MINUTES

Advisory Committee on Model Civil Jury Instructions
February 13, 2006
4:00 p.m.

Present: Honorable William W. Barrett, Jr., Paul M. Belnap, Juli Blanch, Marianna Di Paolo, Phillip S. Ferguson, L. Rich Humpherys, Jathan Janove (chair of the employment instruction subcommittee), Jonathan G. Jemming, Timothy M. Shea, Paul M. Simmons, David E. West and John L. Young (chair)

Excused: Francis J. Carney, Ralph L. Dewsnup, Tracy H. Fowler, Colin P. King, Stephen B. Nebeker

Mr. Young called the meeting to order.

Report on Meeting with Supreme Court. Mr. Young and Mr. Shea met with the Utah Supreme Court and provided the court with a status report. As soon as the committee completes the employment law instructions, it will publish its work up to that point. The instructions will be posted on the web in a way that will facilitate copying and pasting. The instructions will also be presented at the district court judges' meeting in May. Mr. Shea has drafted a proposed introduction and will invite comments on it.

Employment Law Instructions. The committee continued its review of the employment law instructions:

1. *18.106. Rebutting the "at-will" presumption.* Mr. West asked whether the instruction needs to define "presumption." Mr. Young pointed out that the previous instruction (18.105) explains the presumption. The two instructions should be given together (18.105 followed by 18.106). At Dr. Di Paolo's suggestion, the first part of the instruction was revised to read: "An employee may defeat the presumption that his employment may be terminated at will by establishing . . ."

2. *18.107. Rebutting the "at-will" presumption. Express or implied agreement.* At Mr. Young's suggestion and consistent with other instructions, "by a preponderance of the evidence" was deleted from the first paragraph. Mr. Young suggested dividing subparagraph (1) into subparts and revising the order of subparagraphs (1) and (2). The committee struggled with clearer language for the phrase "unless pursuant to certain procedures." The last part of the instruction was revised to read as follows:

> This requires the employee to establish that:
>
> (1) the employer communicated its intent to the employee that the employee's employment would not be terminated–
>
> (a) except for certain conduct,

(b) until after a certain time period, or

(c) unless applicable procedures were followed; and

(2) the communication was sufficiently clear and definite to create a reasonable belief by the employee that his employment could not be terminated "at will."

3. *18.108. Rebutting the "at-will" presumption. Intent of the parties.* Mr. Ferguson suggested that the first sentence be revised to read: "In deciding whether the parties intended to create an employment contract that could not be terminated 'at will,' you must consider all of the circumstances of employment as a whole." Mr. West thought the instruction duplicated instruction 18.103. Other committee members pointed out that 18.103 deals with evidence of an implied employment contract, whereas 18.108 deals with evidence that an employment relationship cannot be terminated at will. The same jury may not get both instructions. Mr. Young suggested that the last sentence be bracketed and an advisory committee note added to the effect that the last sentence need not be given if 18.103 is also given. Dr. Di Paolo thought it was okay to repeat the concept. Mr. Belnap suggested that Mr. Janove take the committee's comments back to his subcommittee and see if instructions 18.103, 18.107 and 18.108 can be combined. Mr. Janove pointed out that instructions 18.103 and 18.108 are not duplicative; they cover different situations. But his subcommittee will consider combining instructions 18.107 and 18.108.

4. *18.109. Rebutting the "at-will" presumption. Violation of public policy.* Mr. West suggested eliminating gender-specific pronouns. Judge Barrett asked why subparagraph (1) was necessary, since a termination is presumed. Dr. Di Paolo asked what the difference was between subparagraphs (3) and (4). Mr. Shea suggested deleting subparagraph (3), but Mr. Janove thought that the case law made it significant. According to Mr. Janove, the cases suggest that the trier of fact must consider exactly what the employee was doing and its relation to public policy before reaching the question of causation. Mr. Ferguson asked whether the phrase "brought the policy into play" was understandable to the average juror. Other words were suggested, including "triggered," "related to," "covered" and "implicated." Mr. Humpherys asked whether the existence of a clear and substantial public policy was a question of fact for the jury to decide or a question of law for the court to decide. If the latter, he suggested that the instruction read: "The court has determined that public policy is [or requires] . . ." or "The court has determined that [describe the policy] is a clear and substantial public policy." The jury must then decide whether the employee's conduct brought the policy into play. Ms. Blanch asked whether the jury must also decide whether the public policy is "clear and substantial." Mr. Young suggested that the instruction read, "The court has determined that a substantial public policy exists, namely, . . . To establish a violation of that public policy, you must decide . . . ." Mr. Janove suggested that the instruction start out, "The employee alleges that he was fired

because [describe the relevant public policy]." Mr. Young compared the instruction to former MUJI 18.11, which is substantially different. Mr. Janove thought 18.11 was too general and that its language was out of date. Mr. Humpherys asked whether the standard for causation is a "substantial factor" (the standard under 18.11) or "at least in part" (the standard under 18.109). Mr. Janove said that if a public policy violation was at least part of the reason for the discharge, the burden shifts to the employer to prove that the employee would have been discharged anyway. Mr. Janove noted that the Utah Supreme Court will hear argument this spring in a case addressing discharges in violation of public policy and suggested that the instruction be tabled until the court's decision is issued. The committee suggested that Mr. Janove take the instruction back to his subcommittee for revisions in light of the committee's discussions.

5. *18.110. Violation of public policy. Shifting burdens.* Mr. Humpherys suggested combining instruction 18.110 with 18.109 and adding to the end of current 18.109 the sentence, "However, if the employer shows a legitimate reason for the employee's termination, then the employee must show that the public policy was a substantial factor in his termination." Dr. Di Paolo asked whether the jury must decide the issues in stages. Mr. West questioned whether the law in this area was clear. Mr. Humpherys asked what the relationship was between the instruction and federal employment law. Mr. Janove suggested that the instruction could read, in effect: "The plaintiff alleges that he was fired because [of a violation of public policy, which the court should describe]. The defendant alleges that the plaintiff was fired because [of a legitimate reason, which the court should describe]. You must decide whether the plaintiff was fired because of [the reason that violates public policy] or [the legitimate reason]." Mr. Young and Mr. Ferguson suggested leaving instructions 18.109 and 18.110 open until the Utah Supreme Court provides further clarification. Mr. Janove will present the issues to his subcommittee and see if the subcommittee wants to try to rewrite the instructions before the court decides the issues.

6. *18.111. Implied employment contract. New terms.* At the suggestion of Messrs. Ferguson and Young, "prospectively" was deleted from the first line. At the suggestion of Messrs. Humpherys and Shea, the last sentence was deleted, and the last line was revised to read, ". . . a new or modified employment contract is formed that includes the new terms."

Numbering System. Mr. Shea circulated with the meeting materials a memorandum outlining a proposed numbering system.

The meeting concluded at 6:00 p.m.

Next Meeting. The next meeting will be Monday, March 13, 2006, at 4:00 p.m. At the next meeting, the committee will consider proposed instructions on loss of consortium and intervening or superseding cause, among other things.