MINUTES
Advisory Committee on Model Civil Jury Instructions
May 1, 2008
4:00 p.m.

Present: John L. Young (chair), Juli Blanch, Francis J. Carney, Dr. Marianna Di Paolo, Phillip S. Ferguson, Tracy H. Fowler, L. Rich Humpherys, Gary L. Johnson, Colin P. King, Stephen B. Nebeker, Timothy M. Shea, Paul M. Simmons, Peter W. Summerill, David E. West

1. *Procedure*. Mr. Young recommended that, where a subcommittee or reviewing committee (the so-called Gang of Three) cannot agree on what the law is, the instruction should not be included. He noted that the committee was continuing to get bogged down in discussions about the what the law is. He further noted that an instruction does not have to come out of the subcommittee unanimously, but it should have the support of a clear majority of subcommittee members.

Mr. Ferguson joined the meeting.

2. *Medical Malpractice Instructions*. The committee continued its review of the medical malpractice instructions.

a. *CV 301. "Standard of care" defined. "Medical malpractice" defined. Elements of claim for medical malpractice.* The instruction was approved as revised by the subcommittee.

b. *CV 302. "Standard of care" for nurses defined. "Nursing negligence" defined. Elements of claim for nursing negligence.* Mr. Simmons asked why this instruction could not be combined with CV 301. The subcommittee apparently thought it important to keep "medical malpractice" and "nursing negligence" separate. The instruction was approved as revised by the subcommittee.

c. *CV 303. Care owed by nurse under varying circumstances.* The instruction was approved as revised by the subcommittee.

d. *CV 309. "Cause" defined.* Mr. Young asked why there was a separate instruction defining "cause" for medical malpractice cases. The instruction is the same as the general "cause" instruction, but the committee note is specific to medical malpractice cases. The committee concluded that there was no harm in including the instruction in the medical malpractice instructions. At Mr. Fowler's suggestion, "[name of defendant]" was changed to "[name of person]," since the instruction applies both to a claim of negligence and a defense of comparative fault. The committee approved the instruction as amended.

Dr. Di Paolo joined the meeting.

e. *CV 315. Consent is presumed.* Mr. Young noted that he is drafting a general instruction on presumptions. There are few presumption instructions in the model instructions of other jurisdictions. Dr. Di Paolo thought that the "if" clause should be at the beginning of the instruction. The instruction was revised to read: "If a person submits to health care, the care was authorized unless proved otherwise." (Dr. Di Paolo noted that either "proved" or "proven" is acceptable and recommended that the committee consistently use one or the other.) The committee approved the instruction as revised.

Mr. Humpherys joined the meeting.

f. *CV 316. Common knowledge defense.* Mr. Young questioned the use of the word "recover," since it presupposes no defenses and damages. Dr. Di Paolo did not think the common usage of the word was the same as the legal usage. Mr. Ferguson noted that "recover" can be particularly misleading in a medical malpractice case, since "recover" can also mean to regain one's health. The committee suggested revising the instruction to read: "If the risk of harm was commonly known to the public, then [name of plaintiff] may not succeed on a claim that informed consent was not obtained." After discussion of CV 317, however, the instruction was further revised to read: "You must decide if the risk of harm was commonly known to the public. If so, then [name of plaintiff] cannot recover for lack of informed consent." Mr. Young suggested adding a committee note saying that the special verdict form should ask the jury to make a finding on whether the risk of harm was commonly known to the public.

Mr. King joined the meeting.

g. *CV 317. Refusal of information defense.* Mr. West suggested revising the instruction to read, "There can be no claim for lack of informed consent if [name of plaintiff] declined to be informed of the risk of harm." Dr. DiPaolo thought that the instruction did not clearly tell the jury what it was supposed to do. At Mr. Shea's suggestion, the instruction was revised to read:

> You must decide whether [name of plaintiff] refused to be informed of the risk of harm. If [name of plaintiff] refused to be informed of the risk of harm, then [he] cannot succeed on a claim that informed consent was not obtained.

The committee approved the instruction as revised. Mr. Young suggested adding a committee note saying that the special verdict form should ask the jury to make a finding on whether the plaintiff refused to be informed of the risk of harm.

h. *CV 318. Reasonable non-disclosure defense.* Mr. West questioned whether the statutory standard was "reasonable belief." At Mr. Shea's suggestion, the instruction was revised to read:

> You must decide whether [name of defendant] reasonably believed that disclosure of the risk of harm could have had a substantial and adverse effect on [name of plaintiff]'s condition. If [name of defendant] reasonably believed that disclosure of the risk of harm could have a substantial and adverse effect on [name of plaintiff]'s condition, then [name of plaintiff] cannot succeed on a claim that informed consent was not obtained.

The committee approved the instruction as revised.

i. *CV 319. Written consent defense.* Dr. Di Paolo asked whether "material" is defined anywhere. She noted that the common usage of "material" is different from its legal usage. She suggested replacing "material" with "important" or "very important." Some committee members thought there was a qualitative difference between "material" and "important." Mr. Young suggested adding a general instruction defining "material." Mr. Humpherys noted that CV 304 defines materiality without using the word "material."

Mr. Carney joined the meeting.

At Mr. Shea's suggestion, the instruction was revised to read:

> A written consent is a defense to a claim for failure to obtain informed consent, unless:
>
> [(1) [Name of plaintiff] proves by a preponderance of the evidence that the person giving consent lacked the capacity to do so.]
>
> [(2) [Name of plaintiff] proves by clear and convincing evidence that [name of defendant] obtained the consent by fraudulent misrepresentation or fraudulent failure to state facts important to a reasonable person in making decisions about health care.]

Mr. Young suggested stating in the committee note that the verdict form must make clear that a "clear and convincing" standard of proof applies to subsection (2). The committee approved the instruction as revised.

j. *(1) CV 320. Patient's duty of care. (2) CV 321. Patient's negligence in failing to follow instructions. (3) CV 322. Patient's negligence in giving medical history*. Mr. Ferguson asked whether CV 321 and 322 were covered by CV 320. At the suggestion of Messrs. Young and Carney, the second sentence of CV 320 (listing specific ways in which a patient may be negligent) was deleted. Mr. Carney suggested also deleting the first sentence of CV 320, but the rest of the committee thought it was necessary. CV 320 was approved as modified, and CV 321 and 322 were approved.

k. *CV 323. Patient's fault: preexisting conditions*. Mr. Carney suggested deleting this instruction because the subcommittee could not agree on it and because he did not think it said anything. Mr. Young asked whether the matter would be handled before trial by a motion in limine. Mr. Carney responded that the court would still need to instruct on the issue, even if a motion in limine were granted. The committee therefore thought that the instruction was needed. The committee also thought that the instruction adequately stated the law in a neutral manner. It thought that the disagreement would be over the content of the instruction, which will have to be determined in each case (that is, which specific preexisting conditions or behaviors will be listed), and not the instruction itself. Mr. Carney was concerned that Elliott Williams and Curtis Drake were not there to defend their position on the instruction. Mr. Young suggested sending them an e-mail saying that the instruction is approved unless they disagree that it is an accurate statement of the law and inviting them to add to the committee note if they would like.

l. *CV 324. Use of alternative treatment methods*. Mr. Young suggested that the instruction be omitted because the subcommittee could not agree on the instruction. Mr. Carney was not comfortable deleting the instruction because, he said, it was the best instruction the defense has and has been around for years. A version of it was in JIFU and in MUJI 1st, although the authority for the instruction is not clear. Mr. Carney noted that the medical malpractice instructions were the result of compromise between members of the plaintiffs' bar and the defense bar on the subcommittee and thought that the defense bar members had made concessions to assure that this instruction was included. Mr. Carney noted that there was no authority for or against the instruction in Utah case law, and cases from other jurisdictions go both ways. Messrs. King and Summerill did not think it was a proper instruction. Mr. Young thought that if the law is unsettled, the instruction should not be given. Messrs. Fowler and West, however, thought that if the instruction has been used for years, it should be included. Mr. Carney noted that it used to be routinely given over objection; more recently, some trial courts have rejected the instruction. He said it may not be good law, but if it is left out of the model instructions, some attorneys will

argue that that is proof that it is not good law. Mr. Summerill countered that, if it is included in the model instructions, some attorneys will argue that that is proof that it is the law. Mr. Carney recommended leaving the instruction in with an extensive comment making it clear that it has not been approved as the law in Utah, and let the Utah appellate courts resolve the issue. Mr. Young did not want an extensive committee note. Dr. Di Paolo suggested rewriting the instruction along the lines of CV 316 and 317 ("You must decide x. If you decide x, then . . . If you decide not x, then . . ."), so that the jury clearly understands what it is supposed to do. She noted that the term "a respectable portion of the medical community" is vague. If the court and attorneys can't say what constitutes "a respectable portion of the medical community," how can they expect the jury to know? At Mr. Young's suggestion, the instruction was sent back to the subcommittee for further consideration.

m. *CV 325. Timely filing claim. "Discovery of injury" defined.* At Dr. Di Paolo's suggestion, the order of the first and second sentences was reversed. At Mr. Ferguson's suggestion, "physical" was deleted from subparagraph (1). The committee approved the instruction as revised.

n. *CV 326. Expert testimony required.* At Dr. Di Paolo's suggestion, the last line was revised to read, "You may not use a standard based on your own experience . . . ." The committee approved the instruction as revised.

o. *CV 327. Inference of negligence (res ipsa loquitur).* Dr. Di Paolo suggested changing the first line to read, "You may decide that [name of defendant] was negligent . . . ," rather than "You may draw an inference that . . . ." Mr. Johnson thought that the inference of negligence was rebuttable, so he did not want to tell the jury that it "may decide," because he thought the jury would decide that a party was negligent without considering whether the inference had been rebutted. Mr. Carney noted that the jury does not have to draw the inference. Dr. Di Paolo asked what the phrase "draw an inference" means if it does not mean that the jury "may" (but does not have to) decide. Messrs. Young and Johnson thought there was a big difference between drawing an inference and deciding. Dr. Di Paolo agreed that the terms did not mean exactly the same thing. Mr. Young thought that there needed to be an instruction on inferences and suggested putting the instruction on hold until we have an inference instruction. Mr. King and Dr. Di Paolo thought that the first and last sentences of the instruction needed to be correlated, since they do not say exactly the same thing and could confuse the jury about what it is supposed to do. Mr. Simmons noted that the instruction needs to make it clear that the jury can draw the inference even without expert testimony, since other instructions say that expert testimony is needed to establish negligence.

p. *CV 328. Common knowledge and need for expert testimony*. Mr. Humpherys suggested reversing the order of CV 327 and 328. Mr. Carney noted that he thought the instruction was unnecessary until *Bowman v. Gibb,* 2008 UT 9, was decided. Mr. Humpherys noted that, just because something is in a reported decision does not mean it is a proper jury instruction. Mr. Young asked how CV 328 was to be reconciled with CV 326. Mr. Humpherys noted that CV 328 only addresses standard of care and asked whether there needs to be a separate instruction on causation. Mr. Simmons suggested bracketing the alternatives "standard of care" and "causation." Ms. Blanch asked whether it is a proper subject for an instruction, since the judge, not the jury, must decide whether or not expert testimony is needed. Mr. Young asked whether there would ever be a question of fact as to whether expert testimony is required. Mr. West noted that, even if the plaintiff does not have to prove an element of his case by expert testimony, the defense may introduce expert testimony to rebut an inference of negligence, and the court would need to explain to the jury why one side had expert testimony and the other did not. Mr. Carney asked whether the instruction was an end run around res ipsa loquitur. Mr. Summerill said it was not, for the reasons explained in *Bowman*. Mr. Summerill suggested revising the instruction to say, "You may find even in the absence of expert testimony . . ." The instruction was revised to read:

> Expert testimony is not needed to establish the [standard of care/cause] if the medical procedure is of a kind, or the outcome so offends commonly held notions of proper medical treatment, that the [standard of care/cause] can be established by the common knowledge, experience and understanding of jurors.

CV 328 was approved as modified, with Mr. Johnson dissenting.

q. *CV 329. Patient may rely on advice.* The committee approved this instruction.

r. *CV 330. No recovery for oral promises.* Mr. Carney noted that a defense that an oral promise is unenforceable will almost always be resolved on summary judgment. Mr. Ferguson noted, however, that at least two issues may present jury questions: (1) whether the defendant signed the guarantee, and (2) whether the language can be construed as a guarantee or was "mere puffing." Dr. Di Paolo thought the language was awkward. The instruction was revised to read:

> A guarantee, warranty, contract or assurance regarding a result to be obtained from the health care must be in writing and

signed by [name of defendant] or [his] authorized agent to be enforceable.

The committee approved the instruction as revised.

s. *CV 2##. Out-of-state or out-of-town experts.* Mr. Shea noted that this instruction and the next will be moved to the general instructions (the 100 series). Mr. Carney noted that MUJI 1st said that the jury was to give "no weight" to the fact that an expert was from out of state. Mr. Carney did not think that was the law. Mr. King agreed that an expert's testimony may be discounted for a number of reasons, but local residency, by itself, should not give the testimony more weight. Dr. Di Paolo suggested substituting "lives" for "resides." The committee approved the instruction as modified.

t. *CV 2##. Conflicting testimony of experts.* The committee approved this instruction.

u. *Special verdict forms.* Mr. Carney noted that Curt Drake of the subcommittee thought there should be just two lines for damages, for special damages and general damages, but Mr. Carney and the committee agreed that in medical malpractice cases past and future special damages need to be broken out separately, for several reasons, including the calculation of pre-judgment interest and determining any offsets for collateral sources. Dr. Di Paolo wondered whether the forms should tell the jury that they may award zero damages. Messrs. King and Johnson noted that some defense attorneys will argue that the jury should award no damages and will even show the jury in their closing arguments how they think it should complete the verdict form. Mr. Humpherys thought that an instruction on nominal damages should be given only if the jury finds fault but no damages. Mr. Young asked whether past medical expenses are fixed and therefore do not have to be determined by the jury, but Messrs. Carney and King pointed out that there may be disputes over what medical expenses were reasonable and necessary (particularly with such items as chiropractic bills).

Ms. Blanch was excused.

Mr. Nebeker suggested adding a committee note saying that if the jury returns a verdict awarding no damages, then the court should instruct on nominal damages. The special verdict forms were approved.

3. *Next Meeting*. The next meeting is Monday, May 12, 2008, at 4:00 p.m.

The meeting concluded at 6:00 p.m.