MINUTES

Advisory Committee on Model Civil Jury Instructions
April 14, 2014
4:00 p.m.

Present: Alison Adams-Perlac, Francis J. Carney, Marianna Di Paolo, Phillip S. Ferguson, Tracy H. Fowler, Honorable Ryan M. Harris, L. Rich Humpherys, Gary L. Johnson, Paul M. Simmons, Honorable Andrew H. Stone, Peter W. Summerill. Also present: Christopher W. Droubay, John Ray, and Terence L. Rooney

Excused: John L. Young (chair), Juli Blanch, John R. Lund, Ryan M. Springer

Ms. Adams-Perlac conducted the meeting in Mr. Young's absence.

This was Mr. Carney's last meeting. The committee thanked Mr. Carney for his eleven years of service, and Ms. Adams-Perlac presented him with a certificate. She also provided a cake to honor the occasion.

1. *CV324. Use of alternative treatment methods.* Ms. Adams-Perlac and Mr. Carney summarized the history and prior discussions on CV324. The committee had discussed amending it, dispensing with it altogether, leaving it in but with the text struck out, and posting the two sides' position statements in the committee note. Mr. Carney asked whether we should have an instruction where, as here, there is no clear Utah law on point. He noted that in MUJI 1st the committee included alternative instructions when the law was not clear, but this committee has tried to avoid alternative instructions, although the committee made an exception for the instructions on the burden of proof under the Inherent Risks of Skiing Act (CV1113A-1113C).

Dr. Di Paolo, Judge Stone, and Mr. Humpherys joined the meeting.

Mr. Carney noted that the instruction is overused, being requested in nearly every case. He also noted that there are about 26 or 27 states that have a similar instruction, including California. Mr. Rooney read the California and Washington instructions. Mr. Droubay noted that the Washington instruction was revised to meet criticisms similar to criticisms of CV324. Mr. Ray thought the instruction was duplicative and argumentative and not necessary because the law was already adequately covered in the instructions on the standard of care (CV301B and CV302). Mr. Rooney agreed that the instruction is overused but thought it was appropriate where there is a real dispute as to what the standard of care is, such as in some cancer cases, where the physician may have a choice between radiation, chemotherapy, or another treatment. Mr. Summerill thought such a dispute should be resolved by the court under evidence rule 702. He noted that the proposed revision to CV324 uses rule 702 language. Mr. Rooney noted that there is not always a single way to do something, and if there are two or more ways, a doctor should be able to use the one he thinks best. He agreed that the situation does not come up routinely in every case and that the defendant should not win just because he picked one of two accepted methods; he can still be liable if his choice was the wrong one under the

circumstances or if he was negligent in performing the method of treatment. Mr. Ray said the problem with CV324 is that it tells the jury that the defendant is not negligent as long as there is more than one accepted method of treatment. Mr. Carney suggested revising CV324 but putting in a note that it was "not approved by the committee" and letting the issue come up on appeal. Mr. Summerill thought that if the committee included any instruction, it will have the appearance of approval, regardless of what any committee note says. Ms. Adams-Perlac did not think the instruction was supported by the law and thought it should be eliminated. If people are going to use an instruction on the issue, she thought they should have a better version. Judge Stone said that at a minimum we should get rid of the current CV324, which everyone agrees is bad. He suggested a simple instruction saying that there may be more than one standard of care. Mr. Rooney re-read the Washington instruction, WPI 105.08, which says: "A physician is not liable for selecting one of two or more alternative *[courses of treatment][diagnoses],* if, in arriving at the judgment to *[follow the particular course of treatment] [make the particular diagnosis],* the physician exercised reasonable care and skill within the standard of care the physician was obliged to follow." Mr. Summerill said that the problem with the Washington instruction is that it says that the physician is "not liable." He suggested including links to other states' instructions if attorneys need guidance in proposing their own instruction. Dr. Di Paolo pointed out that linking to other states' instructions is problematic because they do not have any basis in Utah law. Mr. Droubay thought that if the committee eliminated the instruction, the defense will be faced with motions in limine saying that they cannot argue that the defendant made a reasonable choice among acceptable alternatives. He thought that one should be able to argue that there is more than one method of treatment that may meet the standard of care. Mr. Carney thought that the model instructions should provide guidance in case the court or attorneys want to use an instruction on the issue. He favored including an instruction with a cautionary note, saying that the committee was not in agreement. Mr. Fowler agreed. He thought that the committee's job was to place the current instructions in plain English, and a form of CV324 was part of the original MUJI instructions. Dr. Di Paolo also thought that if attorneys are going to be creating jury instructions on issues not covered in the model instructions, it would be helpful to give them some guidance. Messrs. Summerill and Simmons thought that would be opening a Pandora's box because it would open the door for instructions on any number of issues for which there is no clear Utah law on point.

Mr. Carney moved to include a cleaned-up version of CV324 in the instructions, say that the committee was sharply divided on the appropriateness of the instruction, say that it should only be used when there really are alternative methods of treatment that are accepted in the medical community, and add position statements supporting and opposing the instruction. Mr. Johnson seconded the motion. The motion carried (Judge Stone, Dr. Di Paolo, and Messrs. Carney, Ferguson, Fowler, Humpherys, and Johnson voting in favor, and Messrs. Simmons and Summerill opposed). Mr. Rooney

thought that the committee note should send the message that attorneys use the instruction at their own risk.

Ms. Adams-Perlac asked if there were any concerns about the language in the proposed revision to CV324 circulated before the last committee meeting. Dr. Di Paolo said the phrase "respectable portion" was problematic. She thought that most people would interpret it to mean more than half. She suggested saying "a method generally approved" but noted that that raised the issue of what percentage of the medical community must approve a method before it is "generally approved." Mr. Ray pointed out that "respectable portion" could also mean a portion of the medical community that was respectable, regardless of its size (such as a few Dr. Welbys). Mr. Ferguson quoted *Walkenhorst v. Kesler,* 67 P.2d 654 (Utah 1937), which says "at least a respectable portion." Mr. Rooney quoted the New Jersey instruction (5.50G), which says that "alternative diagnosis/treatment choices must be in accordance with accepted standard medical practice." Mr. Summerill noted that a "respectable portion" of the medical community could be negligent and referenced Learned Hand's decision in the tug-boat case, *In re Eastern Transportation Co. (the T.J. Hooper),* 60 F.2d 737 (2d Cir. 1932) ("A whole calling may have unduly lagged in the adoption of new and available devices. . . . There are precautions so imperative that even their universal disregard will not excuse their omission.").

Judge Harris joined the meeting.

Judge Stone thought that a new term (e.g., "generally accepted" or "accepted standard medical practice") was not necessary, given the standard-of-care instruction. He also did not think that the matter was an affirmative defense. Judge Harris agreed. Judge Stone thought that the instruction should tell the jury that the standard of care may include more than one method of diagnosis or treatment. Mr. Simmons suggested doing away with CV324 and simply adding a bracketed sentence to the standard-of-care instructions (CV301B and CV302) saying that there may be more than one method of diagnosis or treatment that complies with the standard of care. Mr. Summerill thought this would be problematic because it would be adding language to an instruction that has already been approved and would eliminate CV324, which would raise more questions. Mr. Ray also preferred to keep the instructions separate; he thought that the alternative treatment language would be used in every case if it were part of the standard-of-care instruction. Judge Stone thought that the instruction should sync well with the standard-of-care instructions. Mr. Carney suggested something along the lines of CACI 506: A doctor "is not necessarily negligent just because [he/she] chooses one medically accepted method of treatment or diagnosis and it turns out that another medically accepted method would have been a better choice."

Mr. Humpherys proposed including the current CV324 but with the language struck out with a note that the committee does not approve the instruction, based on

Turner v. University of Utah Hospitals & Clinics, 2013 UT 52, 310 P.3d 1212, that the committee was divided on other ways to approach the issue, and setting forth the plaintiffs' and defense positions on the issue. Mr. Humpherys thought this would show that the MUJI 1st instruction should not be used, that some version of the instruction may be valid, but that the committee could not agree on what version that might be. Judge Stone and Mr. Summerill seconded the motion. Mr. Carney said he would still want to include language that the trial court can work from. Mr. Summerill thought that doing so would make whatever language was suggested appear to have the courts' imprimatur. He thought it would be better to simply let the parties advocate their positions before the trial court. Judge Harris said he was mystified as to when he would ever give CV324. Judge Stone said that because the proposed revised CV324 refers to "*the* standard of care," it implies that there is only one way to do it. He thought the legal principle is that "the standard of care" can include more than one way of doing something. The jury will have to decide which expert to believe, the one who says that there is only one way to skin the cat, or the one who says there are two or more ways.

The committee thought that we needed new proposed language for both the instruction and the committee note before anything could be finally approved. Mr. Carney thought the language should include other things, such as that it is the defendant's burden of proof to show that there is more than one acceptable alternative. Mr. Ferguson thought that the burden of proof is on the plaintiff to show that there is only one acceptable method that meets the standard of care. Ms. Adams-Perlac offered to draft new language. The committee will vote again on the new language.

Messrs. Droubay, Ray, and Rooney were excused.

2. *Term Limits.* Ms. Adams-Perlac noted that the recent resignations of Messrs. Young and Carney (Mr. Young's to take effect after the May 2014 meeting) raised the issue of whether there should be term limits on serving on the committee. She noted that there are currently term limits for the court's advisory committees on rules. A person may serve two four-year terms, with exceptions for judges, staff attorneys, the chair, and institutional members (such as Dr. Di Paolo). The policy and planning committee will consider whether to apply term limits to the jury instruction committees at its next meeting. Ms. Adams-Perlac noted that this committee has been serving since 2003, and some members are getting burned out. Judge Harris thought that the committee needed institutional knowledge. He thought that terms should be staggered so that we do not lose a Mr. Young and a Mr. Carney at the same time. Mr. Carney noted that we have tried to keep the committee evenly balanced between attorneys who represent primarily plaintiffs and those who represent primarily defendants, but committee members do not represent a particular constituency but are supposed to do what is best for the development of the law and legal process. Ms. Adams-Perlac explained the process for adding new members to a committee: When there is a vacancy on a committee, notice goes out to the bar, and attorneys may apply to

fill the vacancy. The staff and committee chair make recommendations to the Supreme Court. The committee generally thought that term limits were a good idea.

3. *Time.* Mr. Carney expressed his view that the committee has lost its way. He noted that the first edition of MUJI took only a year to complete, and we have been working for eleven years with no end in sight. He thought at this point we should only be meeting irregularly when necessary to consider modifications to the rules based on new developments in the law. He thought that the committee needed to triage and set priorities. He noted that every jury trial has instructions, and they are done on time, in much less time than the committee has taken. Judge Harris noted that Judge Lawrence has drafted his own instructions on punitive damages (the next topic the committee is set to discuss) and has shared them with him and Judge Stone. Ms. Adams-Perlac said that she was writing an article for the Bar Journal encouraging people to submit their proposed jury instructions for the committee's consideration. Mr. Carney noted that he and Mr. Young had asked for feedback in the past and had not received much. Ms. Adams-Perlac offered to reach out to judges and ask them to send the committee the actual instructions that they use.

The committee discussed the work of the subcommittees. Dr. Di Paolo noted that people get discouraged when their work is not reviewed for years. She suggested setting timelines and putting a limit on the amount of time spent discussing each instruction. Judge Stone suggested having no more than two meetings on any instruction. Mr. Summerill noted that part of the problem is that committee members do not come to the meetings prepared to discuss the instructions and have to spend a large amount of the meeting time reading the instructions. He thought the best procedure was to have one person on a subcommittee be in charge of drafting the instructions for that area of the law, present them to the subcommittee for revision, and the full committee would just review the final product for minor revisions. Mr. Humpherys suggested making the committee smaller. Mr. Summerill liked the idea and thought that a smaller committee could bring in specialists ad hoc for help in certain areas. Mr. Humpherys also suggested doing the instructions like they would be done at a trial: Each side would argue its position, and the judges on the committee would decide what the instruction should be. Dr. Di Paolo also noted that the instructions should be field tested on lay people so that the committee could have research on how the instructions are actually being understood.

4. *Next Meeting.* The next meeting will be Monday, May 12, 2014, at 4:00 p.m.

The meeting concluded at 6:00 p.m.