MINUTES
Advisory Committee on Model Civil Jury Instructions
May 9, 2016
4:00 p.m.

Present: Juli Blanch (chair), Tracy H. Fowler, Gary L. Johnson, Honorable Ryan M. Harris, Patricia C. Kuendig (by phone), Paul M. Simmons, Honorable Andrew H. Stone, Nancy Sylvester. Also present: Randy L. Dryer and David C. Reymann, from the Defamation subcommittee; George T. Waddoups from the Emotional Distress subcommittee

Excused: Marianna Di Paolo, Joel Ferre, Peter W. Summerill, Christopher M. Von Maack

1. *Minutes.* On motion of Mr. Fowler, seconded by Mr. Johnson, the committee approved the minutes of the April 11, 2016 meeting.

2. *Schedule.* Ms. Blanch reported that the Civil Rights instructions were not ready for the committee's review, so the committee will take up the Emotional Distress instructions after the Defamation instructions.

3. *Defamation Instruction CV1617, Punitive Damages.* Mr. Simmons had pointed out after the last meeting that the changes the committee made last month to the punitive damage instructions created a problem because they failed to instruct the jury that it must find actual malice in cases involving matters of public concern before it can award punitive damages. Mr. Reymann suggested an alternative punitive damage instruction (CV1617) to supplement the general punitive damage instruction, CV2026. But Messrs. Dryer and Reymann also said that the Defamation subcommittee would prefer a stand-alone punitive damage instruction for defamation cases rather than using the general instruction. The committee accepted the subcommittee's recommendation and reinstated CV1617 as originally proposed, with some changes to both the instruction and the committee note. Judge Stone noted that the instructions involve two types of malice—"actual malice," a term of art, and common-law malice (ill will). Mr. Dryer noted that some of the more modern cases refer to "actual malice" as "constitutional malice."

Judge Harris joined the meeting.

Mr. Reymann noted that the concern was that the jury could think that the actual malice requirement could be satisfied by common-law malice. He suggested that the instruction could avoid the term "actual malice," but the same changes would need to be made in the liability instructions that refer to "actual malice." Mr. Dryer thought it was problematic to do away with the term "actual malice," but that, if the committee decided to do so, it should explain the choice in a committee note.

Mr. Blanch suggested changing subparagraph (1) to read, "(1) [name of plaintiff] must prove that at the time [name of defendant] made the allegedly defamatory statement[s], [name of defendant] had actual knowledge the statements were false or actually entertained serious doubts as to whether the statements were true. . . ." Ms. Blanch and Ms. Sylvester will go over CV1617 to make sure that all the proper additions and deletions are made and then run it by Messrs. Dryer and Reymann before presenting it to the committee at the next meeting. Messrs. Dryer and Reymann were then thanked for their service and excused. The committee did not think that they needed to come back for the next meeting.

4. *Emotional Distress Instructions.* Mr. Waddoups represented the Emotional Distress subcommittee, which consisted of Mark Dalton Dunn, Mr. Waddoups, Michael A. Katz, and Steven A. Combe. Mr. Waddoups explained that the subcommittee analyzed the cases that have come out since MUJI 1st and tried to conform the instructions to the case law.

a. *CV1501 [former MUJI 22.1]. Intentional Infliction of Emotional Distress.* Judge Harris questioned whether the instruction should read that the plaintiff must prove "outrageous *and* intolerable conduct" or "outrageous *or* intolerable conduct." Judge Harris and Mr. Waddoups preferred "or," but the case law uses "and," so the committee did also. Ms. Blanch asked whether there should be a committee note to explain the addition of "and intolerable" to the MUJI 1st instruction. Mr. Simmons thought not, since the committee had not explained other differences between MUJI 1st and MUJI 2d. At Ms. Blanch's suggestion, the committee deleted "proximately" before "caused" in subparagraph (3), consistent with the committee's treatment of proximate causation in other instructions. Ms. Blanch suggested adding to the instruction, "These requirements will be explained in the following instructions."

b. *CV1502 [former MUJI 22.2]. Outrageous Conduct.* Mostly based on Judge Harris's suggestions, the committee revised the instruction to read:

> "Outrageous and intolerable" conduct is conduct that offends generally accepted standards of decency and morality or, in other words, conduct that is so extreme as to exceed all bounds of what is usually tolerated in a civilized community. Conduct that is merely unreasonable, unkind, or unfair does not qualify as outrageous and intolerable conduct.

Judge Harris questioned whether "all" in the first sentence should read "the," but the committee chose "all," the term used in the case law.

c. *CV1503 [former MUJI 22.3]. Severe Distress.* The committee added "or extreme" after "severe" in the title to conform with the statement of the elements of the claim in CV1501. Judge Harris questioned the source of the sentence "The character of [name of defendant]'s conduct, if found to be outrageous, can be treated as evidence that severe distress existed." He thought the reasoning was circular: the tort compensates for subjective distress, but the sentence implies that you don't need subjective distress, that the standard is an objective one. Mr. Simmons thought the sentence meant that if a reasonable person would have suffered severe or extreme distress from the conduct, the jury can reasonably infer that the plaintiff did as well. Mr. Fowler suggested that it in effect provided for a rebuttable presumption. Judge Stone found the source of the statement in Restatement (Second) of Torts § 46, comment *j,* which says that the plaintiff must prove severe distress but that, "in many cases the extreme and outrageous character of the defendant's conduct is in itself important evidence that the distress has existed." Ms. Sylvester suggested adding the nature of the defendant's conduct to the list of factors the jury can consider in determining the severity of the distress. Ms. Kuendig suggested restructuring the instruction. Ms. Blanch questioned whether juries would understand "subjective testimony." Judge Harris suggested substituting "testimony from the plaintiff and other witnesses." Mr. Simmons asked whether there needed to be any reference to testimony since the jury is instructed that it must make findings based on the evidence and that the evidence includes the testimony of witnesses and exhibits received into evidence. The committee revised the instruction to read:

> Emotional distress may include such things as mental suffering, mental anguish, mental or nervous shock, or highly unpleasant reactions, such as fright, horror, grief or shame. However, you can award damages for emotional distress only when the distress is severe or extreme.
>
> In determining the severity of distress, you may consider the intensity and duration of the distress, observable behavioral or physical symptoms, and the nature of the defendant's conduct. It is possible to have severe and extreme emotional distress without observable behavioral or physical symptoms.

d. *CV1504 [former MUJI 22.4]. Definition of Intent and Reckless Disregard.* Ms. Blanch asked where the last clause (subsection (2)) came from. Judge Harris thought that the instruction conflated mens rea concepts but that the committee should hew to the language of *White v. Blackburn.* The committee noted that *White* relied on *Matheson v. Pearson,* 619 P.2d 321 (Utah 1980). Messrs. Johnson and Simmons thought that *Matheson* had been overruled. Judge Harris thought that the instruction needed a good definition of "reckless

disregard." He suggested revising the instruction to read, "[Name of plaintiff] must show that [name of defendant] either (1) acted with the intent of inflicting emotional distress, or (2) intentionally performed an act so unreasonable and dangerous that he knew or should have known that it was highly probable that emotional distress would result." Ms. Blanch suggested inserting "with no intent to cause harm" after "(2)." At Mr. Simmons's suggestion, the committee deleted the language "it is not enough that [name of defendant] acted negligently in causing the distress. Rather," from the first two lines.

e. *MUJI 22.7. Negligent Infliction of Emotional Distress: Zone of Danger.* Mr. Waddoups pointed out that the subcommittee could not agree on how to revise MUJI 22.7, so it proposed two versions of the instruction, one that uses "severe," and one that does not. Mr. Waddoups thinks that "severe" emotional distress is not required for negligent infliction of emotional distress.

The committee deferred further discussion of the emotional distress instructions until the next meeting.

5. *Next meeting.* The next meeting will be Monday, June 13, 2016, at 4:00 p.m.

The meeting concluded at 6:00 p.m.