Agenda
Advisory Committee on Model Civil Jury Instructions

April 13, 2009
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

Approval of minutes	Tab 1	John Young
Fraud and Deceit	Tab 2	George Hailey Tim Shea
Attorney Negligence	Tab 3	Frank Carney Bob Gilchrist
CV101B. Further admonition on electronic devices	Tab 4	Frank Carney

Committee Web Page: http://www.utcourts.gov/committees/muji/

Published Instructions: http://www.utcourts.gov/resources/muji/

Meeting Schedule: Matheson Courthouse, 4:00 to 6:00 p.m.

May 11, 2009	Construction Contracts
June 8, 2009	Eminent Domain
July 13, 2009	Premises Liability
August 10, 2009	Insurance Obligations
September 14, 2009	Probate
October 13, 2009	Professional Liability
November 9, 2009	Employment

Tab 1

MINUTES
Advisory Committee on Model Civil Jury Instructions
March 9, 2009
4:00 p.m.

Present: Honorable William W. Barrett, Jr., Francis J. Carney, Marianna Di Paolo, Phillip S. Ferguson, Tracy H. Fowler, John R. Lund, Timothy M. Shea, Paul M. Simmons, Peter W. Summerill, David E. West. Also present: Robert G. Gilchrist

Excused: John L. Young (chair)

Mr. Carney conducted the meeting in Mr. Young's absence.

1. *Procedure*. Mr. Carney led a discussion about the time it is taking to approve new instructions. At the last meeting, it was suggested that the "Gangs of Three" have the final approval of instructions in their subject areas, with perhaps a final review by Dr. Di Paolo and Mr. Shea. Mr. Shea noted that the instructions have been improved at each stage of review, including the review by the full committee. Mr. Ferguson suggested that one way to speed up the process is to circulate the instructions well in advance of the meeting and require committee members to raise any objections or proposed changes to the instructions before the meeting; if no one raises an issue before the meeting, the instruction is deemed approved. Mr. Carney stated that his ideal would be to have all of the jury instructions completed, and the committee meetings would only be used to act on suggestions to improve the instructions.

2. *MUJI 1st*. Mr. Carney noted that some judges have complained about the need to use both MUJI 1st and MUJI 2d to come up with a complete set of instructions in some cases. The committee discussed the possibility of putting the MUJI 1st instructions for a given area on the website (or links from the website to the MUJI 1st instructions) for those areas for which new instructions have not yet been approved. Mr. Shea noted that the Utah State Bar holds the copyright for MUJI 1st and has authorized the courts to use the MUJI 1st instructions. Mr. Carney wanted to see what Mr. Young thinks of the idea.

3. *Meeting with Utah Supreme Court*. Mr. Carney noted that Mr. Young, Mr. Shea, and he are going to meet with the Utah Supreme Court and asked what matters the committee would like them to discuss with the court. Mr. Ferguson noted that district court judges are still not using the MUJI 2d instructions consistently and that it would be helpful if the supreme court issued some directive. Mr. West suggested that the court tell the trial courts that the instructions are presumptively valid. Mr. Shea offered a proposed instruction, based on instructions from other jurisdictions, that said that a court is to use MUJI 2d to the exclusion of other jury instructions on the same subject if (1) there is an applicable MUJI 2d instruction, (2) it accurately states the law, and (3) one of the parties requests it, and further instructing the court to tailor the MUJI 2d instructions to fit the particular case. Mr. Fowler had reservations about the proposal. He noted that, because the MUJI 2d instructions have been drafted by

different subcommittees, they are not all of the same quality. Also, the committee has proposed instructions in areas where there is no Utah law on point and has been reluctant to propose alternative instructions. It has also made other changes such as substituting "cause" for "proximate cause" and "important" for "material." Therefore, Mr. Fowler thought that courts should not be required to use the MUJI 2d instructions, but there should be room for experimentation and improvement. Mr. Lund suggested categorizing the instructions into two sets: (1) those where the law is settled, and (2) those where the law is unsettled. Mr. Shea noted that sometimes the law is unsettled because there is a conflict in Utah case law. Mr. Carney said he was having second thoughts about abandoning the term "proximate cause." Mr. Shea disagreed. He thought that, if the jury does not understand the instructions, it will not follow the law but will do what it thinks is fair. Mr. Carney thought that, if "proximate cause" were defined the first time it is used, the jury could understand the concept, but Dr. Di Paolo thought that the jury would have to be told over and over again what an unfamiliar concept like "proximate cause" means. She noted that a person generally has to hear a word used appropriately seven times before he or she begins to understand it, and if a person doesn't understand a word or concept, he or she won't use it. Mr. West noted that the committee should not simply throw away all of its work and go back to square one. Dr. Di Paolo noted the need for feedback on the instructions and suggested that Messrs. Young, Carney, and Shea raise the issue with the court.

4. *Attorney Negligence Instructions.* The committee reviewed the attorney negligence instructions:

a. *CV401(A). Committee Note on Attorney Negligence Instructions.* The committee revised the note to include MUJI 1st 7.45 (duty of care of specialist) as well as 7.46 (error in judgment not necessarily negligence) because there is no Utah case law to support them. Messrs. Carney and Summerill noted that the latter instruction implies that one must prove something more than negligence, such as intent or bad faith, and that an error of judgment can be negligence.

b. *CV401(B). Elements of claim for attorney's negligence.* At Mr. Ferguson's suggestion, "negligently" was struck from subparagraph (3). He noted that an attorney can be liable for a breach of the standard of care, whether the breach was negligent or not. "Negligence" was replaced with "breach" in subparagraph (4). Dr. Di Paolo suggested revising the first sentence to read, "[Name of plaintiff] claims that [name of defendant] was negligent in performing legal services," but the committee did not approve the change. Mr. Carney asked whether the general negligence instruction should be repeated in the attorney negligence instructions. Mr. Summerill thought that CV401(B) defined negligence in the context of attorney malpractice. At Mr. Carney's suggestion,

CV401(A) was renumbered CV401, and CV401(B) was renumbered CV402, and the other instructions were renumbered accordingly.

c. *CV402. Attorney-client relationship.* The first sentence was revised to read, "An attorney-client relationship can be established by an express contract between the parties, or by an implied contract based upon [name of defendant's] statements or conduct." Mr. Lund questioned whether an attorney-client relationship can be based solely on the acts of one side. Mr. Carney noted that MUJI 1st 7.43 said that the relationship must be induced by the attorney's conduct. Mr. Shea suggested adding at the end of the instruction, "Unless reasonably induced by the attorney's statements or conduct, plaintiff's belief that an attorney-client relationship exists is not sufficient to create an attorney-client relationship," but the committee rejected the suggestion. The committee approved the instruction as modified.

d. *CV403. Duty of care.* At Mr. Ferguson's suggestion, the sentence "Failure to do so is negligence" was added to the end of the instruction. The committee approved the instruction as modified.

e. *CV404. Duty of care of specialist.* Mr. Carney asked whether the instruction was needed and whether there is a different standard of care for specialists. He noted that the instruction would protect attorneys who do the work of a specialist but do not hold themselves out as specialists. Dr. Di Paolo and Mr. Fowler noted the distinction between an attorney taking on a matter he or she is not competent to do and an attorney making an error in his or her area of specialty. Mr. Carney noted that the instruction was based on an analogy to medical malpractice. Mr. Summerill noted that in medical malpractice a doctor has a duty to refer a patient if the doctor does not have the training or expertise to deal with the problem and asked whether an instruction was needed on an attorney's duty to refer a client. The committee ultimately decided to delete the instruction because there is no Utah case law supporting it.

f. *CV405. Uncertain laws or judicial mistakes.* At Mr. Gilchrist's suggestion, "laws" in the second line was replaced with "decisions." Mr. Lund noted that the phrase "errors about laws" was ambiguous. It does not say whose error--the attorney's, the court's, or the law's. Mr. West thought that an attorney could be negligent for failing to tell a client that the law is uncertain or unsettled. Mr. Shea suggested adding to the instruction, "[Name of defendant] has a duty to advise [name of plaintiff] that the law is unsettled." Mr. Lund asked whether the instruction meant that an attorney is not liable for an error in judgment. The subcommittee rejected such an instruction from MUJI 1st. Mr. Fowler expressed concern that a jury could impose liability on an attorney because the attorney

turned out to be wrong on an unsettled or debatable issue of law. Mr. Lund thought there needed to be objective evidence of an error of law. Messrs. Carney and Summerill reviewed the cases cited as authority for the instruction (*Crestwood Cove Apartments,* 2007 UT 48, 164 P.3d 1247, and *Watkiss & Saperstein v. Williams,* 931 P.2d 840 (Utah 1997)). Mr. Carney noted that *Crestwood Cove* did not talk about negligence but about proximate causation, and Mr. Summerill noted that *Watkiss & Saperstein* held that whether the law is unsettled is a question of law. At Mr. Shea's suggestion, the first sentence was revised to read, "[Name of defendant] is not liable for decisions that result from mistakes by a judge," and the title was changed to "Judicial mistakes." Mr. Lund suggested that there be a separate instruction on unsettled laws to the effect that, if the law is uncertain, unsettled, or debatable, the defendant has a duty to inform the plaintiff that the law is uncertain. Mr. West suggested deleting the instruction altogether. Mr. Gilchrist thought that an attorney still has a duty to advise the client that the law is unsettled. Mr. Simmons asked what the jury is supposed to do--decide whether the judge made a mistake? decide whether the attorney made a decision that was induced by a judge's mistake? Mr. Shea thought the issue for the jury was one of causation. The plaintiff will be claiming that the defendant's negligence caused the plaintiff harm, and the defendant will be claiming that a judge's mistake caused the defendant to err. Mr. Shea asked whether fault could be apportioned to the judge who made the mistake. Mr. Summerill thought that if the law is uncertain, that would be a complete defense to a legal malpractice claim. Mr. Shea noted that *Crestwood* said that causation presented a question for the trier of fact. A sentence was added to the beginning of the instruction that reads, "You must decide the cause of the plaintiff's damages." The committee approved the instruction as modified.

The meeting concluded at 6:00 p.m.

Next Meeting. The next meeting will be Monday, April 13, 2009, at 4:00 p.m.

Tab 2

Fraud and Deceit

(1) CV1801. Elements of fraud.

[Name of plaintiff] claims that [name of defendant] defrauded [him] by making a false [oral/written], statement of fact that caused [him] harm. To succeed in this claim, [name of plaintiff] must prove each of the following by clear and convincing evidence:

(1) [name of defendant] made a false statement about an important fact; and

(2) either [name of defendant] made the statement knowing it was false, or [he] made the statement recklessly and without regard for its truth; and

(3) [name of defendant] intended that [name of plaintiff] would rely on the statement; and

(4) [name of plaintiff] reasonably relied on the statement; and

(5) [name of plaintiff] suffered damages as a result of relying on the statement.

I will provide you with more information about each of these in the following instructions.

References

Yazd v. Woodside Homes Corp., 143 P.3d 283 (Utah 2006).

Armed Forces Insurance Exchange v. Harrison, 70 P.3d 35 (Utah 2003).

Gold Standard, Inc. v. Getty Oil Co., 915 P.2d 1060 (Utah 1996).

Taylor v. Gasor, Inc., 607 P.2d 293 (Utah 1990).

Dilworth v. Lauritzen, 18 Utah 2d 386, 424 P.2d 136 (1967).

Child v. Hayward, 16 Utah 2d 351, 400 P.2d 758 (1965).

See Instruction CV118, Clear and convincing evidence.

MUJI 1st Instruction

17.1; 17.9

Committee Notes

This instruction and the instructions which follow use the term "important" rather than "material." The Committee made this change because jurors are more likely to understand the former term, and because Utah case law defines materiality in terms of importance. See, e.g., Yazd v. Woodside Homes Corp., 143 P.3d 283 ¶ 34 (Utah 2006) ("To be material, the information must be 'important.'").

Although some of the instructions in this section may be useful in negligent misrepresentation cases, they do not purport to comprise a complete set of instructions for such cases.

Approved

(2) CV1802. Reckless false statement.

A false statement is made recklessly if [name of defendant] knew that [he] did not have sufficient knowledge to make the statement.

References:

Kuhre v. Goodfellow, 2003 UT APP 1, 69 P.3d 286.

Prince v. Bear River Mut. Ins. Co., 2002 UT 68, 56 P.3d 524.

Rawson v. Conover, 2001 UT 24, 20 P.3d 876 ("To have made a false representation recklessly, defendants would have to know that they had insufficient knowledge upon which to base the representation made.")

MUJI 1st Instruction

Approved

(3) CV 1803 Negligent misrepresentation.

[Name of plaintiff] claims [he] was harmed when [name of defendant] negligently misrepresented an important fact. To succeed in this claim [name of plaintiff] must prove by clear and convincing evidence that:

(1) [name of defendant] owed a duty to [name of plaintiff];

(2) [name of defendant] represented to [name of plaintiff] that an important fact was true;

(3) [name of defendant] had a financial interest in the transaction;

(4) [name of defendant] was in a better position than [name of plaintiff] to know the true facts;

(5) that it is reasonable to assume that [pame of plaintiff] would trust that the fact was true;

(6) [name of defendant]'s representation of fact was not true; and

(7) [name of plaintiff] suffered damage as a result of relying on the representation.

References:

West v. Inter-Financial, Inc., 139 P.3d 1059, Court of Appeals (Utah 2006).

Smith v. Frandsen, 94 P.3rd 919, (Utah Sup. Ct. 2004).

Price v Orem Investment Company v. Rollins, Brown & Gunnel, Inc., 713 P.2d 55 (Utah Sup. Ct. 1986).

Jardine v. Brunswick Corporation, 423 P.2d 659 (Utah Sup. Ct. 1967).

Is it OK to include a negligence instruction in the midst of the fraud instructions? Do we need an instruction on when defendant owes a duty to plaintiff?

(4) CV1804. Recovery for misrepresentation of fact.

You must decide whether the defendant's statement was a representation of fact as opposed to an opinion. Generally, a plaintiff may recover for fraud only if the defendant's statements were misrepresentations of facts.

References:

Cerritos Trucking Co. v. Utah Venture No. 1, 645 P.2d 608 (Utah 1982).

MUJI 1st Instruction

17.3; 17.4

Committee Notes

Approved

(5) CV1805. Promises and statements of future performance.

A promise about a future act is a false statement of fact if [name of plaintiff] proves that [name of defendant]:

(1) never intended to keep the promise; and

(2) made the promise for the purpose of deceiving [name of plaintiff].

References:

Cerritos Trucking Co. v. Utah Venture No. 1, 645 P.2d 608 (Utah 1982)

Hull v. Flanders, 83 Utah 158, 27 P.2d 56 (1933)

MUJI 1st Instruction

Approved

(6) CV1806. Important statement of fact.

A statement of fact is important if knowing that it is false would influence a reasonable person's judgment, or [his] decision to act or not to act.

References:

Yazd v. Woodside Homes Corp., 2006 UT 47, 143 P.3d 283

Walter v. Stewart, 2003 Utah App. 86, 67 P.3d 1042

MUJI 1st Instruction

Approved

(7) CV1807. Intent to induce reliance.

You must decide whether [name of defendant] intended [name of plaintiff] to rely on a false statement, even though [name of defendant] did not make it directly to [name of plaintiff].

[Name of defendant] intended [name of plaintiff] to rely on the false statement if

[[Name of defendant] made the statement to a group of people that included [name of plaintiff]].

[[Name of defendant] made the statement to another person, with the intent or the belief that it would be communicated to [name of plaintiff]].

References:

Ellis v. Hale, 373 P.2d 382 (1962)

MUJI 1st Instruction

Approved

(8) CV1808. Reasonable reliance.

In deciding whether [name of plaintiff]'s reliance on the false statement was reasonable, you must take into account all relevant circumstances, such as [his] age, mental capacity, knowledge, experience, and [his] relationship to [name of defendant].

References

Mikkelson v. Quail Valley Realty, 641 P.2d 124 (Utah 1982)

Berkeley Bank for Coops. v. Meibos, 607 P.2d 1369 (Utah 1980)

MUJI 1st Instruction

17.8

Approved

(9) CV1809. Reliance on statement of opinion.

[Name of plaintiff] claims that [his] reliance on [name of defendant]'s statement was reasonable, even though the statement was an opinion. To succeed in this claim, [name of plaintiff] must prove by clear and convincing evidence that:

(1) the opinion was that of a person [name of plaintiff] reasonably believed was disinterested; and

(2) the fact that the person holds the opinion was important to [name of plaintiff].

OR

(1) [name of plaintiff] did not know about the matter about which [name of defendant] stated the opinion; and

(2) [name of defendant] stated the opinion in a way that implied the matter to be true, rather than just as an expression of belief.

OR

[(1) [name of defendant] claimed to have special knowledge about the matter that [name of plaintiff] did not have;] or

[(2) [name of defendant] and [name of plaintiff] had a relationship of trust;] or

[(3) [name of defendant] secured [name of plaintiff]'s confidence;] or

[(4) [name of defendant] has a special reason to expect that [name of plaintiff] would rely on [name of defendant]'s opinion.]

References:

Baird v. Eflow Inv. Co., 289 P.2d112 (Utah 1930).

See Restatement of Torts (Second) Sections 538A, 539, 542 and 543.

Committee Notes

Under the general rule, plaintiff;s reliance on an opinion is not reasonable and the fourth element stated in Instruction 1801 is not met. Restatement of Torts (Second) Sections 538A. However, plaintiff's reliance on an opinion may be reasonable under three special scenarios.

First, plaintiff's reliance may be reasonable if plaintiff believes the person stating the opinion is disinterested and the fact that the person holds the opinion is important. This scenario is expressed in the first set of elements (1) and (2). Restatement of Torts (Second) Section 543.

Second, plaintiff's reliance may be reasonable if plaintiff does not know of the facts and defendant expresses the opinon to imply that defendant knows facts that are not incompatible with the opinion or that are sufficient to justify the opinion. This scenario is expressed in the second set of elements (1) and (2). Restatement of Torts (Second) Section 539.

Third, plaintiff's reliance may be reasonable if defendant claims expertise that plaintiff does not have or there is a relationship of trust between the parties. This

scenario is expressed in the third set of elements (1) though (4). Restatement of Torts (Second) Section 542. Note that under this scenario only one of the four elements is necessary.

The judge should instruct the jury only on the scenario for which there is evidence and if the third scenario is included, only on those bracketed elements for which there is evidence. If there is evidence to support more than one of the bracketed elements, they should be connected by the disjunctive "or."

(10) CV1810. Concealment or fraudulent non-disclosure.

I have determined that [name of plaintiff] was in a [type of relationship] that gave [name of defendant] a duty to disclose an important fact to [name of plaintiff]. You must decide whether [name of defendant] failed to disclose an important fact. To establish that [name of defendant] failed to disclose an important fact, [name of plaintiff] must prove all of the following:

(1) that [name of defendant] knew [describe the important fact] and failed to disclose it to [name of plaintiff];

(2) that [name of plaintiff] did not know [describe the important fact]; and

(3) that [name of defendant]'s failure to disclose [describe the important fact] was a substantial factor in causing [name of plaintiff]'s damages.

References

Yazd v. Woodside, 143 P.3d 283 (Utah 2006)

Moore v. Smith, 158 P.3d 561 (Utah App. 2007)

MUJI 1st Instruction

17.10

Committee Note

This instruction should be given only if the Court has determined that a special relationship imposing the higher duty is established as a matter of law. Moore v. Smith, 158 P.3d 561 (Utah App. 2007).

Approved

(11) CV1811. Compensatory damages.

If you decide that [name of defendant] defrauded [name of plaintiff], then you must also decide how much money is needed to fairly compensate [name of plaintiff] for any damages caused by the fraud.

~~[ALTERNATIVE A]~~

~~In deciding how much money [name of plaintiff] is entitled to as damages, you should determine the difference between the value of the property that [name of plaintiff] [bought/sold] and the value the same property would have had if [name of defendant]'s statements about it had been true~~

~~[ALTERNATIVE B]~~

~~In deciding how much money [name of plaintiff] is entitled to as damages, you should determine the total amount [name of plaintiff] was damaged as a consequence of [his] reliance on [name of defendant]'s statements.~~

You may award damages for the harm [name of plaintiff] experienced because of [name of defendant]'s fraud as long as you determine that the damages were reasonably foreseeable, and that [name of plaintiff] has proven these damages with reasonable certainty. [Name of plaintiff] claims the following damages:

[(1) the difference between the value of the property that [name of plaintiff] [bought/sold] and the value the same property would have had if [name of defendant]'s statements about it had been true.]

[(2) loss of good will;]

[(3) expenditures in mitigation of damages;]

[(4) lost earnings;]

~~[(5) prejudgment interest;]~~

[(5) loss of interest on loans required to finance [describe the loss]]

[(6) lost profits;]

[(7) emotional distress;]

[(8) describe other items claimed.]

References

~~Alternative A~~

Dugan v. Jones, 615 P.2d 1239 (Utah 1980)

Lamb v. Bangart, 525 P.2d 602 (Utah 1974)

Dilworth v. Lauritzen, 424 P.2d 136 (Utah 1967)

Alternative B

Restatement (Second) of Torts, § 549

Campbell v. State Farm Mutual Automobile Ins. Co., 65 P.3d 1134 (2001)

Ong International (U.S.A.) Inc., v. 11th Avenue Corp., 850 P.2d 447 (1993)

Crookston v. Fire Ins. Exch., 817 P.2d 789 (Utah 1991)

MUJI 1st Instruction

17.11

Committee Notes

This instruction expands MUJI 17.11 to address a broader range of fraud cases. ~~Alternative A~~ This instruction states the traditional measure of damages in fraud cases involving the purchase or sale of property, as recognized in Dugan v. Jones, 615 P.2d 1239 (Utah 1980) (real estate), Lamb v. Bangart, 525 P.2d 602 (Utah 1974) (livestock), Dilworth v. Lauritzen, 424 P.2d 136 (Utah 1967) (distributorship) and others.

~~Alternative B is intended for cases where~~The instruction also includes loss ~~is~~ suffered in reliance on a fraudulent misrepresentation, ~~but~~ even if there is not ~~necessarily~~ any purchase or sale between the plaintiff and defendant. This situation is presented in a variety of cases: e.g., where the plaintiff is fraudulently induced to extend money or credit, or where the plaintiff is fraudulently induced to purchase or use an article which is inappropriate for the intended use. See Restatement (Second) of Torts § 549, and comments thereto.

(12) CV18##. Intent.

Intent ordinarily ~~may~~ cannot be proved directly because there is no way of ~~fathoming or scrutinizing~~ knowing the operations of [a corporation] ~~or~~ [the human mind]. You may infer intent from the surrounding circumstances and find that [name of defendant] intended the natural and probable consequences of acts done knowingly. You may consider any statement made or acts done by [name of defendant]~~,~~ and all other facts and circumstances that may ~~indicate~~ show intent. ~~You may draw the inference and find that the person intends the natural and probable consequences of acts knowlingly done.~~

References

Deseret Federal Savings and Loan Assn v. United States Fidelity & Guaranty Co., 714 P.2d 1143, 1146 (Utah 1986).

Hoffman v. Life Insurance Company of No. America, 669 P.2d 410, 420 (Utah 1983).

(13) CV18##. Duty to speak the whole truth.

~~In general, once a person undertakes to speak, that person assumes~~ If [name of defendant] made a statement of fact, then [he] had a duty to tell the whole truth, ~~and~~ to make a full and fair disclosure ~~as to~~ of the matters about which ~~the person assumes to speak~~ [he] spoke, and to prevent a partial statement from being misleading or giving a false impression. ~~Under the law, a duty to disclose may exist where one voluntarily undertakes to speak but fails to prevent [his] words from being misleading.~~

~~Likewise, when a party makes a partial disclosure, the party then has a duty to tell the whole truth. A party is under a duty to disclose to prevent a partial statement of facts from being misleading or conveying a false impression.~~

References

Fraud and Deceit, AmJur 2d, Section 209.

(14) CV1899A. Special verdict form.

Please answer the following questions based on the instructions the court has given you.

(a) Do you find that [name of plaintiff] proved the following by clear and convincing evidence?

(1) Did [name of defendant] make a false statement about an important fact?

Yes_____ No_____

(2) Did [name of defendant] make the statement knowing it was false or recklessly and without regard for its truth?

Yes_____ No_____

(3) Did [name of defendant] intend that [name of plaintiff] would rely on the statement?

Yes_____ No_____

(4) Did [name of plaintiff] reasonably rely on the statement?

Yes_____ No_____

(5) Did [name of plaintiff] suffer damages as a result of relying on the statement?

Yes_____ No_____

(b) If you answer "no" to any of these questions, then skip questions (c) and (d).

(c) If you answer "yes" to questions (1) – (5), what if any damage do you award [name of plaintiff]?

Economic Damage $_____

Non-Economic Damage $_____

(d) If you answered "yes" to questions 1 and 2 above, do you find by clear and convincing evidence that the actions of [name of defendant] were the result of willful and malicious or intentionally fraudulent conduct, or conduct that manifests a knowing and reckless indifference toward, and a disregard of, [name of plaintiff]'s rights?

Yes_____ No_____

_____ _____

Date Jury Foreperson

(15) CV1899B. Special verdict form.

Please answer the following questions based on the instructions the court has given you.

(1) Do you find by clear and convincing evidence that [name of defendant] committed fraud on [name of plaintiff]?

Yes_____ No_____

(2) If you answered "yes" to question (1), do you find by clear and convincing evidence that such conduct was a cause of damage to [name of plaintiff]?

Yes_____ No_____

(3) If you answered "yes" to question number (2), what if any damage do you award [name of plaintiff]?

Economic Damage $_____

Non-Economic Damage $_____

(4) If you answered "yes" to questions (1) and (2), do you find by clear and convincing evidence that the actions of [name of defendant] were the result of willful and malicious or intentionally fraudulent conduct, or conduct that manifests a knowing and reckless indifference toward, and a disregard of, [name of plaintiff]'s rights?

Yes_____ No_____

_____ _____

Date Jury Foreperson

Tab 3

Attorney Negligence

(1) CV401. Committee Note on Attorney Negligence Instructions

The Committee intentionally omitted MUJI 1st Instructions 7.45 and 7.46 because there is no Utah case law supporting them.

If the defendant claims not to be liable because the law is uncertain, the court decides as a matter of law whether the law is uncertain. Watkiss & Saperstein v. Williams, 931 P.2d 840 (Utah 1997).

(2) CV402. Elements of claim for attorney's negligence.

[Name of plaintiff] claims that [name of defendant] negligently performed legal services. To succeed on this claim, [name of plaintiff] must prove that:

(1) [he] and [name of defendant] had an attorney-client relationship;

(2) because of that relationship [name of defendant] owed a duty to [name of plaintiff];

(3) [name of defendant] breached that duty; and

(4) [name of defendant]'s breach was a cause of [name of plaintiff] injury, loss or damage.

MUJI 1st Reference

7.42

References

Crestwood Cove Apartments Business Trust v. Turner, 2007 UT 48, 164 P.3d 1247.

Bennett v. Jones, Waldo, Holbrook & McDonough, 2003 UT 9, 70 P.3d 17.

Committee Notes

Approved

(3) CV403. Attorney-client relationship.

An attorney-client relationship can be established by an express contract between the parties, or by an implied contract based upon [name of defendant]'s statements or conduct. An implied attorney-client relationship exists when [name of plaintiff] reasonably believes that [name of defendant] represents [name of plaintiff]'s legal interests. The reasonableness of that belief must be weighed in light of all of the facts.

MUJI 1st Reference

7.43

References

Roderick v. Ricks, 2002 UT 84, 54 P.3d 1119.

Kilpatrick v. Wiley, Rein & Fielding, 2001 UT 107, 37 P.3d 1130.

Utah State Bar Ethics Advisory Opinion No. 05-04, Issued September 8, 2005.

Committee Notes

If the attorney-client relationship is not disputed, rather than give this instruction, the court should instruct the jury that that fact is stipulated.

Approved

(4) CV404. Duty of care.

[Name of defendant] has a duty to use the same degree of care, skill, judgment and diligence used by qualified lawyers under similar circumstances. Failure to do so is negligence.

MUJI 1st Reference

7.44

References

Watkiss & Saperstein v. Williams, 931 P.2d 840 (Utah 1997).

Williams v. Barber, 765 P.2d 887 (Utah 1988).

Committee Notes

Approved

(5) CV405. Scope of representation.

[Name of defendant] may limit the scope of representation if the limitation is reasonable under the circumstances and if [name of plaintiff] gives informed consent. In general, [name of defendant] has no duty to act beyond the scope of representation.

MUJI 1st Reference

7.47

References

Lundberg v. Backman, 11 Utah 2d 330, 358 P.2d 987 (1961).

Bruer-Harrison, Inc. v. Combe, 799 P.2d 716 (Utah App. 1990).

Rule of Professional Conduct 1.2. Scope of Representation.

Utah State Bar Ethics Advisory Opinion No. 05-04.

Committee Notes

There may be some circumstances in which there is a duty to act beyond an agreed upon limit.

(6) CV406. Standard of care for plaintiff.

[Name of plaintiff]'s actions that caused [him] to hire [name of defendant] cannot be considered when you decide who was at fault.

[Name of plaintiff]'s negligent actions after hiring [name of defendant] can be considered when you decide who was at fault.

MUJI 1st Reference

7.48

References

Steiner v. Johnson & Higgins, 996 P2d 531 (Utah 2000).

Committee Notes

(7) CV407. Fiduciary relationship.

[Name of plaintiff] claims that [name of defendant] breached a fiduciary duty. To succeed on this claim [name of plaintiff] must prove that [he] and [name of defendant] have a fiduciary relationship that requires [name of defendant] to:

[(1) not take advantage of [his] legal knowledge and position;]

[(2) have undivided loyalty to [name of plaintiff];]

[(3) treat all of [name of plaintiff]'s matters as confidential;]

[(4) not conceal any facts or law from [name of plaintiff]; and]

[(5) not deceive [name of plaintiff] in any way.]

A breach of a fiduciary duty is a breach of the standard of care.

MUJI 1st Reference

7.49

References

Kirkpatrick v.Wiley, Rein & Fielding, 909 P2d 1283 (Utah 1996).

Smoot v. Lund, 13 Utah 2d 168, 369 P2d 933 (1962).

Committee Notes

This list of fiduciary duties is not exhaustive. This instruction should be given only in cases that involve claims of breach of fiduciary duty, for example, mishandling client

funds, breach of confidentiality, conflict of interest, etc. Include in the instruction only those items for which there is evidence.

(8) CV408. "Cause" defined.

[Name of plaintiff] must prove that if [name of defendant] had done the act [he] failed to do, or not done the act complained about, [name of plaintiff] would have benefitted.

I've instructed you before that the concept of fault includes a wrongful act or failure to act that causes harm.

As used in the law, the word "cause" has a special meaning, and you must use this meaning whenever you apply the word. "Cause" means that:

(1) the person's act or failure to act produced the harm directly or set in motion events that produced the harm in a natural and continuous sequence;

and

(2) the person's act or failure to act could be foreseen by a reasonable person to produce a harm of the same general nature.

There may be more than one cause of the same harm.

MUJI 1st Reference

7.50

References

Kilpatrick v. Wiley, Rein & Fielding, 909 P2d 1283 (Utah 1996).

Harline v. Barker, 854 P2d 595 (Ut App. 1992).

Dunn v. McKay, Burton, McMurray & Thurman 584 P2d 894 (Utah 1978).

Young v. Bridwell, 20 Utah 2d 332, 437 P2d 686 (1968).

See Instruction CV209, "Cause" defined.

Committee Notes

(9) CV409. Damages caused by a judicial mistake.

[Name of defendant] claims that any damages [name of plaintiff] may have suffered were caused by mistakes made by a judge. [Name of defendant] is not liable for damages that result from mistakes by a judge.

MUJI 1st Reference

References

Crestwood Cove Apartments Business Trust v. Turner, 2007 UT 48, 164 P.3d 1247.

Committee Notes

Approved

Damages is described as an element of the claim in 402, but there is no instruction on calculating damages. The following is from MUJI 1st, citing only BAJI as its authority. It does not instruct on calculating damages, but has the same concept as the MUJI 1st instruction on proximate cause. (Highlighted text in 408.)

MUJI 7.52 PLAINTIFF MUST PROVE DAMAGES RESULTING FROM ATTORNEY NEGLIGENCE

In order to recover damages from an attorney for negligence in the handling of a lawsuit, the plaintiff must not only establish that the attorney was negligent but also must establish that, but for such negligence, the prior lawsuit [would have resulted in a collectible judgment in the plaintiff's favor] [would have been successfully defended].

References:

BAJI No. 6.37.5 (1986). Reprinted with permission; copyright © 1986 West Publishing Company

Tab 4

(1) CV101B. Further admonition on electronic devices.

Serious problems have been caused around the country by jurors using computer and electronic communication technology. It's natural that we want to investigate a case, or to share with others our thoughts about the trial, and it’s easy to do so with the internet and instant communication devices or services, such as Blackberries, iPhones, Facebook, Twitter, and so on.

However, please understand that the rules of evidence and procedure have developed over hundreds of years in order to ensure the fair resolution of disputes. The fairness of the entire system depends entirely on you, the jurors, reaching your decisions based on evidence presented to you in court, and not on other sources of information. You violate your oath as jurors if you conduct your own investigations or communicate about this trial with others.

Jurors have caused serious consequences for themselves and the courts by “Googling” the parties, issues, or counsel; “Twittering” with friends about the trial; using Blackberries or iPhones to gather or send information on cases; posting trial updates on Facebook pages; using Wikipedia or other internet information sources, and so on. Even using something as seemingly innocent as "Google Maps" can result in a mistrial.

Post-trial investigations are common and can disclose these improper activities. If they are discovered, they will be brought to my attention and the entire case might have to be retried, at substantial cost.

Violations may also result in substantial penalties for the juror.

So I must warn you again - do not use your cellphone or computer to investigate or discuss anything connected with this trial until it is completely finished. Do no internet research of any kind, and advise me if you learn of any juror who has done so.

References

Committee Note

News articles have highlighted the problem of jurors conducting their own internet research or engaging in outside communications regarding the trial while it is ongoing. See, e.g., Mistrial by iPhone: Juries' Web Research Upends Trials, New York Times (3/18/2009). The court may therefore wish to emphasize the importance of the traditional admonitions in the context of electronic research or communications.