

MINUTES

Advisory Committee on Model Civil Jury Instructions

November 11, 2014

4:00 p.m.

Present: Juli Blanch (acting chair), Alison Adams-Perlac, Marianna Di Paolo, Phillip S. Ferguson, Tracy H. Fowler, Honorable Ryan M. Harris, L. Rich Humpherys, Gary L. Johnson, Paul M. Simmons, Honorable Andrew H. Stone, Peter W. Summerill, Nancy Sylvester

Excused: Paul M. Belnap, John R. Lund, Stuart H. Schultz, Ryan M. Springer

Note: The October 14, 2014 meeting was canceled for lack of a quorum.

1. *Minutes.* Judge Stone moved to approve the minutes of the September 8, 2014 meeting. Mr. Fowler 2d. The motion passed without opposition.

2. *Policy & Planning Update.* Ms. Adams-Perlac reported that the Judicial Council has adopted an amended rule 1-205 of the Judicial Council Rules of Judicial Administration, which makes the model jury instruction committees standing committees of the Judicial Council. The Policy & Planning Committee of the Judicial Council has recommended a rule (3-418) regarding Model Utah Jury Instructions. It has been tentatively approved, but the Judicial Council wanted input from the jury instruction committees. The Model Utah Criminal Jury Instructions committee would like a thirty-day comment period for new instructions, similar to the comment period for rules, and asked that the last sentence of the proposed rule, which says "A model instruction will not be published for comment before publication on the Utah state court website," be deleted. This committee thought that comments on instructions should be encouraged but did not think publication on the website should be delayed for comments or that there should be a deadline for making comments. But the committee had no objection to deleting the last sentence. Mr. Simmons questioned the provision that allows committees to propose alternative instructions where there is no Utah law on point, noting that this committee has generally avoided proposing instructions on issues where Utah law is not established or clear. The committee thought that provision was acceptable, since it leaves it to the committee's discretion whether to propose alternative instructions or not.

Ms. Adams-Perlac was excused.

3. *Punitive Damage Instructions.* The committee continued its review of the punitive damages instructions.

a. *CV2030. Reprehensibility.* Mr. Schultz sent an e-mail before the meeting suggesting changes to CV2030 based on Supreme Court precedent (*State Farm v. Campbell*) that says that the only conduct relevant to the reprehensibility analysis is conduct similar to that which harmed the plaintiff.

Mr. Humpherys did not dispute Mr. Schultz's reading of the law but thought the matter went only to the admissibility of evidence of other conduct, which was a matter for the court and did not raise a fact issue for the jury to decide. Mr. Summerill agreed. Mr. Johnson, relying on language from *Westgate Resorts*, thought that the court requires some safeguard, such as a jury instruction, if evidence of dissimilar conduct is admitted. Judge Stone noted that such evidence may come in for some other purpose, in which case the court may need to instruct the jury that it cannot consider the evidence for reprehensibility. Mr. Humpherys thought such an instruction may allow defense counsel to argue that the evidence is not sufficiently similar even after the court has made a legal determination that it is sufficiently similar to be admitted. He therefore suggested dealing with the issue in a comment or bracketed language. Mr. Johnson thought that the remedy in that case should be a motion to strike and a curative instruction. Mr. Summerill thought that CV127 on "limited purpose evidence" already covered the issue. Mr. Johnson expressed concern that CV127 may be given in the first phase of the trial but not the second, after evidence of other conduct has been admitted. Mr. Summerill noted that the instruction can be repeated in the second phase of the trial. Judge Stone suggested that similarity is not binary but lies on a continuum. The more similar the conduct is, the more weight the jury will give to it in determining reprehensibility. He therefore thought it was appropriate to instruct the jury on similar/dissimilar conduct. He added that, if evidence that should have been excluded comes into evidence, having a jury instruction on how the jury is to consider the evidence helps protect the verdict on appeal. He suggested telling the jury that it can consider other harm in determining reprehensibility but cannot award damages for other harm. Mr. Humpherys suggested inviting the court to give an instruction tailored to the particular piece of evidence. Mr. Ferguson drew a distinction between conduct and harm and noted that the purpose of punitive damages is to change conduct. Judge Harris noted that the instruction is inconsistent. The first sentence says that the jury may consider harm to others in "deciding what level of punishment and deterrence is warranted," but the last sentence says harm to others may not be used to determine the amount of punitive damages, which is based on the "level of punishment and deterrence . . . warranted." He said he did not know what the jury was supposed to do with the instruction. Mr. Humpherys suggested breaking the instruction into two. The first would tell the jury it can consider similar conduct in determining reprehensibility, and the second would tell the jury that it can consider reprehensibility in determining the amount of punitive damages, but that harm to others can't be used in determining the amount. Mr. Ferguson gave the following example: The jury may consider the fact that the defendant cheated 3,000 people in addition to the plaintiff and punish him for that conduct, but the amount of money that the 3,000 people lost may not be used as the amount of

punitive damages, since the purpose of punitives is not compensation but deterrence and punishment. The committee rewrote the instruction to read:

In determining the amount of punitive damages to award, you should consider the reprehensibility of [name of defendant]'s conduct toward [name of plaintiff].

In making this determination, you may consider similar conduct by [name of defendant] toward other people who are not in this lawsuit, but only for the purpose of assessing the reprehensibility of [name of defendant]'s conduct. However, you may not consider the amount of harm sustained by other people in other cases as the measure of punitive damages in this case.

The committee considered whether “reprehensibility” would be clear to lay jurors. Someone suggested saying “reprehensibility or blameworthiness,” but Mr. Fowler questioned whether the two terms were synonymous. He thought “blameworthiness” might imply a lesser degree of reprehensibility. Judge Harris, citing dictionary.com’s definition of “reprehensible,” thought the two terms were synonymous, but the committee decided not to include “blameworthiness” for fear of departing too much from the language of the cases. Dr. Di Paolo thought “reprehensibility” was probably okay, since there was enough of a context for the jury to understand the concept. The committee approved the instruction as modified. Mr. Humpherys will talk to Mr. Schultz and explain the committee’s reasoning.

b. *CV2029. Crookston factors.* At Judge Harris’s suggestion, the title was changed to “Factors to consider in determining the amount of punitive damages.” Factor (5) was revised to read, “the probability of future reoccurrence of the misconduct toward the plaintiff or others.” Ms. Sylvester suggested deleting the commentary in the references, but Judge Stone and Mr. Ferguson recommended against it. The committee approved the instruction as modified.

c. *CV2026. Punitive damages—introduction, committee note.* Mr. Simmons noted that the first sentence of paragraph 3 of the committee note was not an accurate statement of the law, since bifurcation is only required if evidence of the defendant’s wealth is going to be introduced, and the Utah Supreme Court has said that evidence of wealth is not a necessary condition for punitive damages in every case. The sentence was revised to read, “The statute requires bifurcation in all cases where punitive damages are sought and evidence of the defendant’s wealth is introduced.” At Judge Harris’s suggestion, the second sentence was deleted. On motion of Mr. Humpherys, seconded by Mr. Johnson, the committee

approved the committee note. (The instruction itself had been previously approved.)

d. *CV2028. Punitive damages.* Mr. Ferguson thought the introductory clause could be deleted. He also thought that the second sentence was inconsistent with CV2030 and questioned whether CV2028 was necessary. The only thing it seems to add is the concept of deterrence. Judge Harris noted that CV2026 and CV2027 talk about “discourag[ing]” future misconduct. Dr. Di Paolo preferred “discourage” to “deter.” Judge Harris thought CV2028 could be combined with CV2030. Judge Stone noted that deterrence assumes other victims, so the jury must necessarily consider the effect of the defendant’s conduct toward others. Mr. Humpherys thought that CV2028 was adequately covered by factors (4) and (5) of CV2029 and was therefore unnecessary. Mr. Johnson initially thought that CV2028 was necessary but then acknowledged that it is largely covered by CV2030. He suggested making the last sentence of CV2030 the first sentence, to change the emphasis. Judges Harris and Stone, however, thought CV2030 flowed better as it was. Judge Stone suggested leaving CV2030 to deal with reprehensibility and dealing with deterrence and factors that can *not* be considered in CV2028. The committee agreed that CV2028 in its present form was not an accurate statement of the law. Mr. Johnson thought the concept that needs to be addressed is that the jury cannot award punitive damages to punish conduct in other states where the conduct is legal in those states and gave as an example the tort of alienation of affections. Mr. Ferguson drew the distinction between deterrence and punishment and noted that the jury can award punitive damages to deter harm to others but cannot award punitive damages to punish harm to others. Judge Stone noted that the conduct to be deterred is future *wrongful* conduct, and the jury needs some direction on considering conduct from other jurisdictions where the conduct may not be unlawful. Mr. Ferguson suggested that the real issue is one of admissibility of the evidence and not an issue for the jury. Mr. Fowler noted that the geographical issue comes up in other jurisdictions and asked how other states have dealt with it. Judge Harris suggested revising CV2028 to address the jurisdictional issue. Mr. Humpherys will try to do so. The committee deferred further discussion of CV2028.

4. *Next meeting.* The next meeting will be Monday, December 8, 2014, at 4:00 p.m.

The meeting concluded at 6:00 p.m.