MINUTES

Advisory Committee on Model Civil Jury Instructions
November 8, 2010
4:00 p.m.

Present: John L. Young (chair), Francis J. Carney, Marianna Di Paolo, Phillip S. Ferguson, Tracy H. Fowler, Stephen B. Nebeker, Timothy M. Shea, Paul M. Simmons, Peter W. Summerill, Diane Abegglen, and Justin Matkin (representing the Eminent Domain subcommittee)

Excused: Honorable William W. Barrett, Jr., John R. Lund, and David E. West

1. *Committee Membership*. The committee discussed adding new members to the committee. Judge Barrett has a hard time making the committee meetings because of his law-and-motion calendar on Mondays. The committee thought it could benefit from more judicial input on the committee. Mr. Young noted that Gary Johnson is nearing the end of his term as managing partner of Richards, Brandt, Miller & Nelson and is interested in serving on the committee again. Mr. Summerill suggested that Ryan Springer would also make a good addition to the committee. Mr. Young proposed adding Messrs. Johnson and Springer to the committee. He also asked committee members to come to the next meeting prepared to suggest one or two judges to add to the committee. Ms. Abegglen will check with the Chief Justice to make sure it is not a problem for the committee to add new members.

2. *Eminent Domain Instructions*. The committee continued its review of the eminent domain instructions.

a. *CV1617. Reasonable cost of repair or restoration as measure of severance damages.* Mr. Matkin noted that the subcommittee did not think the cost of repair instruction should be combined with the severance damage instruction. It rewrote CV1617. The new version is meant to replace the version the committee previously considered. It is meant to explain that the cost of cure is not to be added to severance damages but may be a measure of severance damages. The committee thought the word "cure" was problematic. Mr. Macklin noted that the issues that are usually disputed in these cases are (1) the cost of cure, and (2) whether it is feasible to cure the remaining property. Dr. Di Paolo noted that "feasible" connotes "doable," not that it is probable. Mr. Macklin said that awards of the cost of curing the property are often not used to cure the property. The committee revised the instruction to read:

CV1617. Reasonable cost of restoring the property as measure of severance damages.

Severance damages may be reduced or eliminated by restoring the remaining property.

> If you find that restoring the remaining property to its fair market value before the taking will eliminate severance damages, then you must award [name of property owner] the lesser of (1) the reasonable cost to restore the property, or (2) the full amount of severance damages, but not both.
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> If you find that the remaining property cannot be restored to its fair market value before the taking, then you must award [name of property owner] the lesser of (1) the reasonable cost to partially restore the property to the extent possible, plus the remaining severance damages, or (2) the full amount of severance damages, but not both.
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> [Name of the party asserting that severance damages should be reduced or eliminated] has the burden to prove that the restoration is feasible and reasonable.

Mr. Summerill asked if the references need to be updated. He suggested adding a reference to Utah Code Ann. § 78B-6-511. The committee note was replaced by a new note approved by the subcommittee. The committee revised the note to eliminate the use of "cure" and "cured":

> This instruction should be given if a party contends that severance damages can be reduced or eliminated by restoring the property to its fair market value before the taking. The Committee is unaware of any Utah law holding that the cost to restore is a proper measure, if the severance damages can be reduced but not eliminated through restoration.

b. *CV1622. Apportionment of just compensation between owner and tenant.* Mr. Macklin explained the rationale for the instruction: "just compensation" is a number that represents the fair market value of the property taken and any severance damages, and any award should not exceed the amount of just compensation. So if the jury finds that a tenant has a favorable lease for which he should be compensated, that amount is deducted from the landlord's recovery. Mr. Shea thought use of the term "bonus value" was confusing. The committee revised the first paragraph to read:

> After you determine the total amount of the just compensation, you must apportion it between [name of property owner] and [name of lessee]. [Name of lessee] is entitled to the difference between: . . .

"[A]nd" was inserted between subparagraphs (1) and (2), and the phrase "date that lease expires or end of term" was used in both subparagraphs. The first sentence of the last paragraph was deleted, and "if any" was deleted from the last bracketed phrase. The phrase "as a whole" was also deleted from the last sentence. Mr. Simmons asked whether the instruction needed to explain how to handle a taking where the lease had an option. The committee thought that would be handled as a fact question and would affect the jury's determination of the end of the lease term. The committee approved the instruction as revised.

3. *Premises Liability Instructions*. The committee noted that the premises liability subcommittee under the chairmanship of Jeffrey Eisenberg had not proposed any instructions. Mr. Summerill volunteered to help with the instructions. He proposed drafts of two instructions (CV1101, "Elements of claim for harm because of property condition," and CV1102, "Duty of property owner"). The instructions assume that the injured person was a business invitee. He noted that we also need instructions defining business visitor or invitee, licensee, and trespasser and instructions dealing with attractive nuisance, permanent vs. temporary conditions, and statutes such as the Inherent Risk of Skiing Act, among other things. He thought the MUJI 1st instruction on open and obvious danger was now subsumed under comparative fault. Mr. Carney noted that he had mediated a premises liability case that recently settled and volunteered to ask the attorneys in that case (Lynn Harris and Ruth Shapiro) for their proposed jury instructions. Mr. Summerill noted that Darren Davis had recently lost a slip-and-fall trial against Snowbird. Mr. Ferguson suggested that Mitch Rice, who represents Wal-Mart, might also be a resource for premises liability instructions. Mr. Shea offered to put the MUJI 1st instructions into plain English. Messrs. Ferguson and Summerill offered to review his draft. The committee deferred further discussion of the premises liability instructions until the next meeting.

The meeting concluded at 5:45 p.m.

Next Meeting. The next meeting will be Monday, December 13, 2010, at 4:00 p.m.