



## Criminal Jury Instructions Committee

Meeting Minutes  
September 13, 2024.

### Attending:

Hon. Jennifer Green--Chair  
Hon. Elizabeth Bingert (*Departed at 2:17*)  
Hon. Lacey Stover Gard (*Proxy for Bingert*)  
Ryan Alcorn  
Jamal Allen  
Dan Carrion  
Sasha Charls  
David Euchner  
Kristian Garibay  
Kevin Heade  
Alice Jones  
Samantha Kluger  
Karen Komrada (*Departed at 2:19*)  
Todd Lawson  
Michael Minicozzi (*Proxy for Komrada, Baumann, and Linn*)  
Christine Ortega  
Mikel Steinfeld  
Evan Tompkins  
William Wallace  
Ilona Kukan

### Absent:

Hon. Jeffrey Altieri  
James Baumann (*Proxy sent*)  
Hon. Sarah Mayhew  
Gregory Benson  
Joseph Butner  
Jarom Harris  
Jennifer Linn (*Proxy sent*)  
Joshua Spears

### 1. Call to Order and Approval of March 8, 2024, Meeting Minutes

- a. Hon. Green called the meeting to order at 1:30
- b. **Euchner moved to approve the minutes** as written (without yellow highlighting present in the draft). **Kluger seconded.**
  - i. **Minutes approved.** Abstentions from Ortega and Tompkins

### 2. New Members Introduction (Christine Ortega & Evan Tompkins).

- a. Ortega and Tompkins introduced themselves to the committee.

### 3. Comment to Hazardous Materials in Courtroom.

- a. Hon. Green noted there was a robust discussion on this topic during the last meeting. There was one comment from the Maricopa County Attorney's Office. The comment raised many of the topics we previously discussed. Hon. Green opened the topic for discussion.
  - i. Hon. Green led off the discussion. The first criticism in the MCAO comment argued that, without reference to court rules, the instruction

would invite speculation that a party has done something improper. Hon. Green didn't believe that would be a problem. The second criticism was that the instruction does not mention that it applies to hazardous materials. Hon. Green noted that the reference to hazardous materials is below the line, just not above. The third criticism was that referencing the hazardous material by exhibit number would not be clear because the excluded material would not have been admitted.

- ii. Regarding the third issue, Hon. Green asked the committee what they've seen in trials.
  - 1. Alcorn noted that he hasn't had or seen a trial where this has happened yet.
  - 2. Euchner asked, for hypothetical, what sort of material wouldn't even be brought in. Hon. Green said we could poll our judicial officers about whether they are marking the material. But if the State is alleging (for example) that a substance is fentanyl, we wouldn't want to call it fentanyl because that's an element. Euchner noted that's why the draft says exhibit number rather than labeling.
  - 3. Heade explained he is currently working on an appeal where heroin was deemed a hazardous material. The instruction referred to the material as heroin, and Heade is considering challenging the instruction on appeal on the ground that it's a comment on the evidence. He also initially believed the heroin was marked as an exhibit and admitted, but not given to the jury. He later clarified the heroin itself was not marked and admitted, the picture was.
  - 4. Ortega sat on a jury in a drug case and the drug was meth. It was marked as an exhibit but not provided. During deliberations, a photograph was provided. She does not believe the jury was given any instruction as to why they were not provided the substance.
- iii. Jones proposed that we could put a use note of alternative language. But also noted we could wait until there's an issue.
- iv. Minicozzi explained he agrees with the first two points, but does not have a concern on the third point. He did not see harm saying that the rules of court prohibit the actual evidence. By saying the "court" did not allow the evidence--as opposed to "court rules"--jurors may believe the offering party did something wrong. He acknowledged that referring to the substance may be a comment regarding the substance. But he believed it's better to be transparent with the jury and let them know why the evidence is not admitted. He understood, though, why we should just use an exhibit number.
- v. First issue--Court Rules
  - 1. Euchner did not see a problem saying court rules, but the instruction already says the court prohibited. By the time the jury gets this instruction, they already know what the material is alleged to be. The party can argue in closing why it can't be brought in. In context, it works fine. Minicozzi asked if there would be a problem

with saying court rules. Euchner didn't know that it would be a problem because it gets us to the same place. But he would not oppose a change to "The rules of court prohibit ...."

2. Hon. Binger proposed: "In this case, the court rules prohibit ..."  
Kluger preferred this option as well. Bingert noted we will have to make a conforming change: "required" to "require."
  3. Heade expressed he is not opposed to this change.
- vi. Second issue--"hazardous materials"
1. Hon. Green moved the committee to the second concern. Hon. Green asked Minicozzi where the words hazardous materials should be reflected. Minicozzi believed the comment regards the title. Hon. Green noted that the purpose was to ensure we didn't put the thumb on the scale.
  2. Hon. Green asked if there's a proposed new title. Minicozzi suggested: "Photograph admitted in lieu of potential hazardous material." Euchner noted there is a problem with any reference to hazardous material because half of the trials he sees provide the jury with the title of the instruction.
  3. Alcorn expressed confusion because the rule requires the court to make a decision about what the substance is. Most cases are not about what the substance is. The rule requires the court to make that finding and it becomes a foregone conclusion.
  4. Heade explained that is the problem. The purpose is to prevent the material from getting to the jury, not to communicate the finding to the jury. Communicating this to the jury could negatively impact the jury's assessment. We want to avoid usurping the jury's role.
  5. Euchner added that calling the substance "hazardous material" would encourage the jury to speculate about why it's hazardous.
  6. Alcorn asked how those concerns are not addressed by adding "potentially."
  7. Steinfeld pointed out that the jury doesn't have to know or decide any of this. As a result, even including "potentially hazardous material" introduces information to the jury that is irrelevant to their decision, and could improperly influence them.
  8. Hon. Bingert preferred to leave the title as is. Steinfeld agreed.
  9. Hon. Green acknowledged the concern that we aren't calling a spade a spade. But Hon. Green was concerned about people who have no experience with any drug. If we call the drug hazardous, it may signal to jurors that they should be concerned for their safety. It sounds an alarm and may lead to distractions.
- b. **Minicozzi moves** to change the language to: "In this case, the court rules require ..."). **Euchner seconds.**
- i. **Approved.**
  - ii. Two nays: Baumann and Linn via proxy.

#### 4. Proposal to Amend Current Preliminary 16.

- a. There are actually three proposals included in this agenda item: Preliminary 16, Standard Criminal 52, and 4.04 & 4.05 (both Justification for Self-Defense).

##### b. Preliminary 16.

- i. Hon. Green explained the proposal and opened it for discussion.
  1. Euchner noted that the proposal includes no language instructing the jury to signal the bailiff.
  2. Heade said this proposal reflects an issue he's seen arise a couple of times regarding the scope of the trial judge's discretion to implement different procedures. Heade asked whether the court has discretion as to when they ask the questions.
    - a. Kluger said city courts keep a basket where jurors place their questions.
    - b. Steinfeld said that he is not aware of anything that binds the court to proceed in one manner or another.
  3. Hon. Green suggested the language: "If you do have a question, please signal and make sure that it is in writing."
  4. Euchner said that the "make sure" language may not be necessary. "If you do have a question, please signal and write the question."
  5. Steinfeld shared his screen so the group could see proposed language changes while discussing.
- ii. **Steinfeld moved** to retain the current language but add (where the proposal adds language): "This might be your only opportunity to ask a question of that witness. Once excused, a witness might not return." (Steinfeld's motion rejected all other proposed changes.) **Jones seconded.**
  1. **Approved** unanimously.

##### c. Standard Criminal 52.

- i. Hon. Green explained the proposed change. When a juror asks a question during deliberations, the instructions currently instruct the juror or the foreperson to sign the question. The proposal strikes that language.
- ii. Hon. Green opened the proposal for discussion.
  1. Euchner asked if a single juror could ask their own question. The consensus was that a single juror could ask a question.
  2. Heade noted that there may also be communication regarding juror misconduct. Requiring a juror to sign may cause a juror who wants to communicate misconduct to feel less at ease.
  3. Jones asked if anyone knew where the language came from. Euchner recalled it was from when Hon. McMurdie was on the committee and that Hon. McMurdie likely drafted it based on a prior instruction.
  4. Steinfeld noted that removing any identifiers may make it more difficult to investigate potential claims of juror misconduct. Unless the court knows who sent the question, there is no effective way to follow up and learn about what's happened.

5. Heade noted that it would be helpful to have a memo explaining the problem we're trying to solve. The concern may be the inverse of what he initially proposed.
6. Hon. Green indicated she's willing to talk with Hon. Myers about it. She summarized the competing sides: 1) The Court may be unable to investigate issues without identifiers vs. 2) Jurors may not be willing to make complaints when they are required to sign or identify themselves.

**iii. Lawson moved to table. Euchner seconded.**

**1. Unanimously tabled.**

**d. Changes to 4.04 and 4.05 (Justification for Self-Defense).**

- i. In 4.04, the proposal would add "Physical force." In 4.05, the proposal would add "deadly" to "physical force."

**ii. Euchner moved to approve; Lawson seconded.**

**1. Unanimously approved.**

**5. Proposal to Amend Current Standard 37.**

- a. Heade explained his proposal.
- b. No discussion.
- c. Heade moved; Euchner seconded.**
- d. Vote:
  - i. Ayes: Carrion, Ortega, Tompkins, Allen, Heade, Kristian, Steinfeld, Kluger, Wallace
  - ii. Nays: Minicozzi + proxies (4 total); Alcorn; Gard; Jones, Charls, Lawson
- e. Discussion in light of the 9-9 tie.
  - i. Jones explained that she is not always convinced to follow case law for definitions. She might be open to further discussion, but believed this proposal starts to get into the jury's domain. Gard agreed. Also questioned whether the proposal is necessary.
  - ii. Euchner said that if it's been a problem in cases, then that's a sign it needs to be fixed.
- f. Heade moved to table; Euchner seconded.**
  - i. Unanimously tabled.**

**6. Question Regarding Current Criminal Instruction 13.08.**

- a. Hon. Green noted that the instruction is missing some factors included in the statute.
- b. Jones volunteered to convert the email into a proposal.
- c. Euchner noted that the RAJI was likely based on a prior version of the statute and not updated. Lawson agreed.
- d. Jones will provide the committee with a proposal before the next meeting.

**7. Any Other Business.**

- a. Jones asked if there was time for further proposals. The committee agreed there is time.

- b. The Committee set a deadline for new proposals: Any new proposals must be sent to Ilona 3 weeks before the next meeting--November 22, 2024.

**8. Call to the Public.**

- a. No public comments.

**9. Adjourn.**

- a. Next meeting December 13, 2024, at 1:30 p.m.
- b. Euchner moved to adjourn; Carrion seconded.
- c. Adjourned at 2:56 p.m.