MINUTES

Advisory Committee on Model Civil Jury Instructions
May 12, 2014
4:00 p.m.

Present: John L. Young (outgoing chair), Alison Adams-Perlac, Juli Blanch, Phillip S. Ferguson, Honorable Ryan M. Harris, L. Rich Humpherys, Gary L. Johnson, Paul M. Simmons, Honorable Andrew H. Stone, Peter W. Summerill

Excused: Marianna Di Paolo, Tracy H. Fowler, John R. Lund, Ryan M. Springer

1. *Committee Status.* Mr. Young reported that the Utah Supreme Court has scheduled a meeting with him, the chair of the Criminal Instructions committee, and the staff attorneys for May 28 to discuss ways in which the drafting and approval process can be accelerated. Mr. Young solicited suggestions from the committee. He suggested using the Litigation Section as a source for volunteers. Ms. Adams-Perlac thought that the process should involve more new attorneys, who are eager to work, on subcommittees if not on the committee itself. Ms. Blanch thought it would be a good idea to involve younger attorneys, who have not begun to specialize and are not biased toward one side or another at this point in their practices. Ms. Adams-Perlac also reported that Judge Lindberg is writing an article for the *Utah Bar Journal* on MUJI 2d. Mr. Humpherys thought that the committee had spent a lot of time discussing jury instructions "on the edges" and suggested spending less time on such instructions and on plain English review and focus on core instructions. He also thought that the committee might move more quickly if it had fewer members, but other members thought that the committee benefited from the perspectives and collective wisdom of all its members. Ms. Adams-Perlac suggested limiting the number of instructions to consider at any meeting. She noted that committee members often do not review the full packet for a meeting because they don't think the committee will cover all of the instructions in the packet. She thought the preparation would be better if the meetings were limited to discussing a few instructions and that the meetings would be successful if the committee could approve 3-5 new instructions at each meeting. She noted that the committee had spent four meetings on a single instruction (CV324). Mr. Ferguson thought that the subcommittees had not been as robust lately and that the committee ends up doing the subcommittees' work. Mr. Young agreed and noted that we need to get subcommittees going in other areas. He also noted that the Gang-of-Three approach had worked to speed things up. Mr. Humpherys noted that the problem is getting attorneys to do the work when they have busy practices. He suggested soliciting volunteers from the Bar. Mr. Young explained the procedure for getting appointed to an advisory committee. Mr. Humpherys noted that he would like to see the insurance and punitive damage instructions through, whether he remains on the committee or is involved as a member of the subcommittees or an adviser.

2. *Mr. Young.* This was Mr. Young's last meeting. Ms. Adams-Perlac presented him with a certificate from the Supreme Court and a plaque, acknowledging

and thanking him for his eleven years of service as chair of the committee, and the committee gave him an ovation. Mr. Young was then excused. Ms. Adams-Perlac directed the rest of the meeting.

3. *CV324. Use of alternative treatment methods.* Ms. Adams-Perlac drafted a new version of CV324 but noted that, after further consideration, she thinks the instruction should be deleted in its entirety. Mr. Ferguson suggested at least leaving in the committee note to alert practitioners to the issue, but he thought we should not include the plaintiffs' and defense position statements. He thought we needed to say that the question is controversial and has not been decided yet. Mr. Humpherys moved to leave in the instruction number and title and committee note but delete the rest of the instruction and let the law develop. Mr. Ferguson seconded the motion. Judge Harris suggested leaving in the first sentence of the committee note ("The committee discussed this instruction at length and agreed that the previous version of the instruction was not supported by Utah law."). Judge Stone suggested adding, "Alternative treatment methods are adequately covered by other instructions." He did not want to preclude the argument altogether by deleting the instruction. Mr. Humpherys suggested adding, "Previous versions were neither supported nor contradicted by Utah law." Judge Harris noted that the real problem with the instruction was that it was not supported by the law and suggested saying, "Previous versions of the instruction were not adequately supported by Utah law," and citing to *Turner v. University of Utah Hospitals & Clinics*, 2013 UT 53. Judge Stone asked whether the jury should be instructed that there is mor than one way to skin a cat (i.e., comply with the standard of care) or leave it for the experts to argue. Mr. Ferguson said that in his experience, the instruction is never needed but thought that the issue was whether to have a separate instruction or to roll it into the standard-of-care instructions. Ms. Blanch thought that the absence of an instruction could cause a judge to preclude expert testimony that the standard of care may include more than one acceptable method of treatment. Judge Stone thought it was a fact question as to whether the standard of care included more than one method of treatment. His concern was that the standard-of-care instructions refer to "*the* standard of care," suggesting that there is only one way to do something. Judge Harris suggested saying in the comment, "Whether there are multiple ways of complying with the standard of care should be determined based on the facts and circumstances of the case." Judge Stone suggested adding, "The court should determine whether it is appropriate to instruct on alternative treatment methods." Mr. Humpherys thought that the committee should provide a suggested instruction in case the court determines it is appropriate. Judge Harris asked whether it should be a separate jury instruction or be included in the committee note. Mr. Humpherys revised his motion to include the first sentence of the revised instruction ("The standard of care may include more than one acceptable method of treatment.") and drop the second sentence on the burden of proof, which the committee agreed goes beyond current Utah law. Mr. Johnson seconded the revised motion, which passed without opposition.

4. *CV302. "Standard of care" for nurses defined.* Ms. Adams-Perlac reported that she had rewritten CV302 to track CV301C. Judge Stone moved that the committee adopt the revision. Mr. Summerill seconded the motion, which passed without opposition.

5. *Punitive Damage Instructions.* Mr. Humpherys noted that there are not clearly defined lines as to the role of the jury, the trial court, and the appellate courts in determining the amount of punitive damages. Consequently, there are unresolved issues, including the following: (a) Should the jury be told about the presumptive ratios for upholding an award of punitive damages? (b) Should the jury be told that half of any punitive damage award above $50,000 goes to the state? (c) Can the jury consider criminal penalties for the same conduct in determining the amount of punitive damages? He suggested raising these issues in a committee note.

a. *CV2026. Purpose of punitive damages.* Mr. Johnson questioned the use of the term "wrongdoer" in the first sentence. The committee thought it was appropriate since the instruction was intended to be given in the second phase of the trial, after the jury had made a finding of the defendant's liability for punitive damages. At Mr. Ferguson's suggestion, "some" was deleted from the first sentence. Mr. Summerill and others questioned whether the phrase "to serve as a deterrent to others" would be easily understood by lay jurors. The committee discussed alternatives and replaced the phrase with "to discourage others from similar conduct." Judge Stone and Mr. Ferguson asked whether there should be a general introductory instruction alerting the jury that it is moving into a new phase of the trial. Mr. Summerill noted that he had some he had used in the past. He also thought the sentence "They are not intended to compensate the plaintiff" was problematic, because it could cause the jury to award less punitive damages because they may think they are enriching the plaintiff, not knowing that half of any award over $50,000 goes to the state. On the other hand, telling the jury that half of any award over $50,000 will go to the state runs the risk that the jury will increase its award of punitive damages in order to help the state rather than to punish the defendant or deter future misconduct. Judge Harris suggested that the parties can make a motion on that issue on a case-by-case basis. Mr. Humpherys moved to approve the instruction as revised. Mr. Simmons seconded the motion, which passed without opposition. Mr. Humpherys offered to draft a committee note to go with CV2026.

c. *CV2027. Requirements for punitive damages.* Some committee members thought that the statutory terms ("willful and malicious," "intentionally fraudulent," and "conduct that manifested a knowing and reckless indifference toward and a disregard of the rights of others") needed to be explained or put in plainer English, but other committee members thought that the committee could not do much with the statutory language. Judge Harris suggested that it was for

the jury to decide what they mean in a particular case. The committee thought that the instruction should be given in the first phase of the trial, before the jury is asked to decide whether the defendant is liable for punitive damages. Mr. Humpherys agreed to rework the instruction.

The committee discussed whether the phrase "punitive damages" should be used in the first phase of the trial, before the jury has made a finding that the defendant's conduct meets the standard for punitive damages. Judges Harris and Stone favored telling the jury why they are being asked to make a finding on the egregiousness of the defendant's conduct, on the grounds that jurors generally make better decisions when they understand why they are being asked to do things.

Committee members volunteered to provide jury instructions on punitive damages from other trials they have been involved in.

c. *CV2028. Amount of punitive damages.* Mr. Johnson questioned whether a lay jury would understand what "reasonable and proportionate to the harm" meant. He suggested changing it to "must bear a reasonable relationship to the amount of actual injury," citing *Cooper Industries v. Leatherman Tool Group,* 532 U.S. 424, 448-49 (2001). Mr. Humpherys said that the idea the instruction is meant to convey is that punitive damages are not like winning the lottery, that there are legal limits on the amount of punitive damages the jury can award. But he would stop short of telling the jury the presumptive ratios. Judge Stone thought that we should not assume that there will be a bifurcated trial in every case. The statute says that evidence of the defendant's wealth or financial condition can only come into evidence after there has been a finding of liability for punitive damages, Utah Code Ann. § 78B-8-201(2), but if wealth is not an element but only one factor the jury can consider, the parties may decide to forego evidence of wealth, in which case the jury could consider liability for and the amount of punitive damages in the same phase. Mr. Humpherys thought there was a Utah appellate opinion that suggested that there can be no punitive damage award in the absence of evidence of the defendant's wealth. Mr. Humpherys offered to find the case for the next meeting. Judge Stone noted that other punishments in the law do not necessarily depend on the defendant's wealth. For example, the fine for jaywalking is the same whether the defendant is penniless or Bill Gates. Ms. Blanch thought the amount should be enough that the defendant feels some pain but not so much as to bankrupt the defendant. Mr. Humpherys noted another issue: The Supreme Court has said that the jury may not consider others' conduct, yet the purpose of punitive damages is to deter not only the defendant but also others from engaging in the same or similar conduct in the future. Mr. Summerill thought the Supreme Court's proscription was limited to the defendant's conduct in other states. Judge Stone questioned the

use of the term "randomly." Ms. Adams-Perlac noted that she had changed it from "arbitrarily." Judge Stone thought jurors understand what "arbitrarily" means. He thought there were risks from deviating too much from Supreme Court language in this area where there are constitutional limits on the amount of punitive damages. Mr. Summerill thought that the phrase "The amount of punitive damages may not be arbitrarily selected" was unnecessary because the jury is told that the amount must be sufficient to fulfill the dual purpose of punitive damages (to punish and deter). He thought the instruction should start by telling the jury what punitive damages should be, not what they should not be. Judge Harris suggested revising the instruction to read:

> [If you decide] [Now that you've decided] to award punitive damages, you must determine the amount. Punitive damages should be the amount necessary to fulfill the two purposes of punitive damages--to punish past misconduct and to discourage future misconduct. The amount must be reasonable and in proportion to the harm to the plaintiff.

Mr. Simmons questioned the phrase "the amount necessary," on the grounds that it implies there is only one proper amount, but Judge Harris thought there was, and it was what the jury decides it is. The committee approved the instruction as revised.

6. *Next meeting.* The next meeting will be Monday, June 9, 2014, at 4:00 p.m.

The meeting concluded at 6:00 p.m.