MINUTES
Advisory Committee on Model Civil Jury Instructions
October 16, 2006
4:00 p.m.

Present: Ralph L. Dewsnup, Marianna Di Paolo, Phillip S. Ferguson, L. Rich Humpherys, Stephen B. Nebeker, Timothy M. Shea, Paul M. Simmons, Robert H. Wilde, and John L. Young (chair)

Excused: Honorable William W. Barrett, Jr., Paul M. Belnap, Juli Blanch, Francis J. Carney, Tracy H. Fowler, Jathan Janove, Jonathan G. Jemming, Colin P. King, David E. West

Draft Instructions

The committee continued its review of the employment instructions.

1. *1911. Breach of employment contract. Just cause.* Mr. Wilde presented a revised instruction 1911, which was rewritten in light of *Uintah Basin Medical Center v. Hardy,* 2005 UT App 92, 110 P.3d 168. Mr. Ferguson reported that Karra J. Porter of his office thought that the revised instruction improperly put the burden of proof on the employer to prove just cause, rather than requiring the plaintiff to prove that he was terminated without just cause. She suggested rewriting the instruction to place the burden on the plaintiff to show the lack of just cause. The committee debated who has the burden to show that a termination was or was not for just cause. Mr. Wilde thought that Utah courts would follow the burden-shifting analysis of the *McDonald-Douglas* case, analogizing an employee whose employment contract requires just cause for termination to an employee in a protected class. Thus, if he shows that his contract requires just cause for termination and that he was terminated, he has established a prima facie case, and the burden should shift to the employer to provide a legitimate reason for the termination. If he does not, the employer loses, but if he does, the burden then shifts back to the employee to show that the proffered reason is pretextual. Mr. Ferguson (and Ms. Porter) thought that just cause for a termination was not an affirmative defense and that to establish a prima facie case the plaintiff must show that he was terminated for something other than just cause. Mr. Young read the comparable California instructions (CACI 2404 and 2405), which appear to say that, if the employee makes out a prima facie case of wrongful termination, the burden shifts to the employer to justify the termination. The employee can then show that the asserted justification is pretextual. Mr. Wilde thought that Utah would follow the California approach, since the California case cited as authority (*Cotran v. Rollins Hudig Hall Int'l, Inc.,* 948 P.2d 412 (Cal. 1998)) was cited with approval in the *Uintah Basin* case. Messrs. Young and Simmons suggested leaving the instruction as is but with a committee note saying that it should only be given after the court determines that the plaintiff has made out a prima facie case of wrongful termination. Mr. Humpherys asked, If the burden shifts and the employer does not put on any evidence, does that mean the plaintiff is entitled to a directed verdict? The committee asked whether Ms. Porter had authority for her position. Mr. Humpherys called Ms. Porter, and she explained her views to the committee by telephone. In her opinion, breach of contract cases are

different from Title VII cases. The plaintiff has the burden of proving a breach of contract, which means proving that he was terminated for a reason other than just cause. He can do this by proving that the asserted reason for his termination was pretextual, but the burden never shifts to the employer to establish just cause. There is no Utah authority adopting either approach. The committee decided to draft a note stating that it had discussed differences between statutory title VII cases and common law claims, and it is not clear which approach the Utah Supreme Court would adopt.

Messrs. Shea and Wilde will draft a committee note explaining the issue.

2. *1913. Fiduciary duty.* Mr. Ferguson reported that Ms. Porter thought that there should be a committee note stating that some relationships are fiduciary as a matter of law. The committee debated whether to use the term "fiduciary" in the instruction, since it is not a term familiar to jurors. Mr. Dewsnup suggested "relationship of trust." Mr. Young thought that the title should refer to fiduciary duties so that lawyers and judges will understand what the instruction is intended to cover. He suggested calling the instruction, "Special duty of trust (fiduciary duty)." Mr. Young also questioned whether the term "fidelity" would be understood. Mr. Dewsnup suggested "faithfulness" or "loyalty." Mr. Humpherys expressed concern with referring to the duty as a special duty of trust and then defining it using other words.

Dr. Di Paolo joined the meeting.

Mr. Dewsnup thought that, by the end of the case, the jury would understand what the term fiduciary means. Mr. Humpherys, however, thought that the term would only be used by the lawyers and not be explained by the evidence. Dr. Di Paolo thought it is okay to use specialized terms if they are defined up front. Mr. Young suggested reversing the order of the first two sentences. Mr. Ferguson thought the first sentence was okay but that the second sentence should start out, "A fiduciary duty means . . ." Mr. Dewsnup thought that the instruction as written adequately defined fiduciary duty. Mr. Shea pointed out that the second paragraph uses the term "extraordinary relationship," rather than "fiduciary duty" (or "relationship"), without defining it. Mr. Humpherys suggested using one term consistently. Mr. Shea asked whether there is a difference between a fiduciary duty and a fiduciary relationship. Mr. Simmons questioned whether the existence of a fiduciary duty was a question for the court or the jury. The committee thought that it may depend on the facts, in which case it would present a jury question. Mr. Dewsnup suggested revising the second sentence of the instruction to read: "To prevail on this claim, [name of defendant] must prove that [name of plaintiff] both had and violated an extraordinary duty of fidelity, confidentiality, honor, trust and dependability." At Dr. Di Paolo's suggestion, "fidelity" was moved to follow "trust." Messrs. Nebeker and Shea thought the instruction did not adequately tell the jury what the effect is if it finds a breach of fiduciary duty. Mr. Young asked whether there were any defenses to a breach of fiduciary duty, or, once a breach

is found, the case is over. Mr. Ferguson thought that comparative fault is a defense. The committee agreed that the effect of a finding of breach may depend on the pleadings and the evidence. Messrs. Dewsnup and Humpherys thought that the instruction should say as much. Mr. Young thought that the matter could be handled by the special verdict form. After further discussion, the committee agreed to add a comment to the effect that a claim of breach of fiduciary duty may arise in several ways--for example, as an affirmative defense, as a counterclaim, or as a claim for a setoff--and that the court and the parties will need to fashion a follow-up instruction telling the jury the appropriate remedy if it finds a breach, based on the pleadings and the evidence.

3. *1914. Contract damages.* Mr. Shea noted that he had combined former instructions 1914 through 1916 into one instruction and had incorporated instruction 2002 on proof of damages. Mr. Humpherys thought the first two sentences were redundant, and Mr. Wilde pointed out that the instruction relates only to contract damages, not to damages for wrongful termination in violation of public policy. Accordingly, the first two sentences were revised to read:

> If you find that [name of defendant] breached the contract with [name of plaintiff], then you may award damages--
>
> (1) for the salary and other benefits that [name of plaintiff] would have received . . . .

Mr. Young suggested adding a committee note specifying the other benefits that are possible, such as medical benefits, retirement benefits, etc. The committee note should also explain that for other employment claims, other damages are available, and cross-reference applicable instructions. For example, tort damages are available for wrongful termination in violation of public policy (instruction 1917), and statutory damages are available for a title VII violation.

Mr. Wilde will prepare such a note.

At Mr. Dewsnup's suggestion, the phrase "reasonably certain" was changed to "reasonably likely." Mr. Dewsnup also suggested adding "also" to the fourth paragraph, so that it reads, "To be entitled to damages, [name of plaintiff] must also prove two points," since the plaintiff must first prove liability. Dr. Di Paolo noted that the fifth and sixth paragraphs seemed to say the same thing, that neither the fact of damage nor the amount of damage can be left to speculation. Mr. Humpherys suggested deleting the phrase "not just speculation" from both paragraphs. Mr. Nebeker noted that the word "fault" at the end of the fifth paragraph should be changed, since the instruction deals with breach of contract, not a tort. Mr. Dewsnup suggested replacing it with "defendant's conduct." Mr. Young suggesting reversing the order of the sentences in paragraph six, to read: "Although the law does not require damages to be proved to a mathematical

certainty, there must be evidence that gives a reasonable estimate of the amount of damages. The level of evidence required to prove the *amount* of damages is not as high as what is required to prove the *occurrence* of damages." Mr. Shea asked if instruction 2002 should be amended to conform to the changes to instruction 1914. The committee did not think it needed to be modified.

4. *1917. Damages for wrongful termination in violation of public policy.* At Mr. Humpherys' suggestion, the first paragraphs were revised in accordance with the changes to instruction 1914. They now read:

> If you find that [name of defendant] wrongfully terminated [name of plaintiff], then you may award economic damages to [name of plaintiff]--
>
> (1) for the salary and other benefits that [name of plaintiff] would have received . . . .
>
> (2) for other items of damage.

The language "that you find were contemplated by the parties or reasonably foreseeable . . ." was deleted, since it states a standard for contract damages and not tort damages.

> **Mr. Wilde will provide Mr. Shea with a list of other items of damage that are recoverable for wrongful termination.**

Mr. Wilde noted that punitive damages may also be available. Mr. Humpherys noted that "noneconomic damages" are only meaningful to the extent they are contrasted with "economic damages." Mr. Dewsnup noted that someone had questioned the use of the terms "economic" and "noneconomic" damages at a recent CLE presentation because all damages are economic in the sense that they are monetary compensation. Dr. Di Paolo noted that she was also troubled by the use of the terms and asked where they came from. The committee noted that they are used in Utah's medical malpractice statute and in California's new jury instructions. Mr. Young thought use of the terms would not be a problem for jurors because they will be defined in the jury instructions. The bigger question is whether by substituting "economic" and "noneconomic" for "special" and "general" damages (or "general" and "consequential" damages), we are changing the law or creating two different vocabularies--one for juries and one for other areas of the law. If so, use of the terms may have unintended consequences. Mr. Young noted that in drafting pleadings and other legal papers, it would probably be a good idea to use both terms, for example, "The plaintiff prays for economic (general) and noneconomic (special) damages."

The meeting concluded at 6:10 p.m.

Next Meeting. The next meeting will be Monday, November 13, 2006, at 4:00 p.m.