MINUTES

Advisory Committee on Model Civil Jury Instructions
March 10, 2014
4:00 p.m.

Present: John L. Young (chair), Alison Adams-Perlac, Juli Blanch, Francis J. Carney, Marianna Di Paolo, Phillip S. Ferguson, Honorable Ryan M. Harris, L. Rich Humpherys, Gary L. Johnson, Paul M. Simmons, Peter W. Summerill. Also present: Jack Ray

Excused: Tracy H. Fowler, John R. Lund, Ryan M. Springer, Honorable Andrew H. Stone

1. *CV301B. "Standard of care" defined. "Medical malpractice" defined. Elements of claim for medical malpractice.* Mr. Carney reviewed the prior discussions and history of CV301B and CV324. Mr. Ferguson reported that his subcommittee (Mr. Ferguson, Ms. Blanch, and Ms. Adams-Perlac; Mr. Springer was not there) decided to move CV326 into CV301B and added the following language: "The expert witnesses may disagree as to what the standard of care is and what it requires. If so, it will be your responsibility to determine the credibility of the experts and to resolve the dispute." Mr. Carney noted that a party cannot argue "alternative treatment methods" under CV324 just because the experts may disagree on what the standard of care is. Mr. Ferguson noted that the subcommittee did not use CV136 ("conflicting testimony of experts") as a reference. It also did not use CV129 ("statement of opinions"), which allows the jury to ignore expert opinions, because jurors cannot ignore all expert testimony on the standard of care in a medical malpractice or other professional liability case. Mr. Summerill noted that the phrase "skill ordinarily used by other qualified [providers/doctors]" in the first paragraph was problematic. Mr. Ray added that the legal standard is an objective, reasonableness standard and that the level of skill "ordinarily used" by other providers may not meet this objective standard. He proposed the following language, based on *Schaerrer v. Stewart's Plaza Pharmacy, Inc.*, 2003 UT 43, ¶ 35, 79 P.3d 922: "the reasonable degree of skill, care, and knowledge that would be exercised by a reasonably prudent [provider] in the same situation." Mr. Carney agreed with Mr. Ray and raised another issue, namely, whether the locality rule was still alive. The court held that it did not apply to "specialists" in *Jenkins v. Parrish*, 627 P.2d 533 (Utah 1981), but alluded to the rule in a later case. The committee agreed that it is seldom argued any more.

Ms. Blanch and Dr. Di Paolo joined the meeting.

Mr. Carney asked whether the instructions should refer to "medical negligence" or "medical malpractice." Messrs. Ray and Summerill noted that they have had potential clients say, in explaining their claim, that they did not know if the defendant's conduct was malpractice or just negligence, as if they were different. Dr. Di Paolo said that "malpractice" sounds much worse than "negligence." Mr. Young suggested adding a committee note recommending that the court clarify that medical negligence and medical malpractice are the same thing. Mr. Ray thought that "medical negligence" is

appropriate, since the standard is a negligence standard. Mr. Ferguson noted that we don't say that a negligent driver is guilty of vehicular malpractice. Mr. Humpherys asked whether "malpractice" should be purged from all the jury instructions. Mr. Summerill noted that CV302 refers to "nursing negligence," whereas CV301B refers to "medical malpractice." Mr. Carney noted that CV302 on the nursing standard of care should be revised to track any changes to CV301. Judge Harris thought that the instruction should tell the jury that the terms mean the same thing. Mr. Humpherys was concerned that using "malpractice" at all will taint "medical negligence." Mr. Carney noted that the verdict form just refers to "fault." Dr. Di Paolo suggested using both terms ("malpractice" and "negligence") every time one is used. Mr. Young suggested a separate introductory instruction to dispose of the issue at the beginning. Dr. Di Paolo suggested asking on the verdict form, "Did [name of defendant] violate the standard of care?" It was noted that "fault" encompasses both breach of the standard of care and causation, yet the verdict form asks both whether the defendant was at fault and whether the defendant's fault was a cause of the plaintiff's harm. Mr. Simmons suggested revising CV301B to read:

> **CV301B Elements of a medical negligence claim**
>
> To establish [his] [her] claim, [name of plaintiff] has the burden of proving two things:
>
> 1. That [name of defendant] breached the standard of care, and
>
> 2. That the breach was a cause of [name of plaintiff]'s harm.

Then a separate instruction (CV301C) could define "standard of care":

> **CV301C "Standard of care" defined.**
>
> A [health care provider/doctor] is required to use that degree of learning, care, and skill used by reasonably prudent [providers/doctors] in good standing practicing in the same [specialty/field] under the same or similar circumstances. This is known as the "standard of care." The failure to follow the standard of care is a form of fault known as either medical negligence or medical malpractice. The terms mean the same thing.
>
> To establish a breach of the standard of care, [name of plaintiff] has the burden of proving–
>
> 1. What the standard of care is, and
>
> 2. That [name of defendant] failed to follow the standard of care.

> The standard of care is established through expert witnesses and other evidence. You may not use a standard based on your own experience or any other standard of your own. It is your duty to decide, based on the evidence, what the standard of care is. The expert witnesses may disagree as to what the standard of care is and what it requires. If so, it will be your responsibility to determine the credibility of the experts and to resolve the dispute.

Judge Harris noted that *Schaerrer* says that a health-care professional is required to "possess and exercise" the requisite care and asked if the instruction loses anything by saying simply "use." The committee thought not. They thought that as long as a defendant used the requisite care in the particular case, he would not liable even though he otherwise may not possess all the care exercised by reasonably prudent providers. Mr. Simmons asked what other "evidence" could establish the standard of care besides expert testimony, since even learned treatises or medical journals must come in through an expert. Mr. Ferguson pointed out that the standard can also be established by judicial notice or stipulation. The committee also noted that res ipsa loquitur can apply in a medical malpractice case. Mr. Summerill suggested adding to the committee note that a plaintiff does not have to establish the standard of care in a res ipsa loquitur case. Mr. Ray noted that the part of CV301B that listed the plaintiff's allegations raises questions, such as, must the plaintiff prove that the defendant failed to follow the standard of care in all respects listed? Must the jury agree on the same items? What if, for example, three jurors think the defendant breached the standard of care with respect to issue (1), two thought he did with respect to issue (2), and three thought he did with respect to issue (3)? All eight jurors agree that the defendant breached the standard of care, but there is no majority that agrees on any specific breach. The committee decided to delete the paragraph, since it raises more questions than it answers. The last paragraph of old CV301B was moved to the beginning of CV309, "Cause" defined, and the phrase "in any of these respects" was deleted from it. The committee approved CV301B, CV301C, and CV309 as revised.

2. *CV324. Use of alternative treatment methods.* Mr. Carney raised two questions regarding an alternative treatment instruction: (1) is it ever appropriate? and (2) if so, what form should it take? Mr. Ferguson's subcommittee proposed a revised CV324 that treated it as an affirmative defense. Mr. Ray thought the instruction created a legal doctrine that does not exist in Utah. He thought the committee was trying to salvage something that should not exist. Mr. Summerill thought it was argument and should not be presented as a court-sanctioned theory. Ms. Blanch thought it was not the committee's job to invalidate instructions that have not been invalidated by the Utah Supreme Court. Other committee members thought it was not the committee's job to perpetuate instructions that were not based on Utah law. Ms. Adams-Perlac said the committee's job is to get rid of bad instructions. Mr. Young noted that if there is no Utah law supporting an instruction, we should not be using it. Mr. Summerill noted that

CV301A says that the committee considered instructions on certain claims (such as loss of chance) but did not include them because there is no clear appellate authority on whether those claims exist in Utah. Mr. Carney thought that part of the committee's job is to help judges and attorneys and provide guidance where Utah law may not be clear. Mr. Simmons said he had an analytical problem with CV324 as revised. He thought that it invited inconsistent verdicts, because, before the jury could reach the question of alternative treatment methods as an affirmative defense, it first had to find that the defendant breached the standard of care, for example, by his choice of treatment methods or his application of the method under the circumstances of the case. If it decided that the defendant breached the standard of care but then decided that the defendant was not liable because he used a method that was "approved by a respectable portion of the medical community," that would mean that a negligent defendant could escape liability. The instruction in effect gives the defendant a "Get Out of Jail Free" card. Dr. Di Paolo thought that the concept was already covered in the standard-of-care instructions and thought that a committee note could be added to CV301B or 301C to explain the absence of the instruction. Mr. Carney noted that no one from the medical malpractice defense bar was at the meeting and said he was not comfortable proceeding in their absence. Ms. Adams-Perlac said that she had not sent them a notice of the meeting. Mr. Carney notified them the day of the meeting, but that may not have been sufficient time. Mr. Young suggested tabling the discussion. Mr. Humpherys thought that any decision should be based on a sound foundation, whether anyone was present to represent a particular side or not, and asked if anyone was advocating that there is Utah law to support CV324. He also suggested asking the defense bar to draft a comment on their position if the committee decides to eliminate CV324. Judge Harris suggested leaving CV324 in but using the strike-out feature on it. Further discussion was deferred until the next meeting.

3. *Committee Membership*. David E. West has resigned from the committee.

4. *Next Meeting*. The next meeting will be Monday, April 14, 2014, at 4:00 p.m.

The meeting concluded at 6:00 p.m.