

## ***MINUTES***

Advisory Committee on Model Civil Jury Instructions

February 22, 2016

4:00 p.m.

Present: Juli Blanch (chair), Marianna Di Paolo, Tracy H. Fowler, Honorable Ryan M. Harris, Gary L. Johnson, Patricia C. Kuendig, Paul M. Simmons, Honorable Andrew H. Stone, Peter W. Summerill, Nancy Sylvester. Also present: David C. Reymann, from the Defamation subcommittee

Excused: Joel Ferre, Christopher M. Von Maack

1. *Minutes.* On motion of Mr. Johnson, seconded by Mr. Fowler, the committee approved the minutes of the January 11, 2016 meeting.

2. *Schedule.* The committee will return to the punitive damage instructions once it finishes with the defamation instructions. It will then address the civil rights instructions.

3. *Defamation Instructions.* The committee continued its review of the defamation instructions. Mr. Reymann noted that the defamation subcommittee had not proposed instructions on injurious falsehood (slander of title and business disparagement). He noted that the two areas protect different interests. Defamation law protects a person's interest in his reputation, whereas injurious falsehood protects one's interest in the quality of a product. But he thought there was enough overlap between the two areas of law that it made sense to have the defamation subcommittee propose instructions for injurious falsehood as well. He asked, however, to be given additional time to address the latter set of instructions.

a. *CV1608. Conditional Privilege.* The committee had previously approved the substance of the instruction. At Mr. Simmons's suggestion, the last sentence of the second paragraph was revised to read: "[Name of defendant] can abuse the privilege by [common law malice,] [actual malice,] [and/or] [excessive publication]." The three types of abuse were also bracketed in the last paragraph. Mr. Reymann had revised the committee note. At Mr. Simmons's suggestion, the examples of conditional privileges in the third paragraph of the committee note were broken out into separate bullet points.

Dr. Di Paolo joined the meeting.

On motion of Mr. Simmons, seconded by Mr. Johnson, the committee approved the instruction as modified.

b. *CV1612. Group defamation rule.* Mr. Reymann explained that the group defamation rule is related to the "of and concerning" requirement, but fit better here. If the rule is satisfied, all group members have a defamation claim.

Ms. Blanch suggested breaking out the numbered requirements. Dr. Di Paolo suggested setting off “or” between elements (1) and (2) in a separate paragraph, but the committee noted that they had not done that in other instructions. Ms. Kuendig suggested combining the second and third sentences: “[Name of plaintiff] can maintain a defamation claim based on a statement that refers only to a group or class of people if and only if . . . ,” but her suggestion wasn’t adopted. The committee revised the last sentence to read, “The fact that a referenced group is large does not by itself preclude [name of plaintiff] from satisfying this requirement.” On motion of Mr. Fowler, seconded by Mr. Johnson and Dr. Di Paolo, the committee approved the instruction as revised.

c. *CV1613. Damages–In General.* Messrs. Johnson and Summerill questioned whether an introductory instruction setting out the types of damages recoverable was necessary. All types wouldn’t necessarily apply in a given case. Mr. Reymann noted that there may be different damages for each statement and thought it would be more confusing not to have an introductory damage instruction. He added that if the committee decided to do away with the instruction, it should still include a committee note on damages. He noted that there is a split of authority on whether Supreme Court decisions prohibit presumed damages in all cases, and there is no Utah Supreme Court decision on point. There is a Utah Court of Appeals decision that suggests that presumed damages are recoverable, but if there is no actual injury, they are limited to nominal damages. Mr. Reymann thought that presumed damages are not a separate category of damages, that a plaintiff may recover special damages, general damages, and/or nominal damages. Mr. Simmons thought that there should be a causation instruction. Several committee members noted that the committee had done away with the term “proximate” or “proximately” in the causation instructions. The committee changed the title of the instruction to “Causation” and revised the first paragraph of the instruction to read:

In order to prove a claim for defamation, [name of plaintiff] must prove by a preponderance of the evidence that the allegedly defamatory statement[s] caused damage to [name of plaintiff].

Judge Harris joined the meeting.

The committee also deleted the third paragraph of CV1613 and incorporated the committee note to CV1613 into the committee note to the next instruction. On motion of Mr. Simmons, seconded by Mr. Johnson, the committee approved the instruction as revised.

Judge Stone joined the meeting.

d. *CV1614. Damages–Defamation Per Se.* Mr. Reymann explained that there are two issues with defamation per se—(1) whether it applies to written defamation (libel), and (2) whether presumed damages are allowable at all. Dr. Di Paolo thought the instruction had too many negatives to be easily understood. Mr. Reymann explained that the concept is that if the plaintiff seeks more than nominal damages, he or she must prove actual damage. He said that defamation per se is just a damage concept. It is an anachronism. It just means that the plaintiff must prove special damages if the statement is not considered defamatory per se. Mr. Reymann explained that a statement can be defamatory per se but not defamatory, for example, if it accuses someone of criminal conduct or having a loathsome disease but was said as a joke or insult, under circumstances where the hearer would not understand it to be a statement of fact. The committee asked what “loathsome disease” meant. Mr. Reymann explained that it generally means a venereal disease or leprosy. He further explained that it is for the court to decide whether a statement is defamatory per se, but it is for the jury to decide whether the statement was actually made. Dr. Di Paolo asked whether we needed another sentence telling the jury, “You must determine whether [name of defendant] said the statement.” Judge Stone asked whether an instruction on defamation per se was even necessary, since the jury doesn’t have to decide the issue. He suggested that the concept could be handled through the special verdict form. Judge Stone noted that he does not want to have to tell the jury what defamatory per se means and that he has determined that a particular statement is defamatory per se because he doesn’t want the jury second-guessing the court’s ruling. Dr. Di Paolo suggested deleting “I have determined that” in the third paragraph. Mr. Fowler suggested simply telling the jury, “The statement entitles [name of plaintiff] to at least nominal damages.” The committee changed the name of the instruction to “Presumed Damages.” The committee discussed whether the first two paragraphs were necessary. Dr. Di Paolo thought they were necessary for context, but the committee decided to delete them. The committee changed the first sentence of the third paragraph to read:

I have determined that the following statements are statements that the law presumes caused at least some type of damage to [name of plaintiff].

Mr. Summerill was excused.

The committee revised the committee note to say that the committee is using the term “presumed damages” to capture the concept of defamation per se. It also added the four categories of defamation per se to the note and incorporated the note from CV1613. The committee added a definition of “nominal damages,”

taken from CV1615, before the last sentence of the instruction: “Nominal damages mean an insignificant amount.” At Mr. Simmons’s suggestion the committee added “such as \$1,” since what may be insignificant to one person may not be to another person. On motion of Dr. Di Paolo, seconded by Mr. Johnson, the committee approved the instruction as revised.

e. *CV1615. Damages–Nominal Damages.* The committee deleted CV1615. With the changes to CV1614, the committee thought it was no longer necessary.

f. *CV1616. Damages–Special Damages.* Mr. Simmons noted that the general tort damage instructions use the terms “economic” and “non-economic” rather than “special” and “general” when referring to damages. The committee decided to follow the same convention. The committee also deleted the term “proximately,” consistent with prior instructions.

Judge Stone thought that the general causation instruction should be given as part of the defamation instructions. At Judge Harris’s suggestion, the committee revisited CV1613 and added a committee note saying that the instruction is not intended to capture the concept of proximate cause and should be given along with some version of CV209, the causation instruction from the negligence instructions. On motion of Judge Stone, seconded by Mr. Johnson, the committee approved this change to the committee note to CV1613.

Mr. Reymann noted that there is a tendency for double recovery in defamation cases because damages to reputation can have both economic and non-economic consequences. Judge Harris suggested adding examples of special or economic damages to the instruction. Mr. Reymann noted that medical expenses are treated differently in defamation cases from other tort cases. The committee revised the instruction to read:

Economic damages are awarded to compensate a plaintiff for actual and specific monetary losses that are caused by the publication of a defamatory statement. Economic damages are out-of-pocket losses and can include such things as loss of salary, employment, income, business, and other similar economic losses. [Name of plaintiff] must prove each item of economic damages with specific evidence.

On motion of Judge Stone, seconded by Mr. Johnson, the committee approved CV1616 as revised.

4. *Next meeting.* The next meeting will be Monday, March 14, 2016, at 4:00 p.m.

The meeting concluded at 6:00 p.m.