MINUTES

Advisory Committee on Model Civil Jury Instructions
December 9, 2013
4:00 p.m.

Present: John L. Young (chair), Alison A. Adams-Perlac, Juli Blanch, Francis J. Carney, Marianna Di Paolo, Phillip S. Ferguson, Honorable Ryan M. Harris, L. Rich Humpherys, Paul M. Simmons, Ryan M. Springer

Absent: Tracy H. Fowler, Gary L. Johnson, John R. Lund, Honorable Andrew H. Stone, Peter W. Summerill, David E. West

1. *Instructions for Cases Involving Pro-se Litigants.* Mr. Ferguson reported that he did not think it was possible to lay down a set of rules for juries to follow in cases involving pro-se litigants. He noted that the cases say that pro-se litigants will be held to the same standard of knowledge and practice as qualified members of the bar; "[n]evertheless," they should be "accorded every consideration that may reasonably be indulged." *See, e.g., State v. Winfield,* 2006 UT 4, ¶ 19, 128 P.3d 1171 (citations omitted). Courts must decide what constitutes reasonable indulgence based on the facts of each case. Mr. Young suggested that a committee note be added to CV99 that explains that and references the cases that state the standard (*State v. Winfield; Allen v. Friel,* 2008 UT 56, 194 P.3d 903; and *Nelson v. Jacobsen,* 669 P.2d 1207 (Utah 1983)). Ms. Adams-Perlac volunteered to draft the committee note.

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

a. *CV2408. To whom notice must be given.* Mr. Humpherys noted that the instruction was taken from the statute, Utah Code Ann. § 31A-21-312(1)(a) & (4). Mr. Young raised the question of electronic notice, such as by e-mail. Mr. Humpherys thought that it could come under the rubric "written notice" but noted that there was no Utah law on the issue.

Ms. Blanch and Mr. Carney joined the meeting.

Mr. Humpherys suggested adding a comment referring users to the instructions on agency. He noted that the regulation, R590-190-7(2), says that notice of claim or loss may be given to "any appointed agent, authorized adjuster, or other authorized claim representative" unless the insurer "clearly directs otherwise," as provided in the regulation. He did not think, however, that the regulation could limit the people who could receive notice under the statute. Mr. Young thought that a committee note would not be necessary in light of the regulation. The committee decided to add a reference to R590-190-7(2) instead of a cross-reference to the agency instructions but not define in the instruction the "Specific Disclosure" required by the regulation. Mr. Ferguson asked whether the insurer's agent for service of process would be considered an "appointed agent" for notice

purposes. Mr. Humpherys did not know the answer but thought one could argue so. Ms. Adams-Perlac offered to look for cases interpreting the statute. At Mr. Simmons's and Dr. Di Paolo's suggestion, the phrase "or mail by depositing a first class postage prepaid envelope addressed to [insurer] with the notice inside" was replaced with "or by first-class mail to the [insurer]." The committee approved the instruction as revised.

b. *CV2409a. To whom proof of loss must be given.* Mr. Humpherys noted that the instruction was the same as CV2408 except that "proof of loss" replaced "notice of loss." The instruction was revised to correspond to the revised CV2408. Mr. Humpherys noted that the regulation governing notice of loss (R590-190-7) does not apply to proofs of loss, which are governed by R590-190-3(10). A citation to the latter regulation was added to the references, and the instruction was approved as modified.

c. *CV2410. When insurer claims prejudice from delay in notice or proof.* Ms. Adams-Perlac noted that she had revised the instruction in light of the discussion at the last meeting. Mr. Young did not think the list of ways an insurer could be prejudiced needed to be included twice. Mr. Ferguson noted that, in the last paragraph, "[insured]" and "[insurer]" needed to be switched. Mr. Humpherys questioned the phrase "both at the outset and as new information came in during the investigation" in subparagraph (2). The committee deleted the phrase. He also questioned whether subparagraph (3) ("Direct and control the actual trial with attorneys of its choosing") was an accurate statement of the law. He noted that an insurer is not prejudiced if the insurer's chosen counsel provides appropriate representation. He said the problem occurs when trial counsel does not protect the insurer's interest. Mr. Ferguson suggested deleting the phrase "with attorneys of its choosing." Ms. Blanch asked whether the committee was trying to be too precise in enumerating ways the insurer may be prejudiced by late notice. Dr. Di Paolo quested the use of the phrase "actual detriment" and asked what "actual" added. She noted that, if we use the term "actual detriment," jurors will assume it means something different from "detriment" and will try to figure out the difference. Mr. Simmons suggested that courts use the phrase "actual detriment" to distinguish it from "theoretical detriment" but thought that juries did not need to be concerned with the distinction. The committee decided to delete "actual." Mr. Young suggested that we include a committee note explaining that the cases (including *State Farm Mut. Auto. Ins. Co. v. Green*, 2003 UT 48, 89 P.3d 97) talk about "actual prejudice," but the committee decided to use a different term that would be more understandable to lay people, without intending any difference in meaning. Ms. Adams-Perlac questioned whether "detriment" was sufficiently plain English and suggested using "harm" instead. Dr. Di Paolo agreed that "detriment" does not mean much to lay people and is vague. After considering alternatives (including

"loss"), the committee decided to use "harm" throughout. The committee questioned the use of "interfered" as well and considered alternatives, such as "obstructed," "inhibited," and "prevented." Mr. Humpherys noted that it is not enough that the late notice interfered with the insurer's ability to investigate, defend, or resolve a claim; the insurer must be harmed *because of* the interference. The committee decided to use "obstructed." Mr. Young questioned whether the last paragraph was necessary. Mr. Humpherys thought it was because it explains who has the burden of proof. The committee also discussed the order of the sentences within the instruction and revised the instruction to read:

> **CV 2410. When insurer claims prejudice (harm) from delay in notice or proof**
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> [Insurer] claims that [insured]'s delay in providing [notice/proof] of [describe claim or loss] harmed [insurer] by obstructing [insurer's] ability to reasonably [investigate/defend/resolve] the claim.
>
> The failure to give [adequate/timely] [notice/proof] of loss is a valid reason to deny the claim if [insurer] proves that it was harmed because of [insured]'s failure to give [adequate/timely] [notice/proof] of loss.
>
> You must determine whether the evidence shows [insurer] was harmed due to [insured]'s delay.

The committee approved the instruction as revised.

d. *CV2414. Must have an insurable interest.* Mr. Humpherys noted that he still needs to draft CV2414a, "What is an insurable interest." He noted that it will be complicated because it differs with each type of insurance. He noted a Utah case that involved a partnership that took out life insurance on its two partners. After the partnership was dissolved, one of the partners died. The other partner claimed the life-insurance proceeds, as did the deceased partner's family. The court sided with the family, on the grounds that the surviving partner did not have an insurable interest in the life of his former partner at the time of his death. The case has been heavily criticized because the partner had an insurable interest in his partner's life when the policy was purchased, and the partnership paid the premiums on the policy. Mr. Simmons asked whether CV2414 should explain when the insurable interest must exist. Mr. Young thought it could vary depending on the type of insurance and would be covered in CV2414a. At Judge Harris's suggestion, the titles of CV2414 and CV2414a were

changed to "Insurable interest required" and "Insurable interest defined," respectively. At Mr. Ferguson's suggestion, the phrase "Under the law" was deleted from the beginning of the instruction. At Mr. Young's suggestion, the phrase "You will be asked to decide" was replaced with "You must decide" in the last sentence. The committee approved CV2414 as modified.

Mr. Humpherys asked to be excused because he had another commitment. The committee decided to defer further discussion of the instructions until he can be present.

3. *Next meeting.* The next meeting will be on Monday, January 13, 2014, at 4:00 p.m.

The meeting concluded at 5:30 p.m.