MINUTES

Advisory Committee on Model Civil Jury Instructions
December 11, 2017
4:00 p.m.

Present: Honorable Andrew H. Stone (chair), Tracy H. Fowler, Honorable Keith A. Kelly, Patricia C. Kuendig (by phone), Ruth A. Shapiro, Lauren A. Shurman, Paul M. Simmons, Peter W. Summerill, Nancy Sylvester, Christopher M. Von Maack (by phone). Also present: Ryan Frazier, chair of the Economic Interference subcommittee, and David C. Reymann, chair of the Injurious Falsehood subcommittee

Excused: Marianna Di Paolo, Joel Ferre

1. *New Committee Members.* Judge Stone introduced the new committee members--Judge Keith Kelly (who joined the meeting after his trial concluded) and Lauren Shurman of Stoel Rives.

2. *Schedule.* Judge Stone reviewed the schedule. The first section of Civil Rights instructions has been released for comments. The comment period expires January 11, 2018. The committee should be ready to take up the second set in February 2018.

3. *Minutes.* The committee deferred approval of the November 13, 2017 minutes until the next meeting, to allow more time for committee members to review them.

4. *Economic Interference Instructions.* The committee continued its review of the economic interference instructions.

a. *CV1404, Definition of "Improper Means."* Judge Stone asked whether improper means was a question for the court or the jury. Mr. Frazier said that what happened was a question for the jury, but whether the conduct qualifies as "improper means" would be a question for the judge. Ms. Shapiro added that what is the "established standard of a trade or profession" may also be a fact question, which may have to be determined from competing expert testimony (similar to determining the standard of care in a medical malpractice action). Ms. Shurman noted that the court may need to instruct on the elements of the improper means, such as fraud or violation of a statute. She noted that often both the underlying tort and tortious interference are pleaded in the same complaint, and the court instructs on the elements of both. Judge Stone analogized the instruction to the instruction on violation of a safety law. He suggested adding at the end of the instruction, "In this case, [name of plaintiff] claims that the improper means used were [describe the improper means]," and adding to the committee note, "Depending on the theory, this instruction can be used in conjunction with instructions on the improper means (e.g., fraud)." Mr.

Von Maack noted that, under his reading of *Eldridge v. Johndrow*, 2015 UT 21, 345 P.3d 553, breach of contract alone is not sufficient to constitute improper means. But because the issue was not specifically addressed in *Eldridge*, the committee thought the best way to deal with it was to point out the issue in the committee note without taking a position on it. On motion of Ms. Shapiro, seconded by Mr. Fowler, the committee approved the instruction as revised.

b. *Nominal Damages.* The committee had asked the subcommittee to consider whether there should be an instruction on nominal damages. Earlier in the day, Ms. Sylvester had circulated a memo with the subcommittee's conclusion. Mr. Frazier explained that the subcommittee had not found any cases addressing the issue. Some members thought that a nominal damage instruction was not appropriate because nominal damages are usually awarded to vindicate a right where no actual damage took place, and actual damage is an element of the tort of economic interference. But even if nominal damages can be awarded for intentional interference, the subcommittee did not think there should be a special nominal damage instruction for economic interference but that it should be covered in the general tort damages instructions, and the parties and court can decide whether it should be given in a particular case, whatever the nature of the claims.

Mr. Frazier was excused. Judge Kelly and Mr. Reymann joined the meeting.

5. *Injurious Falsehood Instructions.* Mr. Reymann introduced the injurious falsehood instructions. He noted that they were similar to the defamation instructions, but the two torts protect different interests. Defamation protects a person's interest in his reputation, whereas injurious falsehood, which covers the common-law torts of slander of title and trade libel (now generally referred to as "business disparagement"), protects one's economic interests. Mr. Reymann noted that there is an open question as to whether the constitutional interests applicable to defamation apply to injurious falsehood but noted that the question does not come up much because, for injurious falsehood, the plaintiff must prove actual knowledge of falsity; reckless indifference is not enough, and only economic damages are available. Mr. Reymann noted that there are not a lot of Utah cases on the subject, but Utah law appears to be consistent with the Restatement (Second) of Torts on the subject. Judge Kelly noted that Utah has statutes governing wrongful liens that would not be covered by the instructions on the common-law torts. Mr. Reymann offered to take a look at the statutes and, if appropriate, add a reference to them in the committee notes. Judge Kelly thought that there should be a reference to statutory causes of action in both the introductory note and in the note on the elements of the claim (CV1902). He identified the relevant statutes as sections 38-9-101 through 38-9-205 and sections 38-9a-101 through 38-9a-205 of the Utah Code.

a. *CV1901, Injurious Falsehood--Introductory Notes to Practitioners.* The committee deferred approval of CV1901 until after it reviews the other instructions in this section. Ms. Shapiro questioned whether the instruction should have a number. The committee noted that a similar instruction in the defamation instructions (CV1601) was numbered. The instruction says that it should not be read to the jury, and the instruction numbers in MUJI 2d are not part of the instructions that go to the jury.

b. *CV1902, Elements of an Injurious Falsehood Claim*. Ms. Shapiro asked whether "harmful" in the first sentence needed to be defined. Mr. Reymann thought it could be deleted, that harmfulness is adequately covered in the damage instruction. Judge Kelly asked whether the second sentence should include the burden of proof (e.g., "[name of plaintiff] must prove the following elements by a preponderance of the evidence"). The committee noted that its practice has not been to state the burden of proof in elements instructions unless the burden is something other than a preponderance of the evidence. Mr. Reymann noted that there may be a higher standard for proving falsity and malice, but because it was not clear whether there was, it would be better not to state the standard and let the parties argue for a higher standard if they think it appropriate. At Ms. Shurman's suggestion, "property," "goods," and "services" were bracketed. At Ms. Sylvester's suggestion, the first element was divided into two subsections:

> (1) [name of defendant] published statement(s) that disparaged
> (a) the quality of [name of plaintiff's] [property,] [goods,] [or] [services]; [or]
> (b) [name of plaintiff's] property rights in [land,] [personal property,] [or] [intangible property]

Mr. Reymann noted that "malice" in this context has a special meaning, which is defined in CV1907. Since the definition differs from a layperson's understanding of "malice," Mr. Reymann suggested that the committee might be able to avoid using the term by changing the third element to read "the statements were made with actual knowledge that they were false." Other committee members thought that that did not capture the full definition of CV1907. Mr. Simmons suggested adding a fourth element: "[name of defendant] intended to injure [name of plaintiff] by publishing the statements or reasonably should have expected that the statements would injure [name of plaintiff]." A majority of the committee elected to leave "malice" in CV1902 and include its definition in CV1907. On motion of Mr. Fowler, seconded by Mr. Summerill, the committee approved CV1902 as revised.

c. *CV1903, Definition: Publication.* On motion of Mr. Fowler, seconded by Mr. Simmons, the committee approved the instruction, which tracks CV1603, the definition of "publication" in the defamation instructions.

d. *CV1904: Definition: Disparaging Statement.* Ms. Shurman asked who determines if a statement is capable of more than one meaning. Mr. Reymann said the court does. Similarly, the court decides whether the statement is disparaging (or can be reasonably interpreted as disparaging). Judge Stone asked what "more than one meaning" meant. He gave the example of a statement that a restaurant has the "spiciest food" in town. Some people might consider that a favorable recommendation, and others might not, depending on their preference for spicy food. Mr. Reymann said that at least one of the meanings must be disparaging. Ms. Shapiro noted that the definition of "disparaging statement" was not too helpful. Mr. Reymann thought "cast doubt on" fits well with slander of title but not so well with trade libel. The committee discussed possible definitions of "disparaging." At Judge Kelly's suggestion, it decided to say, "A statement is disparaging when it (a) calls into question in a negative way the quality of [name of plaintiff's] [property,] [goods,] [or] [services], [or] (b) casts doubt on [name of plaintiff's] property rights in [land,] [personal property,] [or] [intangible property]." Mr. Fowler suggested starting the instruction with the second paragraph. Judge Kelly suggested putting the fourth paragraph before the third.

Mr. Summerill was excused.

The committee revised the first paragraph of the committee note to read:

> The element of disparagement has not been extensively addressed by Utah courts in the injurious falsehood context, including the question of the court's role in determining whether a statement is capable of conveying a disparaging meaning. The element is analogous, however, to the element of defamatory meaning for defamation claims, which has been addressed by Utah courts, and with respect to which the court's role is clearly defined. References are therefore included to defamation authority for this instruction. [Citations omitted.] The definition of "disparaging" comes from the Restatement. *See* Restatement (Second) of Torts § 629 (1977). Because the phrase "cast doubt on" may not be as inclusive of the types of statements that would constitute business disparagement, the instruction also uses the phrase "calls into question in a negative way."

The committee deferred further discussion of CV1904 until the next meeting.

6. *Next meeting.* The next meeting is Monday, January 8, 2018, at 4:00 p.m.

The meeting concluded at 6:00 p.m.