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.