MINUTES

Advisory Committee on Model Civil Jury Instructions
August 11, 2008
4:00 p.m.

Present: John L. Young (chair), Francis J. Carney, Dr. Marianna Di Paolo, Phillip S. Ferguson, Tracy H. Fowler, Gary L. Johnson, Stephen B. Nebeker, Timothy M. Shea, Paul M. Simmons, Peter W. Summerill. Also present: P. Bruce Badger, Katie Carreau, Todd Shaughnessy, Elliott J. Williams

1. *Medical Malpractice Instruction CV324. Use of alternative treatment methods*. Mr. Carney noted that he had cleaned up the instruction and the committee note. He indicated that the instructions were generally agreed to as a group and that the defense attorneys on the medical malpractice subcommittee had made concessions. Mr. Carney noted that this was an instruction that the defense bar felt strongly about. Mr. Carney was concerned that, if the instruction was rejected, the defense bar may want to go back and revisit all the medical malpractice instructions. Mr. Carney noted that he personally might not favor the instruction in the abstract, but he recommended that the committee approve the instruction. Mr. Williams spoke in favor of the instruction, noting that it has a long history, beginning with a California pattern instruction and continuing through JIFU and MUJI 1st. He said the instruction was an effort to give effect to what doctors would expect the law to be. He said that the plaintiffs' attorneys on the MUJI 1st committee did not have a problem with it. He noted that the subcommittee voted 3-1 in favor of the instruction. The committee voted to approve the instruction, with Messrs. Carney, Fowler, Johnson, and Nebeker voting in favor of the instruction, and Mr. Simmons abstaining. Mr. Williams was excused.

Messrs. Ferguson and Summerill joined the meeting. Mr. Summerill expressed concern that the committee had voted on the instruction without him. He objected to the phrase in the instruction that says "it is not medical malpractice" to select an approved alternative method of treatment and proposed revising the instruction to read:

> When there is more than one method of [diagnosis/treatment etc.] that is approved by a respectable portion of the medical community, and no particular method is used exclusively by all providers, you may consider that in determining whether or not the physician failed to follow the standard of care as outlined above. The provider has the burden to prove that the method used is approved by a respectable portion of the medical community.

He also proposed cross-referencing CV301, which defines the standard of care. Mr. Young was reluctant to reopen the matter since Mr. Williams had not seen the proposal and had been excused, but he indicated that Mr. Summerill could bring the matter back to the committee at its next meeting if the subcommittee approved it. Mr. Carney said that he would be willing to take Mr. Summerill's proposal back to the subcommittee and see if the subcommittee would be willing to revisit the issue.

2. *Product Liability Instruction CV1057. Safety risks*. Mr. Young noted that the committee had deadlocked on this instruction at the last meeting. Mr. Young indicated that he would not break the tie at this time but asked the subcommittee to revisit the instruction and explain why it was not covered by CV1005 and CV1009. He noted that the instruction appeared to be an attempt to make the issue of duty a matter of instruction rather than a question of law for the court to decide.

Dr. Di Paolo joined the meeting.

3. *Contract Instructions*. The committee continued its review of the contract instructions. Mr. Young welcomed Mr. Badger, the chair of the contracts subcommittee, and Mr. Shaughnessy and Ms. Carreau to the meeting. Mr. Badger had responded in writing to some of the questions that the committee had raised the last time it considered the contract instructions, and Mr. Shea had circulated his responses to the committee.

a. *CV2103, Creation of a contract, & CV2107, Consideration*. The committee had suggested a note saying that the instructions apply only to executory contracts and not to unilateral contracts. Mr. Badger asked whether the committee meant "bilateral" contracts, instead of "executory contracts." The committee said it did. The subcommittee will propose comments for these instructions.

b. *CV2109. Unspecified time of performance*. The committee had asked what role the plaintiff's expectations play in determining time of performance. Mr. Badger noted that the case law says that what constitutes a reasonable time must be determined from all the relevant circumstances but does not specify what circumstances are relevant. The subcommittee recommended the following substitute instruction:

> When a provision in a contract requires an act to be performed without specifying the time to perform the act, the act must be done within a reasonable time under the circumstances.
>
> Because the contract does not require [name of defendant] to [describe the act] by a particular date or time, you will need to decide, based on all of the circumstances, what a reasonable date or time was for [name of defendant] to [describe the act].

At Mr. Shaughnessy's suggestion, "name of defendant" was changed to "name of party." As modified, the substitute instruction was approved.

c. *CV2113. Disputed condition precedent.* The committee had asked whether the instruction was limited to verbal or implied conditions. The subcommittee thought that whether a contract contains a condition precedent is a question of law if the contract is in writing, and that the only time a jury needs to decide if a condition precedent exists is if the contract is oral or implied. If the court determines that the written contract is unambiguous, then the existence of the condition precedent is a matter of law, and the jury only decides if the condition has been satisfied. But if the court determines that the contract is ambiguous, then the jury decides whether the contract contains a condition precedent. Accordingly, the subcommittee recommended revising the instruction to read as follows:

> [Party's name] claims that [he] did not have to [describe the obligation] unless [describe the alleged condition] occurred first. Based on the evidence, you must decide whether the parties intended that this condition was part of the contract. If you decide that this condition was part of the contract, then [party's name] had to [describe the obligation] before [other party's name] was required to perform his contract obligations.

The committee approved the revised instruction.

d. *CV2114, Performance excused by material breach, & CV2118, Material breach.* Ms. Carreau suggested dropping CV2114 in favor of CV2118, which she thought was a clearer statement of the law. Dr. Di Paolo thought that CV2114 was clearer because it defined "material," whereas CV2118 uses "material" without explaining it. Dr. Di Paolo suggested that CV2118 would be clearer if it were broken up into paragraphs. The committee revised CV2118 to read:

> You must decide if there was a material breach of the contract.
>
> A breach is material if a party fails to perform an obligation that was important to fulfilling the purpose of the contract.
>
> A breach is not material if the failure was minor and could be fixed without difficulty.
>
> If you decide that [name of defendant] materially breached the contract, then [name of plaintiff] was excused from doing what [he] had promised to do under the contract.

CV2118 was approved as revised, subject to a proposal from Dr. Di Paolo to modify the instruction if she chooses to make one. CV2114 was deleted.

e. *CV2119. Total breach.* At Mr. Badger's suggestion, the instruction was deleted as unnecessary.

f. *CV2115. When performance is not excused by other party's non-performance.* The committee had suggested a note on who has the burden of proof. Mr. Summerill noted that whoever claims that his performance was excused should have the burden of proof. The committee approved the instruction as written.

g. *CV2121. Anticipatory breach.* The committee had questioned what the standard of proof is to show an anticipatory breach. Mr. Badger noted that the case law consistently says that a party must "positively and unequivocally" show that he or she does not intend to perform the contract. Courts look to whether the party's language was sufficiently positive that it expressed a clear intent not to perform the contract. Mr. Simmons thought it was confusing to use "material breach" in this instruction when it is defined differently in CV2118. Mr. Shea noted that CV2118 defined "material breach" as a failure to do something, whereas this instruction deals with one party saying it will not do something. Messrs. Young and Shea suggested saying, "An anticipatory breach must be a material breach." Messrs. Carney and Ferguson and Ms. Carreau suggested not using the word "material." The subcommittee proposed a new instruction CV2121. Dr. Di Paolo suggested revising the first sentence of the new instruction to read, "[Name of plaintiff] claims that [name of defendant] breached the contract by making statements that he was not going to perform an important contract obligation." Mr. Badger suggested: "[Name of plaintiff] claims that [name of defendant] breached their contract by making statements that he was not going to perform a contract obligation that was important to fulfilling the purpose of the contract. A party must indicate positively and unequivocally that he does not intend to perform his contract obligations to materially breach the contract." Dr. Di Paolo thought that lay people take "positively" to mean "without any negatives," and to say, "I won't perform the contract" is a negative statement and therefore not a "positive" and unequivocal refusal to perform. Mr. Ferguson noted that "positively" is a philosophical term (related to "positivism") and may be misunderstood. Mr. Carney suggested a synonym, such as "definitively" or "unambiguously." Mr. Shea thought the instruction would be clear if it just said "unequivocally" or "clearly" and not "positively and unequivocally," perhaps with a committee note saying that the committee did not intend any substantive change in the law but was just trying to make the instruction understandable for lay people. Mr. Nebeker asked whether the cases distinguish between "positively"

and "unequivocally." Dr. Di Paolo noted that, if the instruction uses the term "positively," it should be defined in the instruction so that the jury does not use the wrong definition of it. Mr. Badger suggested making the second sentence of the first paragraph the last sentence. He proposed revising the first paragraph of the instruction to read:

> If a party merely says that he doesn't want to perform his contract obligations, or that he has misgivings about the contract, this isn't enough to constitute a material breach of contract. But when a party is supposed to perform his obligation at some time in the future, it is a material breach of contract if he manifests positively and unequivocally that he does not intend to perform his contract obligations when the time arrives. [Name of plaintiff] claims that [name of defendant] materially breached their contact by making statements that he was not going to perform his contract obligation.

Mr. Shaughnessy and Ms. Carreau suggested replacing "manifests" with "indicates." Mr. Young noted that the instruction is called "Anticipatory breach," yet the word "anticipate" (or any of its forms) does not appear in the instruction. The subcommittee noted that an anticipatory breach gives the nonbreaching party three options but did not think the jury needed to be instructed on the options. At Mr. Badger's suggestion, the instruction was referred back to the subcommittee for reconsideration in light of the committee's discussion.

h. *CV2122. Implied covenant of good faith and fair dealing*. Mr. Humpherys had expressed concerns about the instruction, but he was not at the meeting to explain his concerns. The committee noted that there will be separate jury instructions on insurance bad faith. Mr. Badger did not think that bad faith in other contractual situations required any more than what CV2122 provided. Mr. Summerill thought the instruction was unwieldy. Mr. Carney thought the instruction should make clear that the court should only instruct on the limits set out in the second paragraph that apply in the particular case. The subcommittee will revisit the instruction.

i. *CV2125, Duress, & CV2126, Improper threat*. Mr. Young asked whether the instructions cover economic duress. The subcommittee will revisit CV2125 and CV2126.

j. *CV2130, Substantive unconscionability, & CV2131, Procedural unconscionability*. The subcommittee was not prepared to discuss CV2130 and CV2131, so further discussion was deferred until the next meeting.

4. *New Committee Member*. Messrs. Young and Carney made a joint motion to add John Lund of Snow, Christensen & Martineau as a member of the committee. Mr. Johnson seconded the motion. There was no opposition.

5. *Next Meeting*. Mr. Young thought that the committee needed to meet twice in September and October to get back on schedule. The next meeting will be Monday, September 8, 2008, at 4:00 p.m. The committee will try to finish the contract instructions at that meeting. The committee will then meet on Monday, September 22, 2008, to discuss the motor vehicle accident instructions. The committee will also meet on Tuesday, October 14, 2008 (because Monday, October 13, is Columbus Day) and may meet again on Monday, October 27, 2008, if necessary.

The meeting concluded at 6:00 p.m.