MINUTES
Advisory Committee on Model Civil Jury Instructions
September 11, 2006
4:00 p.m.

Present: Paul M. Belnap, Francis J. Carney, Ralph L. Dewsnup, Marianna Di Paolo, Phillip S. Ferguson, Tracy H. Fowler, L. Rich Humpherys, Jonathan G. Jemming, Stephen B. Nebeker, Karra J. Porter, Timothy M. Shea, Paul M. Simmons, David E. West, Robert H. Wilde, and John L. Young (chair)

Excused: Honorable William W. Barrett, Jr.

Publicity

The committee discussed the need to educate members of the bench and bar about the new instructions and to encourage their use. Mr. Shea noted that he and other committee members had made presentations to the district court judges and to the Utah Trial Lawyers Association and will be making another presentation to UTLA on Friday. Mr. Carney noted that he and Mr. Humpherys are writing an article about the new instructions for the *Utah Bar Journal,* with introductions by Mr. Young and (it is to be hoped) by Chief Justice Durham.

Draft Instructions

The committee continued its review of the employment instructions. Mr. Humpherys introduced Ms. Porter from his firm, who was invited to attend the meeting to address her concerns with the instructions.

1. *1911. Breach of employment contract. Just cause.* Ms. Porter noted that just cause does not have to be shown in the majority of employment cases. She had concerns with the term "fair." She thought that juries should not be asked to determine fairness for themselves, that the standard was more akin to an abuse of discretion standard, and that jurors should not second-guess employment decisions made in good faith. She thought the test was more subjective: was the employer's action reasonable from the employer's perspective based on what he knew at the time? She also thought that the last part of the instruction (referring to pretext) was superfluous or redundant, since the jury must determine the real reason for the termination. Messrs. Carney and Wilde pointed out that the instruction was a direct quote from *Uintah Basin Medical Center v. Hardy,* the only Utah appellate decision defining "just cause" in the employment context. Mr. Humpherys thought that the *Hardy* standard was not stated in plain English. Mr. Young suggested rewriting the instruction based on ¶ 22 of the *Hardy* decision. The instruction may also need a committee note.

Mr. Wilde and Ms. Porter will confer and suggest a revised instruction.

Mr. Ferguson joined the meeting.

2. *1913. Fiduciary duty.* Ms. Porter thought that the instruction did not belong because fiduciary duties are not limited to employment situations and in fact are rare in employment cases. Mr. Humpherys noted that, just because a breach-of-fiduciary-duty claim may also appear in other contexts, does not mean that it should not also be included in the employment instructions. Mr. Wilde noted that breach of fiduciary duty is often asserted as an affirmative defense or counterclaim in employment cases. It is typically the employer who claims that an employee breached a fiduciary duty. Mr. Dewsnup therefore suggested using the terms "employer" and "employee" rather "plaintiff" and "defendant." The committee debated whether the existence of a fiduciary duty was a question of law for the court to decide or a question of fact for the jury to decide. Ms. Porter and Mr. Belnap thought it was always a question of law. Mr. Wilde thought it may depend on the facts that the jury finds. He also thought that the jury may have to decide the extent of any fiduciary duty. The committee asked whether the jury would have to make piecemeal determinations; for example, the jury would be asked to determine whether certain facts existed; if the jury found they existed, it would then be instructed on the fiduciary duty that those facts give rise to and be asked to determine whether that duty had been breached and, if so, what damages flowed from the breach. Ms. Porter thought that the problem could be handled through the special verdict form. Mr. Belnap suggested adding a comment to the effect that the instruction presupposes that the judge has found that a fiduciary duty exists. Mr. Shea suggested revising the instruction to read, "I have found that the employee owed the employer a duty of . . . ." Ms. Porter thought this would imply that the judge was siding with one side over the other. Mr. Young suggested the language: "Under the circumstances of this case, the employee owed the employer a duty of . . . ."

Dr. Di Paolo joined the meeting.

Mr. Nebeker noted that lay people do not understand what is meant by "fiduciary duty." Mr. Dewsnup suggested revising the instruction to read, "For the employer to prevail on his claim of breach of fiduciary duty, the employer must prove that the employee violated an extraordinary duty of fidelity, confidentiality, honor, trust, or dependability." Mr. Wilde noted that the cases use the terms in the conjunctive ("*and* dependability"). Ms. Porter suggested bracketing the terms and telling the court to use only those terms that are at issue (e.g., confidentiality). Mr. Humpherys suggested revising the instruction to read, "If you find that there was an extraordinary relationship between the employee and the employer, then the employee owed the employer a duty of . . . ."

Mr. Belnap was excused.

Mr. Young noted that in MUJI 17.10 (fraudulent omission--confidential or fiduciary relationship) the jury is asked to determine the existence of a duty. He suggested that the instruction should be structured as follows: A preliminary statement to the effect that the employee owed the employer a fiduciary duty to do (or not do) something (specify); then tell the

jury that it must decide whether the employee breached that duty. He suggested that the instruction be rewritten. He noted that the scope of the duty in any case will be fact specific.

Mr. Jemming was excused.

Mr. Wilde suggested revising the instruction to ask the jury to determine whether there was a fiduciary relationship (rather than a fiduciary duty). The instruction could define the types of fiduciary relationships that give rise to fiduciary duties in the employment context. The committee noted that the last sentence of 1913 is no longer accurate in light of the recent decision in *Sorensen v. Barbuto,* 2006 UT 340.

The instruction will be revised.

3. *1915. Contract damages. General damages.* Ms. Porter asked why the committee was using the terminology "general damages" and "consequential damages" (instruction 1916). Some committee members thought the use of the terms could only confuse the jury. Mr. Dewsnup noted that all damages are consequential in the sense that they are a consequence of the breach of duty. Mr. Young asked why the terms used in the tort damage instructions--economic and noneconomic damages--could not be used. Some committee members noted that in the employment or contract context, both general and consequential damages are generally economic. It is generally only where the breach of contract gives rise to an independent tort that the plaintiff is entitled to also recover noneconomic damages. Mr. Young asked what items of damage general damages include besides wages and benefits. Mr. Wilde suggested that diminution in retirement benefits and attorney fees may be recoverable in some cases. Mr. Humpherys suggested revising the instruction to say, "The items of damages are . . . ," and then simply list the damages claimed. He thought that the phrase "naturally flowing from the breach" was unnecessary and would not be understood by jurors. Ms. Porter noted that emotional distress may "naturally flow" from the breach, but is not generally recoverable. Dr. Di Paolo asked what the jury needed to know to do its job. Mr. Humpherys suggested that it only had to be told, "If you find a breach of contract, then you may award the following damages: . . ." It could then be told, "You may also award those damages that were contemplated by or reasonably foreseeable to the parties at the time the contract was made." Mr. West and Mr. Young suggested combining the damage instructions (1914-16) into one instruction. Mr. Simmons circulated a proposed draft that did that.

Mr. Shea will revise Mr. Simmons's draft in light of the committee discussion and circulate the revised instruction before the next meeting.

Mr. West suggested adding a comment to let judges and attorneys know that the committee has decided not to use the terms "general" and "consequential" damages but that

items 1 through x are what we used to call "general damages," and the other items are what we used to call "consequential damages."

Mr. Ferguson asked whether there might be tort and contract damages in the same case. If so, the instruction may need to be modified.

Ms. Porter noted that breach of contract cases in the employment context are not limited to termination cases, so the instruction should be worded broadly enough to cover other types of breaches.

4. *1917. Damages for wrongful termination in violation of public policy.* Mr. Humpherys thought that if both contract and tort damages are awardable in the same case, the jury should be instructed not to award double damages. Ms. Porter thought the problem could be handled through the special verdict form. Mr. Simmons thought that the jury should award damages for each of the plaintiff's theories and that any impermissible duplication should be eliminated by the court when the judgment is entered.

Mr. Shea will revise the instruction in light of the committee discussion and the other instructions on damages.

Mr. Wilde suggested that a reference to *Peterson v. Browning,* 832 P.2d 1280 (Utah 1992), be added to the references.

5. *1918. Damages. Employee duty to mitigate damages.* Ms. Porter thought that an employee has a duty to mitigate damages regardless of whether the employment he can find is "comparable." Messrs. Wilde and Dewsnup disagreed. They thought that a corporate vice-president who loses his job is not required to "sling hash at McDonald's" to mitigate his damages. Mr. Dewsnup thought that "comparable" included comparable compensation. Mr. Ferguson asked whether "comparable employment" is a term of art and whether the jury should be instructed in the factors it should consider in deciding whether or not other employment is "comparable." Mr. Wilde thought not. Mr. Young asked whether the instruction should address future damages (front pay). Ms. Porter noted that in Title VII employment cases, the Tenth Circuit has held that front pay is equitable, to be determined by the court and not by the jury. Mr. Humpherys thought the instruction was broad enough to cover both past and future damages. Dr. Di Paolo thought that the last sentence (on the burden of proof) should come before the second paragraph. Other committee members thought it fit better where it was because it applied to the instruction as a whole. At Mr. Shea's suggestion, the phrase "and the amount that could have been earned" was added to the end of the last sentence. Mr. Fowler suggested revising the instruction to read: "The employer claims that the employee has not mitigated his damages. The employer has the burden of proving that . . ."

Mr. Carney was excused.

Mr. Shea asked whether the instruction applies to pre- or post-trial actions. Mr. Young suggested that, if the law is not clear, the issue should be raised in a comment.

6. *1919. Special damages. Unemployment compensation.* Ms. Porter suggested bracketing the specific collateral sources, since not all will apply in every case. She also suggested revising the title of the instruction so that it does not appear to be limited to unemployment compensation. Mr. Young asked how evidence of collateral sources would have come into evidence in the first place, to even provide a basis for the instruction. The hour being late, the committee deferred further discussion of this instruction for a later meeting.

7. *Other.* Mr. Dewsnup asked whether there should be a jury instruction on the tax implications of employment awards.

The meeting concluded at 6:10 p.m.

Next Meeting. The next meeting will be Monday, October 16, 2006, at 4:00 p.m. This is the third Monday in October since the courts will be closed the second Monday in October for Columbus Day.