MINUTES

Advisory Committee on Model Civil Jury Instructions
October 9, 2012
4:00 p.m.

Present: John L. Young (chair), Diane Abegglen, Marianna Di Paolo, Phillip S. Ferguson, Honorable Ryan M. Harris, Gary L. Johnson, Timothy M. Shea, Paul M. Simmons, Honorable Andrew H. Stone. Also present: Craig R. Mariger, chair of the Design Professional subcommittee (by phone) and Craig C. Coburn, of the Design Professional subcommittee

Excused: Francis J. Carney, Ryan M. Springer, Peter W. Summerill, David E. West

1. *New Member:* Mr. Young introduced Judge Stone as the newest member of the committee. He also welcomed Messrs. Mariger and Coburn to the meeting.

2. *Professional Liability: Design Professionals*. The committee discussed the draft instructions for cases against design professionals.

a. *CV501. Standard of care for design professionals*. Mr. Coburn thought that the edits to the first paragraph by the gang of three were acceptable. The committee discussed whether the Uniform Building Code establishes the standard of care and concluded that it did not necessarily. Mr. Young observed that the building code is a moving target in Utah, since it can be amended by counties and cities. Mr. Mariger noted that the clearest case of design professional negligence involves a code violation and that most cases involve experts arguing over what the code requires. But the committee agreed not to make a code violation a requirement for breach of the standard of care.

Mr. Young asked whether the instruction should say "A licensed [design professional] . . . ," since design professionals must be licensed in Utah. Mr. Mariger noted that home designers do not have to be licensed for certain activities.

At least one member of the subcommittee thought that the locality requirement was meant to make plaintiffs hire local experts, but Mr. Mariger noted that some standards for some design services, such as geotechnical engineering services, may vary greatly from, say, Texas to Utah. He further noted that the instruction says that if there is evidence that the standard varies with the locality, then the jury should apply the standard for the locality at issue. Mr. Young asked whether it was for the judge or the jury to decide whether the standard varied with the locality. Mr. Mariger thought it was for the jury, based on the expert testimony the judge allows into evidence. Mr. Simmons questioned whether the sentence "The standard of care may change over time and may be different in different localities" was necessary. Dr. Di Paolo thought it was helpful. At Mr. Ferguson's suggestion, the committee decided to leave in the sentences about the locality rule but to bracket them, since it is not an issue in every case. Mr. Shea will add a note to the committee note about the reason for

the brackets. Mr. Shea suggested changing "localities" to "places." Dr. Di Paolo thought that "localities" implies a political unit. Mr. Mariger thought the standard varied by geography or region and not by the particular local governmental unit. He suggested using "geographic location" if the committee thought "localities" was not clear enough. Dr. Di Paolo did not think juries would misunderstand the term. At Mr. Shea's suggestion, the committee deleted "at issue in this matter" from the last sentence of the first paragraph and changed "community" to "locality."

Mr. Simmons thought the second paragraph was similar to the "mere fact of an accident" instructions that the Utah Supreme Court has held to be improper. Mr. Coburn noted that the language was taken from *SME Industries, Inc. v. Thompson, Ventulett, Stainback & Associates, Inc.,* 2001 UT 54, 28 P.3d 669. Mr. Simmons said that his objection was not that the instruction did not accurately state the law but that the court has said that juries should be instructed on what the law requires, not on what it does not require. Mr. Mariger said he would defer to the committee, but he thought lay people think that professionals have to be perfect. Mr. Coburn noted that *SME* says that the law does not require a "perfect plan or outcome" and that a design professional does not warrant results. The committee noted that similar instructions have not been included in the negligence or medical malpractice instructions. Judge Harris thought the design professional context was different and was inclined to leave the paragraph in. Messrs. Young and Ferguson agreed, noting that in medical malpractice there are not plans, blueprints, and change orders that can solve or create problems. The committee voted to include the language, with Judge Stone and Mr. Simmons opposing the motion. Mr. Ferguson questioned the use of "inherent" and suggested, "There is always the possibility of error in the professional services of [the design profession] . . . ." Mr. Young thought "always" goes further than "inherent." Mr. Mariger said that the case law says "inescapable possibility of error." The committee agreed that this language was worse. Judge Stone thought the language could be read as giving the design professional a pass. He noted that a single error in 1000 pages of plans can violate the standard of care, depending on the error. Messrs. Mariger and Coburn agreed. The committee debated whether to say "the law does not require . . ." or "the standard of care does not require . . . ." Dr. Di Paolo favored "the law"; Judge Harris and Mr. Shea favored "the standard of care," since that is the subject of the instruction and the term being defined. Mr. Shea suggested adding to the end of the first paragraph, "The standard of care does not require a perfect plan or satisfactory result," and deleting the rest of the second paragraph. Judge Harris suggested adding the word "necessarily" ("The standard of care does not necessarily require . . ."). Messrs. Mariger and Coburn disagreed. They thought the addition of "necessarily" was not supported by case law and that a satisfactory result was a matter of contract, not part of the standard of care. Dr. Di Paolo

suggested: "The law does not require perfect plans or a satisfactory result but rather requires compliance with the standard of care." Judges Harris and Stone and Mr. Simmons thought this language was acceptable.

At Mr. Shea's suggestion, the committee replaced "injury" with "harm" and "the cause" with "a cause" throughout the instruction and agreed to remove the quotations from the References section, just citing the cases.

Dr. Di Paolo asked whether the third paragraph of the instruction was redundant. Messrs. Mariger and Coburn thought it was necessary to show that the plaintiff has the burden of proving the standard of care. Judge Stone asked why the plaintiff's specific theories were listed. Mr. Shea and Judge Harris noted that the same format is used in the medical malpractice and negligence instructions. Mr. Shea questioned whether the sentence "[Name of defendant] is an [specify type of design professional]" was necessary. Judge Harris and Mr. Young thought so, especially if the instruction is read at the beginning of trial.

The committee approved the instruction as modified.

b. *CV502. More than one recognized practice.* Mr. Young asked whether there was a Utah case that supported the instruction. Judge Harris thought that it contradicted CV501. Mr. Coburn noted that the intent was to say that professionals can disagree about a practice without it necessarily violating the standard of care. Dr. Di Paolo thought the instruction was confusing. She was troubled by the phrase, "if the practice . . . turns out to be the wrong choice . . . ." Judge Stone thought the instruction implied that one can violate the standard of care as long as he or she used his or her best judgment, even if that judgment was poor. Mr. Johnson moved to delete the instruction; Judge Harris 2d. The committee voted to eliminate the instruction.

c. *CV503. Standard of care of a specialist.* Mr. Young asked whether there are specialists among design professionals and whether the instruction is supported by Utah law. Mr. Mariger thought it was similar to medical malpractice, where there are board-certified specialists. He thought that if design professionals hold themselves out as specialists, they should be held to a higher standard of care. He gave as an example a geotechnical engineer who says he is an expert in shoring and bracing design. Merely being a geotechnical engineer is not enough to impose a higher standard of care on the defendant, but when the defendant holds himself or herself out as a specialist within his or her field, then he or she should be held to a higher standard of care. But Mr. Mariger recognized that there could be a problem with insurers denying coverage because the professional is agreeing to a standard of care that is greater than the contract requires. Mr. Ferguson thought the instruction should be included unless there was contrary case law. Mr. Johnson 2d. Judge Harris asked if other states have adopted such an instruction. Judge Stone thought it followed from the medical

malpractice cases but expressed concern that it could encourage ultrafine distinctions among experts. Mr. Coburn suggested a distinction between claimed specialties and recognized specialties. Mr. Mariger thought the better analogy was to attorneys, who are generally not board certified but hold themselves out as specialists in various fields. He thought that it was the act of holding oneself out as a specialist that created the higher standard of care. At Judge Stone's suggestion, the committee agreed to delete the last paragraph of the instruction, leaving it to the trial judge to qualify an expert on the standard of care. Whether an expert's testimony is admissible will be decided in a rule 702 hearing. Mr. Young suggested that the subcommittee try to find additional authority for the instruction, but the instruction was otherwise approved as modified.

3. *Next Meeting*. The next meeting will be Tuesday, November 12, at 4:00 p.m.

The meeting concluded at 6:00 p.m.