MINUTES

Advisory Committee on Model Civil Jury Instructions
January 8, 2018
4:00 p.m.

Present: Honorable Andrew H. Stone (chair), Marianna Di Paolo, Tracy H. Fowler, Honorable Keith A. Kelly, Ruth A. Shapiro, Lauren A. Shurman, Paul M. Simmons, Nancy Sylvester, Christopher M. Von Maack. Also present: David C. Reymann, chair of the Injurious Falsehood subcommittee; Chloe Fleischer (an intern in Mr. Von Maack's office)

Excused: Joel Ferre, Patricia C. Kuendig, Peter W. Summerill

1. *Minutes.* On motion of Ms. Shapiro, seconded by Mr. Von Maack, the committee approved the minutes of the November 13, 2017 meeting (as revised) and the December 11, 2017 meeting.

2. *Injurious Falsehood Instructions.* The Committee continued its review of the Injurious Falsehood instructions.

a. *CV1902, Elements of an Injurious Falsehood Claim.* Mr. Reymann noted that he had added language to the committee note saying that the instruction is not intended to address statutory claims for wrongful liens.

b. *CV1904: Definition: Disparaging Statement.* Dr. Di Paolo questioned whether an average juror would understand "disparage," "personal property" and "intangible property" as used in the instruction. She thought that lay people generally think of "disparage" as referring to a person. Mr. Reymann explained that "disparage" is commonly used more broadly than the situations covered by subparts (a) and (b) of the instruction but that statements that disparage a person's character are covered by defamation law. Dr. Di Paolo also questioned the use of the term "recipient." She noted that most people think that "receiving" a communication means to receive a written communication. She suggested saying "hearing or receiving." She also thought the second paragraph was hard to understand and suggested moving the third paragraph up to the second paragraph.

Mr. Fowler joined the meeting.

Mr. Reymann explained that the jury's role was to decide whether the statement was understood in a disparaging sense. Mr. Simmons noted that, as written, the last paragraph would require that all recipients of the statement understand the statement in a disparaging sense, and if one recipient did not, the claim would fail. The committee revised the instruction to read--

> I have already determined that the following statement[s] [is/are] capable of having a disparaging meaning: [Insert statements.]
>
> You must determine whether the person to whom the statement was published actually understood the statement[s] in [its/their] disparaging sense. You must also determine whether that person understood the statement as referring to [name of plaintiff's] [interests]. "Published" has a special meaning and is defined in the previous instruction.
>
> A statement is disparaging when it
>
> (a) calls into question in a negative way the quality of [name of plaintiff's] property, goods, or services; or
>
> (b) casts doubt on [name of plaintiff's] property rights. "Property rights" can mean an interest in land, personal property, or other types of property.
>
> Some statements may convey more than one meaning. For example, a statement may have one meaning that is disparaging and another meaning that is not. To support an injurious falsehood claim, [name of plaintiff] must prove, for any particular statement, that someone to whom the statement was published actually understood it in its disparaging sense and as referring to [name of plaintiff's] [interests]. If no one actually understood a particular statement in its disparaging sense and understood it as referring to [name of plaintiff's] [interest], then that statement cannot be used to support an injurious falsehood claim.

On motion of Ms. Shapiro, seconded by Mr. Simmons, the committee approved the instruction as revised.

Judge Kelly joined the meeting.

c. *CV1905, Definition: False Statement.* Mr. Reymann pointed out that the instruction was the same as the equivalent instruction in the defamation instructions and that there is no independent case law in Utah defining "false statement" in an injurious falsehood case. Dr. Di Paolo objected to the word "literally" because its meaning in common usage has changed; it is no longer understood to mean "literally." Judge Kelly asked whether we can vary from the language used in appellate court opinions. The committee thought that its charge

was to make the instructions more understandable for lay audiences and that it could depart from the language of appellate decisions when necessary to make the law more understandable, as long as it did not change the law's meaning. Mr. Simmons moved to take out "literally" from the third paragraph of this instruction and CV1605 (the equivalent instruction in the Defamation instructions). His motion failed for lack of a second. Judge Kelly asked whether "literally" has a different meaning from "absolutely" and "totally"; if not, it would be unnecessary. Mr. Reymann thought it did. Mr. Von Maack looked up synonyms for "literally." Ms. Shurman suggested "technically." On motion of Mr. Von Maack, seconded by Ms. Shapiro, the committee approved the instruction as written, with Dr. Di Paolo dissenting. She noted that one cannot make words mean what people do not use them to mean, and as much as the committee may want to retain the traditional meaning of "literally," people today will not understand it in that sense.

d. *CV1906, Definition: Opinion.* Mr. Reymann noted that this instruction is also the same as the equivalent instruction in the Defamation instructions (CV1606). He further noted that the U.S. and Utah supreme courts have not held that the First Amendment applies to injurious falsehood, but there is Utah constitutional protection for pure opinions, Utah Constitution article I, sections 1 and 15. Mr. Simmons did not think the instruction clearly explained what the jury was supposed to do. The committee revised the instruction to read:

> A statement that expresses a mere opinion or belief rather than a verifiable statement of fact is protected by the Utah Constitution and cannot be used to support an injurious falsehood claim. A statement of an opinion can be the basis of an injurious falsehood claim only when it implies one or more facts that can be proved to be false, and [name of plaintiff] shows that [a fact/the facts] [is/are] both false and disparaging. I have determined that the following statement[s] are statements of opinion: [Insert specific statements.]
>
> You must determine whether any particular statement of opinion implies one or more facts that are both false and disparaging.

Mr. Reymann noted that the defamation instruction should be revised if necessary to conform to the revised CV1906. Dr. Di Paolo asked whether the instruction should be revised to cover statements of fact as well. She suggested revising it to refer to statements that "state or imply facts." The committee thought that statements of fact are covered by other instructions. Mr. Reymann noted that the burden of proving falsity is somewhat unsettled in defamation

claims but not here; the burden is clearly on the plaintiff. Mr. Reymann noted that there is a Supreme Court opinion on statements of opinion that should be added to the references (namely, *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990)). Judge Stone asked whether CV1906 should be used for a literal statement of opinion (that is, a statement that is a statement of opinion on its face). Mr. Reymann said that there is no clear guidance on whether prefacing a remark with "In my opinion" makes what follows a pure statement of opinion. One must look at such things as the context of the statement. It is up to the court to weed out which statements are opinions and which are assertions of fact couched as an opinion. The instruction should only be used if the court concludes that a statement is a statement of opinion but can be construed as also stating or implying facts. Mr. Von Maack questioned the use of the passive voice in the first sentence ("cannot be used to"). Dr. Di Paolo thought that the use of the passive voice was not a problem and can aid clarity in some cases. She said that the purpose of adding the phrase "cannot be used to" was to avoid someone from arguing that, in his mind, the statement supports an injurious falsehood claim even though he legally cannot rely on it to support his claim. On motion of Ms. Shapiro, seconded by Mr. Von Maack, the committee approved the instruction as revised, with the addition of the reference to the *Milkovich* case.

Mr. Reymann volunteered to draft a new instruction, to be added at the end of the instructions, on statements that are not actionable.

e. *CV1907, Definition: Malice.* Mr. Reymann noted that malice is different for injurious falsehood than it is for defamation. Defamation requires actual or common-law malice. Injurious falsehood requires more than reckless disregard. It requires that the defendant have actual knowledge of the falsity of the statement and the intent to injure the plaintiff or the defendant should have reasonably expected that the plaintiff would be injured by the statement. The test for actual knowledge of falsity is a subjective test. Dr. Di Paolo thought that the instruction did not clearly explain what the jurors were supposed to do. She thought that they would have to determine falsity. Judge Stone expressed concern with the third paragraph. He and other committee members thought that if a reasonable person would have known that the statements were false, it was probative of whether the defendant really knew that the statements were false. The committee agreed that self-serving denials of knowledge should not necessarily be enough to defeat the claim. The committee decided to delete the third paragraph. The committee revised the instruction to read:

> You must determine whether [name of plaintiff] has proved that the statements were published with "malice." Malice in this context does not mean simply ill will or spite, as the word is commonly

> understood. Rather, to show [name of defendant] published the injurious statements with malice, [name of plaintiff] must prove that--
>
> (1) [name of defendant] actually knew the injurious statements were false when [he/she/it] published them; and
>
> (2) [name of defendant] either;
>
> (a) intended to injure [name of plaintiff] by publishing the statements; or
>
> (b) reasonably should have expected that the statements would injure [name of plaintiff].

The committee deferred voting on revised CV1907 until the next meeting.

3. *Next meeting.* The next meeting is Monday, February 12, 2018, at 4:00 p.m.

On motion of Judge Kelly, seconded by Mr. Von Maak, the meeting adjourned at 6:05 p.m.