MINUTES

Advisory Committee on Model Civil Jury Instructions
January 9, 2006
4:00 p.m.

Present: Juli Blanch, Francis J. Carney, Marianna Di Paolo, Phillip S. Ferguson, Tracy H. Fowler, Jathan Janove (chair of the employment instruction subcommittee), Timothy M. Shea, Paul M. Simmons, David E. West and John L. Young (chair)

Excused: Honorable William W. Barrett, Jr., Paul M. Belnap, Ralph L. Dewsnup, Colin P. King

Mr. Young called the meeting to order.

1. *Damage Instructions.* The committee reviewed the following damage instructions:

a. *15.109. Economic damages. Injury to real property.* Mr. Young asked whether stigma damages only apply in the case of repair, since any stigma would presumably be included in the fair market value of the property if the property cannot be repaired. The committee reviewed the case allowing for recovery of stigma damages (*Walker Drug v. La Sal Oil,* 972 P.2d 1238 (Utah 1998)). Mr. Young suggested that the last, bracketed sentence of the instruction be moved to the advisory committee note and that the last paragraph be placed in brackets. He also suggested making the last sentence of the second paragraph the first sentence of the last paragraph. Mr. Shea suggested changing the order of the last sentence and stating, "if the plaintiff proves by a preponderance of the evidence" rather than "if the evidence establishes." The committee rejected this last suggestion on the grounds that the burden of proof is adequately explained in other instructions. In the first sentence of the second paragraph, "is" was changed to "are." After further discussion, the last paragraph of the instruction was revised to read:

> If the property can be repaired for a lesser amount, then the damages would be the reasonable cost of repair. [In addition, if the evidence establishes that the repaired property will not return to its original value because of a lingering negative public perception that was caused by the injury, you may award stigma damages for any reduction in the value of the property.]

The following advisory committee note was added: "The bracketed sentence should be given only if there is evidence to support a claim of lingering negative public perception." As modified, the instruction was approved.

b. *15.120. Present cash value.* At Mr. Simmons's suggestion, the phrase "and even recommended" was deleted from the last paragraph of the advisory committee

note. The committee noted that the issues raised in the advisory committee note cannot be resolved by the committee but will have to be resolved by the court. The committee deferred further discussion of the instruction.

2. *Employment Instructions.* Mr. Shea noted that two employment law instructions included in the current MUJI--instructions 18.7 regarding the provisions of an implied employment contract, and instruction 18.10 defining public policy--appear to have been omitted. Jathan Janove, the chair of the employment law subcommittee, thought that they were covered in substance by the revised instructions. Mr. Young asked whether the determination of public policy is made by the court or the jury. Mr. Janove believed that as a practical matter it is generally determined as a matter of law by the court on summary judgment but acknowledged that there may be situations in which a jury would have to decide factual issues related to public policy.

After a brief introduction by Mr. Janove, the committee reviewed the following employment law instructions:

a. *18.101. Definition of employment contract.* Mr. Shea suggested that an instruction on the elements of breach of an employment contract be given as an introductory instruction. Mr. Janove thought that the instructions adequately covered the elements of a cause of action. At Mr. Fowler's suggestion, the phrase "express or implied" was added after "an agreement" in the first line. Mr. Young and Mr. Shea suggested adding an introductory sentence stating that the plaintiff is the employee and the defendant is the employer. Mr. Simmons noted that in some cases there may be an issue of fact as to whether an employer-employee relationship exists, making such a statement inappropriate, so no introductory sentence was added.

b. *18.102. Corporation as person.* The committee thought this instruction should be included in the general instructions, since it is not specific to employment law. The instruction was added to the beginning of instruction 1-201. Dr. Di Paolo suggested substituting the term "actual" for "natural" before "person." At Mr. Young's suggestion, the phrase "a natural person or" was deleted so that the instruction now reads: "A person means an individual or a corporation, organization, or other legal entity." As modified, the instruction was approved.

c. *18.103. Creation of express employment contract. Burden of proof.* At Mr. Shea's suggestion, the phrase "orally or in writing" was deleted from the second line on the grounds that it was adequately covered in instruction 18.101. Mr. Simmons suggested making the last sentence a separate instruction on burden of proof, not limited to express contracts. The committee rejected the suggestion and approved the instruction as modified.

d. *18.104. Creation of implied employment contract. Elements of proof.* Mr. Simmons suggested that the instruction needed an introductory sentence defining an implied contract. Mr. West suggested revising the instruction to follow the structure of instruction 18.103 on express contracts. Dr. Di Paolo asked what difference it makes whether an employment contract or provision is express or implied. She noted that the elements of an implied employment contract as stated in the instruction are not what an average person would understand from the term "implied," since they require that the employer clearly communicate his intent to the employee. For that reason, she suggested putting the term "implied" in quotation marks, to cue jurors that "implied" was being used in a special way. Mr. Young did not think that quotation marks were necessary. Mr. Janove agreed that the elements would seem to be those for an express contract and noted that the differences between express and implied employment contracts are not clearly defined in Utah. Mr. West noted that subparagraph (1) was broader than its counterpart in the old MUJI 18.6, which said that the employee's employment would not be terminated "except for certain conduct or pursuant to certain procedures." Mr. Janove noted that the change was intentional, since the *Cook* case extended the concept of implied employment provisions beyond cases of termination. Dr. Di Paolo asked how subparagraphs (2) and (3) differed. Mr. Ferguson noted that a contract requires a meeting of the minds; subparagraph (2) focuses on the employer, while subparagraph (3) focuses on the employee. Mr. Shea questioned whether the instruction should spell out the types of evidence the jury may consider, since the instructions do not do so for other areas of the law. The committee thought that it was appropriate to list them in this case. Ms. Blanch noted that the evidence enumerated in the last paragraph can apply to each element of the claim and is not limited to evidence of the employer's intention. After further discussion, the instruction was revised to read:

> An implied employment contract is created when:
>
> (1) the employer intended that the employee's employment would include [describe terms in dispute]; and
>
> (2) the employer communicated its intent to the employee; and
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> (3) the communication was sufficiently clear and definite to create a reasonable belief by the employee that his employment would include [describe terms in dispute].
>
> A party seeking to establish the existence of an implied contract has the burden of proving these things. Evidence may be derived from the employment manuals, oral statements, the conduct of the parties, announced personnel policies, practices of a particular trade or industry,

and other circumstances. However, an implied contract cannot contradict a written contract term.

e. *18.105. Breach of employment contract.* The instruction was approved as drafted.

f. *18.106. Employment contract may be terminated at will.* Mr. Young suggested adding an introductory sentence to the effect that the defendant claims that the plaintiff was an at-will employee. Mr. Janove thought that such a sentence might imply that the employer has the burden of proving that the relationship was at will. Mr. Young also suggested simplifying the second sentence. Mr. Ferguson suggested making it the third sentence. Mr. Shea suggested striking the phrase "by the employer or the employee" in the second sentence, since the concept was covered in the first sentence. He also suggested limiting the instruction to the party claiming wrongful termination. Mr. Janove and Mr. Carney thought that it was important for the instruction to state that the relationship could be terminated by either side with or without cause. After further discussion, the instruction was revised to read:

> You must decide whether the employment here was an "at-will" relationship. An employment relationship is presumed to be at will if the employment is for an unspecified time and without other restrictions on either the employer's or the employee's ability to terminate the relationship. When the employment relationship is "at will," there does not have to be any reason for the termination other than the employer's or the employee's desire to discontinue the employment relationship. It may be terminated at any time, for any reason or for no reason, with or without cause. [However, it may not be terminated for an illegal reason.]

An advisory committee note was added that reads, "The bracketed final sentence should be used only when a claim is made for termination for an illegal reason." As modified, the instruction was approved.

The meeting concluded at 6:00 p.m.

Next Meeting. The next meeting will be Monday, February 13, 2006, at 4:00 p.m.