MINUTES
Advisory Committee on Model Civil Jury Instructions
May 11, 2008
4:00 p.m.

Present: Juli Blanch, Francis J. Carney, Mariana Di Paolo, Phillip S. Ferguson, Tracy H. Fowler, John R. Lund, Stephen B. Nebeker, Timothy M. Shea, Paul M. Simmons

Excused: John L. Young (chair)

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

1. Mr. Shea noted that he and Mr. Young talked to the Utah Supreme Court in April about getting feedback from judges and attorneys. They also suggested that the court enter an order requiring trial courts to use a MUJI 2d instruction if one applies, unless the trial court decides that the instruction is not an accurate statement of the law.

2. *CV1802. Negligent misrepresentation.* At the last meeting, the instruction was returned to the subcommittee to answer the question of whether the standard of proof is a preponderance of the evidence or clear and convincing evidence. Mr. Shea noted that the subcommittee did not respond. Mr. Carney said that some jurisdictions apply a preponderance standard, and some apply a clear-and-convincing standard and that he had not found any Utah case on point. Mr. Shea will add parentheticals to the case citations in the committee note to indicate which approach each case adopted. Mr. Lund thought that to require a plaintiff to prove by clear and convincing evidence that a defendant "should have known" that a representation was false would be a hybrid standard. The committee revised the elements of the claim to read:

(1) [name of defendant] represented to [name of plaintiff] that an important fact was true;

(2) [name of defendant]'s representation of fact was not true;

(3) [name of defendant] failed to use reasonable care to determine whether the representation was true;

(4) [name of defendant] was in a better position than [name of plaintiff] to know the true facts;

(5) [name of defendant] had a financial interest in the transaction;

(6) [name of plaintiff] relied on the representation, and it was reasonable for him to do so; and

(7) [name of plaintiff] suffered damage as a result of relying on the representation.

The committee approved the instruction and committee note as revised.

Dr. Di Paolo joined the meeting.

3. The committee continued its review of the attorney negligence instructions.

a. *CV402. Elements of claim for attorney's negligence.* Mr. Simmons thought that the second element (that the defendant owed a duty to the plaintiff) should not be included in the instruction because it presented a question of law for the court to decide, not a question of fact for the jury. Mr. Lund suggested combining the first two elements. Mr. Ferguson suggested revising the instruction to read: "You must find that [name of plaintiff] had an attorney-client relationship with [name of defendant]. If you find such a relationship, then [name of defendant] owed [name of plaintiff] a duty to use reasonable care. Then you must also find whether [name of defendant] breached that duty and whether any breach caused any harm to [name of plaintiff]." Mr. Carney noted that the new Restatement of Law Governing Lawyers is well written and clearly sets out the elements of a legal malpractice claim. Mr. Fowler suggested deleting the second element and expanding the fourth. Mr. Shea suggested deleting the second element and revising the remaining two elements to read:

(2) [name of defendant] failed to use the same degree of care, skill, judgment and diligence used by qualified lawyers under similar circumstances; and

(3) [name of defendant]'s failure to use that degree of care was a cause of [name of plaintiff]'s injury, loss or damage.

The committee changed "qualified lawyers" in subparagraph (2) to read "reasonably careful lawyers." Dr. Di Paolo suggested revising the introductory sentence to say that the plaintiff "must prove all of the following" or "must prove three things:" The committee re-approved the instruction as modified.

b. *CV403. Attorney-client relationship.* Mr. Simmons asked whether the attorney's statements must have been made to the plaintiff. Dr. Di Paolo and Mr. Lund thought they did not, that the fact that the statements may have been made to someone else goes to the reasonableness of the plaintiff's belief that he had an attorney-client relationship with the defendant but does not preclude an

attorney-client relationship from arising. At Mr. Simmons's suggestion, the committee note was revised to read, "If the attorney-client relationship is not disputed, rather than give this instruction, the court should instruct the jury that there is an attorney-client relationship." The committee re-approved the instruction and the committee note as modified.

c. *CV404. Duty of care.* Mr. Shea asked whether the instruction was necessary in light of the changes to CV402. Mr. Ferguson thought there was no harm in including the instruction. The committee changed "qualified lawyers" to "reasonably careful lawyers," to match CV404, and deleted the last sentence of the instruction. The committee re-approved the instruction as modified.

d. *CV405. Scope of representation.* Dr. Di Paolo noted that the instruction did not define "scope of representation" and asked what it meant. Mr. Lund noted that an attorney may limit what he will do for a client. Dr. Di Paolo suggested adding an appositive--"that is, what [he] will do in the case." The instruction was revised to read:

> In general, a lawyer has no duty to act beyond the scope of representation. "Scope of representation" means what the lawyer will do for the client. [Name of defendant] may limit the scope of representation if the limitation is reasonable and if [name of plaintiff] gives informed consent.

Dr. Di Paolo asked whether "informed consent" needed to be defined. Mr. Shea noted that it was only defined in the medical malpractice instructions. Mr. Carney noted that the phrase comes from Utah Rule of Professional Conduct 1.2, but the rule does not define the term. Mr. Lund asked whether informed consent required independent legal advice. The committee added a sentence to the committee note to the effect that the court may need to draft an instruction defining "informed consent" because rule 1.2 does not define the term. The committee approved the instruction as modified.

e. *CV406. Standard of care for plaintiff.* Messrs. Shea and Lund noted that the instruction does not define a standard of care but talks about comparative fault. The committee changed the title to read, "Plaintiff's actions." Ms. Blanch suggested that the instruction take the form: "[Name of defendant] claims that [name of plaintiff] was at fault. In determining whether [name of plaintiff] was at fault, you may consider . . . . You may not consider . . . ." Mr. Shea noted that the instruction presupposes instructions on comparative fault and asked whether the general negligence instructions on comparative fault were sufficient. Mr. Carney thought not. He and Mr. Fowler suggested adding a cross-

reference to CV211 ("allocation of fault"), with a notation to insert CV406 into CV211 if comparative fault is at issue. The committee revised the instruction to read:

> [Name of defendant] claims that [name of plaintiff]'s actions were a cause of the harm. In deciding whether [name of plaintiff] was at fault,
>
> (1) you may not consider [his] actions before hiring [name of defendant]; however,
>
> (2) you may consider [his] actions after hiring [name of defendant].

The committee approved the instruction as modified.

f. *CV407. Fiduciary relationship*. The committee questioned whether the jury had to find a fiduciary relationship between the attorney and client. The committee thought that a fiduciary duty was a given if there was an attorney-client relationship. The committee questioned the need for the instruction. Mr. Carney quoted from *Kilpatrick v. Wiley, Rein & Fielding,* 909 P.2d 1283 (Utah 1996), that "legal malpractice" is a generic term for three different causes of action: (1) breach of contract; (2) breach of fiduciary duty; and (3) negligence. Mr. Fowler asked if we needed to add breach of contract instructions to this section. Mr. Ferguson noted that a party may plead a claim for breach of fiduciary duty because it may have a different statute of limitations, may give rise to an award of attorney's fees, and may give rise to punitive damages. Mr. Simmons suggested that the instruction track the format of CV402:

> [Name of plaintiff] claims that [name of defendant] breached a fiduciary duty. To succeed on this claim, [name of plaintiff] must prove that--
>
> (1) [he] and [name of defendant] had an attorney-client relationship;
>
> (2) [name of defendant] breached a duty to [name of plaintiff] by--
>
> (a) taking advantage of [name of defendant]'s legal knowledge and position;
>
> (b) failing to have undivided loyalty to [name of plaintiff];
>
> (c) failing to treat all of [name of plaintiff]'s matters as confidential;
>
> (d) concealing facts or law from [name of plaintiff]; or

(e) deceiving [name of plaintiff]; and

(3) [name of defendant]'s breach was a cause of [name of plaintiff]'s injury, loss or damage.

Next Meeting. The next meeting is Monday, June 8, 2009, at 4:00 p.m.

The meeting concluded at 6:00 p.m., to the strains of "Back in the Saddle Again" wafting from Mr. Carney's computer.