MINUTES
Advisory Committee on Model Civil Jury Instructions
October 2, 2017
4:00 p.m.

Present: Juli Blanch (Chair), Nancy Sylvester (staff), Professor Marianna Di Paolo, Joel Ferre, Tracy H. Fowler, Ruth A. Shapiro, Honorable Andrew H. Stone, Peter W. Summerill, Christopher M. Von Maack.

Excused: Paul Simmons, Patricia Keundig

Guests: Judge Barry Lawrence, Ryan Frazier

1. *Welcome, announcements and approval of minutes*. Ms. Blanch welcomed the committee's guest, Judge Barry Lawrence, to the meeting. On motion of Ruth Shapiro, seconded by Tracy Fowler, the committee approved the minutes of the September 11, 2017 meeting.

2. *Subcommittees and subject area timelines*. Ms. Blanch asked the committee members to treat this as a running task and look at it periodically to make sure these are in the right order of importance. If members notice they're not, they were asked to advise Judge Stone since he will be taking over as the committee chair in November.

3. *Negligence Instructions Revisited*. Judge Barry Lawrence was invited to the first hour of the meeting to discuss the Negligence Instructions. He expressed his concern that jurors may have a difficult time comprehending some of the instructions that they are given and that they may not fully comprehend the definition and elements involving "negligence." In an effort to make the instructions easier for them to understand, he has created his own set of instructions to provide to juries at his jury trials.

Ms. Blanch stated that she does not want to rewrite the instructions at this time, but would like to receive feedback from judges and attorneys in order to determine if the instructions may need to be revisited in the future.

Ms. Blanch noted that the way the instructions are currently written, the term "fault" is synonymous with the wrongful act or failure to act; whereas in Judge Lawrence's instructions, he would have "fault" be synonymous with that wrongful act or failure to act plus causation (or causing the harm). When the committee was first drafting these instructions in 2004, there was extensive discussion on how to define fault and where it would fit in with causation. The committee came up with a Special Verdict Form, and if fault was found, then the instructions would go to a second grouping, causation.

The committee would design a Fault Instruction Form and a Harm Instruction Form accordingly.

Ruth Shapiro said one of the issues that we run into is that everybody seems to have a lay opinion of what negligence is, and they are not aware that there are four elements related to the definition of negligence (duty, breach, causation, and damages). She has also had a jury come back and say there is no cause, so they checked off the box showing "fault", but the fault was not the cause. She feels that there needs to be a set of jury instructions that defines from a legal standpoint what the four elements of negligence are. Judge Lawrence said he doesn't necessarily agree with this and feels that she is using the term "negligence" to define the wrongful act. He feels that we mostly use the term "negligence" in sort of a non-legal way to mean the tort of negligence has four elements. It lets jury members know that for purposes of this, there was a wrongful act which we're going to call "negligence".

Judge Lawrence said he believes that the concept of fault is not the same as negligence (duty, breach, causation and damages). The first two elements constitute negligence. If there is cause, then you are at fault. If there is no cause, you are not at fault. That's why the verdict form is set up the way it is. Did someone breach the standard of care, and if so, was there cause? You don't apportion fault unless there is cause. Fault is a concept that encompasses both of them. You should be held at fault only if you did something wrong and you caused the injury. He said it doesn't really matter what you call these things, but he feels more comfortable with "fault" than "negligence" on the instructions because it is something everybody understands. Since most people understand the concept of negligence, he doesn't think it's right to say that negligence equals fault. Were they negligent? If so, was there a cause? If the answer is yes to both of these, then fault is established and then you apportion. Juries use these forms all the time and there hasn't been a significant problem up until now, but he doesn't think they are accurate so he has changed the forms for his trials. The whole concept is apportioning fault. In order to get to the apportionment there has to be a negligent act and causation. This could be confusing for some jury members. If a jury hears "we're apportioning fault," what if this guy is at fault out of negligence, but it wasn't the cause, do we still apportion it? The answer would be no.

Ms. Shapiro argued that one is inclusive of the other, so if you have negligence, that doesn't necessarily equal fault because there has to be other components of it. Fault is a portion of negligence. Judge Lawrence responded that negligence plus causation equals fault. Ms. Shapiro said if you go from the way the verdict is form is set up, it spans more like a pyramid than an inverse pyramid. Fault, in and of itself, doesn't equate to negligence because there have to be other elements. Judge Lawrence recommended that the form read "negligence" instead of "fault." Was the defendant negligent? Yes. If so, was that a cause? If so, then you move to the apportionment of fault phase.

Judge Lawrence said he doesn't care whether you say it's a wrongful act or whether you say it's negligence. You're defining it for the jury. Theoretically, negligence could be defined as encompassing all four elements, but if we're instructing them that "negligence" for purposes of these instructions is the wrongful act, then that should take care of that. He would like to simplify it for the jury to understand.

Ms. Shapiro said she thinks there needs to be jury instructions that define from a legal standpoint what negligence is with those four elements. Judge Lawrence does not necessarily agree; he feels that you can use the term "negligence" to define the wrongful act. He thinks we've used the term "negligence" in sort of a non-legal way. Even though the tort of negligence has four elements, he doesn't think it's inappropriate to tell a jury for purposes of this wrongful act, we're going to call it "negligence."

Ms. Shapiro thought this would be confusing for a jury because as an attorney for the defendant, you may be arguing causation and so a jury may say yes it's negligence, and thinking based on the jury instructions, they have checked off the box for all four. Then you are again asking them to determine again whether there's cause. If they have checked the box saying there's negligence, then they've checked the box for all four, so you don't need the second question about cause.

Ms. Blanch said two concerns that are paramount with any instruction are whether they are legally accurate and whether they are confusing to jurors. Are you repeating causation again if you give them a separate cause group of instructions in the special verdict form? She said whatever this committee decides to do, we need to know if jurors are confused by these instructions.

Judge Lawrence said we could define negligence in the instructions, but he doesn't believe that's the problem. Under the existing MUJI, we have that problem. He has not had a problem with it, and he believes his instructions are appropriate. He doesn't think that juries are confused by when a wrongful act has occurred, negligence is defined as whether a person has used reasonable care.

Ms. Blanch noted that there is a judge's conference coming up, and since these particular instructions are so commonly used, she asked whether there would be an opportunity during the conference to have a set of Judge Lawrence's instructions with his Special Verdict Form and then MUJI 2d with a Special Verdict Form to pass around. Judge Lawrence noted that the topics fill up far in advance, so there wouldn't likely be an opportunity at this conference, but maybe a later one.

A committee member asked what prompted the review of these instructions. Judge Lawrence said he was reading the instructions one day and felt that these

instructions weren't quite right. And an attorney pointed out some problems with the MUJI instructions at one of Judge Lawrence's trials. He believes the possibility exists that jurors could be confused, although none have personally mentioned it. He is not aware of anyone who has said that jurors are misled or confused, but the possibility exists when you're interchanging terms that really aren't the same.

Judge Lawrence noted that no one has objected to the MUJI instructions, but he'll continue to use his own instructions. If someone points out something that is wrong, he is happy to look at it. He reiterated his stance on the instructions, saying that the first questions is, "Was there a breach of the duty that was owed?" He said he's calling it negligence. The second question should be, "Is that a cause of damages?" And not until you've answered both of those questions, do you apportion fault. So in this case, it's negligence; in a different case, it could be fraud or could be an intentional inference. He said he's not advocating that his instructions would replace every type of tort claim. He just feels they more accurately reflects what a negligence claim is. He doesn't think it's problematic to tell the jury that negligence means that a person didn't use reasonable care.

Judge Lawrence excused himself from the meeting at this time.

Ms. Blanch reminded the committee that no changes will be made to the jury instructions at this time, but she does hope that the committee receives some feedback from judges and attorneys about potential concerns or a compelling reason to rewrite the current jury instructions. Part of the goal is to try to make the instructions uniform and if the instructions are revised, there needs to be a compelling reason to make changes to the instructions such as citing new case law or precedent, or if someone objects to the instructions as they are currently written.

Judge Stone joined the meeting.

Ms. Blanch said it was her understanding that the instructions are currently being used in all eight districts. Judge Stone said that there are a few judges and attorneys who don't care for the instructions or don't use them. Ms. Blanch said in the past there was a letter before the jury instructions that stated, "The Utah Supreme Court approves these instructions," indicating that judges and practitioners should use them. Ms. Sylvester noted that part of the reason the MUJI committees had moved under the Judicial Council rather than the Supreme Court was that the Supreme Court had not approved them and needed to freely review them on appeal. Judge Stone said although the opening and closing instructions differ from judge to judge, the instructions basically have the same substance but may be stated a different way. He believes that there is a value in putting the message out to judges more that their feedback would be helpful.

4. *Economic Interference Instructions*

Ms. Blanch introduced Ryan Frazier to the committee and explained to him that the committee discusses the instructions in order and then approves each instruction as it is finished. Once an instruction is approved, then they move to the next instruction but occasionally have to go back and revisit instructions.

Brian then introduced the economic interference instructions. He said the subcommittee was in agreement on virtually everything. There were a few times that they weren't quite sure as it was unclear in the law. He said there were originally 23 instructions but they whittled them down to six. He said several instructions were obsolete due to the law changing and the subcommittee dropped damages because they are addressed elsewhere.

Instruction 1401 – Mr. Frazier said this instruction is the statement of the law in this area. He said they combined both intentional interference with contract and intentional interference with prospective business relations. The subcommittee agreed that there wasn't a substantive enough difference between the two that it merited a separate instruction. The subcommittee's proposed language was as follows: "To award damages for this claim, you must find three things: you must find that Plaintiff proved three things: 1) that [name of defendant] intentionally interfered with an existing or potential economic relationship that plaintiff had 2) that [name of defendant] did so by improper means, and 3) that [name of defendant]'s interference caused injury to [name of plaintiff]."

Ms. Blanch suggested brackets around "existing" and "potential" to allow for the instruction to be tailored to the particular case. Professor DiPaolo said she's not sure if people know what "economic relations" means. Also the word "injury" in Element 3 may cause someone to believe that it's physical injury. The committee inserted "harm" instead of "injury."

Ms. Shapiro recommended taking out the last line in the note, "The next three instructions define the critical terms of the first two elements--"economic relationship" (CV1402), "intentionally interfered" (CV1403), and "improper means" (CV1404)," which the committee did. The committee then changed "subcommittee adopted" in the notes to "the committee adopted."

A motion was made to adopt Instruction 1401 and it passed unanimously.

Instruction 1402 – "Economic Relationship Defined." The subcommittee's instruction read as follows:

> As part of the first element, you must first determine whether [name of plaintiff] had an existing or potential economic relationship with [name of

> third party] from which, at the time of the interference, [name of plaintiff] expected or was likely to receive some future economic benefit. A contract is a form of an existing economic relationship, but the relationship does not have to be evidenced by a contract. It is enough if you find that there were either dealings or a course of conduct between [name of plaintiff] and [name of third party] from which [name of plaintiff] had a reasonable expectation of future economic benefit. [Name of plaintiff] must show that this expected benefit was likely to occur and was not just a mere hope, but [he/she/it] does not have to show that it was certain to occur.

Ms. Blanch said her initial impression was that this instruction may need to be divided into two instructions since it was so long. The committee felt that it would be messy to divide it into two instructions and that it would be best to leave Instruction 1402 as it is.

The committee discussed the instruction at length and ultimately crafted the instruction as follows:

> An economic relationship exists when [name of plaintiff] has a reasonable expectation of economic benefit from [his/her/its] relationship with one or more third parties. This expectation must be present at the time of the interference.
>
> An economic relationship can be based upon an existing contract but does not have to be. It is enough if you find that there were either dealings or a course of conduct between [name of plaintiff] and [name of third party] from which [name of plaintiff] had a reasonable expectation of economic benefit. The expected benefit must be likely to occur but does not have to be a certainty.

A motion was made to approve instruction 1402 and it passed unanimously.

5. *Other business*. There was no other business to discuss at this time.

6. *Next meeting*. The next committee meeting will be held on Monday, November 13th from 4:00 – 6:00 p.m.

The meeting adjourned at 5:49 p.m.