Undisputed Elements:** The first and third elements should be eliminated if undisputed. If both of these elements are undisputed, only one element will remain, and the instruction's second sentence should read: "To succeed on this claim, Plaintiff must prove by a preponderance of the evidence that Defendant did not have probable cause to arrest him."

b. **Disputed Arrest:** If the parties dispute whether the defendant was arrested, it may be necessary for the court to define "arrest." If the seizure at issue was not an arrest, the instruction should be modified appropriately.

## 7.06 FOURTH AMENDMENT: FALSE ARREST - DEFINITION OF "PROBABLE CAUSE"

Let me explain what "probable cause" means. There is probable cause for an arrest if at the moment the arrest was made, a prudent person would have believed that Plaintiff [had committed/was committing] a crime. In making this decision, you should consider what Defendant knew and what reasonably trustworthy information Defendant had received.

[It is not necessary that Defendant had probable cause to arrest Plaintiff for [*offense in case*], so long as Defendant had probable cause to arrest him for some criminal offense.] [It is not necessary that Defendant had probable cause to arrest Plaintiff for all of the crimes he was charged with, so long as Defendant had probable cause to arrest him for one of those crimes.]

Probable cause requires more than just a suspicion. But it does not need to be based on evidence that would be sufficient to support a conviction, or even a showing that Defendant's belief was probably right. [The fact that Plaintiff was later acquitted of [*offense in case*] does not by itself mean that there was no probable cause at the time of his arrest.]

### Committee Comments

a. **Authority:** For general authority, see *Brinegar v. United States*, 338 U.S. 160, 175-176 (1949); *Anderer v. Jones*, 385 F.3d 1043, 1049 (7th Cir. 2004); *Kelley v. Myler*, 149 F.3d 641,646 (7th Cir. 1998); *Hughes v. Meyer*, 880 F.2d 967, 969-970 (7th Cir. 1989). *See also Smith v. Lamz*, 321 F.3d 680, 684 (7th Cir. 2003) ("The determination of probable cause is normally a mixed question of law and fact . . . but when 'what happened' questions are not at issue, the ultimate resolution of whether probable cause existed is a question of law . . ..").

b. **Probable Cause for Other Crimes:** The bracketed language in the instruction's second paragraph should only be used in appropriate situations. *See Devenpeck v. Alford*, 125 S.Ct. 588 (2004); *Calusinski v. Kruger*, 24 F.3d 931, 935 (7th Cir. 1994) (probable cause for one of multiple charges); *Biddle v. Martin*, 992 F.2d 673, 676 (7th Cir. 1993) (probable cause for closely-related charge).

c. **Subsequent Acquittal:** The bracketed language in the instruction's third paragraph should only be used in appropriate situations. For authority, *Michigan v. DeFillippo*, 443 U.S. 31, 36 (1979); *Humphrey v. Staszak*, 148 F.3d 719, 728 (7th Cir. 1998).

d. **Prudent Person:** Some cases use the term "objectively reasonable police officer" in discussing how probable cause is defined. *See Ornelas v. United States*, 517 U.S. 690, 696 (1996).

The prevailing standard, however, appears to be that of the "prudent person," and this appears to be the standard most often used in the Seventh Circuit. *See, e.g.*, *Hunter v. Bryant*, 502 U.S. 224, 228 (1991)*; United States v. Schafssma*, 318 F.3d 718, 721 (7th Cir. 2003); *United States v. Mounts*, 248 F.3d 712, 714-15 (7th Cir. 2001). The Committee viewed any possible distinction between the two terms as insignificant because a jury can consider a defendant's position as an officer in all cases when determining what the defendant "knew and what reasonably trustworthy information [he] had received" at the time of an arrest.

## 7.07 FOURTH AMENDMENT: FALSE ARREST - FAILURE TO INVESTIGATE

If there was probable cause, [*Officer*] did not need to do more investigation to uncover evidence that Plaintiff was innocent.

### Committee Comments

The Committee views this instruction as optional in light of Seventh Circuit precedent suggesting that the instruction's principle is not without limits. *See, e.g., Beauchamp v. City of Noblesville, Ind.*, 320 F.3d 733, 743 (7th Cir. 2003) (if complaint would lead reasonable officer to be suspicious, officer has duty to investigate further); *BeVier v. Hucal*, 806 F.2d 123, 128 (7th Cir. 1986) ("A police officer may not close her or his eyes to facts that would help clarify the circumstances of an arrest. Reasonable avenues of investigation must be pursued especially when . . . it is unclear whether a crime had even taken place."). For general authority, see *Arizona v. Youngblood*, 488 U.S. 51, 58-59 (1988) (no obligation to pursue scientific tests or similar investigative leads); *Spiegel v. Cortese*, 196 F.3d 717, 723 (7th Cir. 1999), *as amended* (Jan. 7, 2000); *Garcia v. City of Chicago*, 24 F.3d 966, 970 (7th Cir. 1994).

## 7.08 FOURTH AMENDMENT/FOURTEENTH AMENDMENT: EXCESSIVE FORCE AGAINST ARRESTEE OR PRETRIAL DETAINEE - ELEMENTS

In this case, Plaintiff claims that Defendant used excessive force against him. To succeed on this claim, Plaintiff must prove each of the following things by a preponderance of the evidence:

1. Defendant used unreasonable force against Plaintiff;

[2. Because of Defendant's unreasonable force, Plaintiff was harmed;]

[3. Defendant acted under color of law.]

If you find that Plaintiff has proved each of these things by a preponderance of the evidence, then you should find for Plaintiff, and go on to consider the question of damages.

If, on the other hand, you find that Plaintiff did not prove any one of these things by a preponderance of the evidence, then you should find for Defendant, and you will not consider the question of damages.

### Committee Comments

a. **Unreasonable Force:** For authority regarding the "unreasonable force" element of the claim, see *Graham v. Connor*, 490 U.S. 386 (1989); *Tennessee v. Garner*, 471 U.S. 1 (1985); *Deering v. Reich*, 183 F.3d 645 (7th Cir. 1999). Although *Graham* and *Garner* are Fourth Amendment cases involving arrestees, *Wilson v. Williams*, 83 F.3d 870, 876 (7th Cir. 1996), states that the same standard applies to pretrial detainees. A separate instruction applies to cases involving convicted prisoners.

If the defendant contends that the application of force was accidental, the court may wish to break the first element into two:

1. Defendant intentionally used force against Plaintiff;

2. The force Defendant used was unreasonable;

b. **Harm to Plaintiff:** Although some other circuits include an element of "damage" in their pattern instruction, *see, e.g.*, EIGHTH CIRCUIT MANUAL OF MODEL CIVIL JURY INSTRUCTIONS § 4.30 (1999), the Committee believes that there is significant doubt as to whether damage, or "harm"

as that term is commonly understood, is actually required for a finding of liability under §1983. Though "harm" in the commonly-understood sense is likely to exist in most excessive force cases, some cases will arise in which it does not, *e.g.*, a situation in which an officer strikes the plaintiff with his hand but leaves no mark and causes no lingering injury or pain. In such cases, the court will need to determine whether the jury should be instructed on this point.

In *Gumz v. Morrissette*, 772 F.2d 1395, 1400 (7th Cir. 1985), the court held that an officer's use of force was unconstitutional if it (1) caused severe injuries; (2) was grossly disproportionate to the need for action under the circumstances; and (3) was inspired by malice or shocked the conscience. *Gumz*, however, was overruled by *Lester v. City of Chicago*, 830 F.2d 706 (7th Cir. 1987), which used the same "totality of the circumstances test" that was later adopted by the Supreme Court in *Graham v. Connor*, 490 U.S. 386 (1989). In *Lanigan v. Village of East Hazel Crest, Illinois*, 110 F.3d 467 (7th Cir. 1997), the court upheld a claim based on force consisting of "one violent push and poke," noting that the plaintiff "need not have been injured to have an excessive force claim." *Id*. at 470 n.3. In *McNair v. Coffey*, 279 F.3d 463 (7th Cir. 2002), the court addressed a claim arising from an incident in which no physical force was used, but officers pointed their weapons at the plaintiffs. Though it determined that the officers were entitled to qualified immunity, and indicated that the Fourth Amendment appeared to require *some* use of force, *id*. at 467, the majority ended its opinion with the statement "we do not foreclose the possibility that the circumstances of an arrest could become 'unreasonable' without the application of physical force." *Id*. at 468. *See also Herzog v. Village of Winnetka, Ill.*, 309 F.3d 1041, 1043 (7th Cir. 2002) (refusal to loosen chafing handcuffs or shoving an arrestee would constitute actionable excessive force)

Even if, as *McNair* indicates, an application of force is required in order to implicate the Fourth Amendment, it is not at all clear that the plaintiff must suffer "harm" in order to obtain a finding of liability; the availability of nominal damages in excessive force cases suggests that "harm" is not a requirement. *See, e.g., Briggs v. Marshall*, 93 F.3d 355, 360 (7th Cir. 1996) (indicating that nominal damages may be awarded in a Fourth Amendment excessive force case where no injury resulted from the use of excessive force, where the evidence of actual injury is not credible, or where the injury has no monetary value). Because the issue of whether a plaintiff must prove "harm" is not definitively resolved, the Committee placed the second element in brackets, indicating that a court should give this part of the instruction to the jury at its discretion.

c. **Third element:** The third element should be eliminated if the "color of law" issue is not in dispute.

d. **Single Element Instruction:** If the second and third elements are eliminated, only one element will remain, and the instruction's second sentence should read as follows: "To succeed on this claim, Plaintiff must prove by a preponderance of the evidence that Defendant used unreasonable force against him."

## 7.09 FOURTH AMENDMENT/FOURTEENTH AMENDMENT: EXCESSIVE FORCE - DEFINITION OF "UNREASONABLE"

You must decide whether Defendant's use of force was unreasonable from the perspective of a reasonable officer facing the same circumstances that Defendant faced. You must make this decision based on what the officer knew at the time of the arrest, not based on what you know now. In deciding whether Defendant's use of force was unreasonable, you must not consider whether Defendant's intentions were good or bad.

In performing his job, an officer can use force that is reasonably necessary under the circumstances.

[An officer may use deadly force when a reasonable officer, under the same circumstances, would believe that the suspect's actions placed him or others in the immediate vicinity in imminent danger of death or serious bodily harm. [It is not necessary that this danger actually existed.] [An officer is not required to use all practical alternatives to avoid a situation where deadly force is justified.]]

### Committee Comments

a. **Authority:** *Graham v. Connor*, 490 U.S. 386, 396 (1989); *Tennessee v. Garner*, 471 U.S. 1, 8-9 (1985); *Deering v. Reich*, 183 F.3d 645 (7th Cir. 1999).

b. **Factors:** Case law establishes a number of factors that may be relevant to the jury's determination of whether a particular use of force was unreasonable. The Committee did not list these factors in the instruction because the jury is to consider *all* circumstances, and the listing of some might suggest that others are irrelevant. However, a court may wish to consider giving a list of factors for the jury's consideration, and if it elects to do so the following is proposed:

- the need for the use of force;
- the relationship between the need for the use of force and the amount of force used;
- the extent of the plaintiff's injury;
- any efforts made by the defendant to temper or limit the amount of force;
- the severity of the crime at issue;
- the threat reasonably perceived by the officer(s);
- whether the plaintiff was actively resisting arrest or was attempting to evade arrest by fleeing.

*See Graham v. Connor*, 490 U.S. at 396 (fifth, sixth, and seventh factors). In *Wilson v. Williams*, 83 F.3d 870 (7th Cir. 1996), a Fourteenth Amendment excessive force case involving a pretrial detainee,

the Seventh Circuit listed factors one, two, three, four, and six from the above list, and stated that they are "generally relied on in the Fourth Amendment excessive force context." *Id*. at 876. For this proposition, however, the court cited *Hudson v. McMillian*, 503 U.S. 1, 7 (1992), which was an Eighth Amendment case, not a Fourth Amendment case. *See generally* Eighth Circuit Manual of Model Jury Instructions (Civil) 4.10 (1999) (using factors one, two, and three).

c. **Deadly Force:** The final (bracketed) paragraph applies only in cases involving an officer's use of deadly force. *Tennessee v. Garner*, 471 U.S. 1, 11-12 (1985); *Sherrod v. Berry*, 856 F.2d 802, 805 (7th Cir. 1988). With regard to the final (bracketed) sentence of this paragraph, *see Deering v. Reich*, 183 F.3d 645, 652-653 (7th Cir. 1999); *Plakas v. Drinski*, 19 F.3d 1143, 1148 (7th Cir. 1994). The fact that a particularized instruction is proposed for deadly force cases does not preclude the consideration or giving of a particularized instruction in other types of cases, for example, those involving a fleeing felon or an officer's claim of self-defense.

## 7.10 EIGHTH AND FOURTEENTH AMENDMENTS: PRISON/JAIL CONDITIONS OF CONFINEMENT - ELEMENTS

To succeed in his claim about the conditions of his confinement, Plaintiff must prove each of the following things by a preponderance of the evidence:

1. Plaintiff was incarcerated under conditions that posed a substantial risk of serious harm to his health or safety;

2. Defendant was deliberately indifferent to Plaintiff's health or safety;

[3. Defendant's conduct caused harm to Plaintiff];

[4. Defendant acted under color of law].

If you find that Plaintiff has proved each of these things by a preponderance of the evidence, then you should find for Plaintiff, and go on to consider the question of damages.

If, on the other hand, you find that Plaintiff has failed to prove any one of these things by a preponderance of the evidence, then you should find for Defendant, and you will not consider the question of damages.

### Committee Comments

a. **Authority:** *Farmer v. Brennan*, 511 U.S. 825 (1994). Though *Farmer* is an Eighth Amendment case involving a convicted prisoner, the Seventh Circuit has held that the same standard applies in Fourteenth Amendment cases involving pretrial detainees. *See, e.g., Tesch v. County of Green Lake,* 157 F.3d 465, 473 (7th Cir. 1998).

As to the bracketed third element, see comment b to Instruction 7.08.

b. **Plaintiff Not "Incarcerated"**: In a case where the plaintiff is not yet in jail or prison, the Committee recommends that the court replace the word "incarcerated" with "in custody".

c. **Under Color of Law:** The fourth element should be eliminated if the "color of law" issue is not in dispute.

d. **Deliberate Indifference:** This instruction should be used in conjunction with the definition of "deliberately indifferent" in Instruction No. 7.14.

## 7.11 EIGHTH AND FOURTEENTH AMENDMENTS: FAILURE TO PROTECT - ELEMENTS

To succeed on his claim of failure to protect, Plaintiff must prove each of the following things by a preponderance of the evidence:

1. [*Describe who the attackers were and what they did, e.g., hit, kicked or struck the Plaintiff*];

2. Defendant was deliberately indifferent to the substantial risk of [that] [such an] attack;

3. As a result of Defendant's conduct, Plaintiff was harmed;

[4. Defendant acted under color of law].

If you find that Plaintiff has proved each of these things by a preponderance of the evidence, then you should find for Plaintiff, and go on to consider the question of damages.

If, on the other hand, you find that Plaintiff has failed to prove any one of these things by a preponderance of the evidence, then you should find for Defendant, and you will not consider the question of damages.

### Committee Comments

a. **Authority:** *Farmer v. Brennan*, 511 U.S. 825 (1994); *Whiting v. Marathon County Sheriff's Dep't*, 382 F.3d 700, 703 (7th Cir. 2004) ("subjective recklessness test"). Though *Farmer* is an Eighth Amendment case involving a convicted prisoner, *Zarnes v. Rhodes*, 64 F.3d 285, 289-290 (7th Cir. 1995), applied the same standard to a Fourteenth Amendment case involving a pretrial detainee. *Accord, Velez v. Johnson*, 395 F.3d 732, 735 (7th Cir. 2005) ("Velez, as we said, was a pretrial detainee at the time of the assault; therefore, his claim arises under the Fourteenth Amendment's Due Process Clause, not the Eighth Amendment. But as we have noted time and again, there is 'little practical difference between the two standards.'").

b. **Defendant Awareness:** As a general rule, in order for the defendant to be liable on this type of claim, a plaintiff must be the victim of a specific attack and there must be notice of the particularized attack. *See also Brown v. Budz*, 398 F.3d 904, 913-915 (7th Cir. 2005) (knowledge that inmate was risk to certain types of fellow inmates sufficient); *Velez v. Johnson*, 395 F.3d 732, 736 (7th Cir. 2005) ("Johnson did not have to know the specifics of the danger to be culpable. ... What matters is that Johnson was aware of a serious risk of harm in some form, be it assault or the more

serious transgression that actually occurred."). Although a plaintiff cannot predicate a failure to protect claim on the defendant's knowledge of the general risk of violence in a prison, there may be cases in which a plaintiff can predicate a claim on the defendant's awareness of characteristics of the plaintiff that put him at serious risk of being targeted by other inmates. *Weiss v. Cooley*, 230 F.3d 1027, 1032 (7th Cir. 2000), (citing *Langston v. Peters*, 100 F.3d 1235, 1238-1239 (7th Cir. 1996) and *Swofford v. Mandrell*, 969 F.2d 547, 549-550 (7th Cir. 1992)). This accounts for the Committee's bracketed choices ("that attack"/"such an attack") in the second element of the instruction.

c. **Under Color of Law:** The fourth element should be eliminated if the "color of law" issue is not in dispute.

d. **Deliberate Indifference:** This instruction should be used in conjunction with the definition of "deliberately indifferent" in Instruction No. 7.14.

## 7.12 EIGHTH AND FOURTEENTH AMENDMENTS: FAILURE TO PROVIDE MEDICAL ATTENTION - ELEMENTS

To succeed on his claim of failure to provide medical attention, Plaintiff must prove each of the following things by a preponderance of the evidence:

1. Plaintiff had a serious medical need;

2. Defendant was deliberately indifferent to Plaintiff's serious medical need;

3. Defendant's conduct caused harm to Plaintiff;

[4. Defendant acted under color of law].

If you find that Plaintiff has proved each of these things by a preponderance of the evidence, then you should find for Plaintiff, and go on to consider the question of damages.

If, on the other hand, you find that Plaintiff has failed to prove any one of these things by a preponderance of the evidence, then you should find for Defendant, and you will not consider the question of damages.

### Committee Comments

a. **Authority:** *Farmer v. Brennan*, 511 U.S. 825 (1994). Though *Farmer* is an Eighth Amendment case involving a convicted prisoner, the Seventh Circuit has held that the same standard applies in Fourteenth Amendment cases involving pretrial detainees. *See, e.g., Board v. Farnham*, 394 F.3d 469, 477-478 (7th Cir. 2005); *Jackson v. Illinois Medi-Car, Inc.*, 300 F.3d 760, 764 (7th Cir. 2002); *Higgins v. Correctional Medical Services of Illinois, Inc.*, 178 F.3d 508, 511 (7th Cir. 1999); *Payne for Hicks v. Churchich*, 161 F.3d 1030, 1040 (7th Cir. 1998).

b. **Under Color of Law:** The fourth element should be eliminated if the "color of law" issue is not in dispute.

c. **Deliberate Indifference:** This instruction must be used in conjunction with the definition of "deliberately indifferent" in Instruction No. 7.14.

d. **Serious Medical Need:** This instruction must be used in conjunction with the definition of "serious medical need" in Instruction No. 7.13, unless this element is not in issue.

## 7.13 EIGHTH AND FOURTEENTH AMENDMENTS: FAILURE TO PROVIDE MEDICAL ATTENTION - DEFINITION OF "SERIOUS MEDICAL NEED"

When I use the term "serious medical need," I mean a condition that a doctor says requires treatment, or something so obvious that even someone who is not a doctor would recognize it as requiring treatment. In deciding whether a medical need is serious, you should consider the following factors:

- the severity of the condition;

- the harm [including pain and suffering] that could result from a lack of medical care;

- whether providing treatment was feasible; and

- the actual harm caused by the lack of medical care.

### Committee Comments

*Foelker v. Outagamie County*, 394 F.3d 510, 512 (7th Cir. 2005); *Gutierrez v. Peters*, 111 F.3d 1364, 1373 (7th Cir. 1997); *Thomas v. Pate*, 493 F.2d 151, 158 (7th Cir. 1974). A court should use the bracketed language in the second factor only where applicable.

## 7.14 EIGHTH AND FOURTEENTH AMENDMENTS: CONDITIONS OF CONFINEMENT/FAILURE TO PROTECT/ FAILURE TO PROVIDE MEDICAL CARE - DEFINITION OF "DELIBERATELY INDIFFERENT"

When I use the term "deliberately indifferent," I mean that Defendant actually knew of a substantial risk of [[serious harm] or [*describe specific harm to Plaintiff's health or safety*]], and that Defendant consciously disregarded this risk by failing to take reasonable measures to deal with it. [In deciding whether Defendant failed to take reasonable measures, you may consider whether it was practical for him to take corrective action.]

[If Defendant took reasonable measures to respond to a risk, then he was not deliberately indifferent, even if Plaintiff was ultimately harmed.]

### Committee Comments

a. **Authority:** *See* EIGHTH CIRCUIT MODEL JURY INSTRUCTIONS (CIVIL), §4.44. *See also Farmer v. Brennan*, 511 U.S. 825, 837 (1994); *Davidson v. Cannon*, 474 U.S. 344, 347 (1986); *Pierson v. Hartley*, 391 F.3d 898, 902-903 (7th Cir. 2004); *Zarnes v. Rhodes*, 64 F.3d 285 (7th Cir. 1995); *Billman v. Indiana Department of Corrections*, 56 F.3d 785 (7th Cir. 1995); *Miller v. Neathery*, 52 F.3d 634 (7th Cir. 1995); *Duane v. Lane*, 959 F.2d 673, 676-677 (7th Cir. 1992); *McGill v. Duckworth*, 944 F.2d 344, 348 (7th Cir. 1991).

b. **Bracketed Language:** The bracketed sentence at the end of the first paragraph represents optional language that may apply depending on the particulars of the case. The remaining bracketed language also is optional and its use or non-use should be determined by a court with regard to the particular case.

c. **"Ostrich" Instruction:** The following language, which is commonly known as an "ostrich" instruction, may be useful in certain circumstances: "If you find that Defendant strongly suspected that things were not as they seemed, yet shut his eyes for fear of what he would learn, you may conclude that he was deliberately indifferent. You may not conclude that Defendant was deliberately indifferent if he was merely careless in failing to discover the truth." *See* SEVENTH CIRCUIT FEDERAL CRIMINAL JURY INSTRUCTIONS § 4.06 (1999); *McGill v. Duckworth*, 944 F.2d at 351 (conscious avoidance can amount to deliberate indifference).

## 7.15 EIGHTH AMENDMENT: EXCESSIVE FORCE AGAINST CONVICTED PRISONER - ELEMENTS

To succeed on his claim of excessive use of force, Plaintiff must prove each of the following things by a preponderance of the evidence:

1. Defendant used force on Plaintiff;

2. Defendant intentionally used extreme or excessive cruelty toward Plaintiff for the purpose of harming him, and not in a good faith effort to maintain or restore security or discipline;

3. Defendant's conduct caused harm to Plaintiff;

[4. Defendant acted under color of law].

In deciding whether Plaintiff has proved that Defendant intentionally used extreme or excessive cruelty toward Plaintiff, you may consider such factors as:

- the need to use force;

- the relationship between the need to use force and the amount of force used;

- the extent of Plaintiff's injury;

- whether Defendant reasonably believed there was a threat to the safety of staff or prisoners;

- any efforts made by Defendant to limit the amount of force used.

[In using force against a prisoner, officers cannot realistically be expected to consider every contingency or minimize every possible risk.]

If you find that Plaintiff has proved each of these things by a preponderance of the evidence, then you should find for Plaintiff, and go on to consider the question of damages.

If, on the other hand, you find that Plaintiff has failed to prove any one of these things by a preponderance of the evidence, then you should find for Defendant, and you will not consider the question of damages.

## Committee Comments

a. **Usage and Authority:** *See Whitley v. Albers*, 475 U.S. 312, 320-321 (1986); *Williams v. Boles*, 841 F.2d 181 (7th Cir. 1988). This instruction applies only to cases involving convicted prisoners. Instruction 7.08 covers arrestees and pretrial detainees.

b. **Color of Law:** The fourth element should be eliminated if the "under color of law" issue is undisputed.

c. **Deference to Prison Official Policies:** If the defendant claims to have acted pursuant to a policy of the correctional facility, the instruction should be modified to include the following language in the paragraph that follows the listing of factors:

> You must give prison officials leeway to adopt and carry out policies and practices that in their reasonable judgment are needed to preserve order and discipline and to maintain security in the prison.

## 7.16 FOURTH, EIGHTH, AND FOURTEENTH AMENDMENTS: CLAIM FOR FAILURE OF "BYSTANDER" OFFICER TO INTERVENE - ELEMENTS

To succeed on his failure to intervene claim, Plaintiff must prove each of the following things by a preponderance of the evidence:

1. [*Name of Officer alleged to have committed primary violation*] [*describe constitutional violation claimed, e.g., "falsely arrested Plaintiff," "used excessive force on Plaintiff"*];

2. Defendant knew that [*Officer*] was/was about to [*describe constitutional violation claimed, e.g., "falsely arrest Plaintiff" "use excessive force on Plaintiff"*];

3. Defendant had a realistic opportunity to do something to prevent harm from occurring;

4. Defendant failed to take reasonable steps to prevent harm from occurring;

5. Defendant's failure to act caused Plaintiff to suffer harm;

[6. Defendant acted under color of law].

If you find that Plaintiff has proved each of these things by a preponderance of the evidence, then you should find for Plaintiff, and go on to consider the question of damages.

If, on the other hand, you find that Plaintiff has failed to prove any one of these things by a preponderance of the evidence, then you should find for Defendant, and you will not consider the question of damages.

### Committee Comments

a. **Authority and Usage:** *See Lanigan v. Village of East Hazel Crest, Ill.*, 110 F.3d 467, 477-478 (7th Cir. 1997); *Yang v. Hardin*, 37 F.3d 282, 285 (7th Cir. 1994). This instruction applies in the case of a "standby officer."

b. **Color of Law:** The sixth element should be eliminated if the "color of law" issue is not in dispute.

c. **Principal Actor Out of Case:** If the officer who engaged in the alleged constitutional

violation has settled, or is otherwise not involved in the case, a court will need to adjust the instructions to ensure that the jury has a sufficient understanding of the underlying constitutional issue.

## 7.17 LIABILITY OF SUPERVISORS: ELEMENTS

To succeed on his claim against [*Supervisor*], Plaintiff must prove each of the following things by a preponderance of the evidence:

1. [*Name of Officer alleged to have committed primary violation*] [*describe constitutional violation claimed, e.g., "falsely arrested Plaintiff," "used excessive force on Plaintiff"*];

2. [*Supervisor*] knew that [*Officer*] was about to [*describe constitutional violation claimed*];

*or*

[*Supervisor*] knew that [*Officer/Officers he supervised*] had a practice of [*describe constitutional violation claimed*] in similar situations;

3. [*Supervisor*] [approved/assisted/condoned/purposely ignored] [*Officer's*] [*describe constitutional violation claimed*];

4. As a result, Plaintiff was injured.

If you find that Plaintiff has proved each of these things by a preponderance of the evidence, then you should find for Plaintiff, and go on to consider the question of damages.

If, on the other hand, you find that Plaintiff has failed to prove any one of these things by a preponderance of the evidence, then you should find for Defendant, and you will not consider the question of damages.

### Committee Comments

a. **Authority**: *See Kernats v. O'Sullivan,* 35 F.3d 1171, 1182 (7th Cir. 1994); *Rascon v. Hardiman,* 803 F.2d 269, 273-274 (7th Cir. 1986).

b. **Principal Actor Out of Case:** If the officer who engaged in the alleged constitutional violation has settled, or is otherwise not involved in the case, a court will need to adjust the instructions to ensure that the jury has a sufficient understanding of the underlying constitutional issue.

## 7.18 QUALIFIED IMMUNITY

### Committee Comments

Qualified immunity is an issue for resolution by the court, not the jury. *Hughes v. Meyer*, 880 F.2d 967, 969 (7th Cir. 1989) ("even though pertinent facts may be in dispute, the question whether immunity attaches is always one for the judge to decide."), *citing Jones v. City of Chicago*, 856 F.2d 985, 994 (7th Cir.1988); *Rakovich v. Wade*, 850 F.2d 1180, 1201-1202 (7th Cir.1988) (en banc). Accordingly, no jury instruction on this topic is appropriate, though a special interrogatory may be appropriate when application of qualified immunity turns on an issue of fact.

## 7.19 LIABILITY OF MUNICIPALITY

If you find that Plaintiff has proved [these things] [any of his claims] by a preponderance of the evidence, you must consider whether [*Municipality*] is also liable to Plaintiff. [*Municipality*] is not responsible simply because it employed [*Officer*]. [*Municipality*] is liable if Plaintiff proves by a preponderance of the evidence that Defendant's conduct was a result of its official policy.

### Committee Comments

a. **Authority:** *See Monell v. City of New York Dep't of Soc. Svcs.*, 436 U.S. 658, 690-691 (1978).

b. **Usage:** In a case involving a single constitutional claim, the Committee suggests that courts use this instruction in conjunction with the relevant elements instruction. In a case involving multiple constitutional claims, the Committee suggests that courts use this instruction separately after the jury has been instructed on the elements of each individual claim.

## 7.20 LIABILITY OF MUNICIPALITY: DEFINITION OF "OFFICIAL POLICY"

When I use the term "official policy," I mean:

[- A rule or regulation passed by [*Municipality*]'s legislative body.[1]]

[- A decision or policy statement made by [*Name*], who is a policy-making official of [*Municipality*]. [This includes [*Name*]'s approval of a decision or policy made by someone else, even if that person is not a policy-making official.]

[- A custom of [*describe acts or omissions alleged to constitute constitutional violation*] that is persistent and widespread, so that it is [*Municipality*]'s standard operating procedure. A persistent and widespread pattern may be a custom even if [*Municipality*] has not formally approved it, so long as Plaintiff proves that a policy-making official knew of the pattern and allowed it to continue. [This includes a situation where a policy-making official must have known about a subordinate's actions/failures to act by virtue of the policy-making official's position.]

### Committee Comments

*See City of St. Louis v. Praprotnik*, 485 U.S. 112 (1988); *Monell v. City of New York Dep't of Soc. Svcs.*, 436 U.S. 658, 690-691 (1978); *Estate of Moreland v. Dieter*, 395 F.3d 747, 759-760 (7th Cir. 2005); *Monfils v. Taylor*, 165 F.3d 511, 517-518 (7th Cir. 1998); *McNabola v. Chicago Trans. Auth.*, 10 F.3d 501, 511 (7th Cir. 1993).

[1] The Committee suggests that, when possible, the court refer to the particular legislative body, *e.g.*, "the Smallville City Council".

## 7.21 LIABILITY OF MUNICIPALITY FOR FAILURE TO TRAIN: ELEMENTS

To succeed on his claim against [*Municipality*] for failure to train, Plaintiff must prove each of the following things by a preponderance of the evidence:

1. [*Municipality's*] training program was not adequate to train its [officers/employees] to properly handle recurring situations;

2. [*Official/Policymaker/Policymaking Body*] knew that more [and/or different] training was needed to avoid likely [*describe alleged constitutional violation(s)*], or that this was obvious to [*Official/Policymaker/Policymaking Body*]; and

3. [*Municipality's*] failure to provide adequate training caused [*describe alleged violation(s) of Plaintiff's constitutional rights*].

If you find that Plaintiff has proved each of these things by a preponderance of the evidence, then you should find for Plaintiff, and go on to consider the question of damages.

If, on the other hand, you find that Plaintiff has failed to prove any one of these things by a preponderance of the evidence, then you should find for Defendant, and you will not consider the question of damages.

### Committee Comments

a. **Authority:** *See Board of County Commissioners of Bryan County v. Brown,* 520 U.S. 397, 404 (1997); *City of Canton v. Harris,* 489 U.S. 378, 388-391 (1989); *Robles v. City of Fort Wayne,* 113 F.3d 732, 735 (7th Cir. 1997).

b. **Deliberate Indifference:** The second element of the instruction encompasses the definition of "deliberate indifference" for purposes of a failure to train claim. *See Board of County Commissioners of Bryan County,* 520 U.S. at 407-408; *City of Canton v. Harris,* 489 U.S. at 388-391; *Robles v. City of Fort Wayne,* 113 F.3d 732, 735 (7th Cir. 1997).

c. **Whose Knowledge Required:** The Committee did not resolve the issue of *whose* knowledge is required in order to render a municipality liable. Some members were of the view that knowledge by the "final policymaking body" or "final policymaker" is required. Others were of the view that this issue is not yet settled in this circuit and should be left open for argument in individual cases until there is definitive precedent on the issue.

## 7.22 DAMAGES: PREFATORY INSTRUCTION

If you find that Plaintiff has proved [any of] his claim[s] against [any of] Defendant(s), then you must determine what amount of damages, if any, Plaintiff is entitled to recover.

If you find that Plaintiff has failed to prove [all of] his claim[s], then you will not consider the question of damages.

## 7.23 DAMAGES: COMPENSATORY

If you find in favor of Plaintiff, then you must determine the amount of money that will fairly compensate Plaintiff for any injury that you find he sustained [and is reasonably certain to sustain in the future] as a direct result of [*insert appropriate language, such as "the failure to provide plaintiff with medical care," etc.*] [These are called "compensatory damages".][2]

Plaintiff must prove his damages by a preponderance of the evidence. Your award must be based on evidence and not speculation or guesswork. This does not mean, however, that compensatory damages are restricted to the actual loss of money; they include both the physical and mental aspects of injury, even if they are not easy to measure.

You should consider the following types of compensatory damages, and no others:

[1. The reasonable value of medical care and supplies that Plaintiff reasonably needed and actually received [as well as the present value of the care and supplies that he is reasonably certain to need and receive in the future.]]

[2. The [wages, salary, profits, earning capacity] that Plaintiff has lost [and the present value of the [wages, salary, profits, earning capacity] that Plaintiff is reasonably certain to lose in the future] because of his [inability/diminished ability] to work.]

[When I say "present value," I mean the sum of money needed now which, together with what that sum may reasonably be expected to earn in the future, will equal the amounts of those monetary losses at the times in the future when they will be sustained.]

[3. The physical [and mental/emotional] pain and suffering [and disability/loss of a normal life] that Plaintiff has experienced [and is reasonably certain to experience in the future]. No evidence of the dollar value of physical [or mental/emotional] pain and suffering [or disability/loss of a normal life] has been or needs to be introduced. There is no exact standard for setting the damages to be awarded on account of pain and suffering. You are to determine an amount that will fairly compensate the Plaintiff for the injury he has sustained.]

[If you find in favor of Plaintiff but find that the plaintiff has failed to prove compensatory damages, you must return a verdict for Plaintiff in the amount of one dollar

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[2] The Committee suggests that a court use the phrase "compensatory damages" only if the case also involves a claim for punitive damages.

($1.00).]

## Committee Comments

a. **Usage:** This instruction lists the more common elements of damages in cases under 42 U.S.C. §1983, but is not intended to be exhaustive.

b. **Present Value:** Regarding the definition of "present value," see ILLINOIS PATTERN INSTRUCTIONS (CIVIL) § 31.12 (2000).

c. **Disability and Loss of Normal Life:** The terms "disability" and "loss of a normal life" are in brackets. These terms describe roughly interchangeable concepts. Before instructing the jury on either element, the law relevant to the particular type of §1983 claim must be consulted to determine whether such damages are recoverable and to determine the appropriate terminology.

## 7.24 DAMAGES: PUNITIVE

If you find for Plaintiff, you may, but are not required to, assess punitive damages against Defendant. The purposes of punitive damages are to punish a defendant for his conduct and to serve as an example or warning to Defendant and others not to engage in similar conduct in the future.

Plaintiff must prove by a preponderance of the evidence that punitive damages should be assessed against Defendant. You may assess punitive damages only if you find that his conduct was malicious or in reckless disregard of Plaintiff's rights. Conduct is malicious if it is accompanied by ill will or spite, or is done for the purpose of injuring Plaintiff. Conduct is in reckless disregard of Plaintiff's rights if, under the circumstances, it reflects complete indifference to Plaintiff's safety or rights.

If you find that punitive damages are appropriate, then you must use sound reason in setting the amount of those damages. Punitive damages, if any, should be in an amount sufficient to fulfill the purposes that I have described to you, but should not reflect bias, prejudice, or sympathy toward either/any party. In determining the amount of any punitive damages, you should consider the following factors:

- the reprehensibility of Defendant's conduct;

- the impact of Defendant's conduct on Plaintiff;

- the relationship between Plaintiff and Defendant;

- the likelihood that Defendant would repeat the conduct if an award of punitive damages is not made;

[- Defendant's financial condition;]

- the relationship of any award of punitive damages to the amount of actual harm the Plaintiff suffered.

### Committee Comments

a. **Authority:** *See Smith v. Wade*, 461 U.S. 30, 56 (1983). With regard to the applicable factors, *see generally Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991); EIGHTH CIRCUIT MANUAL OF MODEL CIVIL JURY INSTRUCTIONS § 4.53 (2001) (including commentary); NINTH CIRCUIT

MANUAL OF MODEL CIVIL JURY INSTRUCTIONS § 7.5 (2001). The Committee notes that the Seventh Circuit has not yet addressed whether "preponderance of the evidence" is the appropriate standard for an award of punitive damages in a §1983 case.

b. **Defendant's Financial Condition:** The bracketed factor concerning the defendant's financial condition should be given only if evidence was admitted on that topic.

# 8. PRISONER'S RIGHT OF ACCESS TO COURTS

## 8.01 DESCRIPTION OF CLAIM

In this case, Plaintiff claims that Defendant intentionally denied him meaningful access to the courts. Plaintiff says that Defendant did this by [*describe conduct.*]

Let me explain the concept of "access to courts" in a bit more detail. The Constitution gives us the right to go to court when we have disputes with others. People who are in prison also have a right of "access to courts." By this I mean that a prisoner is entitled to get meaningful help in [preparing and/or filing] his lawsuit. [This might include talking to people with legal training, such as lawyers, law students, or paralegals. Or it might simply mean access to a law library or legal reference materials.]

A prison official can consider security risks in deciding what kind of access to give the prisoner. [For example, a prison official does not need to give a prisoner personal access to a library if that would be dangerous. Instead, the official can find other ways of giving the prisoner materials that he needs to file his lawsuit and make legal arguments.] Inconvenient or highly restrictive regulations may be appropriate if they do not completely deny meaningful access to courts.

In the end, there is no one way for a prison official to provide access to courts. Instead, you must consider the prison official's program as a whole to see if it provides meaningful access.

### Committee Comments

a. **Authority:** *See Lewis v. Casey*, 518 U.S. 343 (1996); *Bounds v. Smith*, 430 U.S. 817 (1977); *Lehn v. Holmes*, 364 F.3d 862 (7th Cir. 2004); *Brooks v. Buscher*, 62 F.3d 176 (7th Cir. 1995); *Vasquez v. Hernandez*, 60 F.3d 325 (7th Cir. 1995); *Hossman v. Spradlin*, 812 F.2d 1019 (7th Cir. 1987); *Corgain v. Miller*, 708 F.2d 1241 (7th Cir. 1983).

**b. Type of Underlying Suit:** Prisons must provide meaningful help for a prisoner's appeal of his conviction, habeas corpus action, or civil rights action challenging his condition of confinements. For all other types of civil lawsuits, the prison officials may not create barriers that impede the prisoner's right of access to the courts, *Snyder v. Nolen*, 380 F.3d 279 (7th Cir. 2004), and the instruction should be modified accordingly.

## 8.02 DENIAL OF PRISONER'S ACCESS TO COURT

To succeed in his claim of denial of access to court, Plaintiff must prove each of the following things by a preponderance of the evidence.

1. Defendant intentionally did at least one of the following things: [*Describe conduct*];

[2. Defendant acted "under color of law." By this I mean that a person performs, or claims to perform, official duties under any state, county, or municipal law, ordinance, or regulation;]

3. Defendant's conduct hindered his efforts to pursue a legal claim;

[4. The case which Plaintiff wanted to bring to court was not frivolous. A claim is frivolous if it is so trivial that there is no chance it would succeed in court or be settled out of court after it was filed;]

5. Plaintiff was harmed by Defendant's conduct.

If you find that Plaintiff has proved each of these things by a preponderance of the evidence, then you should find for Plaintiff, and go on to consider the question of damages.

If, on the other hand, you find that Plaintiff has failed to prove any one of these things by a preponderance of the evidence, then you should find for Defendant, and you will not consider the question of damages.

### Committee Comments

a. **Authority:** *See Snyder v. Nolen*, 380 F.3d 279 (7th Cir. 2004); *Lehn v. Holmes*, 364 F.3d 862 (7th Cir. 2004); *Brooks v. Buscher*, 62 F.3d 176 (7th Cir. 1995); *Jenkins v. Lane*, 977 F.2d 266 (7th Cir. 1992); *Kincaid v. Vail*, 969 F.2d 594 (7th Cir. 1992).

b. **Under Color of Law:** The second element should be eliminated if the "under color of law" issue is not in dispute.

c. **Frivolous Underlying Claim:** Similarly, judges should include the parenthetical material concerning whether Plaintiff's claim was frivolous only if this presents a factual issue in the case. *See Lewis v. Casey*, 518 U.S. 343, 353 & n.3 (1996) ("Depriving someone of a frivolous claim . . . deprives him of nothing at all . . . ."); *Thomson v. Washington*, 362 F.3d 969, 970 (7th Cir. 2004)

("If your legal papers are confiscated in a doomed proceeding, there is no harm and no basis for a constitutional suit . . . even though there is always a chance that the court would have ruled erroneously in your favor."). *Cf. Walters v. Edgar*, 163 F.3d 430, 433 (7th Cir. 1988) ("probabilistic" harm, which is nontrivial, will support standing for prospective injunctive relief).

d. **Harm:** *See Lehn v. Holmes*, 364 F.3d 862 (7th Cir. 2004).

## 8.03 DAMAGES

Use Instructions 7.22, 7.23 and 7.24, as appropriate, listing those elements of damages relevant to the case, as well as:

- the reasonable value of any judgment or settlement Plaintiff would have received if Defendant had not hindered his efforts to pursue his legal claim.

## SAMPLE PRELIMINARY INSTRUCTIONS

**NOTE:** The Committee chose not to produce pattern preliminary instructions in light of the concern that such a set might increase disputes over the way in which preliminary instructions should be worded. Still, the Committee thought it might be helpful to include a sample set of preliminary instructions for judges who have no established set of their own, or for counsel who might seek a preliminary instruction on a topic not customarily covered. In that spirit, the following sample set is included, with the understanding that the sample instructions did not receive the same scrutiny from the Committee as the pattern instructions have received.

## SAMPLE PRELIMINARY INSTRUCTIONS

*Introductory paragraphs*[1]

Ladies and gentlemen: You are now the jury in this case, and I want to take a few minutes to tell you something about your duties as jurors and to give you some instructions. At the end of the trial, I will give you more detailed instructions. Those instructions will control your deliberations.

One of my duties is to decide all questions of law and procedure. From time to time during the trial and at the end of the trial, I will instruct you on the rules of law that you must follow in making your decision.

You should not take anything I may say or do during the trial as indicating what I think of the evidence or what your verdict should be.

*Order of Trial*[2]

The trial will proceed in the following manner:

First, Plaintiff[s]'s attorney may make an opening statement. Next, Defendant[s]'s attorney may make an opening statement. An opening statement is not evidence but is simply a summary of what the attorney expects the evidence to be.

After the opening statements, Plaintiff will call witnesses and present evidence. Then, Defendant will have an opportunity to call witnesses and present evidence. After the parties' main cases are completed, Plaintiff may be permitted to present rebuttal evidence [and Defendant may be permitted to present sur-rebuttal evidence].

After the evidence has been presented, [I will instruct you on the law that applies to the case and the attorneys will make closing arguments] [the attorneys will make closing

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[1] The first and third paragraphs are NINTH CIRCUIT MANUAL OF MODEL CIVIL JURY INSTRUCTIONS § 1.1 (2001). The second paragraph is a stylistic revision of the preliminary instruction in FIFTH CIRCUIT PATTERN JURY INSTRUCTIONS (CIVIL) (2004).

[2] The first and second paragraphs come EIGHTH CIRCUIT MANUAL OF MODEL CIVIL JURY INSTRUCTIONS § 1.06 (2001). The third paragraph is taken from the preliminary instruction in FIFTH CIRCUIT PATTERN JURY INSTRUCTIONS (CIVIL) (2004). The fourth and fifth paragraphs come from NINTH CIRCUIT MANUAL OF MODEL CIVIL JURY INSTRUCTIONS § 1.2 (2001)

arguments and I will instruct you on the law that applies to the case].

After that, you will go to the jury room to deliberate on your verdict.

*Claims and Defenses*[3]

The positions of the parties can be summarized as follows:

Plaintiff _____ claims that *[describe]*.

Defendant _____ denies those claims *[and also contends that [describe]*.

[To prove his claim, Plaintiff will have to prove, by a preponderance of the evidence [*here insert elements of claim*]. [To prove his defense(s), Defendant will have to prove, by a preponderance of the evidence [here insert elements of affirmative defense(s)]. What I have just given you is only a preliminary outline. At the end of the trial I will give you a final instruction on these matters. If there is any difference between what I just told you, and what I tell you in the instructions I give you at the end of the trial, the instructions given at the end of the trial govern.]

[*Burden of Proof – Preponderance*[4]

When I say a particular party must prove something by "a preponderance of the evidence," this is what I mean: When you have considered all the evidence in the case, you must be persuaded that it is more probably true than not true.]

[*Burden of Proof – Clear and Convincing*[5]

When I say that a particular party must prove something by "clear and convincing evidence," this is what I mean: When you have considered all of the evidence, you [are

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[3] The first three paragraphs are 3 KEVIN F. O'MALLEY, JAY E. GRENIG & HON. WILLIAM C. LEE, FEDERAL JURY PRACTICE AND INSTRUCTIONS § 101.03 (5th ed. 2000). The bracketed last paragraph incorporates FIRST CIRCUIT PATTERN JURY INSTRUCTIONS (CRIMINAL CASES) § 1.04 (1998), which is virtually identical to EIGHTH CIRCUIT MANUAL OF MODEL CIVIL JURY INSTRUCTIONS § 1.02 (2003).

[4] Instruction 1.27.

[5] Instruction 1.28. The definition of "clear and convincing evidence" varies among, and even within, jurisdictions. If state law provides the rule of decision and imposes a burden of proof by clear and convincing evidence, the state's definition should be used.

convinced that it is highly probable that it is true] [have no reasonable doubt that it is true].

[This is a higher burden of proof than "more probably true than not true." Clear and convincing evidence must persuade you that it is "highly probably true."]]

*Province of Judge and Jury*[6]

Do not allow sympathy, prejudice, fear, or public opinion to influence you. You should not be influenced by any person's race, color, religion, national ancestry, or sex.

*Evidence in the Case*[7]

The evidence consists of the testimony of the witnesses, the exhibits admitted in evidence, and any facts that I may instruct you to find or the parties may agree or stipulate to.

A stipulation is an agreement between both sides that certain facts are true.

*Credibility of Witnesses*[8]

You will have to decide whether the testimony of each of the witnesses is truthful and accurate, in part, in whole, or not at all. You also have to decide what weight, if any, you give to the testimony of each witness.

[*Direct and Circumstantial Evidence (If Appropriate to Case)*[9]

You may have heard the phrases "direct evidence" and "circumstantial evidence." Direct evidence is proof that does not require an inference, such as the testimony of someone who claims to have personal knowledge of a fact. Circumstantial evidence is proof of a fact, or a series of facts, that tends to show that some other fact is true.

As an example, direct evidence that it is raining is testimony from a the witness who says, "I was outside a minute ago and I saw it raining." Circumstantial evidence that it is

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[6] Taken from Instruction 1.01.

[7] Instruction 1.04, with revisions.

[8] First paragraph of Instruction 1.13.

[9] Instruction 1.12, with minor style change in the last sentence to make the instruction look forward toward the trial. The Committee does not expect this instruction will be needed in every case.

raining is the observation of someone entering a room carrying a wet umbrella.

The law makes no distinction between the weight to be given to either direct or circumstantial evidence. When the time comes to deliberate on your verdict, you should consider all the evidence in the case, including the circumstantial evidence.]

*Inferences*[10]

You should use common sense in weighing the evidence and consider the evidence in light of your own observations in life.

In our lives, we often look at one fact and conclude from it that another fact exists. In law we call this "inference." A jury is allowed to make reasonable inferences. Any inference you make must be reasonable and must be based on the evidence in the case.

*What is Not Evidence; Evidence for Limited Purpose*[11]

The following things are not evidence, and you must not consider them as evidence in deciding the facts of this case: the attorneys' statements, arguments, questions, and objections of the attorneys; any testimony that I instruct you to disregard; and anything you may see or hear when the court is not in session even if what you see or hear is done or said by one of the parties or by one of the witnesses.

[Furthermore, a particular item of evidence is sometimes received for a limited purpose only. That is, it can be used by you only for one particular purpose, and not for any other purpose. I will tell you when that occurs, and instruct you on the purposes for which the item can and cannot be used.] [You should also pay particularly close attention to such an instruction, because it may not be available to you in writing later in the jury room.]

*Official Translations*[12]

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[10] Instruction 1.11.

[11] The first paragraph is NINTH CIRCUIT MANUAL OF MODEL CIVIL JURY INSTRUCTIONS § 1.4 (2001), The second paragraph is EIGHTH CIRCUIT MANUAL OF MODEL CIVIL JURY INSTRUCTIONS § 1.02 (2001).

[12] The first sentence is 3 KEVIN F. O'MALLEY, JAY E. GRENIG & HON. WILLIAM C. LEE, FEDERAL JURY PRACTICE AND INSTRUCTIONS § 102.25 (5th ed. 2000); the remainder of the instruction is Instruction 1.22.

*[Language other than English]* may be used during this trial. You should consider only the evidence provided through the official interpreter. Although some of you may know [*language(s) used*], it is important that all jurors consider the same evidence. Therefore, you must base your decision on the evidence presented in the English translation.

*Rulings on Objections*[13]

From time to time during the trial I may be called upon to make rulings of law on objections or motions made by the lawyers. You should not infer or conclude from any ruling or other comment I may make that I have any opinions about how you should decide this case. And if I should sustain an objection to a question that goes unanswered by a witness, you should not guess or speculate what the answer might have been, and you should not draw any inferences or conclusions from the question itself.

*Bench Conferences*[14]

At times during the trial it may be necessary for me to talk with the lawyers here at the bench out of your hearing, or by calling a recess. We meet because often during a trial something comes up that doesn't involve the jury.

We will, of course, do what we can to keep the number and length of these conferences to a minimum, but you should remember the importance of the matter you are here to determine and should be patient even though the case may seem to go slowly.

[*Note-Taking – Allowed*[15]

Any notes you take during this trial are only aids to your memory. The notes are not evidence. If you do not take notes, you should rely on your independent recollection of the evidence and not be unduly influenced by the notes of other jurors. Notes are not entitled

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[13] Preliminary instruction in ELEVENTH CIRCUIT PATTERN JURY INSTRUCTIONS (CIVIL CASES) (2000), modified as to style.

[14] First paragraph is FIFTH CIRCUIT PATTERN JURY INSTRUCTIONS § 2.7 (CIVIL) (2004). The first clause of the second paragraph is from EIGHTH CIRCUIT MANUAL OF MODEL CIVIL JURY INSTRUCTIONS § 1.03 (2001), and last clause of second paragraph is from the preliminary instruction in ELEVENTH CIRCUIT PATTERN JURY INSTRUCTIONS (CIVIL CASES) (2000).

[15] The first paragraph is based on Instruction 1.07. The first sentence of the second paragraph is taken from NINTH CIRCUIT MANUAL OF MODEL CIVIL JURY INSTRUCTIONS § 1.11 (2001). The second sentence of the second paragraph is taken from EIGHTH CIRCUIT MANUAL OF MODEL CIVIL JURY INSTRUCTIONS § 1.04 (2001).

The Committee takes no position on whether jurors should be allowed to take notes.

to any greater weight than the recollections or impressions of each juror about the testimony.

When you leave the courthouse during the trial, your notes should be left in the [courtroom] [jury room] [envelope in the jury room]. When you leave at night, your notes will be secured and not read by anyone. At the end of the trial, your notes will be destroyed, and no one will be allowed to read the notes before they are destroyed.]

[*Note-Taking – Disallowed*[16]

Jurors often wonder if they are allowed to take notes during the trial.

The desire to take notes is perfectly natural, especially for those of you who are accustomed to making notes because of your schooling or the nature of your work or the like. It is requested, however, that jurors not take notes during the trial. One of the reasons for having a number of persons on the jury is to gain the advantage of your several, individual memories concerning the testimony presented before you; and, while some of you might feel comfortable taking notes, other members of the jury may not have skill or experience in notetaking and may not wish to do so.]

*No Transcript Available to Jury*[17]

Pay close attention to the testimony as it is given. At the end of the trial you must make your decision based on what you recall of the evidence. You will not have a written transcript to consult.

[*Questions by Jurors Forbidden*[18]

I do not permit jurors to ask questions of witnesses or of the lawyers. Please do not interrupt the lawyers during their examination of witnesses.

If you are unable to hear a witness or a lawyer, please raise your hand immediately and I will see that this is corrected.]

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[16] Preliminary instruction from ELEVENTH CIRCUIT PATTERN JURY INSTRUCTIONS (CIVIL CASES) § (2000), slightly revised.

[17] EIGHTH CIRCUIT MANUAL OF MODEL CIVIL JURY INSTRUCTIONS § 1.04 (2001).

[18] 3 KEVIN F. O'MALLEY, JAY E. GRENIG & HON. WILLIAM C. LEE, FEDERAL JURY PRACTICE AND INSTRUCTIONS § 101.16 (5th ed. 2000).

If the judge might allow a juror to ask a question under unforeseen circumstances, the topic should not be addressed in the preliminary instructions; this instruction would foreclose the possibility.

[*Questions by Jurors – Permitted*[19]

You may submit questions to witnesses to clarify their testimony during trial under certain conditions.

If you feel the answer to your question would be helpful in understanding this case, you should raise your hand after the lawyers have completed their examinations but before the witness is excused. I will have you write your question and hand it to the clerk. I will then privately confer with the lawyers about the question and make a ruling on whether the law allows the question to be asked of that witness. If the question is of the type that is allowed, I will address the question to the witness. Please do not directly speak to me, the lawyers, or the witnesses, but carefully follow this procedure if you wish to have a specific question addressed to a witness.]

*Judge's Questions*[20]

During the trial, I may sometimes ask a witness questions. Do not assume that because I ask questions I hold any opinion on the matters I ask about, or on how the case should be decided.

*Jury Conduct*[21]

All jurors must follow certain rules of conduct, and you must follow them, too.

First, you must not discuss this case with anyone, including your fellow jurors,

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[19] INDIANA PATTERN JURY INSTRUCTIONS—CIVIL 2D 1.12 (2003), modified as to style.

The practice of allowing jurors' questions "is acceptable in some cases, but [we] do not condone it," and the court condemned procedures "where jurors are permitted to blurt out their questions," but ultimately decided the practice is within the trial court's discretion. *United States v. Feinberg*, 89 F.3d 333, 336-337 (7th Cir. 1996):

The Committee takes no position on whether trial judges should allow jurors to ask questions, or on how trial judges should go about allowing juror questions, if they decide to allow them (other than offering this up as a suggestion). Judges who intend to allow jurors to ask questions might defer giving this instruction or any like it until a juror actually raises the issue.

[20] The first sentence is from 3 KEVIN F. O'MALLEY, JAY E. GRENIG & HON. WILLIAM C. LEE, FEDERAL JURY PRACTICE AND INSTRUCTIONS § 101.30 (5th ed. 2000). The rest is from Instruction 1.02, revised as to style in the last phrase.

The Committee takes no position on whether or when judges should question witnesses in the jury's presence.

[21] NINTH CIRCUIT MANUAL OF MODEL CIVIL JURY INSTRUCTIONS § 1.9 (2001), revised as to style by inserting "you must" to be consistent with idea that these are rules they *must* follow.

members of your family, people involved in the trial, or anyone else. You must not let others to discuss the case with you. If anyone tries to talk to you about the case please let me know about it immediately;

Second, you must not read any news stories or articles or listen to any radio or television reports about the case or about anyone who has anything to do with it;

Third, you must not do any research, such as consulting dictionaries, searching the Internet or using other reference materials, and do not make any investigation about the case on your own;

Fourth, if you need to communicate with me, you must give a signed note to the [bailiff] [clerk] [law clerk] [matron] to give to me; and

Fifth, you must not make up your mind about what the verdict should be until after you have gone to the jury room to decide that case and you and your fellow jurors have discussed the evidence. Keep an open mind until then.