Agenda
Advisory Committee on Model Civil Jury Instructions

March 10, 2014
4:00 to 6:00 p.m.

Administrative Office of the Courts
Scott M. Matheson Courthouse
450 South State Street
Judicial Council Room, Suite N31

Welcome and approval of minutes.	Tab 1	John Young
Instructions addressing alternative treatment methods.	Tab 2	Phil Ferguson Juli Blanch Alison Adams-Perlac

Committee Web Page

Published Instructions

Meeting Schedule: Matheson Courthouse, Judicial Council Room, 4:00 to 6:00 unless otherwise stated.

April 14, 2014
May 12, 2014
June 9, 2014
September 8, 2014
October 14, 2014 (Tuesday)
November 10, 2014
December 8, 2014

Tab 1

MINUTES

Advisory Committee on Model Civil Jury Instructions
February 10, 2014
4:00 p.m.

Present: Alison Adams-Perlac, Juli Blanch, Francis J. Carney, Marianna Di Paolo, Phillip S. Ferguson, Tracy H. Fowler, Honorable Ryan M. Harris, L. Rich Humpherys, Gary L. Johnson, Paul M. Simmons, Ryan M. Springer, Honorable Andrew H. Stone, Peter W. Summerill. Also present: Kurt M. Frankenburg, Sean C. Miller

Excused: John L. Young (chair), John R. Lund, David E. West

Mr. Carney presided in Mr. Young's absence.

1. *Minutes.* Mr. Johnson said he had a problem with the minutes regarding CV2417, "Claim regarding insurable interest." He thought the burden of proof should be on the insured to prove an insurable interest. But he was not aware of any Utah law on point. Ms. Adams-Perlac noted that she had researched the issue and found one case involving a property loss that suggested that the plaintiff had the burden of proof. Mr. Simmons pointed out that CV2417 did not specify who had the burden of proof. Mr. Johnson withdrew his objection and moved that the minutes be approved. Messrs. Springer and Summerill 2d. The committee approved the minutes.

2. *CV324. Use of alternative treatment methods.* Mr. Carney noted that he had asked the plaintiffs' and defense medical malpractice bars to present their positions on whether the committee should delete or amend CV324 in light of the decision in *Turner v. University of Utah Hospitals & Clinics*, 2013 UT 52. Mr. Carney noted that he and Elliott Williams had drafted the instruction and that it was a compromise. He thought it was less defense oriented than MUJI 1st 6.29. Mr. Carney introduced Messrs. Frankenburg and Miller, whom he had invited to present the defense position. Mr. Frankenburg did not think that *Turner* changed anything because it did not involve alternative methods of treatment. He thought the instruction was still appropriate in cases where it applied; otherwise, the supreme court would have said not to use it anymore. He did not think that the instruction needed to say anything about informed consent; he thought that adding issues of informed consent to the instruction would conflate the issues and confuse juries. He acknowledged that the language in the instruction that "it is not medical malpractice for a provider to select one of the approved methods, even if it later turns out to be a wrong selection" could be misleading, but he thought the instruction was supported by *Walkenhorst v. Kesler,* 92 Utah 312, 67 P.2d 654 (1937). Mr. Miller thought *Butler v. Naylor,* 1999 UT 85, 987 P.2d 41, provided additional support. He thought that if there was a problem with the way the instruction was worded, the jury should consider it in conjunction with CV301B, "Standard of care defined," etc. He noted that the method used needs to comply with the standard of care, but if there are acceptable alternative methods, it is not negligence to choose one over another. He suggested revising the instruction to say "it is not per se negligence" to choose one alternative over another. He thought that *Turner* was not the

problem, that the problem was that jurors need to understand that the treatment chosen still must comply with the standard of care.

Dr. Di Paolo joined the meeting.

Mr. Carney thought that there was a place for the instruction but that it was overused. He noted that doing something and doing nothing are not "alternative methods of treatment."

Mr. Springer presented the plaintiffs' position. He thought there was no support in Utah law for the instruction. He distinguished *Walkenhorst* on the grounds that it involved a physician testifying against a chiropractor, not a choice between alternative treatment methods in the same field or specialty. He said that he had not found a similar instruction in other jurisdictions.

Judge Harris joined the meeting.

Mr. Springer said that the Utah Supreme Court did not reject the instruction in *Turner* because it did not apply on the facts of *Turner,* and the court is not in the business of giving advisory opinions. Mr. Carney pointed out, however, that the court had said not to use other instructions in other cases, such as the unavoidable accident instruction and "the mere fact of an accident" instruction. Mr. Springer thought that the mere fact that a doctor made a choice between alternative methods of treatment should not immunize him from liability. On the other hand, Mr. Frankenburg thought that the plaintiff should not win just by showing that he was not told about an alternative method of treatment. Mr. Springer thought the instruction presupposes that informed consent was given. Mr. Carney thought that the defense should have the burden of proof to show that a substantial body of doctors uses the method, but that informed consent was not needed on every alternative method. Mr. Springer and Mr. Frankenburg agreed that it may be difficult to define "method of treatment." Mr. Springer suggested a distinction between methods of treatment and techniques, but Mr. Frankenburg doubted that such a distinction exists in the case law or medical literature. Dr. Di Paolo asked whether, if we have an instruction on alternative methods of treatment, we need another instruction on alternative techniques.

Ms. Blanch joined the meeting.

Mr. Summerill thought that the instruction tried to avoid a negligence-based analysis. He thought that medical malpractice trials come down to a battle of the experts. He thought the instruction in effect told the jury that it did not have to weigh the experts' opinions in this situation and does away with the reasonableness standard for negligence. He thought the instruction increased the plaintiff's burden.

Mr. Carney asked why the instruction was needed at all. Mr. Miller thought it was necessary because juries are confused by evidence of different methods of treatment. Messrs. Springer and Simmons thought the concept was adequately covered by the standard-of-care instructions. Mr. Simmons thought that medical malpractice cases come down to competing expert opinions on what the standard of care is, whether it was breached, or both. In some cases, the disagreement will be over the doctor's choice of a method of treatment, and in other cases it will be over the doctor's application of his chosen method of treatment, but the jury can consider both under the general standard-of-care instructions. Mr. Johnson was not comfortable with the language "it is not medical malpractice." He said he did not like any jury instruction that tells the jury how to decide the case. He suggested saying that the selection of one method over another is not "in and of itself" negligence. *See Peffer v. Cleveland Clinic Found.*, 894 N.E.2d 1273, 1280 (Ohio Ct. App. 2008). Ms. Blanch suggested an analogy to products liability cases, in which the jury is told that it may consider compliance with governmental standards in deciding whether a product is defective.

Judge Harris said he was having a hard time thinking of a scenario where he would give CV324. He thought the general standard-of-care instruction would adequately cover the issue and that giving a separate instruction on it would be confusing. Before a court could give CV324, both experts would have to agree that the treatment method the defendant chose was "approved by a respectable portion of the medical community." Judge Stone agreed that CV324 was not appropriate but thought that the way "standard of care" is defined in CV301B may not reach alternative methods of treatment. It suggests a single standard of care, whereas alternative methods of treatment suggests that there may be more than one standard of care. He pointed out that doctors may be reasonable doctors but use different methods of treatment. He thought that a jury instruction would be necessary in appropriate cases. Mr. Carney asked whether the issue could be handled by a committee note.

Mr. Summerill thought that there is just one standard of care: A healthcare provider is required to use reasonable care, that is, the care that a reasonable provider would use under similar circumstances. He thought the problem with CV324 is that it does away with reasonableness as the standard. Judge Stone pointed out that CV301B does not mention reasonableness either. Ms. Blanch suggested that the committee beef up CV301B. Mr. Summerill suggested adopting her suggestion and adding that the fact that there is no particular method of treatment that is used by all providers is one factor the jury may consider in determining whether the defendant acted reasonably. Mr. Humpherys said that the problems with listing factors are that (1) it is hard to know what factors to list and which ones to leave out and (2) spelling out factors can become unbalanced and argumentative. Mr. Summerill thought that CV301B in effect already lists factors by listing the parties' contentions. Mr. Frankenburg suggested adding to CV301B a sentence that says, "There can be more than one method of treatment that comes within the standard of care." Mr. Miller thought that additional language needed

to be added to address the hindsight test, that is, that the doctor should not be held liable just because his choice of method later turns out to be wrong. He also noted that the standard of care may change over time, but the committee pointed out that a provider is only required to use the standard of care applicable at the time he or she acted.

Mr. Humpherys said that it is not enough to show that two methods are both reasonable. The plaintiff must also show that the defendant's method was not reasonable. If the plaintiff cannot produce expert testimony to that effect, the case never gets to the jury. A jury question only arises when an expert says that the defendant's conduct was unreasonable.

Judge Stone suggested adding to CV326, "Expert testimony required," the following: "It is your job to decide based on the expert testimony what the standard of care is. You must resolve the dispute between the experts." He suggested adapting CV326 to include the general instruction on conflicting testimony of experts (CV136) and noted that CV326 is inconsistent with CV129 ("Statement of opinion"). Mr. Springer pointed out that the committee note to CV326 says that CV129 is not to be given when CV326 is used.

Mr. Carney took a straw vote. Five committee members (Judge Harris and Messrs. Humpherys, Simmons, Springer, and Summerill) were in favor of deleting CV324. Ms. Blanch and Messrs. Fowler, Ferguson, and Johnson were in favor of amending CV324 and possibly CV301B and CV326 to fix the problems with CV324. Mr. Summerill thought that if the committee kept CV324 it would be creating an instruction where there is no clear Utah law on point. Mr. Johnson suggested having the medical malpractice instruction subcommittee revise CV301B and CV326 to incorporate the protections of CV324. Mr. Ferguson volunteered to work with Ms. Blanch and Mr. Springer to try to propose something for the next meeting. Ms. Adams-Perlac will also serve on the subcommittee.

Messrs. Frankenburg and Miller were excused. They will be invited back to the next meeting. Mr. Springer was also excused.

3. *Insurance Litigation Instructions.* The committee continued its review of the insurance litigation instructions.

a. *CV2412. Recovery of damages.* Mr. Humpherys noted that he had added a new last paragraph, based on *Castillo v. Atlanta Casualty Co.*, 939 P.2d 1204 (Utah Ct. App. 1997), and added a reference to *Castillo.* He also suggested adding "consequential" before damages in the first paragraph. The committee deleted the link to CV2136 and moved the link to CV2135 to a committee note. Mr. Humpherys noted that there is a problem using the term "expectation

damages" in insurance cases because it suggests a version of the "reasonable expectations" doctrine, which the Utah Supreme Court has rejected.

b. *CV2416, Recovery of consequential damages.* Mr. Humpherys noted that his instruction is in addition to CV2412. He thought the last paragraph should be omitted. He was uncomfortable with the phrase "reasonable expectations" for the reason stated above. The committee decided to add the third paragraph of CV2416 to the end of CV2412 and to delete the rest of CV2416. **CV2412 was approved as modified.**

c. *CV2413, Coverage by estoppel, and CV2420, Representation, warranty, and estoppel.* The committee had previously approved CV2413. Mr. Johnson said he was uncomfortable with the instruction and asked how it was different from CV2420. Mr. Humpherys said that CV2420 was his effort to restate the holding in *Youngblood v. Auto-Owners Ins. Co.*, 2007 UT 28, 158 P.3d 1088. At Mr. Humpherys's suggestion, the committee replaced CV2413 with CV2420. Dr. Di Paolo suggested deleting "[material]" from subparagraph b. She noted that "material" has not been used to mean "important" in everyday speech for 200 years. Mr. Humpherys noted that it is the term the case law uses, and he had included it only to prompt a discussion of better synonyms. The committee decided to go with "important," as it had in other instructions. A committee note can be added to explain the use of "important," as was done with CV1801. The second paragraph of the committee note was deleted. It was included only to show the committee the source of the instruction.

d. *CV2421, Estoppel–reasonable reliance.* Mr. Humpherys noted that CV2421 should accompany CV2420. Dr. Di Paolo suggested using the language from CV2420(d) in the first paragraph to tie the two instructions together. The paragraph was revised to read: "When determining whether a reasonable person would rely on the agent's statement, you may consider the following:" Mr. Humpherys noted that CV2420 is supposed to state the standard for the agent's statement (an objective standard), and CV2421 is supposed to state the standard for the insured's reasonable reliance (a combination of objective and subjective standards), but he agreed that the relationship between the two was not clear. He noted that subparagraphs (a) and (b) of CV2421 are subjective, but subparagraphs (c) and (d) are objective. Judge Harris was concerned with the implication that subparagraphs (a) through (e) were an exhaustive list of factors for the jury to consider. Mr. Humpherys noted that they were the factors the Utah Supreme Court listed. Judge Harris suggested revising the instruction to say "you may consider all relevant factors, including the following."

e. *CV2414a, Insurable interest defined.* Mr. Humpherys agreed to draft a new instruction for CV2414a.

4. *Schedule.* Mr. Humpherys said that he thought the insurance instructions could take another year or two to complete. Judge Harris noted that Judge Lawrence and other judges had requested new punitive damage instructions. The committee decided to do punitive damage instructions next and to continue its work on insurance instructions until after the punitive damage instructions are completed.

5. *Committee Membership.* Mr. Humpherys suggested that Paul Belnap be invited to rejoin the committee. Ms. Adams-Perlac will extend an invitation to him.

6. *Next Meeting.* The next meeting will be Monday, March 10, 2014, at 4:00 p.m.

The meeting concluded at 6:00 p.m.

Tab 2

CV301B "Standard of care" defined. "Medical malpractice" defined. Elements of claim for medical malpractice.

A [health care provider/doctor] is required to use the same degree of learning, care, and skill ordinarily used by other qualified [providers/doctors] in good standing practicing in the same [specialty/field]. This is known as the "standard of care." The failure to follow the standard of care is a form of fault known as "medical malpractice."

To establish medical malpractice, [name of plaintiff] has the burden of proving three things:

(1) first, what the standard of care is;

(2) second, that the [provider/doctor] failed to follow this standard of care; and

(3) third, that this failure to follow the standard of care was a cause of [name of plaintiff]'s harm.

The standard of care is established through evidence presented in this trial by expert witnesses and through other evidence admitted for the purpose of defining the standard of care. You may not use a standard based on your own experience or any other standard of your own. It is your job to decide, based on expert testimony, what the standard of care is. "The expert witnesses may disagree as to what the standard of care is and what it requires. If so, it will by your responsibility to determine the credibility of the experts and to resolve the dispute."

In this action, [name of plaintiff] alleges that [name of defendant] failed to follow the standard of care in the following respects:

(1)

(2)

(3)

If you find that the [name of defendant] breached the standard of care in any of these respects, then you must determine whether that failure was a cause of [name of plaintiff]'s harm.

References

Jensen v. IHC Hospitals, 82 P.3d 1076, 1096, 2003 UT 51.
Dalley v. Utah Valley Regional Med. Ctr., 791 P.2d 193, 195 (Utah 1990).
Dikeou v. Osborn, 881 P.2d 943, 947 (Utah 1981).

Chadwick v. Nielsen, 763 P.2d 817, 821 (Utah 1981).
Kent v. Pioneer Valley Hospital, 930 P.2d 904 (Utah App. 1997).
Robb v. Anderton, 863 P.2d 1322 (Utah App. 1993).
Farrow v. Health Servs. Corp., 604 P.2d 474 (Utah 1979).
Lyon v Bryan, 2011 UT App 256 (jury entitled to disregard even unrebutted expert testimony).

MUJI 1st Instruction
6.2

Committee Notes
It is unclear whether Utah cases follow a “similar locality” standard, but it should not be relevant in most cases involving board-certified physicians. The “similar locality” instruction clearly is not applicable in actions against "specialists." Jenkins v. Parrish, 627 P.2d 533 (Utah 1981); Farrow v. Health Servs. Corp., 604 P.2d 474 (Utah 1979).

There may be cases in which the standard may differ from one locality to another, and in such cases counsel should review the cases cited above and amend the model instruction accordingly. If the court uses a "similar locality" instruction, then MUJI 1st 6.19 should also be considered: *A [health care provider] trained and practicing in a specialized field in a major city and holding himself out as a nationally trained and board-certified [expert] is required to use the same national standards of learning, skill and care followed by other qualified fellow [experts] in similar medical centers throughout the medical profession, wherever they might be.*

In Nielson v. Pioneer Valley Hospital, 830 P.2d 270 (Utah 1992), and Brady v. Gibb, 886 P.2d 104 (Utah App. 1994), the courts held that instructions similar to this should not be given in conjunction with a "common knowledge" or res ipsa loquitor instruction unless plaintiff is also alleging breach of a different standard of care.

Instruction CV129, Statement of opinion, should not be given when this instruction is used, as it instructs the jurors that they may disregard expert testimony.

Instruction CV324, Use of alternative treatment methods, should also be given when defendant claims to have used an alternative treatment method.

CV324 Use of alternative treatment methods.
(Name of defendant) claims that the method [he] [she] used in treating (name of plaintiff) was appropriate. In order to prevail on this defense, (name of defendant) must prove the following:

1. ~~When there is more than one~~ the method of [diagnosis/treatment] ~~that~~ is approved by a respectable portion of the medical community;~~,~~

2. ~~and~~ no particular method is used exclusively by all providers;~~, it is not medical malpractice for a provider to select one of the approved methods, even if it later turns out to be a wrong selection, or one not favored by some other providers. The provider has the burden to prove that the method used is approved by a respectable portion of the medical community.~~

3. the standard of care applicable to this treatment method; and

4. (name of defendant) met that standard of care.

The expert witnesses may disagree as to what the standard of care is and what it requires. If so, it will be your responsibility to determine the credibility of the experts and to resolve the dispute.

References
Cf. Butler v. Naylor, 1999 UT 85, 987 P.2d 41 (even if the evidence did not support giving this instruction, it was harmless error to do so, because the jury could have found for the defendant on other grounds).
Turner v. University of Utah Hospitals and Clinics, 2011 UT App 431, rev'd 2013 UT 52.

MUJI 1st Instruction
6.29

Committee Notes
This instruction is currently under review by the committee. This instruction is slightly modified from MUJI 1st 6.29. The committee agreed on deleting the "best judgment" language from the instruction, as that inappropriately suggested a subjective standard of care might be followed; that is, what defendant "thinks best," whether it is within the standard of care or not.

This instruction should only be used when a proper foundation is laid for it, namely, that the "alternative method" is shown by defendant to be used by something more than a small minority of doctors, but not necessarily the majority. In other words, the defendant must show that the challenged treatment enjoys such substantial support within the medical community that it truly is "generally"

recognized. See Peters v. Vander Kooi, 494 N.W.2d 708 (Iowa 1993); Bickham v. Grant, 861 So.2d 299 (Miss. 2003); Velazquez v. Portadin, 751 A.2d 102 (N.J. 2000); Yates v. University of W. Va. Bd. of Trustees, 549 S.E.2d 681(W. Va. 2001); R.A. Eades, JURY INSTRUCTIONS ON MEDICAL ISSUES, Instruction 3-38, cmt. 3 (LexisNexis, 6th ed. 2007).

The drafting subcommittee was not unanimous in its approval of this instruction, so counsel and the trial court should review it with caution. Some thought that it is inappropriate to instruct a jury that a doctor is “not negligent” if he uses an approved method, but that this is simply one factor to consider in determining whether the provider met the standard of care.

Some members of the committee expressed concerns regarding this instruction, and these concerns are summarized as:

First, no Utah authority recognizes the appropriateness of this instruction, and Butler v. Naylor did not question the propriety of giving the "alternative methods" instruction. Rather, appellant only challenged the instruction on the basis that the “evidence failed to establish that the surgical procedure used [was] recognized by a respectable portion of the medical community.” Butler v. Naylor, 1999 UT 85 at & 19, 987 P.2d 41. Butler avoided any detailed examination of the instruction “because [the instruction] presents only one of several theories upon which the jury could have relied in finding for [Defendant].” Id. at & 20. Accordingly, the court offered no direct endorsement or rejection of the instruction as an accurate statement of the law. At best, Butler is ambiguous about whether the instruction reflects the state of the law in Utah.

Second, the instruction is inconsistent with Utah law defining medical malpractice and standard of care. We tell jurors that a health care provider is required to use the same degree of learning, care, and skill ordinarily used by other qualified providers in good standing practicing in the same. This instruction, however, then tells the jurors that “it is not negligence” if more than one method exists, effectively eliminating any requirement that a physician exercise that degree of learning, care and skill ordinarily used

The bare existence of more than one method automatically excuses the physician because “it is not medical malpractice” to choose one method over another, thereby alleviating the physician of their duty to exercise any degree of learning, care or skill ordinarily used in the field. Under this instruction, the physician becomes “not negligent” simply by the existence of alternative methods without needing to exercise any judgment or care whatsoever in choosing the method.

This ignores whether one method may be safer, more effective, or carry less risk of complication. Instead, it simply says that if there is more than one method and the method is “accepted by a respectable portion of medical community,” it is not malpractice to choose one over the other. Clearly, this cannot be the law of medical negligence where every practitioner must exercise their skill, learning and professional care in treating patients.

CV326 Expert testimony required.

~~You must use only the standard of care established through evidence presented in this trial by expert witnesses and through other evidence admitted for the purpose of defining the standard of care. You may not use a standard based on your own experience or any other standard of your own.~~

~~References~~

~~Dalley v. Utah Valley Reg. Med. Ctr., 791 P.2d 193 (Utah 1990).~~
~~Farrow v. Health Servs. Corp., 604 P.2d 474 (Utah 1979).~~
~~Lyon v Bryan, 2011 UT App 256 (jury entitled to disregard even unrebutted expert testimony).~~

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