MINUTES
Advisory Committee on Model Civil Jury Instructions
March 9, 2009
4:00 p.m.

Present: Honorable William W. Barrett, Jr., Francis J. Carney, Marianna Di Paolo, Phillip S. Ferguson, Tracy H. Fowler, John R. Lund, Timothy M. Shea, Paul M. Simmons, Peter W. Summerill, David E. West. Also present: Robert G. Gilchrist

Excused: John L. Young (chair)

Mr. Carney conducted the meeting in Mr. Young's absence.

1. *Procedure*. Mr. Carney led a discussion about the time it is taking to approve new instructions. At the last meeting, it was suggested that the "Gangs of Three" have the final approval of instructions in their subject areas, with perhaps a final review by Dr. Di Paolo and Mr. Shea. Mr. Shea noted that the instructions have been improved at each stage of review, including the review by the full committee. Mr. Ferguson suggested that one way to speed up the process is to circulate the instructions well in advance of the meeting and require committee members to raise any objections or proposed changes to the instructions before the meeting; if no one raises an issue before the meeting, the instruction is deemed approved. Mr. Carney stated that his ideal would be to have all of the jury instructions completed, and the committee meetings would only be used to act on suggestions to improve the instructions.

2. *MUJI 1st*. Mr. Carney noted that some judges have complained about the need to use both MUJI 1st and MUJI 2d to come up with a complete set of instructions in some cases. The committee discussed the possibility of putting the MUJI 1st instructions for a given area on the website (or links from the website to the MUJI 1st instructions) for those areas for which new instructions have not yet been approved. Mr. Shea noted that the Utah State Bar holds the copyright for MUJI 1st and has authorized the courts to use the MUJI 1st instructions. Mr. Carney wanted to see what Mr. Young thinks of the idea.

3. *Meeting with Utah Supreme Court*. Mr. Carney noted that Mr. Young, Mr. Shea, and he are going to meet with the Utah Supreme Court and asked what matters the committee would like them to discuss with the court. Mr. Ferguson noted that district court judges are still not using the MUJI 2d instructions consistently and that it would be helpful if the supreme court issued some directive. Mr. West suggested that the court tell the trial courts that the instructions are presumptively valid. Mr. Shea offered a proposed instruction, based on instructions from other jurisdictions, that said that a court is to use MUJI 2d to the exclusion of other jury instructions on the same subject if (1) there is an applicable MUJI 2d instruction, (2) it accurately states the law, and (3) one of the parties requests it, and further instructing the court to tailor the MUJI 2d instructions to fit the particular case. Mr. Fowler had reservations about the proposal. He noted that, because the MUJI 2d instructions have been drafted by

different subcommittees, they are not all of the same quality. Also, the committee has proposed instructions in areas where there is no Utah law on point and has been reluctant to propose alternative instructions. It has also made other changes such as substituting "cause" for "proximate cause" and "important" for "material." Therefore, Mr. Fowler thought that courts should not be required to use the MUJI 2d instructions, but there should be room for experimentation and improvement. Mr. Lund suggested categorizing the instructions into two sets: (1) those where the law is settled, and (2) those where the law is unsettled. Mr. Shea noted that sometimes the law is unsettled because there is a conflict in Utah case law. Mr. Carney said he was having second thoughts about abandoning the term "proximate cause." Mr. Shea disagreed. He thought that, if the jury does not understand the instructions, it will not follow the law but will do what it thinks is fair. Mr. Carney thought that, if "proximate cause" were defined the first time it is used, the jury could understand the concept, but Dr. Di Paolo thought that the jury would have to be told over and over again what an unfamiliar concept like "proximate cause" means. She noted that a person generally has to hear a word used appropriately seven times before he or she begins to understand it, and if a person doesn't understand a word or concept, he or she won't use it. Mr. West noted that the committee should not simply throw away all of its work and go back to square one. Dr. Di Paolo noted the need for feedback on the instructions and suggested that Messrs. Young, Carney, and Shea raise the issue with the court.

4. *Attorney Negligence Instructions.* The committee reviewed the attorney negligence instructions:

a. *CV401(A). Committee Note on Attorney Negligence Instructions.* The committee revised the note to include MUJI 1st 7.45 (duty of care of specialist) as well as 7.46 (error in judgment not necessarily negligence) because there is no Utah case law to support them. Messrs. Carney and Summerill noted that the latter instruction implies that one must prove something more than negligence, such as intent or bad faith, and that an error of judgment can be negligence.

b. *CV401(B). Elements of claim for attorney's negligence.* At Mr. Ferguson's suggestion, "negligently" was struck from subparagraph (3). He noted that an attorney can be liable for a breach of the standard of care, whether the breach was negligent or not. "Negligence" was replaced with "breach" in subparagraph (4). Dr. Di Paolo suggested revising the first sentence to read, "[Name of plaintiff] claims that [name of defendant] was negligent in performing legal services," but the committee did not approve the change. Mr. Carney asked whether the general negligence instruction should be repeated in the attorney negligence instructions. Mr. Summerill thought that CV401(B) defined negligence in the context of attorney malpractice. At Mr. Carney's suggestion,

CV401(A) was renumbered CV401, and CV401(B) was renumbered CV402, and the other instructions were renumbered accordingly.

c. *CV402. Attorney-client relationship.* The first sentence was revised to read, "An attorney-client relationship can be established by an express contract between the parties, or by an implied contract based upon [name of defendant's] statements or conduct." Mr. Lund questioned whether an attorney-client relationship can be based solely on the acts of one side. Mr. Carney noted that MUJI 1st 7.43 said that the relationship must be induced by the attorney's conduct. Mr. Shea suggested adding at the end of the instruction, "Unless reasonably induced by the attorney's statements or conduct, plaintiff's belief that an attorney-client relationship exists is not sufficient to create an attorney-client relationship," but the committee rejected the suggestion. The committee approved the instruction as modified.

d. *CV403. Duty of care.* At Mr. Ferguson's suggestion, the sentence "Failure to do so is negligence" was added to the end of the instruction. The committee approved the instruction as modified.

e. *CV404. Duty of care of specialist.* Mr. Carney asked whether the instruction was needed and whether there is a different standard of care for specialists. He noted that the instruction would protect attorneys who do the work of a specialist but do not hold themselves out as specialists. Dr. Di Paolo and Mr. Fowler noted the distinction between an attorney taking on a matter he or she is not competent to do and an attorney making an error in his or her area of specialty. Mr. Carney noted that the instruction was based on an analogy to medical malpractice. Mr. Summerill noted that in medical malpractice a doctor has a duty to refer a patient if the doctor does not have the training or expertise to deal with the problem and asked whether an instruction was needed on an attorney's duty to refer a client. The committee ultimately decided to delete the instruction because there is no Utah case law supporting it.

f. *CV405. Uncertain laws or judicial mistakes.* At Mr. Gilchrist's suggestion, "laws" in the second line was replaced with "decisions." Mr. Lund noted that the phrase "errors about laws" was ambiguous. It does not say whose error--the attorney's, the court's, or the law's. Mr. West thought that an attorney could be negligent for failing to tell a client that the law is uncertain or unsettled. Mr. Shea suggested adding to the instruction, "[Name of defendant] has a duty to advise [name of plaintiff] that the law is unsettled." Mr. Lund asked whether the instruction meant that an attorney is not liable for an error in judgment. The subcommittee rejected such an instruction from MUJI 1st. Mr. Fowler expressed concern that a jury could impose liability on an attorney because the attorney

turned out to be wrong on an unsettled or debatable issue of law. Mr. Lund thought there needed to be objective evidence of an error of law. Messrs. Carney and Summerill reviewed the cases cited as authority for the instruction (*Crestwood Cove Apartments,* 2007 UT 48, 164 P.3d 1247, and *Watkiss & Saperstein v. Williams,* 931 P.2d 840 (Utah 1997)). Mr. Carney noted that *Crestwood Cove* did not talk about negligence but about proximate causation, and Mr. Summerill noted that *Watkiss & Saperstein* held that whether the law is unsettled is a question of law. At Mr. Shea's suggestion, the first sentence was revised to read, "[Name of defendant] is not liable for decisions that result from mistakes by a judge," and the title was changed to "Judicial mistakes." Mr. Lund suggested that there be a separate instruction on unsettled laws to the effect that, if the law is uncertain, unsettled, or debatable, the defendant has a duty to inform the plaintiff that the law is uncertain. Mr. West suggested deleting the instruction altogether. Mr. Gilchrist thought that an attorney still has a duty to advise the client that the law is unsettled. Mr. Simmons asked what the jury is supposed to do--decide whether the judge made a mistake? decide whether the attorney made a decision that was induced by a judge's mistake? Mr. Shea thought the issue for the jury was one of causation. The plaintiff will be claiming that the defendant's negligence caused the plaintiff harm, and the defendant will be claiming that a judge's mistake caused the defendant to err. Mr. Shea asked whether fault could be apportioned to the judge who made the mistake. Mr. Summerill thought that if the law is uncertain, that would be a complete defense to a legal malpractice claim. Mr. Shea noted that *Crestwood* said that causation presented a question for the trier of fact. A sentence was added to the beginning of the instruction that reads, "You must decide the cause of the plaintiff's damages." The committee approved the instruction as modified.

The meeting concluded at 6:00 p.m.

Next Meeting. The next meeting will be Monday, April 13, 2009, at 4:00 p.m.