MINUTES

Advisory Committee on Model Civil Jury Instructions
April 9, 2018
4:00 p.m.

Present: Honorable Andrew H. Stone (chair), Marianna Di Paolo, Joel Ferre, Lauren A. Shurman, Paul M. Simmons, Nancy J. Sylvester, Christopher M. Von Maack. Also present: Heather S. White, Chair of the Civil Rights subcommittee

Excused: Tracy H. Fowler, Honorable Keith A. Kelly, Ruth A. Shapiro, Peter W. Summerill

1. *Minutes.* Mr. Ferre pointed out that the reference to Judge Stone being excused at the top of page 2 of the March 12, 2018 minutes should be to Judge Blanch, not Judge Stone. With that correction, on motion of Mr. Ferre, seconded by Ms. Shurman, the committee approved the minutes of the March 12, 2018 meeting.

2. *Schedule.* Ms. Sylvester reported that the economic interference jury instructions went out for comment. We should have the comments back to discuss at the next meeting. The injurious falsehood instructions will go out for comments this month, and the comments should be back to discuss at the June meeting.

3. *Civil Rights Instructions.* The committee received comments on the first set of Civil Rights instructions from two attorneys--W. Earl Webster and Meb Anderson.

a. *CV1301, Section 1983 Claim--Elements.* Mr. Webster thought that CV1301 was a clear, concise, and correct statement of federal law on section 1983 actions but not necessarily of Utah law and suggested that the committee delay implementation of the instruction until the Utah Supreme Court issues its decision in *Kuchcinski v. Box Elder County*, case no. 20160674. The committee thought the instruction was clear that it only applies to claims based on 42 U.S.C. § 1983 and was not meant to cover claims based on state constitutional violations. Mr. Ferre noted that most plaintiffs rely on section 1983 because it provides for attorney's fees for the prevailing plaintiff, whereas state law does not. Ms. White noted that she has never had a state constitutional claim go to trial. At the suggestion of Ms. Shurman and Mr. Simmons, the committee added a paragraph to the end of the committee note stating that the instruction addresses federal section 1983 claims only and adding some references to Utah cases addressing state constitutional claims. On motion of Mr. Simmons, seconded by Mr. Ferre, the revised committee note was approved.

Mr. Anderson suggested that the proposed instructions on section 1983 may not be necessary since there are many federal model civil rights instructions. Ms. White noted that the subcommittee considered the availability of federal instructions but thought it would be helpful to include instructions on federal

civil rights claims in the model Utah instructions because the federal instructions were not as clear and concise. She noted that the federal district court in Utah has used the MUJI instructions.

Mr. Anderson also thought that CV1301 should use the terms "state actor" and "acting under color of state law," the terms federal case law uses. He noted that "state actor" is a term of art in civil rights cases and can be broader than "state employee," which might be construed as an employee of the State of Utah and not merely any governmental actor. Mr. Anderson also noted that it is generally not disputed at trial that a defendant was a "state actor" and was acting "under color of state law," but thought keeping the traditional federal terms could avoid problems where those elements are disputed. Ms. White noted that the subcommittee and committee had avoided the term "state actor" on purpose to try to make the instruction more understandable to a lay audience. The committee decided to do away with the term "state employee," however, for the reasons Mr. Anderson raised. Ms. White suggested saying "government [employee] [official]," since a state actor may not necessarily be an employee of the government, but could be, for example, a city councilperson. Mr. Ferre suggested using "state actor" but then defining it in a separate instruction. Dr. Di Paolo suggested saying, "state actor, that is, someone acting on behalf of the government." Ms. Sylvester suggested adding, "I have determined that [name of defendant] was a state actor" or whatever other term the committee decided to use. The committee eventually decided to avoid the term "state actor" or any of its synonyms altogether and changed the first element to read: "First, that [name of defendant] had authority to act on behalf of the government."

Dr. Di Paolo asked what the difference between the first and second elements was. The committee explained that the person whose conduct gave rise to the claim must have actually had authority to act on behalf of the government, but the person may have been acting outside the scope of his authority; as long as he was purporting to act in his official capacity, the governmental unit can still be liable. Ms. White suggested that the first element could be omitted because it is generally decided as a matter of law before the case goes to the jury. But Dr. Di Paolo thought that it would be helpful for the jury to understand the difference between the two elements.

Dr. Di Paolo and Judge Stone questioned the phrase "pretending to act" in the second element. Dr. Di Paolo thought that a lay person would not draw any distinction between "purporting to act" and "pretending to act" and thought that "pretending to act" was the more common term and would suffice. Others thought that "pretending to act" implied an element of intent or deception that was not required and preferred "purporting to act," which they thought included

"pretending to act" but was broader. "Purporting to act in performance of official duties," for example, would cover a police officer who uses excessive force, whereas "pretending to act" may not. Dr. Di Paolo did not think that "purporting" was sufficiently clear for a lay juror. The committee searched the case law and found support for the use of "pretending" in cases from the Fifth and Ninth Circuits. The committee decided to revise the second element to read: "Second, was acting, purporting to act, or pretending to act in performance of [his/her] official duties."

Ms. White thought that the references for the instruction should come from U.S. Supreme Court or Tenth Circuit decisions. She and Ms. Sylvester will try to find controlling authority for the use of "pretending" and add it to the references.

b. *CV1303, Warrantless Arrest.* At Mr. Anderson's suggestion, on motion of Mr. Simmons, seconded by Mr. Ferre, the committee struck "a" before "probable cause" in the last line of the first paragraph.

c. *CV1308, Excessive Force--Introductory Instruction.* Mr. Anderson objected to the omission of the term "objectively" from the reasonableness standard. Dr. Di Paolo thought that lay jurors would ignore the term "objectively" and would not understand how objective reasonableness was any different from reasonableness.

Mr. Ferre was excused. The committee no longer had a quorum but continued to discuss the instructions.

The committee thought that CV1308 and CV1309, read together, adequately explained the "objectively reasonable" standard, without using the term "objectively reasonable." The committee felt that adding "objectively" was an unnecessary legalism. Mr. Von Maack noted that CV1308 talks about "unreasonable" and "reasonable" force, but the title of the instruction is "Excessive Force," and CV1309 defines the "test of reasonableness," not "reasonable." Ms. Sylvester added "Unreasonable or" to the titles of CV1308 and CV1309. At Mr. Simmons's suggestion, the committee added a sentence to the end of the first paragraph of CV1308 that reads, "Excessive force is unreasonable force." At Judge Stone's suggestion, the committee also added a sentence to the end of the second paragraph: "I will explain what force is reasonable in another instruction." At Dr. Di Paolo's suggestion, the committee added a committee note that says: "*Graham v. Connor*, 490 U.S. 386 (1989), confirms objective reasonableness as the standard by which an officer's use of force is measured.

Although the term 'objectively reasonable' is not used in these instructions, CV1309 provides a definition of the term."

Dr. Di Paolo moved to approve the changes to CV1308 and CV1309, subject to any objections from any of the absent committee members. Mr. Simmons seconded the motion. The committee decided instead to vote on the changes to the instructions at the next meeting, when a quorum is present.

4. *Next meeting.* The next meeting is Monday, May 14, 2018, at 4:00 p.m.

The meeting adjourned at 6:00 p.m.