***MINUTES***
Advisory Committee on Model Civil Jury Instructions
November 13, 2012
4:00 p.m.

Present: John L. Young (chair), Diane Abegglen, Francis J. Carney, Marianna Di Paolo, Honorable Ryan M. Harris, Gary L. Johnson, Timothy M. Shea, Paul M. Simmons, Ryan M. Springer, Honorable Andrew H. Stone. Also present: Craig R. Mariger, Chair of the Design Professional subcommittee

The committee continued its review of the Professional Liability: Design Professionals instructions:

1. *CV504A. Evidence of standard of care where expert is required.* Mr. Mariger noted that there were no substantive changes from the MUJI 1st instruction. He also noted that a Utah Court of Appeals case held that an expert is not needed in a landscape design case. Judge Stone suggested replacing "must" with "may." Mr. Johnson thought "must" was appropriate because the jury has to choose between the opinions of competing experts. Mr. Simmons questioned whether the jury has to choose between the opinion of one expert and that of another or whether they can pick and choose which parts of the various expert opinions to apply. Judge Stone saw no problem with telling the jury what factors to consider but thought the instruction should not dictate how the jury considers the factors. Mr. Carney suggested making the instruction consistent with CV129 on opinion testimony and CV326 on the medical malpractice standard of care. He also compared the instruction to MUJI 2.14. Mr. Mariger said he was okay with omitting the last two paragraphs if they were adequately covered by other instructions but thought the concepts needed to be covered. Dr. Di Paolo thought it was important that the jury understand why it had to rely on expert testimony. Mr. Young noted that CV136, on conflicting testimony of experts, adequately covered the third paragraph of CV504A, and Mr. Mariger agreed. At Mr. Shea's suggestion, the committee decided to add the sentence "If you find that an expert witness has relied on a fact that has not been proved, or has been disproved, you must consider that in determining the value of the expert witness's opinion" to CV136. The committee agreed, but changed "must" to "may." Mr. Young suggested revising the first sentence of CV136 to say "you must compare" (as opposed to "you may compare"). Dr. Di Paolo was concerned with omitting the second and third paragraphs from CV504A; she thought the jury needed specific language in CV504A because it has to use an expert's standard of care. She suggested putting CV136 into the body of CV504B. Mr. Springer and Judge Harris thought that including the concepts in a general instruction was more efficient. The committee decided to add a committee note saying to give CV136 after CV504B and not to use CV129 in this situation. The committee revised CV504A to read: "Due to the advanced learning and skill involved in [architecture] [landscape architecture] [engineering] ]land surveying], I have determined that you must rely on expert testimony to decide whether [name of defendant] complied with the standard of care. You must use only the standard of care established through evidence presented in this trial by expert witnesses and through other evidence admitted for the purpose of defining the standard of care. You may not use a standard based on your own experience

or any other standard of your own." When asked what "other evidence" might apply, Messrs. Carney and Johnson noted that there may be literature, admitted under the learned treatise exception to the hearsay rule. The committee approved the instruction as revised.

2. *CV504B. Evidence of standard of care where expert is not required.* Mr. Johnson questioned whether the instruction was necessary. He thought the issue would be decided before trial, by a motion in limine. Mr. Young questioned whether the instruction was covered by CV129, "Statement of opinion." Mr. Mariger thought not. He thought the subject needed to be covered, but that it could be done in a general instruction. Judge Harris asked whether we needed an instruction for cases where one side has an expert and the other side does not. Mr. Young thought the second sentence in effect told the jury that it could ignore the expert testimony. Mr. Simmons suggested deleting the second sentence. Mr. Young suggested deleting the first sentence. Mr. Mariger thought that CV504B would rarely be given, since expert testimony is required in most cases. He suggested replacing it with a general instruction to the effect that "I have determined that expert testimony is not needed to establish the standard of care. You may consider expert testimony, but you are not bound to use it." Mr. Shea thought that the instruction did not need to be limited to standard of care. Mr. Young suggested putting the last two sentences of the first paragraph in CV129, "Statement of opinion." Judge Stone noted that CV129 covers all opinion testimony, not just expert testimony. He suggested bracketing the second paragraph of CV129, to be used only in cases where expert testimony is not required. Mr. Shea noted that a committee note to CV326 and CV504A will say not to give CV129 in cases where expert testimony is required. Judge Stone noted that there may be two types of expert opinions in the same case–expert opinions where expert opinions are required, and others where they are not. The instructions may have to be adapted to explain to the jury how to consider each type of expert opinion involved in the case. Mr. Springer suggested explaining that in the committee note to CV129. The committee agree to delete CV504B.

3. *CV505. Damages. Entitlement to damages.* Judge Harris thought the instruction was adequately covered by the general damage instructions. Mr. Carney suggested adding a hyperlink to the general instructions (CV2001-CV2004).

4. *CV505A. Damages. Measure of property damages.* Mr. Young suggested comparing CV505A to CV2231 (damages for contractor's defective work) and CV2232 (avoiding unreasonable economic waste). Mr. Mariger noted that the instruction is based on the Restatement (Second) of Contracts, which says you get the repair measure of damages unless it is disproportionate. Utah has only adopted the first Restatement of Contracts, which says you can recover the greater of the repair measure or loss of property value. *See Stangl v. Todd,* 554 P.2d 1316 (Utah 1976). (*Stangl* was decided before the second Restatment was adopted.) At Mr. Young's suggestion, Mr. Mariger

agreed to compare CV505A and CV506 with CV2231 and CV2232 for the next meeting. Mr. Springer thought that CV2231 was less cumbersome than CV505A. Mr. Young thought that they should be the same. Mr. Mariger asked whether the committee wanted to follow the Restatement (Second) approach, anticipating a change in Utah law. The committee has generally tried to follow the law as it is rather than anticipate what Utah appellate courts might do, but reserved further discussion of the issue and of CV505A until the next meeting.

5. *CV506. Betterment or value added.* Mr. Mariger noted that there is no Utah case directly on point. He explained that betterment arises when an error is caught before there is any activity in the field. In construction law, the matter is handled by change orders. Mr. Young asked whether the committee should omit the instruction because there is no Utah law on point or give its best guess as to how the Utah Supreme Court would decide the issue. Mr. Mariger noted that a similar instruction was in MUJI 1st, and an instruction will be given whether it is in MUJI 2d or not. Judge Harris said he would prefer to have Utah case law to back up the instruction. Mr. Carney thought it was okay to include the instruction as long as the committee note included a caveat that it may not accurately state Utah law. Mr. Springer did not think the instruction was terribly controversial. Mr. Mariger noted that MUJI 1st did not include the plaintiff's response to a betterment defense, namely, that the plaintiff would not have done the project had he known what it would have cost to do it right. Mr. Young did not think examples were necessary. Dr. Di Paolo thought that the first three sentences of the instruction were not easy to understand, but agreed that the examples were long. Judge Harris noted that it is the attorney's job to provide examples in closing argument. He agreed that the instruction was not clear. Dr. Di Paolo suggested revising the instruction along the lines of: "Start with $x (the amount it would have cost). [Explain how you get to $x.] Then reduce it by $y." Mr. Young thought that MUJI 7.41 was clearer. Mr. Mariger offered to rewrite the instruction with Dr. Di Paolo's suggestion in mind.

6. *CV507, Transition instruction; CV508, Breach of warranty essential elements; and CV509, Creation of a warranty.* Mr. Mariger suggested adding a reference to *Groen v. Tri-O-Inc.,* 667 P.2d 598 (Utah 1983). Mr. Young suggested combining CV507 and CV509. Mr. Shea suggested following CV1023, "Breach of Warranty. Definition of 'Warranty.'" Mr. Young asked whether the definitions of warranty differ in design professional cases and under the Uniform Commercial Code. He thought the instruction should start with a clear definition of warranty. Mr. Mariger noted that the cases say that a warranty is an assurance of a fact. The most common warranty is that a product is free of defects. He thought there were better cases to cite as references. The committee revised the second sentence of CV509 to read, "A warranty is an assurance or promise of a certain fact or condition regarding the work of [name of defendant]." Mr. Young suggested moving this sentence to the second sentence of

CV507. Mr. Shea suggested renaming CV507 "Creation of a warranty" and revising it to read:

> [Name of plaintiff] claims that [name of defendant] is responsible for damages for breach of warranty. You must decide whether [name of defendant] made a warranty of the [work/service] to [name of plaintiff]. A warranty is an assurance or promise of a certain fact or condition regarding the work of [name of defendant].

Dr. Di Paolo and Judge Harris suggested making the last sentence of Mr. Shea's proposal a separate jury instruction or making it a part of CV508. The committee approved CV507 as modified by Mr. Shea.

The meeting concluded at 6:00 p.m.

*Next Meeting*. The next meeting will be Monday, December 10, 2012, at 4:00 p.m.