

MINUTES

Advisory Committee on Model Civil Jury Instructions

December 8, 2014

4:00 p.m.

Present: Juli Blanch (chair), Marianna Di Paolo, Honorable Ryan M. Harris, L. Rich Humpherys, Gary L. Johnson, Stuart H. Schultz (ex officio member), Paul M. Simmons, Honorable Andrew H. Stone, Nancy Sylvester

Excused: Paul M. Belnap, Phillip S. Ferguson, Tracy H. Fowler, John R. Lund, Ryan M. Springer, Peter W. Summerill

The committee lacked a quorum, so no matters were voted on, but those present decided to go ahead and discuss the punitive damage instructions to take advantage of Mr. Schultz's input.

1. *CV2030. Reprehensibility.* Mr. Schultz agreed that whether or not other conduct is sufficiently similar to be relevant to the reprehensibility analysis and thus admissible was for the trial court to decide in the first instance. He suggested revising the first sentence of the second paragraph to say, "In making this determination, you may consider the evidence that has been admitted of similar conduct by the defendant toward other people who are not in this lawsuit." The committee thought the language was an improvement.

Mr. Johnson suggested listing in brackets the factors that the Supreme Court identified in *State Farm v. Campbell* as relevant to the reprehensibility analysis so that the parties could tailor them to the facts of the case. He noted that the only factor mentioned in CV2030 is similar conduct toward others and argued that, without such an instruction, defense counsel could argue that the defendant's conduct did not justify punitive damages because he did not harm anyone else in a similar way. Mr. Humpherys did not want to limit the factors that the parties could argue or that the jury could consider in determining reprehensibility. Mr. Simmons agreed that the *State Farm* factors were not exhaustive. Ms. Sylvester had attached to the materials Illinois pattern instruction 35.01 as an example. The instruction lists six factors (similar to those mentioned in *State Farm*) and then has a space for "[other]."

Mr. Humpherys asked whether reprehensibility was a legal standard for the court to apply in determining whether the issue of punitive damages should go to the jury in the first place or whether it is a factor for the jury to consider in determining the amount of punitive damages to award. The committee thought it was the latter; the legal standard is set out in the punitive damage statute, Utah Code Ann. § 78B-8-201. Judge Harris noted the inconsistency of saying that the jury can consider conduct toward others in determining how reprehensible the defendant's conduct was but cannot use the defendant's conduct toward others in setting the amount of punitive damages, even though reprehensibility only goes to the amount of punitive damages. Dr. Di Paolo did

not think jurors would understand the distinction the last paragraph of CV2030 is trying to make.

Judge Stone noted that the law treats repeat conduct more severely in other areas as well; for example, two drivers who commit the same act and cause the same harm as a result of drunk driving will receive different sentences if it is the first offense for one but the fourth offense for the other. The latter will be sentenced more severely.

Mr. Humpherys suggested bracketing the second paragraph, since it would only apply if the court admitted evidence of similar conduct toward others. Alternatively, he suggested having a separate instruction on similar conduct, which would only be given if evidence of similar conduct was admitted at trial.

Mr. Humpherys noted that the purpose of punitive damages is two-fold: punishment and deterrence. He asked whether reprehensibility goes only to punishment or also to deterrence. A defendant may not be punished for his conduct toward others, but deciding on the proper amount for deterrence may require the jury to consider how widespread the defendant's wrongful conduct is. Mr. Humpherys and Judge Stone suggested telling the jury that it may not award punitive damages to punish the defendant for harm to other people. Mr. Simmons pointed out that CV2028 already contains such language. But he also thought that it would not hurt to repeat the caution when talking about evidence of similar conduct, unless CV2028 immediately followed CV2030. Ms. Sylvester suggested adding to the end of CV2030, "In other words, you may not punish the defendant for harm he may have caused to others." Dr. Di Paolo thought jurors would still be confused.

2. *CV2028. Punitive damages.* Ms. Sylvester noted that she had added a sentence to the end of CV2028 to address the issue of conduct that may be wrongful in Utah but lawful in other states. Mr. Humpherys thought that, as it was written, it did not accurately state the law because it suggested that the jury could not punish conduct in Utah that was wrongful here but lawful in other states. Judge Stone and Mr. Simmons suggested revising the sentence to read, "You also may not award punitive damages based on evidence of [name of defendant]'s conduct in another state if it was lawful where and when [he/she/they/it] committed it." Ms. Blanch suggested renaming CV2028 "Punitive damages and harm to other people." Mr. Humpherys thought it would be better to have separate jury instructions on each concept. Ms. Blanch suggested that he break out all of the punitive damage instructions into discrete concepts for the next meeting, and Mr. Humpherys agreed to do so.

3. *Next meeting.* The next meeting will be Monday, January 12, 2015, at 4:00 p.m. The chair wished everyone happy holidays.

The meeting concluded at 5:20 p.m.