

## ***MINUTES***

Advisory Committee on Model Civil Jury Instructions

September 14, 2015

4:00 p.m.

Present: Juli Blanch (chair), Marianna Di Paolo, Joel Ferre, Tracy H. Fowler, Honorable Ryan M. Harris, Gary L. Johnson, Patricia C. Kuendig (by phone), Paul M. Simmons, Honorable Andrew H. Stone, Nancy Sylvester. Also present: Randy L. Dryer, David C. Reymann, from the Defamation subcommittee

Excused: Ryan M. Springer, Peter W. Summerill

1. *Minutes.* On motion of Mr. Fowler, seconded by Mr. Ferre, the minutes of the May 11, 2015 meeting were approved.

2. *Appreciation for the Service of Mr. Springer and Discussion of Replacement.* Ms. Blanch noted that Mr. Springer is leaving the committee and recognized him for his years of service on the committee. Ms. Sylvester noted that seven attorneys who primarily represent plaintiffs had expressed interest in joining the committee--Nelson Abbott, Daniel Bertch (who is also a Justice Court judge), Loren Lambert, Nathan Morris, Bruce Pritchett, Denver Snuffer, and Christopher Von Maack. Ms. Blanch asked for feedback on any of the applicants. Mr. Johnson noted that he used to work with Mr. Morris and thought he would be a good choice. Mr. Simmons noted that he knew Messrs. Abbott, Lambert, and Pritchett and thought any of them would also be a good choice.

Judge Harris joined the meeting.

3. *CLE Credit.* Ms. Sylvester reported that she met with representatives of the Utah State Bar to ask if committee members could obtain CLE credit for their work on the committee. The bar was hesitant to give credit for committee work but left open the possibility that members of subcommittees who actually draft the jury instructions could receive credit.

4. *Fall Forum.* Ms. Blanch noted that she and Judge Michele Christiansen will be giving a presentation at the Fall Forum on jury instructions.

5. *Schedule and Subcommittees.* The committee reviewed the list of subcommittees and projected time lines that Ms. Sylvester circulated with the minutes. Mr. Johnson noted that the Insurance subcommittee, which he chairs, needs more members. The committee suggested Lance Milne of Dewsnup, King & Olsen, Ryan Schriever of Myler Injury Law, and Robert Thompson and Rick Vazquez of Snow, Christensen & Martineau. Matthew Barneck, the chair of the Wills and Probate subcommittee, has questioned whether jury instructions are needed for his area.

Dr. Di Paolo joined the meeting.

6. *Defamation Instructions.* Ms. Blanch introduced Mr. Dryer, the chair of the Defamation subcommittee, and David Reymann of that committee. Mr. Dryer reported that the subcommittee, consisting of three plaintiffs' attorneys and three defense attorneys, agreed for the most part on all the instructions. The MUJI 1st instructions needed revising because of changes in the law since they were promulgated. One area that the subcommittee could not resolve, because there has not been an authoritative decision on the issue yet, is the level of fault required in cases of a private figure and a non-public concern.

a. *CV1601. Defamation--Introduction.* Mr. Dryer explained that the instruction was meant as an explanatory note for courts and practitioners and was not meant to be read to the jury. The subcommittee had followed the format of the Professional Liability: Medical instructions (series 300). Judge Stone suggested renaming the instruction "Instruction Notes," as in CV301A. Mr. Simmons asked whether the instruction had to be numbered. Ms. Sylvester said that the format for adding new instructions requires a number. Dr. Di Paolo suggested numbering all such introductory instructions to end in 00, such as CV1600. That would require renumbering the medical malpractice instructions. Mr. Simmons noted that we have avoided using letters after the instruction numbers, so if the medical malpractice instructions were renumbered, CV301A through 301C should be renumbered CV300, CV301, and CV302, with others renumbered accordingly. Judge Stone noted that the med mal instructions were not before the committee at this time and that any renumbering may also require renumbering internal cross-references. At Mr. Dryer's suggestion, CV1601 was revised to read, "CV1600: Introductory Notes to Practitioners (not to be read to the jury)." On motion of Judge Stone, seconded by Mr. Simmons, the instruction was approved as modified, and subsequent instructions were renumbered accordingly. (For purpose of the minutes, the instructions will be referred to by the numbers they bore in the meeting materials.)

b. *CV1602. Elements of a Defamation Claim.* Mr. Reymann noted that the elements were taken from the case law. Cases in some jurisdictions say that truth and privilege are defenses. The committee note explains the "truth is a defense" issue but does not address privilege. Technically, the defendant has the burden of asserting a privilege; the court decides whether a privilege exists; and, if it does, the burden then shifts to the plaintiff to show that the privilege was abused and therefore does not apply. Dr. Di Paolo thought that jurors would not understand the concept of "privileged" the first time they hear it. Later instructions explain the plaintiff's burden. Because a privilege may not be asserted in every case, at Mr. Fowler's suggestion, the committee bracketed the fourth element (that "the statements were not privileged"). Judge Harris

expressed concern with the second paragraph of the committee note that says that section 45-2-2 of the Utah Code is “likely unconstitutional for failure to require falsity.” Messrs. Dryer and Reymann explained that the statute provides definitions for statutory privileges that apply to retractions and is not consistent with the case law, which provide that one cannot be liable in defamation for a true statement. At Judge Harris’s suggestion, the quoted language in the comment was changed to “may suffer from constitutional infirmities for failure to require falsity.” Dr. Di Paolo suggested changing “published” to “made” in the first and fifth elements. She thought the jury would understand “published” to mean a written publication. Mr. Reymann pointed out that “made” may not be sufficient, since the statement must also have been heard or received. Mr. Simmons suggested substituting “communicated” for “published.” Judge Harris suggested putting terms of art, such as “published” in quotation marks and adding that those terms have special meanings that will be explained later. The committee replaced the last sentence of CV1602 with “Some of these words have special meanings, and they will be explained in the following instructions.” At Dr. Di Paolo’s suggestion, “elements” was added to the end of the second sentence (the plaintiff “must prove the following elements”), and “requisite” in subparagraph (5) was changed to “required.” On motion of Mr. Johnson, seconded by Dr. Di Paolo, the committee approved the instruction as modified.

c. *CV1603. Burden of Proof.* Mr. Simmons suggested bracketing the second sentence, since not every case may involve a claim of privilege. Mr. Reymann noted that a defamation case may involve multiple statements, for some of which there may be a claim of privilege and for some not. Ms. Blanch suggested taking out the second sentence and saving it for the privilege instructions. Ms. Sylvester suggested making it a separate paragraph, and Dr. Di Paolo suggested making it a separate instruction. Mr. Simmons noted that, without the second sentence, the instruction was covered by the general burden-of-proof instruction, CV117. Mr. Dryer explained that the subcommittee thought that the defamation instructions needed to be self-contained, but the committee explained that they are meant to be used in conjunction with the general instructions. At Judge Stone’s suggestion, CV1603 was deleted, and, at Mr. Reymann’s suggestion, the first sentence of the committee note was moved to the beginning of the committee notes for CV1610 and CV1611.

Ms. Kuendig joined the meeting by phone.

d. *CV1604. Definition: Publication.* Dr. Di Paolo asked whether “nonverbal conduct” was equivalent to “nonverbal behavior.” She thought the latter phrase was more comprehensive. Mr. Reymann said the intent was to be broad, and that even silence could be a publication under some circumstances. The committee revised the reference to nonverbal conduct to say “nonverbal

conduct or actions.” On motion of Mr. Johnson, seconded by Mr. Fowler, the committee approved the instruction as modified.

e. *CV1605. Definition: About the Plaintiff.* Mr. Fowler questioned the use of the term “actionable.” He thought lay jurors would not easily understand it. Mr. Reymann explained that statements that a reasonable person would not understand as referring to the plaintiff cannot be the basis of a defamation claim. Ms. Kuendig suggested saying that such statements “are not ‘about’ the plaintiff.” Mr. Simmons asked whether both subjective and objective tests were necessary. For example, if the person to whom the statement was made did not understand the statement to be about the plaintiff but a reasonable person would have so understood it, can the defendant still be liable? Mr. Dryer noted that the instruction was taken from MUJI 1st and that in many cases, the statement may have been made to many people, some of whom may not have understood it to refer to the plaintiff but others who may have. Mr. Fowler asked if there was a Restatement section that addressed the issue. Mr. Simmons suggested flagging the issue in a comment. Messrs. Dryer and Reymann offered to look into the matter more and report back at the next committee meeting.

f. *CV1606. Definition: False Statement of Fact.* Dr. Di Paolo noted that the committee had tried to avoid using “material” in the sense of “important” or “relevant,” but the committee had a hard time coming up with a better word. It considered “importantly,” “considerably,” “non-trivially,” or “in a relevant manner” but found them all unworkable. Mr. Dryer noted that counsel can argue the materiality of the statement in closing arguments. Mr. Reymann noted that the concept is that the statement must be false on a matter of significance as opposed to false on a trivial matter. It is the falsity of the statement that must be material, not the subject of the statement itself. He thought that the rest of the instruction explains the concept. He suggested that the first sentence be omitted. Mr. Fowler suggested leaving the first sentence as it is and adding a definition of “materially.” Mr. Dryer offered to take the instruction back to the subcommittee for further review.

7. *Next meeting.* The next meeting will be Tuesday, October 13, 2015, at 4:00 p.m. (Monday, October 12, being a state holiday).

The meeting concluded at 6:00 p.m.