MINUTES
Advisory Committee on Model Civil Jury Instructions
March 8, 2021
4:00 p.m.

Present: Ruth A. Shapiro (chair), Honorable Kent Holmberg, Honorable Keith A. Kelly, Nancy J. Sylvester (staff), Marianna Di Paolo, Joel Ferre, Douglas G. Mortensen, Lauren A. Shurman, Samantha Slark, Randy Andrus, Ricky Shelton, Adam D. Wentz (recording secretary).
Also present: Tracy Fowler. Paul M. Simmons

Excused: Alyson McAllister, Honorable Judge Kent Holmberg

1. *Welcome.*

Ruth Shapiro welcomed everyone to the meeting.

2. *Approval of Minutes.*

Ruth Shapiro asked for a motion on the February meeting minutes. The minutes were unanimously approved.

3. *Timeline.*

The committee discussed the timeline and decided to hold off on 1009 and circle back at the next meeting.

4. *Discussion of Product Liability Instructions.*

- 1010 (previously 1012)
  - The two groups agree on this instruction.
  - Ruth Shapiro questioned whether we should have a definition for "component part."
    - Tracy Fowler agreed that a committee note is appropriate explaining that the court provide a definition of "component part."
    - Lauren Shurman suggested we simply add a bracketed instruction to describe component part within the language of the instruction itself.
    - Judge Kelly agreed that a bracketed instruction to describe component part be included.
  - The committee discussed removing the word "integration" as it may not be understandable to laypeople. Looking for something simpler. Discussed using bracketed options instead. (Installed, incorporated, used.)
    - Marianna Di Paolo suggested that the instruction should be consistent throughout, whatever the committee decide: either integration or the bracketed options.

        - Keith Kelly suggested using "integrated/integration" throughout, even though it creates redundancy within the language of the instruction.
        - Marianna Di Paolo suggested using the phrase "included with" instead of integrated/integration as it is much more common. The committee discussed whether that phrase would properly apply to all possible fact patterns.
        - Judge Kelly prefered using the language used by the Utah Supreme Court in their decisions. The cited precedent used "integration." He would only prefer switching out Court-used language if and when it is not understandable to jurors.
        - Paul Simmons agreed that integration better explains the Supreme Court's decision in *Gudmundson v. Del Ozone*, 2010 UT 33, 232 P.3d 1059.
        - Marianna Di Paolo reminded the committee that "integrated" does not cover all possible fact patterns.
        - Judge Kelly noted that the instruction should only apply to those fact patterns where integration of one product into another is occurring and that perhaps a different instruction would be necessary for other fact patterns. If one product is not being integrated into another, then the *Gudmundson* standard would not apply.
        - Paul Simmons agreed with Judge Kelly and suggested that integration be used throughout the instruction.
    - Marianna Di Paolo suggested replacing the phrase "finished product" with "final product."
        - Tracy Fowler had no objection at this point to "final product."
        - Paul Simmons also had no objection.
    - Judge Kelly made a motion for using the term "integrated" throughout the instruction rather than the bracketed options, along with replacing the phrase "finished product" with "final product."
        - The committee informally approved this motion but will revisit it with a committee note if there is one to be included in 1010.

- 1011 (formally 1013)
    - The plaintiff group believes this instruction should not be included because it is contrary to *Bylsma v. R.C. Willey*, 2017 UT 85, ¶ 81, 416 P.3d 595.
    - The defense group thinks it is appropriate for the trial judge to consider as a counterpart to CV1010.
    - Lauren Shurman suggested that the plaintiff's group propose an alternative instruction.

        - Paul Simmons suggested that there be language that the manufacturer of the component part can be held jointly and severally liable.
    - Tracy Fowler does not believe that "jointly and severally liable" should be included.
    - Tracy Fowler stated that in theory there could be a dispute between the component part manufacturer and the final product manufacturer about what made the final product defective and that is why 1011 would be necessary.
    - Judge Kelly asked what instruction would apply, if any, where one component manufacturer of many argues that its component did not create the defect in the final product. Paul Simmons suggested that 1010 would cover this scenario.
    - Judge Kelly questioned whether the committee should even be creating an instruction if the law is indeed unclear as Paul Simmons suggests.
        - Tracy Fowler believes that precedent in *Bylsma* does, in fact, cover the scenarios spelled out in 1011. To the extent there is uncertainty, he opined that the committee should reflect that in a committee note.
    - Ruth Shapiro suggested whether a committee note informing that there is some disagreement as to the underlying case law, whether that would create enough flexibility to allow the instruction to move forward.
    - Paul Simmons opined that 1010 could apply to all scenarios that the defendant group believes 1011 answers.
    - Doug Mortensen suggested striking 1011 and that the subcommittee work on a comment in 1010 to address the scenarios from 1011.
        - Tracy Fowler argued that 1011 should stay with a committee note.
        - Paul Simmons argued that the committee send the instruction back to the subcommittee.
    - Judge Kelly made a motion to send the instruction back to the subcommittee for a compromise or alternative instructions/comments.
        - The committee informally approved this motion.

- 1012 (formally 1014)
    - The two groups agree on this instruction.
    - Doug Mortensen expressed concern regarding the "inadequate warning" language.
    - Judge Kelly made a motion to approve this instruction as written.
        - The committee informally approved this motion.

- 1013 – Failure to warn claims for FDA approved drugs.
    - The two groups do not agree on this instruction.

- The plaintiff group does not believe that the law is settled on this issue as the 10th Circuit did not provide a lot of guidance in *Cerveny v. Aventis, Inc.*, 855 F.3d 1091 (10th Cir. 2017). As such, the plaintiff group believes that it should be omitted.
- The defendant group believes the plaintiff group's concerns regarding *Cerveny* be addressed in a committee note rather than omitting the instruction altogether.
- Lauren Shurman questioned whether a jury should be even considering this affirmative defense.
- Judge Kelly is concerned that by including this instruction, we are rendering this a question for the jury and not the judge. The committee must be sure that is what it wants to do. He is also concerned that the cited case is so unusual that it may not warrant having a separate jury instruction.
    - Tracy is worried that if we do not include this instruction, parties will imply that the issues addressed in 1013 were not intended to be questions for the jury. He also opined that the precedent cited may not be a common case, but it is not an unusual one.
- Judge Kelly suggested we send the instruction back to the subcommittee to come up with alternatives.
- Ruth Shapiro suggested looking at other jurisdictions to see whether they have similar instructions and suggested it could provide guidance.
    - Tracy Fowler agreed to look into this very issue.
- Marianna Di Paolo suggested changing the phrase "not liable for not including." It may be grammatically correct but can be difficult to process.

5. *Adjournment.*

The meeting concluded at 6:03 P.M.

6. *Next Meeting.*

April 12, 2021.