

## ***MINUTES***

Advisory Committee on Model Civil Jury Instructions

April 11, 2011

4:00 p.m.

Present: John L. Young (chair), Honorable William W. Barrett, Jr., Francis J. Carney, Marianna Di Paolo, Phillip S. Ferguson, Gary L. Johnson, Timothy M. Shea, Paul M. Simmons, Ryan M. Springer, Peter W. Summerill, David E. West, Dianne Abegglen, and David A. Cutt

Excused: Juli Blanch, Tracy H. Fowler, Honorable Deno Himonas, L. Rich Humpherys, Honorable Kate A. Toomey

1. *CV1109. Recovery for injury to ski resort patrons.* David A. Cutt joined the meeting to discuss CV1109. Mr. Cutt thought that the instruction was inadequate. He noted that the case law construing the Inherent Risks of Skiing Act recognizes two categories of risks: those skiers expect to encounter, such as steep slopes and weather conditions, and those they would not want or expect to encounter, such as man-made structures on a ski run. The former are inherent risks of skiing for which a ski resort owner or operator cannot be liable, whereas an owner or operator can be liable for the latter if the risk could have been made safer through the exercise of reasonable care. Mr. Cutt noted that the instruction uses the term “risks of skiing,” rather than the statutory term “inherent risks of skiing.” Mr. Young explained that the committee was trying to simplify instructions by replacing terms of art with terms jurors would understand. Mr. Cutt, who represents injured skiers, said that he had discussed the instructions with Kevin Simon, who represents ski resorts, and the two agreed that more instructions were needed. He offered to work with Mr. Simon to come up with an agreed set of jury instructions. The two have a case going to trial beginning June 6, 2011, so they will need to prepare a set by then in any event. The committee accepted Mr. Cutt’s offer and agreed to withdraw CV1109 in the meantime. Mr. Cutt was then excused. Messrs. Ferguson, Shea, and Summerill agreed to serve as the “Gang of Three” to review the proposed instructions that Messrs. Cutt and Simon submit for readability.

2. *“Jury Service in Utah.”* Mr. Shea played for the committee the new video “Jury Service in Utah,” which is being distributed to courts this week. Mr. Ferguson thought it made some of the general jury instructions superfluous, but Dr. Di Paolo thought that it was helpful to repeat the material in the general jury instructions.

Ms. Abegglen was excused.

3. *CV101, General admonitions.* Mr. Shea presented a new CV101, which he based on the American College of Trial Lawyers’ jury instruction that Mr. Carney had circulated following the last meeting. Mr. Shea’s proposal would replace both CV101A, “General admonitions,” and CV101B, “Further admonition about electronic devices.” The committee deleted “or your jury service” from the fourth paragraph, telling the jury that they must not communicate with anyone about the case. The committee also added “about this case” to the next paragraph, following the phrase “must not talk with your

fellow jurors.” The committee also replaced the phrase “until I give you the case for deliberation” with “until I send you out to deliberate.” Similarly, at Mr. Summerill’s suggestion, the last line of the instruction was changed from “until all the evidence is in” to “until I send you to deliberate.” Mr. Carney asked whether jurors should be required to sign an affirmation such as the one the ACTL proposed. Mr. Shea thought that if such a change were to occur, it should go through the administrative process. He suggested that, alternatively, a reminder could be posted in the jury room, or the jurors’ oath could be modified to accomplish the same result. A number of committee members thought that asking jurors to sign an affirmation was inappropriate and implied that the court and the litigants did not trust them. Judge Berrett noted that, in his experience, jurors as a whole are conscientious and try very hard to do what they are supposed to do. The committee questioned whether it was necessary to say anything about sequestering juries. Some thought it was necessary because jurors will have heard of the practice or seen it on television. The committee changed that part of the instruction to say, “sequester, or isolate, . . . .” The committee approved the instruction as modified. The instruction will replace CV101A and 101B. Mr. Carney suggested sending the approved instruction to the committee preparing the model criminal instructions for its consideration.

Mr. Springer was excused.

4. *CV111. Definition of “person,” and CV107, All persons are equal before the law.* Dr. Di Paolo suggested combining CV111 and CV107. Mr. Shea noted that CV111 applies to other sets of instructions, not just the general or preliminary instructions. Mr. Johnson thought that including both paragraphs of CV107 in the same instruction may suggest to the jury that it should be prejudiced against a corporation. Mr. Young noted that the instruction was meant to minimize that concern and not isolate corporations for special treatment. Mr. Ferguson asked whether taking the second paragraph out of CV107 would cause more problems. Mr. Johnson suggested combining the second paragraph of CV107 with CV111. The committee decided to keep CV111 a separate instruction and to divide CV107 into two instructions. The first paragraph will be its own instruction, titled “Jurors may not decide based on sympathy, passion and prejudice.” The second paragraph will be a separate instruction titled “All persons equal before the law.” The committee approved the instructions as so modified.

5. *CV112. Multiple parties.* Dr. Di Paolo said that she would leave the instruction as it was, that it did not need to be shortened. At Mr. Carney’s suggestion, the committee left “each plaintiff and each defendant” in the second sentence but replaced it with “all parties” in the third sentence. The committee approved the instruction as modified.

6. *CV113, Multiple plaintiffs, and CV114, Multiple defendants.* The committee approved CV113 and CV114 as modified (to delete the phrase “in this action” from each).

7. *CV115. Settling parties.* Dr. Di Paolo suggested revising the instruction to make it clear that parties may settle only part of their dispute. At Mr. Summerill’s suggestion, “parties” was replaced with “persons” throughout, since a person may settle before he or she is ever brought into the lawsuit as a party. Mr. Young noted that, by referring to persons who were “at fault,” the instruction applies to tort cases but may not apply to commercial, non-tort cases as written. Mr. Simmons questioned whether the jury would have to decide any issues relating to nonparties in a non-tort case. Mr. Ferguson suggested having separate instructions for tort and non-tort cases. Mr. Summerill suggested dealing with the problem in a committee note saying that the instruction may need to be adapted for non-tort cases. Mr. Summerill also suggested leaving the specifics of fault allocation to the jury instruction dealing with allocation of fault. Mr. Ferguson questioned whether the term “settlement agreement” should be included in the instruction, since the agreement itself is rarely if ever given to the jury. The committee revised the second paragraph of the instruction to read:

There are many reasons why persons settle their dispute. A settlement does not mean that anyone has conceded anything. Although [name of settling person] is not a party, you must still decide whether any of the persons, including [name of settling party], were at fault.

You must not consider the settlement as a reflection of the strengths or weaknesses of any party’s positions.

The title of the instruction was changed to “Effect of settlement.” The committee approved the instruction as modified.

**Mr. Shea will draft a committee note for the instruction.**

Mr. West was excused.

8. *CV117. Preponderance of the evidence.* Mr. Johnson suggested leaving in the phrase “I must emphasize to you that” in the second paragraph. He thought the instructions could not emphasize enough the differences between civil cases and criminal cases and noted a recent jury trial in which the jurors were overheard to frame the issue as whether the defendant was “guilty of products liability.” The rest of the committee was okay with deleting the quoted language as proposed, but, at Dr. Di Paolo’s suggestion, the second paragraph was made the first paragraph of the instruction. The committee approved the instruction as modified.

9. *CV118. Clear and convincing evidence.* The committee approved this instruction as modified.

10. *CV119. Evidence.* Mr. Shea noted that the deletions to CV119 were made because the matters are now covered in new CV101. Dr. Di Paolo thought the term “stipulate” would not be clear to the average juror. Mr. Carney suggested doing away with the term altogether, but Dr. Di Paolo thought it was helpful to include it because the jury will hear the attorneys referring to stipulations. The committee took “stipulations” out of the first paragraph and revised the penultimate paragraph to read, “The lawyers might agree, or stipulate, to a fact . . . .” The committee approved the instruction as modified.

11. *CV120. Direct and circumstantial evidence.* The committee approved the instruction as modified.

12. *CV126. Depositions.* Mr. Summerill questioned whether the phrase “may be received in evidence” is clear to a lay person. The committee thought that it might lead jurors to think that they can take the deposition transcripts with them into the jury room. At Mr. Ferguson’s suggestion, the first sentence was deleted from the instruction. The committee approved the instruction as modified.

13. *CV127. Limited purpose evidence.* The committee approved the instruction as modified.

14. *CV131. Spoliation.* Mr. Johnson said that he would like to review *Hills v. UPS*, 2010 UT 39, before considering CV131, so the committee deferred discussion of the instruction until the next meeting.

15. *Approval dates.* Mr. Summerill asked whether the dates on which an instruction was approved and revised could be included in the on-line database. Mr. Shea thought that they could be but said that we could not track all of the changes to an instruction on-line, as some publishers do with statutory revisions. For changes to instructions and the reasons for the changes, one would have to review the committee minutes, but including the date the instruction was approved or revised would make searching the minutes easier.

16. *Special verdicts.* Mr. Summerill circulated before the meeting, by e-mail, drafts of proposed special verdict forms. He noted that the special verdict forms currently included in MUJI 2d do not cover multiple parties and non-parties who may have fault apportioned to them. Mr. Carney noted that they also do not make it clear

that the jury must award general damages if it finds liability in a tort case. The committee deferred further discussion of the special verdict forms until a later meeting.

17. *Next Meeting.* The next meeting will be Monday, May 9, 2011, at 4:00 p.m., in the Education Room.

The meeting concluded at 6:00 p.m.