

## ***MINUTES***

### Advisory Committee on Model Civil Jury Instructions

June 13, 2016

4:00 p.m.

Present: Juli Blanch (chair), Gary L. Johnson, Marianna Di Paolo, Honorable Andrew H. Stone, Peter W. Summerill, Nancy Sylvester, Joel Ferre, Honorable Ryan M. Harris, and Peter W. Summerill. Also present: Mark Dunn from the Emotional Distress subcommittee.

Excused: Paul M. Simmons, Tracy Fowler, and Patricia C. Kuendig.

1. *Minutes*. On motion of Gary Johnson, seconded by Judge Stone, the committee approved the minutes of the May 9, 2016 meeting.
2. *Subcommittees and subject area timelines*. Ms. Blanch went over the committee's timeline, noting that the Civil Rights instructions would start up in September. The instructions are quite large, around 40, so they will take some time.
3. *Punitive Damages comment*. Peter Summerill went over the comment received from a group of attorneys at Kirton McConkie regarding presumptive ratios. Mr. Summerill said he circulated the comment to the Punitive Damages subcommittee several times. The feedback he got back was that the commenters' proposal was outside the scope of the committee's charge and there's not enough case law to support what they are requesting. The subcommittee determined the instructions should not be altered. The committee discussed the decision and determined someone would get this issue up on appeal at some point and the case law will eventually be instructive.
4. *Defamation/Slander/Libel Instructions (punitive damages)*. CV1601 needed to be reapproved for an edit to lines 59-62. Judge Stone moved to approve the change and Mr. Johnson seconded. The committee approved the change unanimously. The committee then looked at an edit to CV 1617, which discussed that the term "actual malice" was not used, but was captured in subsection one. Mr. Johnson moved to approve the change and Judge Stone seconded. The committee approved the change unanimously.
5. *Emotional Distress Instructions*. Mr. Dunn represented the Emotional Distress subcommittee, which consisted of Mr. Dunn, George Waddoups, Michael A. Katz, and Steven A. Combe.
  - a. CV 1505 (MUJI 1 22.7): Negligent Infliction of Emotional Distress. Mr. Dunn said the *Hanson* and *Harnicher* cases discussed that the plaintiff must be in the zone of danger. He also mentioned a federal case, *Figueroa*,

which discussed negligence, an objective standard. Mr. Johnson and Ms. Blanch expressed concerns about using “unintentional” versus “negligence.” Mr. Dunn said “unintentional” comes from the Restatement of Torts, but there is a caveat that discusses “negligence.” Mr. Johnson pointed out that unintentionally causing someone emotional distress isn’t actionable unless you owe a duty to that person. The committee then discussed when a duty would be owed. Judge Harris pointed out that there are three requirements for the plaintiff, and two requirements for the defendant and the instruction should be simpler. The committee determined that the instruction could be better written as follows:

In order to recover for negligent infliction of emotional distress, [name of plaintiff] must either:

- 1) suffer a physical injury, or
- 2) be in the zone of danger.

If [name of plaintiff] qualifies for one of the above, [name of plaintiff] must prove all of the following:

- 1) [name of defendant] was negligent;
- 2) [name of defendant]’s negligence placed [name of plaintiff] in danger of physical impact or injury; and
- 3) [[name of plaintiff] suffered severe and unmanageable mental distress in a reasonable person normally constituted.

b. CV 1506 and CV 1507. Following some discussion by the committee, Ms. Blanch requested that the subcommittee take on a summer research project: is the zone of danger a judge or a jury question? The subcommittee should draft a zone of danger instruction with a committee note that says something like, “No Utah court has stated whether the zone of danger is a jury question or legal question. If the judge determines it’s a jury question, this instruction should be used.” The subcommittee will also address the elements of *Harnicher* regarding witnesses and close family members (bystanders and direct victims) and make 1505-1507 into two instructions rather than three.

6. *Next meeting.* The next committee meeting will be on Monday, September 19, 2016 at 4 p.m.

The meeting concluded at 5:06 p.m.