MINUTES

Advisory Committee on Model Civil Jury Instructions
February 27, 2017
4:00 p.m.

Present: Juli Blanch (chair), Marianna Di Paolo, Tracy H. Fowler, Honorable Ryan M. Harris, Patricia C. Kuendig (by phone), Ruth A. Shapiro, Paul M. Simmons, Honorable Andrew H. Stone, Nancy Sylvester, Christopher M. Von Maack. Also present: Heather S. White from the Civil Rights subcommittee

Excused: Joel Ferre, Peter W. Summerill

1. *Welcome.* The committee welcomed Ms. Shapiro, its newest member, who is taking Mr. Johnson's place.

2. *Minutes.* On motion of Mr. Von Maack, seconded by Mr. Fowler, the committee approved the minutes of the January 9, 2017 meeting.

3. *Civil Rights Instructions.* The committee continued its review of the Civil Rights instructions.

a. *CV1314. Entry of residence pursuant to arrest warrant.* Ms. Blanch asked whether "exigent circumstances" is defined anywhere. Ms. White pointed out that it is defined in CV1318. Judge Harris questioned the structure of the instruction. He noted that there are three circumstances under which an officer may legally enter a residence: (1) with consent, (2) if there are exigent circumstances and probable cause, and (3) with a warrant. At Judge Stone's suggestion, the committee revised the instruction to read:

> To lawfully enter a residence based on an arrest warrant, the officer must have reason to believe that (1) the person named in the warrant was living at that residence, and (2) that the person was actually in the residence at the time.

Dr. Di Paolo joined the meeting.

At Judge Harris's suggestion, the committee added a note to the effect that the instruction is limited to entries based only on an arrest warrant and does not apply to entries based on other grounds, such as consent, a search warrant, or exigent circumstances and probable cause. At Mr. Von Maack's suggestion, the reference to *Smith v. Oklahoma*, 696 F.2d 784 (10th Cir. 1983), was deleted, since the case involved an invalid warrant. On motion of Mr. Simmons, seconded by Mr. Von Maack, the committee approved the instruction as revised.

b. *CV1315. Search of residence pursuant to arrest warrant.* Ms. White suggested replacing "make" in the first sentence with "conduct." Dr. Di Paolo thought "conduct" was understandable but thought that "protective security sweep" needed to be defined somewhere. Ms. White explained that it meant a cursory search or review for weapons or other items that could be used to harm an officer and were easily accessible to someone in the house. Ms. Kuendig questioned the use of the term "suspect," since it has not been used in prior instructions. The committee suggested other ways to word the instruction without having to define "protective security sweep." Ms. Kuendig suggested saying "only if the people in the residence are believed to be dangerous." Judge Stone suggested, "The officer is allowed to make a limited search for weapons." Ms. Blanch suggested "for the officer's safety." The committee decided to send the instruction back to the subcommittee to try to describe "protective security sweep" so as not to require a separate instruction defining the phrase. At Mr. Fowler's suggestion, "legally" was replaced with "lawfully," and at Dr. Di Paolo's suggestion, "persons" was replaced with "people."

c. *CV1316. [Entry/Search] of residence pursuant to search warrant.* Mr. Simmons asked whether the validity of a search warrant presented a jury question; that is, whether the jury was allowed to secondguess the magistrate's decision to issue the search warrant. Judge Harris thought that in this circumstance the jury could decide the validity of the search warrant. Dr. Di Paolo noted that "material" is problematic for lay jurors. The committee discussed synonyms and settled on "relevant." Judge Stone thought that the person applying for the warrant must have known that the application omitted relevant information but added that he was not sure what the standard was. Ms. White said that the test is whether, looking at the warrant application with any relevant omitted information included and with any false information deleted, the application was still sufficient to justify issuance of the warrant. Mr. Von Maack quoted from *Salmon v. Schwarz*, 948 F.2d 1131, 1140 (10th Cir. 1991), which gave the standard as "knew . . . or would have known . . . except for his reckless disregard of the truth" (citation omitted). He added that any errors must have also affected the probable cause determination. Judge Stone noted that there is only one affiant who applies for the warrant, but he or she can rely on information from other sources. The affiant may not know or have reason to know that the information is false, but his or her source may know. Judge Stone thought that if the source was an officer in the same department, that would taint the search warrant, but the affiant could rely on false information from a confidential informant, for example, without the warrant being invalid as long as the affiant did not know the information was false. The committee revised the instruction to read:

> A search warrant must be supported by probable cause. To demonstrate that a warrant lacks probable cause, a plaintiff must prove by a preponderance of the evidence that:
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> 1. The search warrant application contained one or more omissions or false statements that were made knowingly, intentionally, or with reckless disregard for the truth; and
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> 2. The information, if accurately included, would have affected the magistrate's decision to issue the warrant.

Mr. Von Maack asked whether the second element was a legal question. Judge Harris asked what the law was on which questions were for the jury and which for the judge. Ms. White said that the jury decides the factual questions, such as, Did the officer know his statement was false? But the judge decides whether it would have affected the magistrate's decision. Judge Harris suggested sending the instruction back to the subcommittee or adding a committee note saying that some of the issues in the instruction may be for the judge to decide, in which case the instruction should be revised accordingly. Ms. White said she preferred a committee note.

Ms. White was excused.

Judge Stone asked whether the matter required a bifurcated trial. Mr. Simmons suggested deleting "intentionally" in the first element, since if the statement or omission were made intentionally, a fortiori it would have been made knowingly, which is sufficient. Judge Harris thought it would be confusing to omit one of the states of mind. He thought the requirement was any state of mind greater than negligence. Judge Stone thought the committee needed to define who made the false statement or omission, since an officer can rely on a false statement of a confidential informant. The committee asked who was liable in the case of an invalid search warrant and for what. Judge Stone thought that if the warrant was invalid, all subsequent actions taken pursuant to the warrant would be invalid, and the officers carrying out the search would not be protected, even though they relied on the warrant. Mr. Von Maack did not think an officer who executes an invalid warrant is liable if he or she did not know the warrant application was defective. The committee was not sure of the law in this area and proposed asking the subcommittee the following questions: (1) Who is the target defendant in a case of an invalid search warrant? (2) Whose misconduct is looked at? Just the affiant's? That of other officers on whom the affiant relied? Mr. Von Maack asked whether the subcommittee looked at federal jury instructions in civil rights cases for guidance.

4. *Next meeting.* The next meeting is Monday, March 13, 2017, at 4:00 p.m.

The meeting concluded at 6:00 p.m.