MINUTES

Advisory Committee on Model Civil Jury Instructions
November 12, 2013
4:00 p.m.

Present: John L. Young (chair), Alison Adams-Perlac, Juli Blanch, Francis J. Carney, Phillip S. Ferguson, Tracy H. Fowler, Honorable Ryan M. Harris, L. Rich Humpherys, Gary L. Johnson, Paul M. Simmons, Honorable Andrew H. Stone

Excused: Marianna Di Paolo, John R. Lund, Peter W. Summerill, David E. West

1. *CV2231. Damages for contractor's defective work.* Mr. Young noted that when the committee approved CV505, "Measure of Damages. Defective Improvements" at its last meeting, it became apparent that CV2231, "Damages for contractor's defective work," was not accurate. Mr. Young therefore revised CV2231 and 2232 to bring them in line with CV505. Kent Scott, the chair of the Construction Contract Instructions subcommittee, has approved the change. Mr. Humpherys thought the "'Loss in Market Value' Measure of Damages" paragraph was cumbersome. Mr. Young noted that "standard of care" does not apply in construction contract cases; the standard is the contract. The committee revised that paragraph to read:

> "Loss in Market Value" Measure of Damages: If repairing the improvements is not possible, or if [name of defendant] proves that the cost to repair the improvements is unreasonably wasteful, then you cannot award [name of plaintiff] the "repair" measure of damages. You must instead award [name of plaintiff] damages equal to the difference between the fair market value that the improvements would have had absent [name of defendant]'s breach and the fair market value of the improvements as received. This is called the "loss in market value" measure of damages.

The committee approved the instruction as revised.

2. *Proposed Pro-Se Instructions.* At Judge Toomey's suggestion, Mr. Johnson, Judge Toomey, and Judge Harris drafted some instructions to be used when one of the parties is pro se. They based them in part on instructions from the Eastern District of California.

a. *CV99. Introducing pro se litigant to the jury.* Mr. Humpherys thought that, if the instructions are to refer to "pro se" litigants, they should define "pro se." The committee thought it would be better to use the term "self-represented" and avoid the Latin phrase. At Mr. Humpherys's suggestion, the committee added the following sentence to the beginning of the instruction: "In this case, [name of plaintiff/defendant] is representing [himself/herself]." The committee also changed "the trier of fact" to "you" in the next paragraph. The committee approved the instruction as revised.

b. *CV101A. General admonitions. (Pro-se version.)* The committee deleted the phrase "proceeding 'pro se,' which means he/she is" from the sixth paragraph and approved the instruction as modified.

c. *CV102A. Role of the judge, jury, parties and lawyers. (Pro-se version.)* At Mr. Ferguson's suggestion, "prejudicial" in the fifth paragraph was changed to "prejudiced." The committee discussed what obligation a judge has to assist a pro-se litigant in order to ensure a fair trial. Judges Harris and Stone noted that the Supreme Court recognized such a duty in *Turner v. Rogers*, 564 U.S. —, 131 S. Ct. 2507 (2011), in a civil contempt case where there was the potential for incarceration. At the suggestion of Judge Stone and Mr. Fowler, the committee added a committee note to the effect that it is unclear to what extent a judge must help a pro-se litigant to insure that the process is fair, citing *Turner v. Rogers*. The committee approved the instruction as revised.

d. *CV119A. Evidence. (Pro-se version.)* Mr. Ferguson did not think that the instruction clearly explained when a pro-se litigant is testifying as a witness. Mr. Young suggested that the court advise the jury whenever the pro-se litigant is testifying as a witness. The committee instead revised the instruction to read, "However, pro se [plaintiff's][defendant's] statements made under oath on the witness stand are evidence." The committee also deleted the preceding sentence ("If the facts as you remember them differ from the way they have stated them, your memory of them controls.") on the grounds that it is not limited to pro-se litigants but applies generally and should be covered in other instructions. The committee approved the instruction as modified.

3. *CV324. Use of alternative treatment methods.* Some committee members thought that whether the instruction would be appropriate would depend on whether the plaintiff was claiming that the defendant was negligent in his or her choice of treatment methods or that he or she was negligent in performing the method chosen. Judge Harris noted that he did not know when a court would ever give the instruction if there is conflicting expert testimony on whether there are acceptable alternative treatment methods. Mr. Humpherys thought that, unless the instruction is supported by Utah law, it should be withdrawn. In Mr. Springer's absence, the committee deferred further discussion of CV324. Mr. Carney noted, however, that he did not think the Medical Malpractice Instructions subcommittee (comprised of Kurt Frankenburg, Brian Miller, Jack Ray, Ryan Springer, Pete Summerill, and Bobby Wright) would agree on what to do with CV324 in light of *Turner v. University of Utah Hospitals and Clinics*, 2013 UT 52. Mr. Carney will ask both sides to present their best arguments on the issue in writing by January 15.

4. *Insurance Litigation Instructions.* The committee continued its review of the Insurance Litigation instructions:

a. *CV2407. Notice of loss.* Mr. Humpherys noted that he had revisited CV2407 in light of the discussion at the last meeting, and the statute and regulation had not been very helpful. He noted that the first part of the fourth paragraph ("If it was not reasonably possible to give the notice of loss within the required time") was deleted because it was not supported by the statute or case law. The committee approved the instruction as revised.

b. *New notice instruction.* Mr. Humpherys thought that there should be a new notice instruction explaining to whom notice may be given, based on a regulation that says one can give notice to an agent of the insured and former section 31A-23-305 of the Utah Code (now section 31A-23a-405(2)), which now reads:

> There is a rebuttable presumption that every insurer is bound by any act of its appointed licensee performed in this state that is within the scope of the appointed licensee's actual (express or implied) or apparent authority, until the insurer has canceled the appointed licensee's appointment and has made reasonable efforts to recover from the appointed licensee its policy forms and other indicia of agency. . . .

Judge Stone asked whether "agent" (or "licensee") is a defined term. Mr. Johnson noted that the Insurance Code used to include definitions for "agent" and "broker," but the revised code refers to them as "producers." But the revision did not change all statutory references to "agent." Mr. Humpherys thought that the statute was referring to agents in the legal sense and not necessarily an insurance "agent." Mr. Johnson thought it would be a fact question as to whether one was acting as an agent for the insurer, the insured, or both (a dual agent).

c. *CV2409. When insurer claims prejudice from delay in notice or proof.* Mr. Humpherys thought use of the word "lengthy" was problematic. At Judge Stone's suggestion, the phrase "was so lengthy it" was deleted from the second line. Mr. Humpherys also thought the phrase "material change in its ability" was problematic. He noted that there could be a material change, but the insurer could still be able to perform an adequate investigation. Mr. Ferguson asked whether the standard was that the insurer could not complete its investigation. Mr. Humpherys thought not. Mr. Young noted that the committee had used "important" for "material" in other contexts, but the committee thought "important" would not work here. Mr. Fowler suggested "significant," and Judge Stone suggested "meaningful." Mr. Humpherys thought there needed to be some showing of harm to the insurance company because it could not perform its full investigation, such as not being able to find a witness whose testimony would

have changed the outcome. Mr. Ferguson noted that delay only becomes an issue if the notice is given after the time specified in the policy. Mr. Ferguson asked whether "is prejudicial" could be understood to imply some racial prejudice. Judge Stone suggested "detriment" for "prejudice." Mr. Simmons wondered whether lay jurors would understand "detriment" any better than "prejudice." The committee considered synonyms to "detriment," including "impairment," "harm," and "disadvantage." Mr. Young questioned whether we need "actual" if we use "detriment." Mr. Simmons questioned how much detriment is required. For example, if the insurer is precluded from performing an investigation that would meet the gold standard for investigations but is not precluded from obtaining enough information to adjust the claim, is that sufficient to bar the insured's claim? The committee thought that it should be a reasonableness standard. The committee revised the first paragraph of the instruction to read:

> [Insurer] claims that [insured's] delay in providing [notice][proof] of [describe claim or loss] caused actual detriment to insurer. An insurer suffers detriment if it is unable to reasonably investigate, or defend, or resolve a claim because of the delay.

Similarly, in the last paragraph the phrase "was prejudiced by" was replaced with "suffered detriment because of."

The committee revised the first part of the third paragraph to read, "In determining if [insurer] suffered actual detriment, you may consider the extent to which late notice interfered with the [insurer's] ability to reasonably: . . ." Mr. Humpherys questioned the use of "interfered with," noting that it implies some positive action, whereas the failure to provide timely notice is an omission. Ms. Adams-Perlac suggested "prevented," but the committee thought that created too high a standard. Ms. Blanch suggested "affected," but the committee thought that created too low a standard. The committee decided to stay with "interfered with."

Ms. Blanch suggested combining paragraphs (1) and (2) (examining the scene and interviewing witnesses) and adding a catch-all "or otherwise conduct its investigation."

Mr. Humpherys questioned whether the instruction should list factors at all for the jury to consider in determining if the insurer suffered sufficient detriment. He thought that the instruction should just state what the law is, and factors to consider are factual matters that the attorneys can argue but are not part of the legal standard. Mr. Johnson wanted to list the factors so that he and the jury could tell what evidence he needed to prove his case. Mr. Young suggested bracketing all of the factors and just giving those that applied in the particular

case. Mr. Humpherys thought that listing factors for the jury to consider either unduly limits the jury's consideration of all the facts and circumstances of the case or unduly focuses the jury on certain facts. Mr. Simmons suggested moving the factors to a committee note, as was done in CV207, "Abnormally dangerous activity." Ms. Blanch noted that other instructions, such as CV2013, "Wrongful death claim. Adult. Factors for deciding damages," list factors. Mr. Humpherys thought the wrongful death instruction was distinguishable because the law limits the damages recoverable in a wrongful death action to only those categories of damages listed in the instruction. Mr. Carney suggested leaving the factors in the instruction and letting Mr. Humpherys draft a committee note explaining why he thinks it is inappropriate to include them in an instruction. Mr. Young suggested tying the factors to the insurer's claims, so that the jury would be told that (1) the insurer claims that it suffered detriment because of a, b, and c; (2) therefore, you must decide if the insurer suffered detriment because of a, b, or c. Ms. Adams-Perlac offered to put the instruction in that form.

5. *Next meeting.* The next meeting will be on Monday, December 8, 2013, at 4:00 p.m.

The meeting concluded at 6:00 p.m.