MINUTES

Advisory Committee on Model Civil Jury Instructions
March 9, 2015
4:00 p.m.

Present: Juli Blanch (chair), Marianna Di Paolo, Phillip S. Ferguson, Tracy H. Fowler, Honorable Ryan M. Harris, L. Rich Humpherys, Paul M. Simmons, Honorable Andrew H. Stone, Peter W. Summerill, Nancy Sylvester. Also present: Leslie Slaugh

Excused: Paul M. Belnap, Gary L. Johnson, John R. Lund, Stuart Schultz, Ryan M. Springer.

1. *Welcome and approval of minutes.* Ms. Blanch welcomed Mr. Slaugh, a member of the punitive damages subcommittee. On Mr. Humpherys's motion, seconded by Judge Stone, the minutes of the last meeting (Dec. 8, 2014) were approved.

2. *Committee composition, term limits, subcommittees, and subject area timelines.* Ms. Blanch reported that she has talked to the current committee members to judge their interest in staying on the committee and their thoughts about the meeting day and time. Most committee members are interested in staying on and found the meeting schedule acceptable. Now that the committee is under the oversight of the Judicial Council, there are term limits. Mr. Humpherys indicated that he would like to stay involved through the committee's review of the insurance instructions but would not mind giving way to another member after that. Ms. Sylvester noted that he will still be involved as a member of the insurance instruction subcommittee even if he resigns from the committee. Ms. Blanch indicated that it may make sense for new terms to start in June. The June meeting is generally the last meeting until the fall. Ms. Blanch reviewed the list of remaining subject areas and asked committee members to suggest attorneys to serve on the subcommittees that still need members. The committee suggested Mitchell Rice and someone from Bob Sykes's office (such as Rachel Sykes or Alyson Carter McAllister) to serve on the assault/false arrest subcommittee. Ms. Blanch invited committee members to e-mail other suggestions to her and Ms. Sylvester.

3. *Punitive damage instructions.* The committee continued its review of the punitive damage instructions.

a. *CV2026, Punitive damages–introduction.* The committee had previously approved CV2026, but Mr. Summerill said that the first sentence of the committee note ("'Malicious conduct' has not yet been defined under Utah law.") was inaccurate. He said that the court defined "malicious conduct" for purposes of punitive damages in *Gleave v. Denver & Rio Grande Western Railroad Company*, 749 P.2d 660 (Utah Ct. App. 1988). The committee asked how the definition of "malicious" conduct in *Gleave* differed from the definition of "knowing and reckless indifference" in the instruction. Mr. Summerill thought that "knowing and reckless indifference" applied a "knew or should have known" standard, but there was no knowledge requirement for "malicious." Ms. Blanch

and Mr. Ferguson did not think that that was a valid distinction, noting that malice generally implies a bad intent. Dr. Di Paolo added that the original meaning of "malice" was "bad." The committee noted that the statute does not just refer to "malicious" conduct but to "willful and malicious" conduct and thought that "willful" added an intent element, even if "malicious" alone did not. Mr. Summerill thought that the intent involved was the intent to do the act and not necessarily the intent to cause harm. He thought that "knew or should have known" should not be part of the definition of "willful and malicious." He also thought that "should have known" should not be part of the "knowing and reckless indifference" definition. Mr. Summerill noted that the court addressed the issue of actual versus constructive knowledge in *Daniels v. Gamma West Brachytherapy, LLC*, 2009 UT 66, 221 P.3d 256. Ms. Sylvester suggested revising the instruction to say that "willful and malicious conduct" is the same as "knowing and reckless indifference" except that it does not require knowledge. Mr. Ferguson thought that "knowing and reckless indifference" meant that the defendant knew that his conduct was likely to cause harm and didn't care. Dr. Di Paolo thought the instruction was very complex, containing a mixture of Anglo-Saxon and Latin words that may or may not have different meanings, and asked if it could be broken out into separate instructions. Mr. Summerill thought there should be separate definitions for each of the three alternative bases for punitive damages–(1) willful and malicious, (2) intentionally fraudulent, and (3) knowing and reckless indifference. Mr. Summerill offered to propose a revised instruction. Ms. Blanch will ask the punitive damages subcommittee to revisit CV2026. She will outline the issues for the subcommittee and copy Mr. Summerill on the e-mail. Mr. Summerill noted that he had recently briefed the issue of the standards for punitive damages and offered to share his briefs with the subcommittee.

b. *CV2028. Punitive damages and harm to other people.* Mr. Slaugh noted that the harm for which punitive damages may be awarded is not just harm to people but can also be harm to property. The phrases "harm to another" and "harm to other people" were replaced in CV2026 and CV2028 with "harm to [persons] [property]." Mr. Ferguson suggested changing the second sentence ("Punitive damages may not be awarded . . .") to the active voice ("You may not award punitive damages . . ."). Judge Harris thought the last sentence was out of place. He suggested bracketing it, since it would not apply unless evidence of the defendant's conduct in other states came into evidence. The committee decided to make the last sentence a separate instruction, CV2032. CV2028 was approved as modified. The parentheticals were removed from the references; they were intended only for the committee's discussion of the instructions.

c. *CV2032. Reprehensibility–conduct in other states.* The committee debated whether both sides should be able to introduce evidence of the

lawfulness of the defendant's conduct in other jurisdictions, to either increase or decrease the jury's evaluation of the reprehensibility of the conduct. The committee did not think there was any authority for using the unlawfulness of the defendant's conduct in other states offensively, to increase the reprehensibility. Some questioned whether evidence of conduct in other states should be admissible at all, since the instructions tell the jury that it cannot award punitive damages to punish the defendant for harm to others, nor can it consider the amount of harm to others as the measure of punitive damages. Judge Harris thought that the admissibility of evidence of the defendant's conduct in other jurisdictions and its legality elsewhere would generally be handled pretrial by a motion in limine but that there may be cases where it is an issue. The committee considered the following language for CV2032: "For the purpose of determining [or evaluating] reprehensibility, you may not award punitive damages based on evidence of [name of defendant]'s conduct in another state if it was lawful where and when it was committed." It was proposed that this language be changed to "For the purpose of determining [or evaluating] reprehensibility, you may not punish [name of defendant] for conduct in other states where it was legal." Mr. Humpherys thought the issue of conduct in other states was an evidentiary issue, not a subject for jury instructions, and that the Supreme Court's pronouncements on the subject were meant for the benefit of appellate courts reviewing jury instructions and not for juries to be instructed on. Judge Stone proposed the following alternative: "You may not consider [name of defendant]'s conduct more reprehensible if the conduct was legal in other states." It was suggested that the last phrase be changed to "based on conduct outside of Utah that was legal where and when it occurred." The committee added a committee note to say that the instruction should only be used where the plaintiff asserts that the defendant's conduct is more reprehensible because it has occurred in other states as well and the defendant responds that the conduct is legal in other states. Judge Harris noted that the concept is that the jury may not use legal conduct to ratchet up the reprehensibility factor. Mr. Slaugh suggested the following: "Evidence that [name of defendant] committed similar conduct outside of Utah may not be considered to increase the level of reprehensibility if the conduct was legal where and when it occurred." Mr. Fowler suggested adding an introductory sentence that evidence of the defendant's conduct in other states should not be admitted, but other committee members thought that that was a question of the admissibility of evidence, which was beyond the scope of the committee's charge. Mr. Ferguson suggested rephrasing Mr. Slaugh's suggested language in the active voice, but Dr. Di Paolo thought the passive voice was fine here, because it placed the emphasis on the matter at issue (evidence of similar conduct in other states). The committee adopted Mr. Slaugh's language and approved the instruction as revised.

Judge Harris was excused.

d. *CV2030. Reprehensibility*. The committee approved the instruction as edited previously.

e. *CV2029. Factors to consider in determining the amount of damages.* Dr. Di Paolo asked what "relative" meant in the first factor ("the relative wealth of [defendant]"). What is it relative to–the population as a whole? the amount of compensatory damages? the amount of punitive damages? Mr. Slaugh thought it meant relative to the amount of punitive damages awarded, since the amount of compensatory damages is a separate factor (number 7). Mr. Ferguson thought it meant the jury was supposed to consider how much the defendant can afford to pay, without bankrupting the defendant. Dr. Di Paolo and Mr. Summerill suggested deleting "relative." Some committee members thought that the instruction should not deviate from the factors as stated by the court in *Crookston v. Fire Insurance Exchange,* 817 P.2d 789, 811 (Utah 1991), which refers to it as "relative wealth." Others thought that the committee was charged with making the law clearer to lay people and thought it was okay to delete "relative," which adds a layer of confusion. Mr. Humpherys noted that the statute says that evidence of a party's "wealth or financial condition" is admissible once there has been a finding of liability for punitive damages. Utah Code Ann. § 78B-8-201(2). The committee noted that there may be a difference between "wealth" and "financial condition." For example, a newly minted doctor may not have much wealth, but his financial condition may be good given his prospects for future income. The committee changed the first factor to read, "(1) the wealth or financial condition of [defendant]" and approved the instruction as modified.

4. *Next Meeting.* The next meeting will be Monday, April 13, 2015, at 4:00 p.m.

The meeting concluded at 6:00 p.m.