MINUTES
Advisory Committee on Model Civil Jury Instructions
April 15, 2003
3:00 p.m.

Present: John L. Young (chair), Timothy M. Shea, Paul M. Belnap, Juli Blanch, Francis J. Carney, Ralph L. Dewsnup, Marianna Di Paolo, Phillip S. Ferguson, Tracy H. Fowler, L. Rich Humpherys, Andrew G. Deiss for Elliott J. Williams, Paul M. Simmons, Honorable David L. Mower, Matty Branch

Excused: Honorable William W. Barrett, Jr., Colin P. King

1. *Welcome and Introductions.* Mr. Young welcomed the members of the committee and introduced Judge Mower and Ms. Branch, who were there to observe. Judge Mower chairs the committee that will be preparing the model criminal jury instructions.

2. *Purpose.* Mr. Young reviewed the advisory committee's charge from the Utah Supreme Court--to develop plain language jury instructions that juries can easily understand and to update the model instructions to reflect changes in the substantive law. Mr. Shea noted that the committee will need to balance clarity and accuracy.

3. *Audience.* Dr. Di Paolo asked who our intended audience was. Mr. Deiss thought that jurors nationally average about a sixth- or seventh-grade education. Other committee members thought that the target audience (Utah jurors) would be more educated.

Mr. Shea will check with the federal district court to see if it has data on juror demographics in Utah.

Mr. Young will check with the Bureau of Economic Research for demographic information.

4. *Training.* Mr. Carney circulated two articles on jury instructions and juror comprehension taken from the Internet, one written by Joseph Kimble. Judge Mower suggested that the committee review principles of writing in plain English. It was suggested that the model jury instruction committees (civil and criminal) receive training in writing jury instructions in plain English.

Mr. Carney will obtain Appendix A to the Federal Judicial Center's Model Criminal Jury Instructions, which contains suggestions for drafting understandable jury instructions.

Mr. Carney will also look at other Internet resources on writing clear jury instructions.

Dr. Di Paolo will review the sources cited in footnote 2 of the Kimble article.

Dr. Di Paolo will also ask some of her colleagues involved in *Forensic Linguistics* (an on-line journal) for suggestions of sources or people who could help train the committees in writing jury instructions in plain English.

Committee members should get suggestions for potential speakers to Mr. Shea and Mr. Carney as soon as possible.

Mr. Carney will check with the Litigation Section of the Utah State Bar to see if it will help fund training for the jury instruction committees.

5. *History*. Mr. Carney reviewed the history of the Model Utah Jury Instructions (MUJI) promulgated by the Litigation Section of the Utah State Bar. Mr. Dewsnup reviewed the work of the committee on jury service.

6. *Status of Current MUJI and Lexis-Nexis Pre-publishing Contract.* Mr. Shea reported that Lexis-Nexis, the successor to Michie Company, the publisher of MUJI, is interested in preparing a supplement to MUJI and has offered free editorial services in exchange for being the first publisher to receive drafts of the committee's work.

7. *Introduction to Model Jury Instructions.* Mr. Shea reported that the Utah Supreme Court is interested in approving the new model jury instructions while reserving the right to review them in the context of a particular case. Mr. Shea presented a draft introduction to the new MUJI for discussion. Mr. Humpherys suggested that the new instructions be given a different name to distinguish them from the original MUJI. Mr. Carney suggested that the court may not want to approve the new instructions since they may deal with areas in which Utah law is not clear. Mr. Dewsnup suggested that the committee adopt some version of the draft introduction as its mission statement.

8. *Committee Meeting Schedule*. The committee agreed to meet the second Wednesday of each month from 4:00 to 6:00 p.m. in the Judicial Council Room on the fifth floor of the Matheson Courthouse.

9. *Priorities.* Mr. Young suggested that the committee set priorities for categories of jury instructions based on (a) those most frequently used, and (b) those most in need of updating. The first category includes (i) preliminary and general instructions, (ii) special verdict forms; and (iii) general negligence instructions. Instructions in the second category include those regarding (i) employment law, (ii) insurance company obligations, (iii) damages (including punitive damages), and (iv) products liability. Mr. Carney asked whether the instructions should

incorporate the Restatement (Third) of Torts: Products Liability. Mr. Humpherys questioned whether there should be a separate subcommittee on verdict forms or whether the subcommittees for each substantive area should prepare their own verdict forms. Mr. Dewsnup raised the question of whether more contract cases are tried to juries than tort cases.

Mr. Shea will obtain statistics on the types of cases that go to trial and those that are tried to juries.

10. *Subcommittees.* The following subcommittees were proposed:

Employment Law: Jathan Janove, Bob Wilde, Steven Baeder and Erik Strindberg have already been serving on an employment law subcommittee, under the direction of Mr. Young. Mr. Humpherys suggested that Karra Porter also be added to the subcommittee. Mr. Humpherys was then excused.

Preliminary and General Instructions: Judge Barrett, Ralph Dewsnup, Phil Ferguson, Judge Mower or Judge McIff.

Negligence: Frank Carney, Peter Collins, Vicky Kidman, David Lambert or Leslie Slaugh, John Lund, Doug Mortensen, Bill Stegall, Steve Sullivan.

Products Liability: Tracy Fowler (chair), Juli Blanch, Colin King, Paul Simmons.

Damages: Paul Belnap, Rich Humpherys.

Ms. Blanch suggested that each subcommittee have a judicial liaison. The final membership of the subcommittees was deferred till the next meeting.

11. *Format.* Mr. Carney suggested that the instructions be available in a loose-leaf binder to which sections could be added over time. Mr. Young indicated that Lexis-Nexis would also like the instructions in a loose-leaf format. Mr. Shea indicated that the instructions would eventually be available on the courts' website. Mr. Carney suggested that the case citations supporting the instructions be hyperlinked to the cases.

Mr. Shea will check with Lexis-Nexis about the possibility of hyperlinking.

12. *Law School Intern Assistance.* Mr. Shea noted that law students may be interested in doing legal research for the committee or subcommittees. The committee debated the relative merits of using law student interns as opposed to associate attorneys or relying on Lexis-Nexis's proffered editorial assistance.

The meeting concluded at 5:00 p.m.

Next Meeting: May 14, at 4:00 p.m. Agenda items for the next meeting should be sent to Mr. Young or Mr. Shea before May 7.

MINUTES
Advisory Committee on Model Civil Jury Instructions
May 14, 2003
4:00 p.m.

Present: John L. Young (chair), Timothy M. Shea, Paul M. Belnap, Francis J. Carney, Ralph L. Dewsnup, Marianna Di Paolo, Phillip S. Ferguson, Tracy H. Fowler, Colin P. King, Paul M. Simmons, Matty Branch

Excused: Honorable William W. Barrett, Jr., Juli Blanch, L. Rich Humpherys, Elliott J. Williams

1. *Minutes.* Mr. Ferguson moved that the minutes of the April 15, 2003, meeting be approved. Mr. Dewnsup 2d. The motion passed without opposition.

2. *Lexis-Nexis Update.* Mr. Young and Mr. Shea reviewed the status of negotiations with Lexis-Nexis. The Utah State Bar, which published MUJI, would like to terminate its contract with Lexis-Nexis or assign the contract to the Administrative Office of the Courts (AOC). Lexis-Nexis is reluctant to terminate the contract without having some arrangement for publication of the new model jury instructions. It would like to be the first publisher to receive drafts of the committee's work.

Mr. Shea will determine what rights the AOC can contract to give to Lexis-Nexis.

3. *Statistics.*

a. *Education Level.* Mr. Young distributed statistics he obtained from the University of Utah showing that 87.7% of the people in Utah age 25 and over have at least a high school education. The committee discussed how this fact could affect the drafting of jury instructions. Mr. Shea reported that the federal district court did not have statistics on the education level of jurors in federal court.

b. *Jury Trials.* Mr. Shea distributed statistics showing the number of civil jury trials in 2002 by case type. He noted that some of the statistics are questionable (such as the statistic for divorce cases and other cases that do not involve juries). After debating the accuracy of the statistics, the committee concluded that it did not need more accurate data. The committee also concluded that contract cases should be included in the top priority of cases for which jury instructions are needed, based on the relative numbers of contract cases and tort cases that go to trial.

4. *Plain Language Drafting Information.* The committee discussed articles on drafting jury instructions in plain language that Mr. Shea and Mr. Carney had distributed before

the meeting. Mr. Carney had also provided before the meeting a list of resources on plain language in jury instructions.

Mr. Carney will continue to try to obtain a copy of Appendix A to the Federal Judicial Center's Model Criminal Jury Instructions, which contains suggestions for drafting understandable jury instructions.

5. *Plain Language Workshop.* The committee discussed ideas for a workshop on drafting jury instructions in plain English. The committee envisions an all-day seminar to which all committee and subcommittee members would be invited. Dr. Di Paolo suggested Bethany Dumas, chair of the Linguistics Program at the University of Tennessee, as a guest speaker. Professor Dumas has taught at the National Institute for Trial Advocacy (NITA) and is writing a book on writing effective jury instructions. Mr. Carney suggested that we talk to people who have been to her NITA seminar for their recommendation.

Mr. Shea will forward to the committee members the information Dr. Di Paolo sent him on Professor Dumas and will obtain additional information on Professor Dumas.

Dr. Di Paolo recommended Peter Tiersma of Loyola as a second choice. Mr. Dewsnup recommended that the seminar be held soon so that committee and subcommittee members will become excited about their assignments and know how to write clearer jury instructions. The committee agreed that it would be difficult to hold the seminar in July or August because of summer vacation schedules. Mr. King suggested that we try to schedule the seminar for the latter part of June if Professor Dumas or Professor Tiersma is available; otherwise, we will try to schedule the seminar for September. The committee authorized Mr. Young and Mr. Shea to make the necessary arrangements for the seminar. Dr. Di Paolo offered to help arrange for the speaker. Mr. Shea noted that the Matheson Courthouse has conference rooms on the first floor that could be used for the seminar, or the committee could rent space at the Law & Justice Center. Mr. Carney suggested that, if the seminar is held at the Law & Justice Center, the committee make separate arrangements for food. Mr. Shea estimated that, if the seminar is held at the courthouse, the cost would be about $1,400 plus the speaker's honorarium.

Mr. Young and Mr. Shea will check on the availability of Professors Dumas and Tiersma and determine how much they charge for a one-day seminar.

Mr. Young and Mr. Carney will try to get the Litigation Section of the Bar to contribute money for the seminar.

6. *Communications.* Mr. Shea asked whether the committee would like a committee bulletin board on the Internet to communicate better. The committee members decided they would be more likely to read e-mails than to access a bulletin board. Anyone having information for the whole committee may e-mail it to Mr. Shea, and he will see that it is forwarded to all committee members.

7. *Subcommittees.* The committee agreed that each subcommittee should prepare its own separate special verdict forms. Then the committee or an editor could edit them to make sure they are uniform. Mr. Young emphasized that the members of the subcommittees are not chosen to advocate for or against a certain point of view but should try to reach a consensus on what the law is in a given area. Mr. Carney suggested that the subcommittees meet before the next committee meeting, which is scheduled for June 11.

a. *Contracts.* Mr. Young proposed that the subcommittee on contracts be broken down further into general contracts, Uniform Commercial Code, construction law and, possibly, debt collection. The following names were suggested for the contract subcommittees: Richard Carling, Mark Olson, Larry Peterson, Bruce Richards, David J. Bird, David Schofield, Kent Scott, Clark Fetzer, and Doug Short.

Mr. Young will make recommendations at the next meeting for the contracts subcommittees.

b. *Employment Law.* Mr. Young reported that Karra Porter of Christensen & Jensen, Nan Bassett of Kipp & Christian, and Stan Preston of Snow, Christensen & Martineau have all expressed an interest in being on the employment law subcommittee. Mr. Young has given their names to Jathan Janove, the committee chair. Mr. Dewsnup suggested that, if the subcommittee needed more members, it could invite Janet Hughie Smith of Ray, Quinney & Nebeker. The committee agreed that the optimal size of the subcommittees is no more than eight members.

c. *Preliminary and General Instructions.* Mr. Dewsnup was selected to chair this subcommittee. Committee members include Judge Berrett and Mr. Ferguson. It was suggested that another judge or two be invited to participate on the subcommittee. The following judges were suggested: David Mower, Kay McIff, Randall Skanchy, Robert Hilder, Michael Lyon, Tom Kay, Fred Howard, Gary Stott and James Taylor. Concerns were expressed about whether some of these judges would have the time to devote to the project.

d. *Negligence.* Mr. Carney chairs this subcommittee. The other members are Warren Driggs, Gary Johnson, Victoria Kidman, John Lund and Peter Summerill.

e. *Products Liability*. Mr. Fowler chairs this subcommittee. The other members are Ms. Blanch, Mr. King, Mr. Simmons, Gordon Roberts, Matthew Moscon and Doug Cannon. It was suggested that Bryon Benevento also be invited to join the subcommittee.

f. *Damages*. This subcommittee is to draft the instructions for damages generally; its work is not limited to punitive damage instructions. Mr. Belnap was selected to chair this subcommittee. The members include Mr. Humpherys and Andrew Morse. Mr. Ferguson reported that Mr. Humpherys had talked to Bob Campbell about being on the subcommittee. The committee agreed that Mr. Campbell would be better suited for the condemnation subcommittee.

Mr. Ferguson will talk to Mr. Humpherys, who will let Mr. Campbell know that his services are needed more on the condemnation subcommittee.

Other names suggested for the damages subcommittee were Jeremy Hoffman, Shawn McGarry, Leslie Slaugh, Steve Horvat and Bob Henderson. Some members of the committee thought that Mr. Henderson may not be interested.

8. *Next Meeting*. The next meeting will be Wednesday, June 11, at 4:00 p.m. One of the agenda items will be to identify the next areas of priorities for jury instructions (including condemnation).

The meeting concluded at 6:00 p.m.

MINUTES

Advisory Committee on Model Civil Jury Instructions

June 11, 2003

4:15 p.m.

Present: John L. Young (chair), Timothy M. Shea, Paul M. Belnap, Juli Blanch, Francis J. Carney, Marianna Di Paolo, Phillip S. Ferguson, Tracy H. Fowler, L. Rich Humpherys, Colin P. King, Paul M. Simmons, Honorable David L. Mower, Matty Branch

Excused: Honorable William W. Barrett, Jr., Ralph L. Dewsnup

1. *Minutes.* Mr. Carney moved that the minutes of the May 14, 2003, meeting be approved. Mr. Fowler 2d. The motion passed without opposition.

2. *Subcommittee Reports.*

a. *Negligence Subcommittee.* Mr. Carney reported that the negligence subcommittee had met on Monday and will continue to meet the second Monday of each month. The subcommittee consists of Mr. Carney (chair), David West, Victoria Kidman, John Lund, Warren Driggs and Gary Johnson. They plan to go through section 3 of MUJI, decide which instructions need to be deleted, which need to be revised or moved, and what instructions need to be added. The following areas were assigned to the negligence subcommittee: tort law/special doctrine (section 4 of MUJI), motor vehicles (section 5), railroad crossings (section 8), common carriers (section 9), and negligent infliction of emotional distress (covered in section 22).

b. *Preliminary and General Instructions Subcommittee.* Mr. Ferguson reported that the subcommittee has not met yet. They intend to conference Judge McIff in by telephone. It was suggested that Judge Henriod also be invited to serve on the subcommittee.

c. *Products Liability Subcommittee.* Mr. Fowler reported that the subcommittee met last week, discussed philosophy, made assignments and plans to meet again the first week in July.

d. *Damages Subcommittee.* Mr. Belnap circulated a list of the subcommittee members. They are Mr. Belnap, Mr. Humpherys, Stephen P. Horvat, Leslie W. Slaugh, Shawn McGarry, Jeremy M. Hoffman and Andrew M. Morse. Mr. Belnap asked about the scope of the subcommittee's assignment. It was agreed that the subcommittee would prepare instructions that apply generally to damages but that damage instructions specific to some unique areas of the law (such as employment, UCC, medical malpractice and condemnation) would be drafted by the subcommittees assigned to those areas and cross-

referenced with the general damage instructions. Each subcommittee will also prepare its own special verdict forms.

e. *Employment Subcommittee.* Mr. Young reported that he had spoken with Jathan Janove, the chair of the employment subcommittee. The committee has added some members but has tried to maintain a balance between attorneys who represent primarily management and those who represent primarily employees.

f. *Contracts Subcommittee.* The following names were suggested for the contracts subcommittee: Kent Scott, Michael Homer, David Slaughter, Ted Barnes, Craig Adamson, Bruce Badger and Dave Zimmerman. Mr. Young reported that he had talked to Richard Carling about serving on the subcommittee, but Mr. Carling was too busy and would recommended another attorney in his office.

Mr. Young will work with the contracts subcommittee to complete its formation.

3. *Other Subcommittees.* Mr. Young reviewed the list of other substantive areas covered by MUJI. The committee recommended the following people to serve on the subcommittees:

a. *Tort Law/Special Doctrine.* This area was assigned to the negligence subcommittee.

b. *Motor Vehicles.* This area was assigned to the negligence subcommittee.

c. *Medical Negligence.* Ralph Dewsnup, Frank Carney, Elliott Williams, Curtis Drake, Charles Thronson and Dave Williams.

d. *Other Professional Negligence.* Matt Lalli, Mike Skolnick, Dick Burbidge, Rick Hincks, Tim Houpt, Rex Madsen, Craig Mariger, Craig Coburn, Craig Adamson or Eric Lee, Bob Peterson, Tom Karrenberg, Scott Call, Gary Bendinger, Steve Marsden.

e. *Railroad Crossings.* This area was assigned to the negligence subcommittee.

f. *Common Carriers.* This area was assigned to the negligence subcommittee.

g. *Intentional Torts (Defamation, Slander, Malicious Prosecution, False Arrest, Abuse of Process, Battery).* David Scofield; Bob Anderson.

h. *Owners, Occupiers, Lessors of Land (Premises Liability).* Jeff Eisenberg, David Cutt, Gordon Strachan, Wendy Faber, Steve Morgan, Joe Minnock, Dave Richards.

i. *Federal Employer's Liability Act.* Brent Hatch, Scott Savage, Clair Williams, Cheri Gochberg. Some committee members questioned whether instructions on FELA were needed in model state jury instructions.

Mr. Young will check with Messrs. Hatch and Savage to see if they think the new model jury instructions should include FELA instructions.

j. *Civil Rights (Section 1983 Actions).* Al Larson, Karra Porter, Steve Dougherty, Kathy Collard.

Mr. Young will check with Mr. Larson to see who is representing plaintiffs in civil rights actions.

k. *Eminent Domain/Condemnation.* Bob Campbell, Steve Ward (Attorney General's office), David Olsen, Peter Billings.

l. *Fraud and Deceit.* Mike Hansen, Steve Doughtery, Jay Gurmankin, George Haley, Paul Drecksel, Bruce Maak. The committee questioned whether fraud and deceit should be a separate subcommittee or whether it should be assigned to the intentional tort subcommittee.

m. *Business Torts/Interference with Contracts.* This area was assigned to the intentional tort subcommittee.

n. *Officers, Directors, Partners, Insiders Liability.* This area was reserved in MUJI.

Mr. Young will check with Tom Karrenberg to see if instructions in this area are needed and, if so, who he would recommend to serve on the subcommittee.

o. *Insurance Company's Obligations.* Discussion on this area was deferred.

p. *Emotional Distress.* The committee assigned intentional infliction of emotional distress to the intentional tort subcommittee and negligent infliction of emotional distress to the negligence subcommittee.

q. *Will Contest.* Charles Bennett, Rick Johnson, Kent Alderman.

r. *Vicarious Responsibility/Partnership/Joint Venture/Parent/Guardian.* Rick Van Wagoner, Jon Dibble. It was suggested that this area could be subsumed in the more general area of agency.

Mr. Young will check with Mr. Dibble to see if he thinks a separate section is needed for vicarious responsibility and, if so, who he thinks should serve on the subcommittee.

s. *Electricity and Other Ultrahazardous Activities.* Mr. King suggested that a subcommittee be assigned to draft instructions on ultrahazardous activities and power companies. He further suggested that Rick Rose serve on the subcommittee.

Mr. Carney suggested that the committee had overlooked a valuable resource--law professors at the S.J. Quinney and J. Reuben Clark schools of law. He suggested that the committee send a letter to the dean of each law school listing the subcommittees and inviting faculty members to participate in the areas of their expertise.

Mr. Young indicated that he would like to involve trial judges in the subcommittees. Judge Mower suggested that Mr. Young solicit the help of trial judges at the annual judicial conference in September.

Committee members should consider what other areas need to be covered by jury instructions.

Mr. Carney will circulate a link to the web page for the California Civil Jury Instructions (BAJI) so that members can compare the categories of instructions included there with the categories in MUJI.

Mr. Young indicated that he would like all the subcommittees in place by October 25 so that all the members can be invited to attend the workshop on that date.

4. *Writing Workshop.* Mr. Young reported that Bethany Dumas of the University of Tennessee will provide training on writing jury instructions in plain English at an all-day seminar on Saturday, October 25. She does not expect a stipend but is willing to come if her expenses are paid. Mr. Carney suggested that she stay at the Grand America or Hotel Monaco. The Litigation

Section of the Bar will fund up to $3,000 of the conference expenses. The civil and criminal instruction committees and subcommittees will be invited to attend the seminar. Dr. Di Paolo will check with Dr. Dumas to see if she would like to do anything with the University of Utah's Department of Linguistics while she is in Utah. If she does, the university may be willing to pick up a share of Dr. Dumas's expenses. Ms. Blanch suggested that the committee host Dr. Dumas at a dinner the night before the conference (Friday, October 24).

Mr. Shea and Dr. Di Paolo will coordinate arrangements with Dr. Dumas.

Mr. Shea will look into the possibility of obtaining CLE credit for the conference attendees.

Mr. Young recommended that the subcommittees have most of their substantive work done by October 25, so that they can then concentrate on putting the instructions into plain language after the workshop. Dr. Di Paolo indicated that she is willing to answer any questions regarding the plain language resources provided to the committee in the interim.

5. *Lexis-Nexis Update.* Mr. Shea reported that Lexis-Nexis will retain its contract with the Bar to republish MUJI as it sees fit. It will also send a letter to the Bar stating that this project will not violate the noninterference clause of its contract with the Bar. The Bar will allow this committee to use noncopyrighted material from MUJI. The committee will allow Lexis to use its product as Lexis sees fit. Once instructions are available on the court's web page, any publisher who wants to use them may. Mr. Shea reported that he has not yet received any letters from Lexis stating the terms of our agreements with Lexis.

Mr. Shea and Mr. Young will follow up with Lexis-Nexis.

6. *Other Matters.*

a. *Philosophy.* Mr. Carney emphasized that the subcommittees should try very hard to agree on instructions that are a fair statement of the law. He indicated that the committee does a disservice to the court if it presents two sets of instructions, one favored by the plaintiffs' bar and one by the defense bar.

b. *Audience.* Judge Mower encouraged the committee to consider its audience--jurors, and not the supreme court. Mr. Carney suggested that instructions also need to be written for the supreme court, with a possible appeal in mind. It was suggested that the two audiences are not necessarily incompatible, that instructions can accurately state the law and still be stated clearly enough for jurors to understand them easily.

c. *Name.* Mr. Carney suggested that the new jury instructions be given a name with an easily referenced acronym, such as Form Utah Jury Instructions (FUJI), Pattern Utah Jury Instructions (PUJI), or simply Utah Jury Instructions (UJI).

d. *Format.* Judge Mower urged the jury instructions provide hyperlinks in the table of contents, to comments and cross-references and to case citations and authorities.

7. *Next Meeting.* The next meeting will be Wednesday, July 9, at 4:00 p.m.

The meeting concluded at 5:35 p.m.

MINUTES

Advisory Committee on Model Civil Jury Instructions

July 9, 2003

4:10 p.m.

Present: John L. Young (chair), Juli Blanch, Francis J. Carney, Ralph L. Dewsnup, Phillip S. Ferguson, Tracy H. Fowler, Colin P. King, Paul M. Simmons, Matty Branch

Excused: Timothy M. Shea, Honorable William W. Barrett, Jr., Paul M. Belnap, Marianna Di Paolo

1. *Minutes.* Ms. Blanch moved that the minutes of the June 11, 2003, meeting be approved. Mr. Fowler 2d. The motion passed without opposition.

2. *Subcommittee Reports.*

a. *Damages Subcommittee.* Mr. Young reported that the damages subcommittee has met and made assignments.

b. *Employment Subcommittee.* Mr. Young reported that he had received an e-mail from Jathan Janove, the chair of the employment subcommittee, raising certain questions:

1) Should the subcommittee deal with civil rights issues in the employment context, or should they be left to the civil rights subcommittee?

2) Should the subcommittee draft instructions for breaches of employment contracts that do not involve termination, or should such instructions be left for the contracts subcommittee?

3) Should the subcommittee draft instructions regarding negligent hiring, retention and supervision, or should they be left for the negligence subcommittee?

4) Should the subcommittee draft instructions on defamation, qualified immunity and related issues, or should they left for the intentional tort subcommittee?

The committee agreed that the employment subcommittee should draft instructions in all of these areas specific to the employment setting but that the instructions would later have to be compared with more general instructions on the same topics and perhaps consolidated with or cross-referenced to the more general instructions. The committee thought that each set of instructions should

be able to stand alone to the extent possible, even if there may be some overlap with other areas.

Mr. Young will let Mr. Janove know the committee's response.

c. *Negligence Subcommittee.* Mr. Carney reported that the negligence subcommittee had met and agreed that four instructions from the current MUJI should be discarded (including MUJI 3.3, 3.4, 3.18) and that two others (MUJI 3.21 and 3.22) should be moved to other sections. At their next meeting, they will address the general negligence instructions (MUJI 3.1 through 3.12), followed, in subsequent meetings, by discussion of the proximate cause and comparative fault instructions.

d. *Preliminary and General Instructions Subcommittee.* Mr. Dewsnup reported that the subcommittee had to cancel its meeting because Judge McIff was not able to attend. Mr. Dewsnup further reported that the subcommittee is using the Judge Mower/Judge McIff preliminary instructions as a starting point and does not think they need major work. Mr. Ferguson has invited Judge Henriod to serve on the subcommittee but has not yet heard back from him.

e. *Products Liability Subcommittee.* Mr. Fowler reported that the subcommittee has met twice and made assignments. It plans to discuss specific instructions at its next meeting.

f. *Contracts Subcommittee.* Mr. Young has spoken with Kent Scott, Michael Homer, George Hunt, Steve Dougherty and Bruce Badger, and they have all agreed to serve on the contracts subcommittee.

Mr. Young will also ask Dave Zimmerman and Dave Slaughter to serve on the contracts subcommittee.

g. *Civil Rights Subcommittee.* Mr. Young has not yet spoken with Al Larsen about forming this subcommittee.

h. *Eminent Domain/Condemnation.* Mr. Young reported that Bob Campbell and Steve Ward have agreed to serve on this subcommittee, but Peter Billings declined. The subcommittee needs more members.

i. *Fraud and Deceit.* Mr. Young reported that George Haley and Paul Drecksel have agreed to serve on this subcommittee. Mr. Haley will be asked to chair the subcommittee. Mr. Haley has recommended the following members: Fran Wikstrom,

James Blanch, Perrin Love and Rod Snow. Steve Marsden and Jay Gurmankin were also suggested as possible committee members.

j. *Officers, Directors, Partners, Insiders Liability.* The committee agreed that instructions are needed in this area, which was reserved in MUJI. The following people were suggested as committee members: Tom Karrenberg, Scott Call, Bob Peterson, Peggy Tomsic, Jay Gurmankin and Carol Clawson.

k. *Federal Employer's Liability Act.* Mr. Young reported that he has spoken with Brent Hatch about whether instructions are needed in this area and is waiting to hear back from Mr. Hatch.

l. *Insurance Company's Obligations.* The committee had deferred formation of this subcommittee pending completion of the damages subcommittee's work, since Mr. Belnap and Mr. Humpherys would be the likely ones to head up this subcommittee, and they are serving on the damages subcommittee. Other suggestions for subcommittee members included David Olsen, Paul Matthews, Alan Sullivan and Michael Zimmerman.

Mr. Young reported that he has not yet contacted potential members of the other subcommittees.

Mr. Young will try to complete the rest of the subcommittees by the next meeting.

Committee members who have suggestions for subcommittee assignments should let Mr. Young know as soon as possible.

3. *Alternative Instructions.* Mr. Fowler raised an issue that came up in the products liability subcommittee meeting, namely, the extent to which subcommittees should draft instructions on issues for which there is no clear Utah law. The committee agreed that the subcommittees should try to provide as complete instructions as possible and to agree on instructions where possible, but where there is no controlling Utah law the subcommittees may have to offer alternative instructions.

Ms. Branch was asked to raise the issue with the court and seek its guidance.

4. *Lexis-Nexis.* Mr. Young reported that there had been no change in the negotiations with Lexis-Nexis.

5. *Writing Workshop.* Mr. Young reminded everyone of the writing workshop planned for Saturday, October 25, with Bethany Dumas of the University of Tennessee. All

subcommittee members should be invited to attend. Committee members should let Mr. Young know if they are interested in attending a dinner with Dr. Dumas the night before.

6. *California Jury Instructions.* The committee reviewed some of the draft California jury instructions that purport to have been written in plain English. The instructions do not appear to be as comprehensive as MUJI. Mr. Carney had earlier circulated a link to the draft instructions on the Internet.

7. *Next Meeting.* The next meeting will be Wednesday, August 13, at 4:00 p.m.

The meeting concluded at 5:05 p.m.

MINUTES
Advisory Committee on Model Civil Jury Instructions
October 8, 2003
4:15 p.m.

Present: John L. Young (chair), Timothy M. Shea, Paul M. Belnap, Francis J. Carney, Ralph L. Dewsnup, Marianna Di Paolo, Phillip S. Ferguson, Tracy H. Fowler, Paul M. Simmons

Excused: Honorable William W. Barrett, Jr., L. Rich Humpherys, Colin P. King

1. *Minutes.* The committee approved the minutes of the July 9, 2003, meeting.

2. *Plain Language Writing Workshop.* The committee discussed preparations for the October 25, 2003, workshop on writing plain-language jury instructions. Mr. Shea reported that a request for CLE credit is pending. The workshop will be videotaped. Mr. Shea will send out an announcement and invitation to all members of the committee and all subcommittees tomorrow asking for a prompt RSVP. Judges have also been invited to attend. Next week an invitation will be extended to the members of the Bar's Litigation Section, with a notice that seating is limited. It was agreed that seating should be limited to no more than 100 participants. Dr. Di Paolo reported that the Department of Linguistics at the University of Utah will pick up Dr. Dumas and entertain her Friday evening. It was agreed that Mr. Young, Mr. Shea and Dr. Di Paolo would take Dr. Dumas to dinner Saturday night.

Any other members of the committee who would like to attend the dinner Saturday evening with Dr. Dumas should let Mr. Young know.

3. *Subcommittees.*

a. *Composition and Chairs.* The committee reviewed a list of subcommittees and their members. Mr. Young has asked the following people to chair subcommittees: Robert Wallace (Civil Rights); Alan Sullivan (Contracts: Commercial); Kent Scott (Contracts: Construction); Rich Humpherys (Damages; Mr. Humpherys and Mr. Belnap were previously serving as co-chairs); Jathan Janove (Employment); George Haley (Fraud & Deceit); Paul Belnap (Insurance Company Obligations); Robert Anderson (Intentional Torts, which will include business torts); Frank Carney (Negligence); Jay Gurmankin (Officers, Directors, Partners, and Insiders Liability); Phillip Ferguson (Preliminary and General Instructions; Mr. Ferguson replaces Mr. Dewsnup as the chair of this subcommittee); Robert Morton (Premises Liability); Tracy Fowler (Product Liability); Craig Mariger (Professional Liability: Architects, Engineers); Robert Gilchrist (Professional Liability: Lawyers, Accountants); Ralph Dewsnup (Professional Liability: Medical Negligence); Charles Bennett (Will Contests). Mr. Young has also asked the members of the subcommittees to serve on them and has invited them to attend the workshop on October 25. Mr. Young reported that he has not had any response from the

faculties at the law schools at the University of Utah and Brigham Young University to his request for participation in the subcommittees. The subcommittee chairs may contact faculty members directly if they desire.

Mr. Shea will circulate an updated list of the subcommittees and their members.

b. *FELA Subcommittee.* Mr. Young spoke to Brent Hatch about the need for a subcommittee to cover Federal Employer's Liability Act claims. Mr. Hatch did not think there was a need for such a subcommittee. Mr. Young will ask Mr. Hatch to serve on the Contracts: Commercial subcommittee.

c. *Negligence and Motor Vehicle Subcommittees.* It was agreed that the Negligence subcommittee would cover ultrahazardous activities and electricity. Mr. Carney suggested that a separate subcommittee be formed to cover motor vehicle accidents and that Bob Gilchrist be asked to chair the subcommittee.

Mr. Young will talk to Mr. Gilchrist about chairing the Motor Vehicle subcommittee.

The following attorneys were suggested as members of the Motor Vehicle subcommittee: Steve Sullivan, Vicky Kidman, Lynn Davies, Barbara Maw, Pete Petersen, Stuart Schultz, David Mortensen, Terry Plant, Ted Kanell, Tad Draper, Jack Helgesen, Scott Waterfall, Chris Shaw, Erik Ward, Kevin Sutterfield, Mark Flickinger, David Lambert and Nelson Abbott.

d. *Wills Subcommittee.* Mr. Ferguson suggested that the scope of the subcommittee should perhaps be expanded to include other probate matters, guardianships and trusteeships. He also suggested that Kent Alderman serve on the committee.

Mr. Young will talk to Charles Bennett or Mr. Alderman or both to see if they think the scope of the subcommittee should be expanded.

4. *Priorities.* The committee established the following priorities for completing instructions:

a. *First group:* Preliminary and General Instructions; Contracts: Commercial; Negligence; and Damages.

b. *Second group:* Employment; Motor Vehicles; Premises Liability.

c. *Third group:* All Professional Liability instructions; Products Liability.

d. *Fourth group:* Fraud & Deceit; Officers, Directors; Insurance; Contracts: Construction.

e. *Fifth group:* Everything else (Civil Rights; Intentional Torts; Wills).

5. *Timing.* The following schedule was established for subcommittees to submit their initial drafts to the full committee:

a. *Negligence:* December 1, 2003.

b. *Preliminary and General Instructions; Damages:* February 1, 2004.

c. *Contracts: Commercial:* March 1, 2004.

d. *Employment:* April 1, 2004.

e. *Premises Liability:* May 1, 2004.

f. *Motor Vehicles:* June 1, 2004.

Dr. Di Paolo recommended that subcommittee drafts be circulated to other subcommittees as they are finished to reinforce the principles of good draftsmanship that will be taught in the October 25 seminar.

6. *Alternative Instructions.* Mr. Young reported that Ms. Branch had asked the Utah Supreme Court whether the committee should propose instructions in areas where there is no clear Utah law. The court was not in favor of instructions in unsettled areas of the law. After some discussion, however, the committee agreed that it would be helpful to offer instructions, including alternative instructions in some cases, even if there is no Utah Supreme Court decision on point, since the bench and the bar will look to the instructions as a research source, and some such instructions may be necessary for the instructions to be complete. The committee agreed that subcommittees should draft such instructions. The committee will review them and decide later whether to raise the issue again with the court. The goal, however, should be to have as few alternative instructions as possible.

7. *Next Meeting.* The next meeting will be Wednesday, November 12, at 4:00 p.m.

The meeting concluded at 5:35 p.m.

MINUTES
Advisory Committee on Model Civil Jury Instructions
December 8, 2003
4:15 p.m.

Present: John L. Young (chair), Timothy M. Shea, Honorable William W. Barrett, Jr., Francis J. Carney, Marianna Di Paolo, Paul M. Simmons

Excused: Phillip S. Ferguson, Colin P. King

1. *Minutes.* Because the minutes of the October 8, 2003, meeting had not been circulated yet, the committee postponed approval of those minutes until the next meeting.

2. *Plain Language Writing Workshop.* The committee discussed the October 25, 2003, workshop on writing plain-language jury instructions. Committee members agreed that they would have liked to have had more practical suggestions.

3. *Writing Guidelines.* Mr. Young suggested that the committee adopt a set of guidelines for drafting easily understood jury instructions. Mr. Shea had previously circulated a Summary of Guidelines for Plain-Language Jury Instructions, taken from various sources.

Mr. Simmons will synthesize the materials we have on drafting plain-language jury instructions and prepare suggested guidelines for the subcommittees that the committee can review at its next meeting.

4. *Motor Vehicle Subcommittee.* Mr. Carney indicated that some of the negligence instructions were best left to the Motor Vehicle Subcommittee, which has not been formed yet.

Members should come to the next meeting prepared to suggest a chair and members for the Motor Vehicle Subcommittee.

5. *Negligence Instructions.* The committee reviewed a draft of the instructions prepared by Mr. Carney's Negligence Subcommittee, which Mr. Shea had e-mailed to committee members on December 3. The following MUJI instructions have been omitted:

MUJI 3.3 (fault/negligence not implied from injury alone) and 3.4 (unavoidable accident). These instructions have been rejected by the Utah Supreme Court. *See Green v. Louder*, 2001 UT 62, ¶¶ 14-18, 29 P.3d 628; *Randle v. Allen*, 862 P.2d 1329, 1336 (Utah 1993).

MUJI 3.19 (comparative negligence--wrongful death). Mr. Carney's subcommittee will prepare a new set of instructions for wrongful death and survival actions.

MUJI 3.20 (effect of parents' negligence). The subcommittee was not comfortable with this instruction without knowing the origin of and authority for the instruction.

MUJI 3.21 (passenger's negligence in passenger's claim against driver). The instruction was left for the Motor Vehicle Subcommittee to consider.

MUJI 3.22 (willful and wanton). This instruction was left for the Intentional Tort Subcommittee to consider.

The committee considered and revised the following new instructions:

1. Introductory Instruction. This instruction was simplified. In cases where the jury is asked to return a general verdict, the instruction will need to be modified, but it was agreed that general verdicts are rarely used anymore in negligence cases.

2. Negligence Defined. The structure of the instruction was revised, and a sentence was added to make it clear that reasonable care is what an ordinarily careful person would do in a similar situation.

3. Standard of Care for the Physically Disabled (old MUJI 3.5). The committee agreed to use the term "disabilities" rather than "impairments" since "impairment" could be misconstrued as something other than a physical disability.

4. Amount of Caution Required When Children Are Involved (old MUJI 3.7). The committee agreed to add to the instruction the requirement that the person knew or should have known that young children might be present. Mr. Carney questioned the need for this instruction and for instruction 6 (dealing with electricity), since they are specific applications of the general instruction that the amount of care required depends on the circumstances, including the danger involved and the foreseeable harm. The committee decided to keep the instructions, at least for the time being.

5. Negligence Applied to Children. The committee questioned how the jury was to evaluate the "intelligence, knowledge and experience" of the child and similar children but decided to leave this phrase in the instruction since it is used in the cases and Restatements.

6. Amount of Caution Required in Handling Electricity (old MUJI 3.9). The first sentence of the draft instruction was deleted since it referred to the "standard of care," a term that had not previously been used or defined.

Copies of the revised instructions are attached to these minutes.

The committee also discussed proposed instruction 7, defining "legal cause." Dr. Di Paolo proposed an alternative instruction that used the term "legally important cause." The

committee agreed that there was more authority for using "legal cause" and that it was less confusing than "proximate cause." Mr. Carney questioned whether the first two elements of the proposed instruction were both required elements of legal or proximate cause or whether they were alternatives. The committee agreed to defer further discussion of the instruction until after the subcommittee had had a chance to reconsider it.

6. *Next Meeting.* The next meeting will be Monday, January 12, 2004, at 4:00 p.m.

The meeting concluded at 6:00 p.m.

MINUTES
Advisory Committee on Model Civil Jury Instructions
January 12, 2004
4:15 p.m.

Present: John L. Young (chair), Timothy M. Shea, Honorable William W. Barrett, Jr., Paul M. Belnap, Juli Blanch, Francis J. Carney, Phillip S. Ferguson, L. Rich Humpherys, Paul M. Simmons

1. *Minutes.* Judge Barrett moved that the minutes of the October 8 and December 8, 2003, meetings be approved. The motion passed without opposition.

2. *Drafting Guidelines.* The committee discussed a draft of Guidelines for Drafting Plain-Language Jury Instructions, which Mr. Simmons had prepared from the materials Mr. Shea had circulated earlier. Mr. Young suggested that the committee refine the guidelines before the next meeting and come to the next meeting prepared to approve them, so that they can be circulated to all the subcommittees.

If committee members have other suggestions or examples for the drafting guidelines, they should get them to Mr. Shea, who will circulate them to all committee members before the next meeting.

3. *Charge.* Mr. Young reviewed the committee's charge, which is to propose a set of plain-language jury instructions. Subcommittees should reach a consensus if at all possible. The court would like to avoid alternative instructions.

4. *Preliminary Instructions.* Mr. Carney suggested that the instructions include a recommendation that instructions be given at different points during the trial. For example, an instruction on expert testimony and the weight it deserves could be given before the first expert witness testifies in the case. Mr. Young suggested that such suggestions be included in the introductory materials.

5. *California Jury Instructions.* Mr. Carney reviewed the new California plain-language jury instructions and noted that the instructions themselves are not copyrighted. Mr. Shea loaned a set of the California instructions to Messrs. Ferguson and Humpherys, who will see that Mr. Belnap gets a set of the damage instructions. Mr. Shea will also see if he can obtain additional complimentary copies of the California instructions.

6. *Negligence Instructions.* The committee reviewed a draft of the instructions prepared by Mr. Carney's Negligence Subcommittee. The committee reviewed and made additional changes to the instructions that were approved at the last committee meeting:

In the third line of instruction 2, "person" was added after the word "careful."

The second paragraph of instruction 2 was revised to read, "One can be negligent in doing something or in not doing something." Mr. Belnap asked whether the examples in that paragraph were necessary. Mr. Humpherys noted that they could lead to disputes in the instruction conference over the examples the court uses.

In the third paragraph, the phrase "an average person" was replaced with "an ordinarily careful person."

Mr. Simmons suggested deleting the first sentence of instruction 4 (regarding the amount of caution required when children are present). Mr. Carney reviewed the corresponding California instruction and decided it was better and will use it instead.

The committee debated whether special instructions were necessary for the standard of care involved in ultrahazardous activities and controlling electricity. Mr. Carney reviewed the corresponding California instruction and noted that some activities may be considered ultrahazardous in California but not in Utah. The committee agreed that more research was needed on the standard of care for ultrahazardous activities in Utah. Mr. Humpherys suggested adding a comment to the effect that the instruction should not be given unless the court has first determined that the activity in question meets the legal criteria for an ultrahazardous activity.

The committee renumbered the instruction on electricity number 7 (and renumbered the following instructions accordingly). Mr. Carney reviewed the corresponding California instruction. Ms. Blanch suggested adding a requirement that it be foreseeable that the plaintiff would come in contact with the power line or other source of electricity. The committee tabled the instruction for further discussion.

Mr. Carney will ask Rick Rose and a plaintiff's attorney who deals with electricity cases to review proposed instruction 7 and its California counterpart.

The committee also considered the following new instructions:

Definition of "Legal Cause." The committee debated whether foreseeability is an element of both duty and proximate causation. Mr. Humpherys asked whether foreseeability was a legal question or a question for the jury to decide. Mr. Belnap expressed his opinion that current MUJI 3.13 accurately expresses the law and should be used. Other committee members thought the current instruction was a good example of the type of instruction that needs to be rewritten to be more comprehensible. The committee tabled the instruction to allow further review of the law on proximate (or legal) causation.

Definition of "Fault." Mr. Young suggested rewriting the instruction to read: "You must determine if any of the following were at fault in causing harm to the plaintiff," and then listing all persons or entities who will be listed on the special verdict form. Mr. Humpherys recommended that the definition of "fault" ("any breach of duty") be tied to the instructions on each of the plaintiff's claims, so that the latter either be stated in terms of a breach of duty or specifically say that negligence, intentional misconduct, breach of warranty, products liability and so forth are "fault." Alternatively, Mr. Humpherys suggested revising the instruction to read: "In deciding this case, you must decide whether any party was at fault. 'Fault' means negligence [or whatever other legal theories of fault the plaintiff may have alleged] that legally caused harm to the plaintiff." The committee deferred further discussion of this instruction and the remaining instructions until the next meeting.

7. *Next Meeting.* The next meeting will be Monday, February 9, 2004, at 4:00 p.m. All committee members are encouraged to be there. After the negligence instructions are approved, the committee will discuss the preliminary and damage instructions.

The meeting concluded at 6:00 p.m.

MINUTES
Advisory Committee on Model Civil Jury Instructions
February 9, 2004
4:10 p.m.

Present: John L. Young (chair), Timothy M. Shea, Honorable William W. Barrett, Jr., Juli Blanch, Francis J. Carney, Ralph L. Dewsnup, Marianna Di Paolo, Phillip S. Ferguson, Tracy H. Fowler, L. Rich Humpherys, Paul M. Simmons

Excused: Paul M. Belnap

1. *Minutes.* Ms. Blanch moved that the minutes of the January 12, 2004, meeting be approved. Judge Barrett 2d. The motion passed without opposition.

2. *Drafting Guidelines.* Dr. Di Paolo noted that the guidelines to limit the use of the passive voice and subordinate clauses can be overdone and that sometimes the passive voice and subordinate clauses can add clarity. The committee discussed the examples used in paragraph 24 (regarding complex sentences).

Mr. Simmons will revise paragraph 24 before Mr. Young sends the guidelines to all the subcommittee members.

Mr. Dewsnup suggested that we add a guideline discouraging italics, boldface type and other artificial means of emphasis. Dr. Di Paolo thought that some typographical signals could help the jurors' comprehension. The committee decided not to include such a guideline in the initial set of guidelines.

3. *Committee Membership.* Mr. Young noted that Elliott Williams has indicated that he is only interested in serving on the medical malpractice subcommittee. The committee discussed possible replacements for Mr. Williams. Mr. Carney suggested Dave West, who has been serving on the negligence subcommittee. Mr. Young suggested Steve Nebeker. Others who had expressed an interest in serving on the committee included Dan Larsen, James Jenkins, Rick Rose, Morris Haggerty, Don Winder, Pat Christensen, Bruce Badger, Doug Cannon, Lynn Davies and Michael Walk. The committee thought that Mr. West's and Mr. Nebeker's experience could help the committee.

Mr. Young will check with Mr. West and Mr. Nebeker to see if they would be interested in serving on the committee. If they are, he will recommend to the Supreme Court that they be added to the committee.

4. *Negligence Instructions.* The committee continued its review of the draft instructions prepared by Mr. Carney's Negligence Subcommittee.

a. *Electricity instruction.*

Mr. Carney will ask for input on this instruction from attorneys who handle electricity cases, such as Rick Rose.

b. *Instruction 10 (violation of a statute, ordinance or safety order).* Mr. Young suggested that the court should paraphrase the requirements of the statute or ordinance rather than quoting the statute or ordinance verbatim. Mr. Dewsnup objected to the use of the term "law" for a statute or ordinance. Dr. Di Paolo suggested that jurors may not understand "statute" or "ordinance" but understand "law." Mr. Young suggested adding a sentence or two explaining what a statute or ordinance is and that it is considered "law." Several committee members thought that the prerequisites for determining whether the violation of a safety statute can be considered as evidence of negligence were for the court--not the jury--to decide. Mr. Carney suggested adding a comment explaining the preliminary determinations that the court must make before giving the instruction. Dr. Di Paolo thought that the instruction was not clear about exactly what the jury was expected to do. Part of the problem is that, under Utah law, violation of a statute or ordinance is only evidence of negligence, which the jury is free to ignore, so even if the jury finds a violation of a statute, that does not require the jury to also find negligence, and even if the jury finds that a statute was not violated, that does not mean that the person was not negligent. (For that reason, the corresponding California instruction was not too helpful because in California a violation of a statute is negligence *per se.)* Mr. Simmons questioned whether the instruction was even necessary. Mr. Young suggested that it be included in the preliminary instructions on evidence and perhaps repeated in the substantive instructions at the end of the case.

Mr. Carney will revise the instruction in light of the committee's discussion.

c. *Definition of "fault."* The committee considered Mr. Humpherys' proposed instruction defining "fault." The intent was to allow the court to use "fault" to encompass both negligence (or other fault, such as an intentional tort or strict liability) and proximate (or legal) causation. The committee rewrote the instruction.

Mr. Carney will have the rewritten instruction for the next meeting.

d. *Proximate cause and comparative fault.* The committee deferred discussion of these instructions until the next meeting, to allow Mr. Belnap to be present.

5. *Other*. Mr. Humpherys suggested that we make instructions available as we complete them, rather than waiting for the committee to finish its work. Mr. Young indicated that his intent was to send out instructions in sections or groups of sections, beginning with the preliminary and negligence instructions.

6. *Next Meeting.* The next meeting will be Monday, March 8, 2004, at 4:00 p.m.

The meeting concluded at 6:00 p.m.

MINUTES
Advisory Committee on Model Civil Jury Instructions
March 8, 2004
4:05 p.m.

Present: John L. Young (chair), Timothy M. Shea, Paul M. Belnap, Juli Blanch, Francis J. Carney, Marianna Di Paolo, Phillip S. Ferguson, Paul M. Simmons

Excused: Honorable William W. Barrett, Jr., Ralph L. Dewsnup

1. *Minutes*. Ms. Blanch moved that the minutes of the February 9, 2004, meeting be approved. Mr. Ferguson 2d. The motion passed without opposition.

2. *Instruction Headings.* The committee thought that the instruction headings could help jurors find particular instructions more easily. The committee agreed to add a note recommending that trial judges include the headings with the instructions and give the jury copies of the instructions to follow while the court reads them.

3. *Gender*. The committee discussed how best to deal with gender in the instructions. It was agreed that it will be less of a problem if the judge uses the actual names of the parties rather than referring to "the plaintiff," "the defendant" or "a person." Where possible, instructions should be worded to avoid generic personal pronouns.

Mr. Shea will review the instructions to see if references to "s/he" can be eliminated.

4. *References to Parties*. The committee preferred "the plaintiff" and "the defendant" to simply "plaintiff" or "defendant."

5. *Negligence Instructions.* The committee continued its review of the draft instructions prepared by Mr. Carney's Negligence Subcommittee. Mr. Shea had renumbered and edited some of the instructions previously discussed.

a. *3.01. Verdict form.* The committee agreed to move this instruction to the end of the general and preliminary instructions, since it applies regardless of the plaintiff's theory of liability. The committee otherwise approved the instruction unchanged.

b. *3.02. "Negligence" defined.* "Ordinarily careful person" was changed to "ordinary, careful person" throughout. Mr. Young asked whether there was a legally significant difference between "care" and "caution." If not, we may wish to use "care" (the more common word) throughout. Mr. Shea asked whether the sentence stating that reasonable care does not require extraordinary caution was consistent with the sentence that the amount of caution required varies with the circumstances. The committee

decided to leave the sentence in but in a modified form. The last sentence of the instruction ("You must decide . . .") was made a separate paragraph.

c. *3.03. Standard of care for the physically disabled.* Based on the comment to this instruction, Mr. Simmons asked whether the instruction should be expanded to cover physically ill adults as well as disabled adults. After much discussion, the committee decided to leave the instruction as written pending further research on what the law requires of physically ill (but not disabled) people.

Ms. Blanch was excused.

d. *3.04. Amount of care required when children are present.* The committee changed "adults only" to "only adults" and approved the instruction as modified.

e. *3.05. Negligence applied to children.* Mr. Simmons asked whether there should be a separate instruction stating that children engaged in adult activities are held to the same standard of care as an adult. A new instruction (3.05a) was added to that effect, with a comment that it is for the court to decide whether an activity is considered an adult activity.

f. *3.06. Amount of care for dangerous activities.* The committee questioned under what circumstances the instruction would be given.

Mr. Simmons will send Mr. Carney a list of Utah cases on the subject. Mr. Carney will review the law in this area before the next meeting and, if necessary, revise the instruction accordingly.

g. *3.07. Amount of care required in controlling electricity.* Rick Rose had proposed adding a sentence to the end of the instruction that read, "This does not mean that one who supplies electricity to the public is liable without regard to fault." The committee decided not to add the sentence. Dr. Di Paolo noted that liability was a concept that had not been introduced before and might confuse the jurors. Mr. Shea noted that the instruction does not suggest liability without fault. Mr. Carney and Mr. Simmons thought that the sentence was argumentative and not in line with recent Supreme Court cases holding that instructions telling the jury that the mere fact that an accident happened does not mean that anyone was at fault should not be given. The sentence is also not unique to electricity cases but could be added to every instruction. Mr. Ferguson suggested adding a sentence to the effect that people have a duty to be careful around power lines if they are aware of them. Mr. Carney questioned whether that was the law, since some people may reasonably assume that a downed power line has

been deactivated or may not be aware that they can receive a shock if they are close enough to the line even if they do not touch it.

h. *Violation of safety law*. Dr. Di Paolo noted that the last paragraph does not clearly explain what the jury is supposed to do. Mr. Simmons noted that the problem is that the violation of a safety law is not negligence *per se*, so the jury does not have to decide whether a safety law has been violated to decide whether or not a party was negligent. The committee will revisit the instruction at a later meeting.

6. *Schedule*. Mr. Young expressed concern with the slow progress the committee is making. He asked committee members to think of ways to streamline the process so that the instructions can be completed more expeditiously, such as by working with subcommittees on editing the instructions, so that the subcommittees have our input earlier and the instructions reach the full committee in a more polished form. Mr. Young also suggested asking the Litigation Section of the Bar for money to hire research help on issues of substantive law that arise during our discussions. Mr. Carney suggested that we may need to meet more often than once a month.

7. *Next Meeting*. The next meeting will be Monday, April 12, 2004, at 4:00 p.m.

The meeting concluded at 6:00 p.m.

MINUTES
Advisory Committee on Model Civil Jury Instructions
April 12, 2004
4:05 p.m.

Present: John L. Young (chair), Timothy M. Shea, Paul M. Belnap, Juli Blanch, Marianna Di Paolo, Phillip S. Ferguson, Paul M. Simmons, Honorable William W. Barrett, Jr., Ralph L. Dewsnup, Paul Belnap, Colin King, Rich Humphreys, Tracy Fowler

Excused: Francis J. Carney

1. *Gender*. The committee discussed how to deal with gender-specific pronouns in the instructions. Tim Shea reported on his communications with Paul Simmons. It was their recommendation that sentences be constructed to avoid the use of gender specific pronouns, but that, when necessary, the pronoun "he" be used. The introduction to the instructions might contain a statement that instructions should be edited to fit the circumstances of the case at hand. John Young observed that it would be easier to find the places that needed attention if the instruction contained a bracketed [she/he/it]. After discussion the committee agreed to bracket alternative pronouns whenever using pronouns cannot be avoided.

2. *Minutes*. The minutes of March 8 were approved without amendment.

3. *Research Assistance*. Mr. Young reported that he and Mr. Carney had contacted the Litigation Section to request a financial contribution to hire a law clerk. The executive committee for the Litigation Section will meet on April 14 and approval is expected. The committee decided that Mr. Young should appoint a research assistant. The committee decided that requests for research from the subcommittees should be directed to Mr. Young.

4. *Negligence Instructions*. The committee postponed its discussion of the negligence instructions until Mr. Carney could attend. Mr. Belnap observed that in the proposed draft to Instruction 3.09 on the definition of "fault," simply referring to the cause of action raised in the case may not work for strict liability. It was suggested that we might consider the statutory phrase "actionable breach of a legal duty." Others thought that phrase too obscure for jurors understand. Mr. Belnap inquired whether it was wise to discontinue use of the term "proximate cause" when there was so much caselaw interpreting that term. Mr. Young responded that the committee's aim was not to abandon that caselaw, but to use a new term, one more understandable to jurors, to summarize the law.

5. The committee reviewed the draft preliminary and general instructions prepared and presented by Mr. Dewsnup, Judge Barrett and Mr. Ferguson. The committee suggested further changes, which the subcommittee will incorporate and present at the next meeting.

6. Mr. Humphreys suggested that we establish routine review of Supreme Court and Court of Appeals opinions to identify those that have an effect on jury instructions. The committee could then more timely incorporate necessary changes to the instructions.

7. The committee adjourned until May 10 at 4:00.

MINUTES
Advisory Committee on Model Civil Jury Instructions
May 10, 2004
4:15 p.m.

Present: John L. Young (chair), Timothy M. Shea, Honorable William W. Barrett, Jr., Paul M. Belnap, Francis J. Carney, Phillip S. Ferguson, L. Rich Humpherys, Colin P. King, Paul M. Simmons

Excused: Ralph L. Dewsnup

1. *Minutes.* The board approved the minutes of the April 12, 2004, meeting.

2. *Law Clerk.* Mr. Carney reported that the Litigation Section of the Bar has committed up to $5,000 for a law clerk to help the committee with research. Mr. Carney placed an ad last week at the S.J. Quinney College of Law for a part-time clerk, to work 15 to 20 hours a month for $20 an hour. He would like to hire someone in the next two weeks. So far he has had only one response to the ad.

3. *New Committee Members.* Mr. Young reported that he has written to Chief Justice Durham recommending that Steve Nebeker and Dave West be added to the committee.

4. *Draft Preliminary and General Instructions.* The committee continued its review of the draft instructions prepared by Mr. Ferguson's subcommittee. Mr. Ferguson reported that he had incorporated the changes discussed at the last committee meeting. The committee reviewed the following instructions:

a. *1.4. Evidence in the Case.* At Mr. Carney's suggestion, the sentence "Do not look things up on the internet" was added.

b. *1.9. Credibility [or Believability] of Witness Testimony.* Mr. Humpherys expressed concern that the instruction as written could be interpreted to require the jury to disregard the testimony of a witness who had a personal interest in the case or a bias. The instruction was revised to address this concern.

c. *2.9. Credibility [or Believability] of Witness Testimony.* The committee discussed whether this instruction (which duplicates 1.9) should be given again at the end of trial. Mr. Shea suggested that, in the interest of space, we not repeat instructions. Mr. Young suggested that the instructions to the court and counsel could suggest that the court may want to repeat some of the preliminary instructions at the conclusion of the case and could even suggest preliminary instructions that the court might consider repeating. Mr. Shea and Judge Barrett noted that the jury should receive at least one written copy of all instructions, regardless of when they are given in the case.

d. *2.10. Inconsistent Statements.* The committee simplified the instruction to make it more understandable.

e. *2.11. Effect of Willfully False Testimony.* Mr. Humpherys noted that, as written, the instruction allowed the jury to believe testimony it found to be willfully false. The instruction was revised to eliminate this problem and to simplify the instruction.

f. *2.13. Statement of Opinion.* The subcommittee had combined the old MUJI instructions on lay opinion testimony and expert testimony into one instruction. Mr. Humpherys questioned whether the jury needs to be instructed on the standards for admissibility of opinion testimony. He further suggested that, even if one or more instructions on expert testimony are desirable, the jury does not need to be instructed on lay opinion testimony, which is adequately covered by instruction 1.9. Mr. Carney thought that the jury needed to be instructed on expert testimony but asked what the law is on expert testimony; specifically, Is the jury required to accept uncontroverted expert testimony? If so, can a party controvert expert testimony by cross-examination alone, or must the party produce contrary expert testimony? Some committee members suggested that, if expert testimony is uncontroverted, the court should direct a verdict on the issue rather than instruct the jury on the effect of the uncontroverted evidence. Mr. Carney reviewed the new California jury instructions on opinion testimony, which suggest that, where expert testimony is necessary to establish the standard of care, the jury must accept expert testimony on the standard of care unless the testimony is rebutted by other evidence. Mr. Humpherys suggested that the jury should be told that it can weigh expert testimony but that it should not guess at or come up with its own standard when expert testimony is required to establish the standard of care. The committee decided that it needs more research on the law governing expert testimony.

Mr. Ferguson's subcommittee will rework the MUJI instruction (current 3.14) on expert opinion testimony.

5. *Schedule.* The committee agreed not to meet during the month of July. The meeting scheduled for July 12, 2004, was cancelled.

6. *Next Meeting.* The next meeting will be Monday, June 14, 2004, at 4:00 p.m.

The meeting concluded at 6:00 p.m.

MINUTES
Advisory Committee on Model Civil Jury Instructions
June 14, 2004
4:10 p.m.

Present: John L. Young (chair), Timothy M. Shea, Honorable William W. Barrett, Jr., Juli Blanch, Francis J. Carney, Marianna Di Paolo, Phillip S. Ferguson, Tracy H. Fowler, L. Rich Humpherys, Colin P. King, Paul M. Simmons, Jonathan Jemming

Excused: David E. West

1. *Minutes.* On motion of Judge Barrett and Mr. Carney's second, the committee approved the minutes of the May 10, 2004, meeting.

2. *Law Clerk.* Mr. Carney introduced Jonathan Jemming, who has been hired as a law clerk to assist the committee with research.

3. *Draft Preliminary and General Instructions.* The committee continued its review of the draft instructions prepared by Mr. Ferguson's subcommittee. Mr. Ferguson reported that he had incorporated the changes discussed at the last committee meeting. His subcommittee is still working on revisions to instructions 2.13 and 2.14 regarding opinion testimony and 2.18 defining the preponderance of the evidence. The committee reviewed the following instructions:

a. *1.4. Evidence in the Case.* At Mr. Simmons's suggestion, "or certain qualified opinions" was struck from the second sentence.

b. *2.15. Charts and Summaries.* Mr. Carney questioned the need for the instruction. The committee suggested that the instruction be broken out into two parts--one for charts and summaries that are received into evidence, and one for those that are not received into evidence. Dr. Di Paolo suggested the last sentence be stated in the negative, as in the original MUJI 2.15.

Mr. Ferguson will revise the instruction in light of the committee's comments.

c. *2.16. Burden of Proof.* Mr. Simmons suggested that the instruction did not accurately state the law in that the party with the burden of proof does not necessarily have to produce evidence to meet the burden; he can meet the burden by evidence produced by the other side. Some committee members questioned whether the jury needed to be instructed on the burden of proof (as opposed to the standard of proof). Mr. Humpherys noted that it matters who has the burden of proof, since if the party with the burden of proof does not meet his burden, he loses. Dr. Di Paolo thought the instruction was too abstract to be helpful. The committee suggested combining it with instructions on the parties' contentions or on the elements of the parties' claims and affirmative defenses. Mr. Ferguson suggested that the burden of proof could be discussed in

connection with the special verdict form. Instruction 2.16 might not be necessary in light of instruction 2.27, "Agreement on Special Interrogatories." The committee then discussed the timing of the instruction. Mr. Shea suggested that the presumption should be to give instructions at the beginning of the trial, so that the jury will have a road map, even if they will need to be repeated at the end of the trial. Mr. Carney suggested that the jury be shown the special verdict form at the beginning of the trial, even though it may have to be revised during the course of the trial. Ms. Blanch suggested that the parties may have conflicting versions of the special verdict form, but Mr. Humpherys suggested that they could agree on a verdict form at pretrial. The committee decided to hold off on instruction 2.16. If it decides to omit the instruction, there will need to be a comment explaining the committee's reasoning.

d. *2.17. Direct and Circumstantial Evidence.* Mr. Carney questioned the need for the instruction. The committee agreed that the instruction was necessary since some people think that circumstantial evidence is not sufficient to meet one's burden of proof. The committee suggested changes to the wording of the instruction, which Mr. Ferguson will incorporate into the next draft.

e. *2.19. Clear and Convincing Evidence.* Dr. Di Paolo thought that an example would help the jury, but the committee agreed that the example used in paragraph 3 was more confusing than helpful. Mr. King suggested that the standards of proof should be explained in the preliminary instructions and that the first paragraph of the instruction should be given whatever the standard of proof is, not just in cases involving a clear-and-convincing standard. Mr. Fowler suggested that the instruction be tailored to the particular facts and issues in the case. Mr. Humpherys, Mr. King and Mr. Simmons questioned the last sentence of the instruction, which states that clear and convincing evidence must "at least have reached the point where there remains no substantial doubt." They thought the standard was too close to "beyond a reasonable doubt."

Mr. Jemming will research what "clear and convincing evidence" means under Utah law.

Mr. Humpherys was excused.

f. *2.20. Taking of Notes.* Mr. Carney suggested that the instruction Judge Iwasaki uses is better than instruction 2.20. Mr. Shea suggested that instruction 1.6 be revised for use at the end of trial and that the revised instruction replace instruction 2.20.

4. *Next Meeting.* There will be no committee meeting in July. The next meeting will be Monday, August 9, 2004, at 4:00 p.m.

The meeting concluded at 6:00 p.m.

MINUTES
Advisory Committee on Model Civil Jury Instructions
August 9, 2004
4:00 p.m.

Present: John L. Young (chair), Honorable William W. Barrett, Jr., Francis J. Carney, Ralph L. Dewsnup, Phillip S. Ferguson, Tracy H. Fowler, L. Rich Humpherys, Stephen B. Nebeker, Paul M. Simmons, David E. West, Jonathan Jemming

Excused: Timothy M. Shea

1. *Minutes.* The committee approved the minutes of the June 14, 2004, meeting.

2. *Draft Preliminary and General Instructions.* The committee continued its review of the draft instructions prepared by Mr. Ferguson's subcommittee:

a. *02.21, Multiple Plaintiffs, and 02.22, Multiple Defendants.* Mr. Carney questioned the need for the instructions. Mr. Fowler pointed out that an instruction on multiple parties may be necessary because the treatment of multiple parties may vary, depending, for example, on whether or not one is vicariously liable for another. Mr. Young and Mr. West suggested that any needed instructions could be covered in the instructions on the special verdict form and in the form itself. Mr. Jemming suggested the instruction should be a preliminary instruction. At Mr. Dewnsup's suggestion, the committee decided to rewrite the instruction as follows and make it part of the preliminary instructions:

> "Although there are multiple parties involved in this case, each party is entitled to have its claims and defenses considered on their own merits."

b. *02.23. Discontinuance as to Some Defendants.* Mr. Carney thought the tone of the instruction was condescending and that the instruction would only pique the jurors' interest. After some discussion, the committee decided to instruct the court and counsel to craft an instruction telling the jury that a party is no longer involved in the case and giving the reason. A general instruction could be included as a guide, perhaps with several alternative explanations as examples.

c. *02.24. Settling Defendants in Multi-party Cases.* Mr. Dewsnup felt that the last two sentences of the proposed instruction were argumentative. Mr. Young felt that the instruction needed to be more specific about what portions of the settlement should be disclosed to the jury. Mr. Humpherys stated that the instruction should tell the jury both what it can and cannot do with information about a partial settlement. Mr. Dewsnup offered a suggested rewrite of the instruction. Mr. Carney reviewed the equivalent California instruction, CACI 217.

Mr. Ferguson will rewrite the instruction in light of Mr. Dewsnup's suggested revisions and CACI 217, after making sure that CACI 217 is consistent with *Slusher v. Ospital*, 777 P.2d 437 (Utah 1989).

d. *02.25. Jurors to Deliberate and Agree If Possible.* Mr. Carney noted that the instruction overlaps instruction 2.7.

Mr. Ferguson will combine instructions 2.7 and 02.25.

e. *2.5. Duty of Lawyers.* The subcommittee had previously rejected former MUJI 2.5 in favor of revised MUJI 1.1. Mr. Carney suggested that former MUJI 2.5 was not adequately covered in revised MUJI 1.1 and was needed.

f. *02.26. Resort to Chance.* The committee simplified the instruction by dropping "speculate, draw lots, or" in line 28 and rewriting the last paragraph as follows:

> If you decide that a party is entitled to recover, you must then decide the amount of money to be awarded to that party. Each of you should express your own independent judgment as to what the amount should be. It is your duty to thoughtfully consider the amounts suggested, evaluate them according to these instructions and the evidence and, after due consideration, come to an agreement on the amount, if any, to be awarded. It is unlawful for you to agree in advance to average the independent estimate of each juror.

f. *02.27. Agreement on Special Interrogatories.* Judge Barrett and Mr. Humpherys suggested dropping the last two lines of the first paragraph. Mr. Dewsnup suggested dropping the second paragraph as well. After some discussion, the committee agreed that it needed to revisit the placement of the instructions on burden of proof.

3. *Next Meeting.* The next meeting will be Monday, September 13, 2004, at 4:00 p.m.

The meeting concluded at 6:00 p.m.

MINUTES
Advisory Committee on Model Civil Jury Instructions
September 13, 2004
4:00 p.m.

Present: John L. Young (chair), Timothy M. Shea, Juli Blanch, Francis J. Carney, Phillip S. Ferguson, L. Rich Humpherys, Marianna Di Paolo, Paul M. Simmons, David E. West, Jonathan G. Jemming

Excused: Honorable William W. Barrett, Jr., Ralph L. Dewsnup, Colin P. King

1. *Minutes.* On motion of Mr. Ferguson, seconded by Mr. West, the committee approved the minutes of the August 9, 2004, meeting.

2. *Draft Preliminary and General Instructions.* The committee continued its review of the draft instructions prepared by Mr. Ferguson's subcommittee that Mr. Ferguson revised in light of the discussion at the last meeting:

a. *1.10. Multiple Parties.* The committee approved revised MUJI 1.10.

b. *2.23. Discontinuance as to Some Defendants.* The committee discussed whether to include the last sentence, informing the jury that they must still decide whether fault should be allocated to dismissed defendants. Mr. Humpherys pointed out that the last sentence may not apply if a defendant is dismissed on a directed verdict, for lack of evidence. Mr. Shea suggested that the last sentence be deleted from 2.23 and added in substance to the instruction on allocating fault to nonparties. Mr. Young suggested that 2.23 needs to be given as soon as a defendant is dismissed from the case, so that the jury does not wonder why there is an empty chair at trial, in which case the jury also needs to know that it may still have to allocate fault to the absent defendant. The committee decided to bracket the last sentence and add a statement to the comment informing the court that it should not give the last sentence if an allocation of fault to the dismissed defendant is not appropriate under applicable law.

c. *2.24. Settling Defendants in Multi-party Cases.* The committee changed the last paragraph to read:

> Because the plaintiff and [the settling defendant(s)] are no longer adversaries, you may consider the settlement in deciding how believable a witness is. In other words, you may consider whether the change in adversary status has any bearing on the witness's believability.

Mr. Young suggested that, because 2.23 and 2.24 refer to allocation of fault but will be given before the jury is instructed on allocation of fault, there should be a preliminary instruction explaining allocation of fault generally.

Mr. Ferguson will add a paragraph to preliminary instruction 1.3 explaining the jury's role in allocating fault.

d. *2.28. Selection of Jury Foreperson and Return of Verdict.* Mr. Ferguson recommended deleting instructions 2.7 and 2.25 and replacing them with revised 2.28. Mr. Shea suggested changing the title to read "and Deliberation" instead of "and Return of Verdict." Mr. Carney suggested deleting "in a few moments" in the first line. Mr. Young suggested changing "becomes" to "is" in the first line of the third paragraph. Dr. Di Paolo suggested changing "beneficial" to "helpful" in the last paragraph. Mr. Carney asked whether it was an accurate statement of the law to say that jurors had a duty to deliberate. After some discussion, the committee agreed that the instruction was probably an accurate statement of the law. Mr. Carney and other members of the committee would prefer a better term than "foreperson," but no one could come up with a better term. Mr. West and Dr. Di Paolo thought that most jurors would understand the term from watching legal dramas on television. Mr. Carney thought that the last paragraph did not emphasize strongly enough the jurors' responsibility to listen to all opinions before making up their minds. He expressed a preference for JIFU 1.8.

Mr. Ferguson will try to incorporate some of the language from JIFU 1.8 into 2.28.

e. *2.26. Resort to Chance.* The committee changed the second sentence to read, "For example, you are not to flip a coin to make a decision." The committee also added "damages" after "recover" in the first line of the second paragraph and deleted the phrase "after due consideration" from that paragraph.

f. *2.27. Agreement on Special Interrogatories.* The committee changed the first line of the second paragraph to read: "Because this is not a criminal case, your verdict does not have to be unanimous. But at least six jurors must agree on the answer to each question . . . ."

3. *Other.* Mr. Carney suggested that when the instructions are completed the committee try them out on focus groups. Dr. Di Paolo suggested that the focus groups could be selected from prospective jurors who are summoned to court but not selected to participate as jurors that day.

4. *Next Meeting.* The next meeting will be Monday, October 18, 2004, at 4:00 p.m. *Note:* This is the third Monday in October, not the second Monday. At the next meeting, the committee will review the provisions regarding allocation of fault that Mr. Ferguson will add to revised instruction 1.3 as well as review the instructions on statements of opinion, burden of proof and clear and convincing evidence. When the preliminary and general instructions are

completed, Mr. Shea will put them together so that the committee can review the order of the instructions.

The meeting concluded at 5:55 p.m.

MINUTES

Advisory Committee on Model Civil Jury Instructions

October 18, 2004

4:00 p.m.

Present: John L. Young (chair), Timothy M. Shea, Honorable William W. Barrett, Jr., Paul M. Belnap, Juli Blanch, Francis J. Carney, Ralph L. Dewsnup, Marianna Di Paolo, Phillip S. Ferguson, Colin P. King, Paul M. Simmons, David E. West, Jonathan G. Jemming

Excused: Stephen B. Nebeker

1. *Minutes.* On motion of Mr. Ferguson, seconded by Ms. Blanch, the committee approved the minutes of the September 13, 2004, meeting.

2. *Draft Preliminary and General Instructions.* The committee continued its review of the draft instructions prepared by Mr. Ferguson's subcommittee:

a. *1.3. Order of Trial.* The committee questioned the placement of paragraph 6 regarding allocation of fault. Mr. Dewsnup questioned whether it was a proper subject for a preliminary instruction. The committee had previously concluded that as a matter of policy jurors should be told generally what they are to decide before they hear the evidence. Several committee members objected to the first two sentences of paragraph 6. Mr. West proposed that paragraph 6 be rewritten as follows:

> In this case you will be called upon to allocate the fault among those who are responsible for causing the accident. This must be done on a percentage basis, and the total amount of fault must add up to one hundred percent. You will be given further instructions about fault and about causation after you hear the evidence, but you should keep in mind that an important part of your deliberations will ultimately be to allocate the percentages of fault.

After some discussion, the committee agreed that paragraph 6, as rewritten, should be a separate, optional instruction that could follow instruction 1.1.

b. *2.23. Discontinuance as to Some Defendants.* Mr. Dewsnup questioned whether the explanations for why some defendants were no longer involved in the case would only confuse the jury. The committee rewrote the first sentence of instruction 2.23 to read:

> Defendants _____ are no longer involved in this case because _____.

The comment says that the court should explain the reasons why the defendants have been dismissed. The committee thought that the language used to explain the reasons should be left up to the court and counsel. At Mr. Carney's suggestion, the last word of the comment was changed from "read" to "given."

c. *2.24. Settling Defendants in Multi-party Cases.* Mr. Dewsnup noted that some plaintiffs as well as some defendants may settle before the case goes to the jury and suggested changing references to "settling defendant(s)" to "settling parties." The reference to "either party" in the second paragraph was changed to "any party." Mr. West thought that the last paragraph was argumentative. The committee thought that *Slusher v. Ospital*, 777 P.2d 437 (Utah 1989), required the court to instruct the jury on the effect a settlement may have on the credibility of a witness.

Mr. Jemming will review *Slusher v. Ospital* and determine what is required in instruction 2.24.

At Mr. Dewsnup's suggestion, the last paragraph was revised to read:

> You may consider the impact of a settlement on how believable a witness is.

The committee discussed the placement of the instruction. Some members thought that the instruction should be given when the parties settle and again at the end of the case. Mr. King asked whether the instruction would have to be given at the outset of the case if some parties settled before trial. Some thought that the timing of the instruction could unduly emphasize the testimony of a particular witness. Mr. Young and Mr. Carney suggested that the instruction be accompanied by a more extensive comment suggesting the factors the court should consider in deciding when to give the instruction and how much detail to present to the jury.

d. *2.25. Jurors to Deliberate and Agree If Possible.* This instruction has been replaced by instruction 2.28.

e. *2.26. Resort to Chance.* At Ms. Blanch's suggestion, the second and third sentences were combined to read:

> For example, you cannot make a decision by flipping a coin, speculating or choosing one juror's opinions at random.

Dr. Di Paolo asked whether the instruction headings were part of the instructions that would be given to the jury. The committee noted that some judges use the headings and

others do not. Dr. Di Paolo suggested that the heading be changed to *"Do Not Resort to Chance."* Others suggested, *"Do Not Speculate."*

f. *2.27. Agreement of Special Interrogatories.* Mr. Dewsnup suggested that the title refer to "Special Verdict" rather than "Special Interrogatories," a term that is not included or defined in the instruction. Mr. Shea suggested the term "presiding juror" be used instead of "foreperson." A majority of the committee thought that most people understand what a "foreperson" is. Ms. Blanch suggested that the second sentence of the second paragraph read, ". . . they need not be the same six *jurors* on each question."

Mr. Carney was excused.

g. *2.28. Selection of Jury Foreperson and Return of Verdict.* At Mr. Shea's suggestion, the last sentence of the first paragraph was revised to read, ". . . and sign the verdict form when it's completed." Mr. Simmons questioned whether the first sentence of the comment was necessary. Mr. Shea suggested that any tracking of instructions from one edition of MUJI to the next be done in a table rather than in comments.

Mr. Dewsnup moved that Mr. Ferguson be commended for the work of his subcommittee. Judge Barrett 2d. There was no opposition.

3. *Damage Instructions.* Because Mr. Humpherys, the chair of the damages subcommittee, was not present, the committee deferred discussion of the draft damage instructions to a later meeting.

4. *Next Meeting.* The next meeting will be Monday, November 14, 2004, at 4:00 p.m. At the next meeting, the committee will complete its review of the preliminary and negligence instructions, specifically, the instructions on the burden of proof, standards of proof, statements of opinion, and causation. Time permitting, it will start on its review of the damage instructions.

The meeting concluded at 5:30 p.m.

MINUTES
Advisory Committee on Model Civil Jury Instructions
November 8, 2004
4:00 p.m.

Present: Francis J. Carney (acting chair), Timothy M. Shea, Honorable William W. Barrett, Jr., Paul M. Belnap, Juli Blanch, Ralph L. Dewsnup, Marianna Di Paolo, Phillip S. Ferguson, L. Rich Humpherys, Colin P. King, Stephen B. Nebeker, Paul M. Simmons, Jonathan G. Jemming

Excused: John L. Young (chair)

1. *Minutes.* On motion of Ms. Blanch, seconded by Judge Barrett, the committee approved the minutes of the October 18, 2004, meeting.

2. *Draft Preliminary and General Instructions.* The committee continued its review of the draft instructions prepared by Mr. Ferguson's subcommittee:

a. *2.24. Settling Defendants in Multi-party Cases.* Mr. Dewsnup questioned whether the terms of a settlement (as opposed to the fact of settlement) must be disclosed and whether the Liability Reform Act superseded *Slusher v. Ospital*. Mr. Ferguson noted that in practice he has always received copies of settlement agreements in multi-party cases when he has asked for them and that, even though *Slusher* was decided under pre-Liability Reform Act law, it recognized, in footnote 13, that "[i]f anything, concerns regarding secret settlement agreements apply more strongly under" the Liability Reform Act than under prior law. Some committee members thought that the terms of the settlement agreement should be disclosed to the judge and that it should be left to the judge's discretion whether to tell the jury about the terms. Mr. Dewsnup questioned whether the parties can disclose the terms of the agreement even to the judge if the settlement is confidential. Mr. Humpherys and Mr. King felt that the terms of a true *Mary Carter* agreement may need to be disclosed. After further discussion, the instruction was amended to read as follows:

02.24. Settling parties in multi-party cases.

Some of the parties have reached a settlement agreement in this matter.

There are many reasons why parties settle during the course of a lawsuit. Settlement does not mean that any party has conceded anything. You must still decide which party or parties, including [the settling parties], were at fault and how much fault each party should bear. In deciding how much fault should be allocated to each party you must not consider the settlement agreement as a reflection of the strengths or weaknesses of any party's position.

> You may consider the settlement in deciding how believable a witness is.

The Advisory Committee Note was revised to read: "The Court and the parties must decide whether the fact of settlement and to what extent the terms of the settlement will be revealed to the jury in accordance with the principles set forth in *Slusher v. Ospital,* 777 P.2d 437 (Utah 1989)." The committee decided not to quote or paraphrase the *Slusher* factors in the note. The committee also decided not to include the comment from former MUJI 2.24, on the grounds that it addresses evidentiary issues rather than jury instruction issues. Finally, the committee decided to include references to *Child v. Gonda,* 972 P.2d 425 (Utah 1998), as well as to *Slusher* and Utah Rule of Evidence 408.

b. *Other Preliminary Instructions.* The committee deferred consideration of the instructions on burden of proof, preponderance of the evidence and clear and convincing evidence until the next meeting, to allow Mr. Ferguson's subcommittee to complete its work on these instructions.

3. *Proposed Introductory Statement.* Mr. Shea introduced a proposed introduction to the new instructions, which prompted a discussion of the following issues:

a. *Name.* The committee discussed what the instructions should be called. Suggestions included Model Utah Jury Instructions Second (MUJI 2d), MUJI Revised (MUJIR) and Utah Civil Jury Instructions.

b. *Approval.* Mr. Shea raised the issue of what Supreme Court approval of the new instructions will mean. The Court will want to be free to review the instructions as they arise in cases that come up for review, particularly where there has not been any Utah law on point. Mr. Shea suggested that the introduction could be worded more strongly if it came from the Court and not the committee.

c. *Release of Instructions.* Mr. King questioned whether the instructions should be released piecemeal. Doing so may raise problems where the new instructions use different terms from those used in MUJI. Mr. Shea suggesting adding a passage to the introduction to discuss the transition from the old instructions to the new. He also recommended adding a table showing where the former instructions are treated in the new instructions. The committee agreed to delete references to MUJI from the references in the new instructions and handle cross-references between the old and new instructions through the table.

d. *Public Comment.* A majority of the committee thought that the instructions should be released for public comment, even though public comment is not required and the comment period may further delay release of the instructions.

e. *Timing of Instructions.* At the committee's suggestion, Mr. Shea will revise the introduction to discuss when the instructions should be given during the course of a trial and refer to Utah Rule of Civil Procedure 47.

Ms. Blanch was excused.

4. *Negligence Instructions.* The committee revisited some of the negligence instructions it had previously approved.

a. *3.01. Verdict Form.* Mr. Dewsnup questioned whether the jury should be instructed in terms of the verdict form or in terms of the elements of the parties' claims and defenses, with special verdict forms included in their own section. The committee discussed when the jury should be given the special verdict form. After further discussion, the committee tentatively approved reading the special verdict form before the instructions on the substantive law of the parties' claims and defenses. Mr. Shea suggested that the instruction should be put in the general instructions, since it is not unique to negligence cases. It was also suggested that 3.01 could be used in place of 2.27.

b. *3.02. "Negligence" defined.* Dr. Di Paolo suggested calling the instruction *Definition of "Negligence."* The committee noted that ordinary people are not always careful and agreed to replace "an ordinary, careful person" with "a reasonably careful person" every time it appears in the instruction. The last line was revised to read: "You must decide whether the [defendant/plaintiff] was negligent by comparing his conduct with that of a reasonably careful person in similar situations." The committee approved the instruction as revised.

c. *3.03. Standard of Care for the Physically Disabled.* The committee debated whether instruction 3.03 accurately states the law. Some committee members thought that it should not be limited to physical disabilities.

Mr. Jemming will determine whether Utah has adopted sections 283 and 283B of the Restatement (Second) of Torts.

Mr. Dewnsup will propose a revised instruction 3.03.

5. *Next Meeting.* The next meeting will be Monday, December 13, 2004, at 4:00 p.m.

The meeting concluded at 6:00 p.m.

MINUTES
Advisory Committee on Model Civil Jury Instructions
January 10, 2004
4:00 p.m.

Present: Paul Belnap, Juli Blanch, Frank Carney, Ralph Dewsnup, Tracy Fowler, Rich Humpherys, Jonathan Jemming, Timothy Shea, David West, John Young (chair).

Excused: Paul Simmons, Judge William Barrett, Marianna Di Paolo, Colin King, Phillip Ferguson, Stephen Nebeker.

1. Minutes. Mr. Young called the meeting to order. The committee approved the minutes of the November 8, 2004 meeting.

2. Standard of proof. Mr. Shea presented a draft instruction on preponderance of the evidence and clear and convincing evidence based on provisions of the current MUJI and the instructions of other states. After discussion the committee decided that a burden of proof instruction should be separate from the standard of proof instructions.

Preponderance of the evidence. Mr. Dewsnup stated that the current MUJI instruction adequately described the greater weight of evidence. He suggested using the term "persuasive" rather than "convincing" to avoid confusion with the instruction on clear and convincing evidence. Mr. Young indicated that he thought the phrase "more likely true than not true" was a good addition. Mr. Dewsnup stated that the draft's closing, which instructs the jury to find a fact not proved if the evidence is evenly balanced, should include the corollary that if the evidence shows the burden of proof to have been met, then the jury should take the fact as proved. Mr. Shea will prepare another draft for the committee to consider.

Clear and convincing evidence. The committee discussed whether introducing the requirement that a fact must be "highly probably" to meet the standard was sound. After discussion, the committee decided to delete this phrase from other states and use the traditional Utah description "that there remains no serious or substantial doubt as to the truth of the fact."

The committee asked for a committee note that the judge should specify for the jury which elements must be held to the clear and convincing standard. This might be done in an instruction or as part of the verdict form. If the judge gives the clear and convincing evidence instruction at the start of the trial and for some reason those issues do not go to the jury (settlement, directed verdict, etc.) the judge should instruct the jury that those matters are no longer part of the case. Mr. Shea will prepare another draft for the committee to consider.

3. Standard of care of the mentally disabled, physically disabled, and children. The committee discussed the research by Mr. Jemming and Mr. Humpherys.

Mental disability. Mr. Jemming stated that the Utah Supreme Court has distinguished between insanity and lesser forms of mental disabilities and between primary negligence and comparative negligence. Mr. Jemming indicated that in primary negligence, the regular standard

of care applies and that "insanity or other mental deficiency does not relieve the actor from liability for conduct which does not conform to the standard of a reasonable man under like circumstances." Mr. Jemming contrasted this with comparative negligence in which the Court held that an insane person could not be negligent, but that lesser mental disabilities should be considered by the jury. *Birkner v. Salt Lake County, et al.*,771 P.2d 1053 (Utah 1989). Mr. Jemming stated that the Court's conclusions may be limited to the circumstances of the case.

Physical disability. Mr. Jemming indicated that Utah case law does not address issues regarding the standard of care owed by a person with a physical disability. The Restatement of Torts 2d §283C provides that a person with a physical disability must use the same care as a reasonable person with a similar disability.

Children. Mr. Jemming stated that Utah law follows the general rule that a child must exercise the same standard of care as a child of like age, knowledge and experience but that a child engaging in an adult activity would be held to the standard of care of an adult.

Mr. Humpherys expressed concern that the proposed jury instructions inadequately describe the standard to be applied. That a child of fewer years might have the greater knowledge. That the law appears to distinguish between a child and an adult with the mental capacity of a child. That the standard should not change depending on whether the negligence was "primary" or contributory. Mr. Humpherys suggested a committee note that the law imposing a reduced standard of care is uncertain and that the instruction should be given only if the court first decides that a reduced standard applies.

Mr. Humpherys noted that Utah has a statute, Section 31A-22-303(1)(a)(iv), which requires liability coverage when a driver is overcome by an unforeseen seizure.

Mr. Belnap and Mr. Jemming will further research the standard of care for children. Mr. Jemming will further research the standard of care for persons with disabilities.

4. Fault defined. The committee decided that the instruction should list each of the grounds of comparative fault listed in the comparative negligence act. It was also noted that the first numbered paragraph is not grammatically correct. Mr. Shea will prepare another draft for the committee to consider.

5. Negligence defined. The committee approved the instruction defining negligence.

6. Amount of care required when children are present. The committee approved the instruction.

7. Child participating in an adult activity. The committee approved the instruction.

8. Amount of care for dangerous activities. Mr. Carney questioned whether the instruction is necessary since this instruction merely repeats the principle stated in the definition of negligence. Mr. Shea questioned whether the reference to "ultra-hazardous activities" in the committee note

is confusing since the rest of the instruction speaks of “dangerous” activities. The meeting was adjourned before the committee concluded its review of this instruction.

9. Adjournment. The committee adjourned at 6:00 pm.

MINUTES
Advisory Committee on Model Civil Jury Instructions
February 14, 2005
4:00 p.m.

Present: John L. Young (chair), Honorable William W. Barrett, Jr., Paul M. Belnap, Juli Blanch, Francis J. Carney, Marianna Di Paolo, Phillip S. Ferguson, Tracy H. Fowler, L. Rich Humpherys, Jonathan G. Jemming, Timothy M. Shea, Paul M. Simmons

Excused: Ralph L. Dewsnup, Colin P. King

1. *Minutes.* On motion of Mr. Carney, seconded by Judge Barrett, the committee approved the minutes of the January 10, 2005, meeting.

2. *Draft Instruction on the Role of Attorneys.* Mr. Carney presented a proposed instruction drafted by Rob Clark of the court's advisory committee on professionalism discussing attorneys' ethical duties. Several committee members thought the instruction would create in the minds of jurors an expectation that the attorneys would not act professionally. Dr. Di Paolo asked what jurors would be expected to do with the information and suggested that it left too many possibilities for jurors to come up with impermissible inferences. Judge Barrett recommended limiting the instruction to the second paragraph. Mr. Carney suggested adding the second paragraph to existing instruction 1.102 on the role of the judge, jury and lawyers.

Mr. Shea will add the second paragraph of the proposed instruction to the end of the fourth paragraph of instruction 01.102 so that the committee can see the proposed language in context.

3. *Draft Preliminary and General Instructions.* The committee continued its review of the draft preliminary and general instructions:

a. *01.401. Burden of Proof.* Mr. Humpherys asked how the instruction was to be used and whether it would have to be repeated with the instructions on each element of the parties' claims and defenses. Mr. Ferguson envisioned the instruction as a general instruction on the burden of proof to be given with a general statement of the nature of the case and the parties' claims. It was meant as a roadmap of the parties' claims and defenses and not a complete statement of every element. Mr. Young suggested that the purpose of the instruction be explained in a note. Mr. Fowler suggested that the instruction indicate that the court will instruct the jury more fully on the parties' claims and defenses at the end of the case. Mr. Simmons questioned whether the instruction accurately stated the law, since the preponderance of the evidence is to be determined by all of the evidence, regardless of who may have produced it. Mr. Shea suggested revising the first sentence to read: "When I use the term 'burden of proof,' it means that the party must persuade you by a preponderance of the evidence."

b. *01.402. Preponderance of the Evidence.* The committee discussed the third paragraph of the proposed instruction. Dr. Di Paolo suggested that the second sentence read, "It is how convincing the evidence is and not just how much evidence there is." The committee suggested that this sentence replace both the second and third sentences of the third paragraph. Mr. Ferguson noted that the quantity of evidence may matter; the more evidence there is on a certain point, the more convincing the evidence on that point may be. Mr. Simmons suggested adding the following language from MUJI 2.18: "The preponderance of the evidence is not determined by the number of witnesses, nor the amount of the testimony, but by the convincing character of the testimony." Dr. Di Paolo suggested reversing the order of the last two sentences of the third paragraph.

Mr. Shea will redraft instruction 01.402 in accordance with the committee's suggestions.

c. *01.403. Clear and Convincing Evidence.* Mr. Simmons asked how "no serious or substantial doubt" differed from "beyond a reasonable doubt" and suggested that "highly probable" may be more accurate than "no serious or substantial doubt." Mr. Fowler suggested that the comparison to the criminal standard contained in instruction 01.402 may have to be repeated in instruction 01.403 if "clear and convincing" were the only standard of proof in a case. The committee could not think of a situation where that might be the case. The committee approved the instruction as drafted.

d. *02.105. Standard of Care of Children.* Mr. Jemming explained that Utah does not follow the tri-partite approach of presuming children in certain age categories capable or incapable of negligence. It is not clear, however, whether children below a certain age (such as age 7) are incapable of negligence as a matter of law. The proposed instruction adopts the standard of care under the Restatement, which is that of children of a similar age. The proposed note explains that there is an exception for children engaged in adult activities.

Mr. Belnap was excused.

e. *02.103. Standard of Care of the Physically Disabled.* Mr. Jemming thought that the first sentence of the proposed instruction was misleading, that the standard is not a diminished standard but simply reasonable care under the circumstances, with the actor's disability being one of the circumstances the jury may consider. Dr. Di Paolo noted that having a separate instruction on the standard of care for the physically disabled suggests that the standard is a lesser standard. Mr. Humpherys asked what qualifies as a disability. The committee agreed that mental disabilities are treated differently from physical disabilities and may not excuse a negligent actor even if his negligence was the result of a mental problem. Mr. Carney read a comment from the

Restatement that confirmed the points the committee had made. Mr. Shea noted that the disability must be relevant to the conduct in question. Mr. Young asked whether the jury must make a preliminary finding of disability. He also suggested that the committee note say that there are no Utah cases on point. Ms. Blanch suggested omitting the instruction altogether and allowing the parties to argue whether or not a disabled person was negligent from the general negligence instruction.

Mr. Shea will redraft the instruction as part of the general negligence instruction, using a physical disability as an example of one of the circumstances the jury may consider in determining whether the actor was negligent.

f. *Abnormally Dangerous Activities.* Mr. Carney presented a revised proposed instruction on abnormally dangerous activities. He noted that, under Utah law, there is strict liability for abnormally dangerous activities. Mr. Humpherys asked whether the court or the jury was to apply the factors listed in the instruction to determine whether an activity is abnormally dangerous. Mr. Simmons thought the question was one of law for the court to decide; otherwise, different people could be held to different standards for the same activity, depending on the decision of the particular juries that heard the evidence. Mr. Carney noted that a comment to section 520 of the Restatement (Second) of Torts says that it is a question of law. The committee suggested putting the factors (a through f) in a comment for the court to consider. Dr. Di Paolo noted that "strict liability" needs to be explained to the jury.

Mr. Carney will revise the instruction.

4. *Next Meeting.* The next meeting will be Monday, March 14, 2005, at 4:00 p.m.

The meeting concluded at 5:30 p.m.

MINUTES
Advisory Committee on Model Civil Jury Instructions
April 11, 2005
4:00 p.m.

Present: John L. Young (chair), Honorable William W. Barrett, Jr., Paul M. Belnap, Juli Blanch, Francis J. Carney, Ralph L. Dewsnup, Marianna Di Paolo, Phillip S. Ferguson, L. Rich Humpherys, Jonathan G. Jemming, Timothy M. Shea, Paul M. Simmons

Excused: Tracy H. Fowler

1. *Minutes*. The minutes of the February 14, 2005, meeting were approved. (There was no meeting March 14, 2005; it was canceled.)

2. *Efficiency*. The committee discussed ways to speed up its work:

a. *Starting Time*. Meetings will start promptly at 4:00 p.m.

b. *Minutes*. The committee will not spend meeting time going over minutes. The minutes of the prior meeting will be sent out ahead of time, and if no objections are received before the next meeting, the minutes will be deemed approved.

c. *Law Clerks*. Mr. Young and Mr. Carney will ask the Litigation Section of the Bar to provide law clerk help for subcommittees over the summer.

d. *Extended Meetings*. Mr. Carney suggested that the committee set aside a full day to complete whole sets of instructions. Mr. Young suggested that a half day might be sufficient. The committee agreed to meet for a half day in June to finalize the preliminary, negligence, comparative fault, causation and damage instructions. Mr. Humpherys, the chair of the damages subcommittee, is starting a trial on June 13, the date originally set for the June committee meeting, so the committee tentatively agreed to meet for a half day on Monday, June 6, beginning at noon, subject to the other committee members' availability. (Mr. Dewsnup is not available that day but agreed that the meeting could go ahead without him.)

Note: After the meeting, Mr. Young suggested that the committee meet on Wednesday, June 1, from 12:00 p.m. to 6:00 p.m., rather than Monday, June 6.

Committee members should let Mr. Shea know by e-mail as soon as possible whether they can meet on Wednesday, June 1, from 12:00 p.m. to 6:00 p.m.

Mr. Humpherys said that the damages subcommittee would try to have a draft of its instructions for the next meeting. Mr. Jemming offered to assist the subcommittee.

3. *Draft Preliminary and General Instructions.* The committee continued its review of the draft preliminary and general instructions:

a. *01.102: Role of the Judge, Jury and Lawyers.* Mr. Dewsnup suggested that the instruction start out, "You, I and the lawyers . . ." Several members did not like the language at the end of the fourth paragraph on professionalism. They thought it called undue attention to the attorneys' conduct. Judge Barrett and Mr. Belnap did not think that civility at jury trials was a problem or that the instruction was necessary. Mr. Simmons thought the instruction infringed on the jury's job of determining credibility by suggesting that the attorneys who are most civil are most believable. Ms. Blanch suggested that the instruction be made more general so as not to single out the attorneys. Mr. Carney explained that the purpose of the instruction was not to change the attorneys' behavior but to change juror expectations so that they would not expect the attorneys to act like the attorneys they see on television and in the movies. Mr. Dewsnup suggested the following language in place of the last two sentences of paragraph 4: "Things that you see on television and movies may not be an accurate reflection of the way that trials should be conducted. Modern trials should take place in an atmosphere of professionalism, courtesy and civility." Mr. Ferguson suggested that this language be placed as a separate paragraph at the end of the instruction. The committee also agreed to make the last paragraph part of the third paragraph. Dr. Di Paolo noted that most jurors would not understand the term "legal questions" in the second paragraph. Mr. Carney suggested changing it to "questions about the admission of evidence and the meaning of the law."

b. *01.401. Burden of Proof.* Mr. Simmons suggested that the instruction would be awkward if there are multiple claims or defenses. The committee agreed that it would not be a good idea to list the elements of each claim and defense in the preliminary instructions, that the preliminary instructions should only provide a general statement of the parties' claims and defenses. Mr. Young suggested that an abbreviated instruction on burden of proof follow the general instruction on the parties' claims and defenses.

c. *01.402. Preponderance of the Evidence.* Mr. Dewsnup suggested that "testimony" in the third paragraph be replaced with "evidence" and that the fourth sentence of that paragraph read: "In weighing the evidence, you should consider all the evidence that applies to a fact, no matter which party presented it." Mr. Young questioned whether "the persuasive character of the evidence" in the third sentence of paragraph 3 should be "the convincing character." Mr. Simmons thought "persuasive" was more correct, that "convincing" suggested a higher standard than mere preponderance.

Mr. Jemming will search for cases referring to the "convincing character of the evidence" and will try to update the references.

The committee approved the instruction as modified.

d. *02.102.* Mr. Shea noted that the last paragraph was added for cases in which one of the actors was under a physical disability. Dr. Di Paolo suggested that the last paragraph be placed after the second paragraph, and Mr. Carney suggested that it be set off in brackets, with the introductory sentence italicized, to show that it is only to be used where applicable. Mr. Carney noted that the definition of negligence in the first paragraph was circuitous ("Negligence means that a person did not use reasonable care. Reasonable care is simply what a reasonably careful person would do in a similar situation."). He compared the new California jury instruction on negligence: "Negligence is the failure to use reasonable care to prevent harm to oneself or to others. [¶] A person can be negligent by acting or by failing to act. A person is negligent if he or she does something that a reasonably careful person would not do in the same situation or fails to do something that a reasonably careful person would do in the same situation. . . ." Mr. Dewsnup thought that the standard should be "what a reasonable person would do in a similar situation," not what "a reasonably careful person" would do. Mr. Young, Ms. Blanch and Mr. Jemming all thought the standard should be that of "a reasonably careful person." The committee did not change "reasonably careful person" to "reasonable person" but approved the instruction as otherwise modified, making 02.103 ("Standard of Care of the Physically Disabled") unnecessary.

e. *02.105. Standard of Care of Children.* Mr. Belnap questioned whether the third sentence ("Rather, a child is negligent if he does not use the amount of care that is ordinarily used by children of similar age," etc.) had the effect of directing a verdict on negligence. The committee thought it was merely definitional and did not invade the province of the jury. The instruction was approved as written.

f. *02.107. Abnormally Dangerous Activity.* Mr. Simmons thought that the last sentence did not accurately state the law because, under the Liability Reform Act, a defendant's strict liability for carrying on an abnormally dangerous activity still has to be compared with the fault of others. He suggested that it read, "Therefore, the defendant was at fault." Mr. Humpherys suggested adding "to some degree." Mr. Dewsnup noted that the same defendant may be at fault in multiple ways. Mr. Ferguson noted that the jury must still find that the defendant's abnormally dangerous activity was a legal cause of the plaintiff's damages. He suggested omitting the last sentence and replacing it with: "You must only decide whether the defendant's activity caused the plaintiff's harm." Dr. Di Paolo thought it would be helpful to let the jury know the consequence of the court's determination that the defendant's activity was abnormally dangerous and thought that most jurors would not understand what "strictly liable" means. Mr. Simmons suggested deleting "strictly" from the first sentence and putting the last phrase ("whether or not [name of defendant] exercised reasonable care") at the end of the first sentence. The

discussion raised several philosophical issues under the Liability Reform Act: What is to be compared--fault or causation? If causation, is it causation of the accident, or causation of the injuries? What forms of fault can be compared? Can an intentional tort, for example, be compared with negligence? Mr. Jemming did not think the issue was resolved by *Field v. Boyer*. Mr. Belnap noted that the Supreme Court had heard arguments on the issue last week.

Mr. Shea will revise the instruction.

g. *02.108. Amount of Care Required in Controlling Electricity.* The committee approved the instruction as written.

h. *02.101 & 02.101a. "Fault" Defined.* Mr. Shea presented 02.101a as an alternative to 02.101. He tried to simplify the definition of fault by parsing the statutory language. Mr. Carney and Mr. Simmons thought that a party must show more than simply that another's act or omission caused the injury; he must also show a breach of duty. The statutory language Mr. Shea relied on was added to allow the conduct of employers and governmental entities that would be actionable but for their immunity to be compared. In light of the discussion, Mr. Shea withdrew 02.101a. Mr. Belnap questioned the need for any instruction defining "fault," since the jury will already be instructed on the elements of each claim. Mr. Simmons noted that an instruction defining "fault" is necessary in cases that involve different types of fault, such as negligence and strict liability. Mr. Young and Mr. Humpherys agreed that an instruction was necessary to help the jury understand what it must do in completing the special verdict form. Mr. Humpherys suggested adding a sentence to the end of each instruction on the elements of a claim to the effect that, if the jury finds that the elements of the claim have been met, then the actor is considered to have been at "fault." The committee agreed that the language "gave rise to a claim for" in subparagraph (1) should not be used. Several committee members objected to subparagraph (2) on the grounds that it required the jury to find causation twice--once as an element of a claim and again as part of the definition of "fault." The committee debated whether causation was an element of negligence. Mr. Carney suggested that the instructions should follow the special verdict form and require the jury to first determine whether a party's conduct breached a standard of care and then determine whether it was a legal cause of the plaintiff's harm. The committee will revisit the instruction.

i. *02.109 & 02.109a. "Legal Cause" Defined.* Mr. Belnap preferred 02.109a to 02.109 on the grounds that it more closely follows the law as it has been traditionally stated. He also preferred to keep the term "proximate cause" rather than "legal cause" and asked whether there was any empirical support for the proposition that jurors are confused by "proximate cause." Mr. Young, Dr. Di Paolo and Mr. Simmons

pointed out that "proximate cause" was criticized as foreign to lay jurors in the articles the committee reviewed when it was starting its work, including the Charrow and Charrow article. Dr. Di Paolo thought that lay jurors would also be confused by "legal cause" as well but agreed that it was better than "proximate cause." She noted that most people hear "approximate" for "a proximate." Mr. Young noted that California just uses "cause." Mr. Humpherys suggested that we ask the court to approve the use of "legal cause." Mr. Young suggested that the instruction include an advisory committee note explaining the change from "proximate" to "legal" cause and citing the studies suggesting that jurors have trouble understanding "proximate" cause. Mr. Dewsnup noted that there is a significant difference between "could foresee" (in 02.109) and "could be expected" (in 02.109a) and that the standard should be foreseeability, not expectations. Mr. Dewsnup moved to combine the draft instructions by adding the first sentence of 02.109 to the beginning of 02.109a and changing subparagraph (3) of 02.109a to read, "could be foreseen by a reasonable person . . ." Mr. Belnap suggested using MUJI 3.13 and simply changing "proximate" to "legal." Mr. Dewsnup objected to MUJI 3.13 on the grounds that it was not plain English. Mr. Young thought that it incorporated elements of superseding and intervening cause, which are best explained in separate instructions. Mr. Carney did not think that MUJI 3.13 was an accurate statement of the law. He thought it defined actual causation and not proximate causation. Mr. Simmons objected to the use of the phrases "substantial role" or "substantial factor" in any causation instruction and circulated an article suggesting that the substantiality of the conduct in producing the harm is not a proper consideration under a causation analysis but goes to the party's relative degree of fault. Mr. Carney and Mr. Jemming argued that "substantial factor" and foreseeability are not separate elements of legal causation but alternatives and that there is more support for a foreseeability test than a "substantial factor" test under Utah law. Mr. Young suggested replacing "and" between subparagraphs (2) and (3) with "or." The committee will revisit the instruction at a later meeting.

4. *Field Testing.* Mr. Carney suggested that the instructions be presented to focus groups before they are submitted to the Supreme Court to determine whether lay people can understand them.

5. *Next Meeting.* The next meeting will be Monday, May 9, 2005, at 4:00 p.m.

The meeting concluded at 6:15 p.m.

MINUTES
Advisory Committee on Model Civil Jury Instructions
May 9, 2005
4:00 p.m.

Present: John L. Young (chair), Honorable William W. Barrett, Jr., Paul M. Belnap, Juli Blanch, Francis J. Carney, Ralph L. Dewsnup, Marianna Di Paolo, Phillip S. Ferguson, L. Rich Humpherys, Jonathan G. Jemming, Colin P. King, Stephen B. Nebeker, Timothy M. Shea, Paul M. Simmons

The committee discussed the following draft instructions:

1. *01.102: Role of the Judge, Jury and Lawyers.* Mr. Simmons suggested that "why" be added before "how" in the second sentence of the third paragraph and that the last sentence be revised to read, "Real trials should be conducted with professionalism, courtesy and civility." The committee approved these changes and approved the instruction as modified.

2. *01.401: Burden of Proof.* Mr. Humpherys suggested that the instruction as written was misleading because a defendant does not have the burden of proving all defenses; for example, he does not have the burden of proving that there is insufficient evidence to support the plaintiff's claims. Mr. Dewsnup suggested omitting the "general statement of the claim or defense." Mr. Carney suggested going back to something along the lines of MUJI 2.16: "Whenever in these instructions it is stated that the burden of proof rests upon a certain party, or that a party must prove a certain proposition, . . . I mean that unless the truth of the allegation is proved by [a preponderance of the evidence] . . . , you shall find that the same is not true." Mr. Carney noted that the new California civil jury instructions (CACI) include a separate section on evidence that has two instructions on the burden of proof. The instruction on preponderance of the evidence (CACI 200) reads:

> A party must persuade you, by the evidence presented in court, that what he or she is required to prove is more likely to be true than not true. This is referred to as "the burden of proof."
>
> After weighing all of the evidence, if you cannot decide that something is more likely to be true than not true, you must conclude that the party did not prove it. You should consider all the evidence, no matter which party produced the evidence.
>
> In criminal trials, the prosecution must prove that the defendant is guilty beyond a reasonable doubt. But in civil trials, such as this one, the party who is required to prove something need prove only that it is more likely to be true than not true.

Some of the committee expressed a preference for an instruction similar to CACI 200. Mr. Young thought it was important to explain the difference between a preponderance of the

evidence and beyond a reasonable doubt. Mr. Shea suggested eliminating instruction 01.401 from the preliminary instructions. Mr. Carney suggested that the instruction could be given both at the beginning and at the end of trial. The committee agreed to use a modified version of CACI 200.

3. *01.402: Preponderance of the Evidence.* Mr. Jemming reported that his research showed that the phrase "convincing nature" has been used most recently in Utah in the context of a "clear and convincing" standard of evidence and should probably not be used in an instruction defining the preponderance of the evidence.

4. *02.107: Amount of Care Required for an Abnormally Dangerous Activity.* At Mr. King's suggestion, the title was changed to "Abnormally Dangerous Activity," dropping any reference to the "amount of care," since engaging in an abnormally dangerous activity gives rise to strict liability. Mr. Humpherys noted that there may be a factual dispute for the jury to resolve as to whether the defendant was actually engaged in the activity, in which case the instruction could be inaccurate or misleading. Mr. Carney noted that he had drafted a comment addressing when the instruction should be given.

Mr. Carney will e-mail the draft comment to Mr. Shea to include in the next draft of the instruction.

The committee debated whether the second paragraph was necessary. Mr. Young thought it assumed both breach of a duty and causation, whereas strict liability does not relieve a plaintiff of his obligation to prove causation. Mr. Carney shared an illustration from the Restatement (Second) of Torts to show that a defendant is not necessarily strictly liable for all the harm caused by an abnormally dangerous activity, no matter how remote.

Dr. Di Paolo thought the first paragraph was confusing in that it suggested that fault and causation were separate concepts, whereas fault subsumes both breach of a duty and causation. The committee debated the meaning of "fault" and whether "fault" could be used as shorthand for breach of duty (as opposed to causation) or meant breach of duty and causation. Based on the statutory definition of "fault" in the Liability Reform Act, the committee concluded that it meant the latter. Dr. Di Paolo said that if fault, causation and harm are not the same, the distinction among them must be clearly articulated for the jury.

Mr. Humpherys suggested revising the last sentence of the first paragraph to read, "You must still decide what harm resulted from [or was caused by] the defendant's fault." Mr. King moved to delete the last sentence of the first paragraph and leave in the second paragraph, in brackets, to be used in cases of multiple defendants or comparative fault. Mr. Humpherys seconded the motion. Dr. Di Paolo noted that a lay juror would not readily understand the instruction to "allocate" fault. After further discussion, Mr. King withdrew his motion.

Mr. Belnap suggested that the second sentence of the first paragraph read that one "may be liable" rather than "is liable" and that the last phrase of that sentence ("whether or not he exercised reasonable care") be deleted. The committee rejected the suggestions.

Finally, Ms. Blanch suggested that the sentence be revised to read: "One who carries on an abnormally dangerous activity is liable for harm caused by that activity whether or not he exercised reasonable care." The committee approved her suggestion.

5. *02.101a: Order of Decision Making.* Mr. Shea explained that this instruction was his attempt to incorporate Mr. Carney's suggestion from the last meeting by setting out the three questions the jury must answer: (1) Did the act or omission of each actor breach the applicable standard of care or legal duty? (2) If so, was the act or omission a legal cause of the plaintiff's harm? (3) How is the total fault causing the plaintiff's harm to be allocated among those on the verdict form?

Mr. Humpherys noted that it was cumbersome to refer continually to "a person's act or failure to act" and proposed that an act or failure to act that breaches the applicable standard of care and causes harm be defined as "fault" and that thereafter "fault" be used throughout the instructions in place of "act or failure to act." Mr. Carney noted that this was the approach the negligence subcommittee had originally tried. Mr. Shea indicated that he had also tried that approach, but it did not work well because it collapsed the traditional two-step analysis of (1) breach of duty and (2) causation. Under that approach, the special verdict form would just have one question for each actor: Was the person at fault in causing plaintiff's injuries? Mr. Belnap thought that the instructions and verdict form should maintain the traditional two-step analysis.

Mr. Young suggested that the instruction give the jury an overview of its task. Mr. Shea and Mr. King noted that that was what instruction 02.101a was meant to do. Mr. Humpherys suggested that the instruction could read: "A person is at fault if (1) he breaches the applicable standard of care [or breaches a duty he owed the plaintiff], and (2) his breach was a cause of the plaintiff's harm. I will now instruction you on the applicable standard of care [or the applicable duty]. I will then instruction you on causation."

Mr. Dewsnup suggested using "conduct" for "act or failure to act." A majority of the committee thought that most people associate "conduct" with an act, as opposed to a failure to act. Dr. Di Paolo further noted that "conduct" has a connotation of good conduct, not misconduct.

Mr. King and Dr. Di Paolo thought that the repetition of the phrase "act or failure to act" would not be too cumbersome in practice because the jury would only hear the phrase a few times in any given set of instructions.

The committee rejected the phrase "amount of care" as misleading; in cases of strict liability, a defendant can be liable regardless of the amount of care used. Mr. Carney noted that "standard of care" is generally used in cases of professional negligence but could be adapted to refer to any conduct that breaches a legal duty. (Mr. Jemming was excused.)

The committee debated whether to use the term "legal cause" (as a substitute for the disfavored term "proximate cause"). Mr. Dewsnup noted that jurors are likely to think that a "legal cause" is to be contrasted with an "illegal cause." The committee noted that California has abandoned both "proximate cause" and "legal cause." CACI simply refers to "cause."

Mr. Shea will take the ideas discussed in the meeting and revise instruction 02.101a (Order of decision making) and the related instructions on fault and allocation of fault as necessary.

Mr. Humpherys suggested that a subcommittee review the revised instructions on fault and allocation of fault before the next committee meeting to work out any obvious problems.

The committee noted that many of the problems it was grappling with were the result of a poorly drafted statute (the Utah Liability Reform Act). Mr. Dewsnup suggested that the committee draft new language for the statute that would clarify some of the issues without altering the intent of the statute and submit the proposed language to the legislature. Mr. Humpherys noted that the instructions should explain the law to the jury in such a way that jurors can understand it and that will not be affected by any effort to clarify the statutory language.

Next Meeting. The next meeting will be Wednesday, June 1, 2005. It will start at 12:00 p.m. and go to 5:00 p.m. or later. The committee plans to spend the first three hours reviewing the revised instructions on fault and the remainder of the time reviewing the damage instructions.

The meeting concluded at 5:55 p.m.

MINUTES
Advisory Committee on Model Civil Jury Instructions
June 1, 2005
12:15 p.m.

Present: John L. Young (chair), Honorable William W. Barrett, Jr., Paul M. Belnap, Juli Blanch, Francis J. Carney, Ralph L. Dewsnup, Marianna Di Paolo, Phillip S. Ferguson, Tracy H. Fowler, L. Rich Humpherys, Jonathan G. Jemming, Colin P. King (joined the meeting in progress), Stephen B. Nebeker, Timothy M. Shea, Paul M. Simmons, David E. West, and Kelly Thacker (typist)

1. *Schedule.* Mr. Young announced that the July 5, 2005, meeting was canceled because it conflicts with the Utah State Bar annual meeting. He noted that once the committee finishes the damage instructions, it will next review the employment, medical malpractice and products liability instructions.

2. *Format.* Mr. Carney showed the committee the Alaska civil pattern instructions online, to give the committee an example of what the revised MUJI instructions may look like when they are finished. Mr. Humpherys questioned whether cross-references to the first edition of MUJI should be included. Several committee members thought they were helpful to show the history of a given instruction.

3. *Preliminary Instructions.* The committee discussed the following draft preliminary instructions:

a. *1.101: General Admonitions.* Mr. Shea proposed this instruction as a new instruction. Mr. Simmons noted that the instruction is largely repeated in instruction 1.112 (rules applicable to recesses). A majority of the committee thought that it was okay to repeat some concepts, since they will be new to jurors. The committee decided to leave both instructions (1.101 and 1.112) as they are.

b. *1.103: Nature of the Case.* The committee approved Mr. Shea's suggestion to delete the last paragraph, since it is covered by other instructions.

c. *1.106: Jurors Must Follow the Instructions.* At Mr. Shea's and Dr. Di Paolo's suggestion, the instruction was revised to read: "The instructions that I give you are the law, and your oath requires you to follow my instructions even if you disagree with them."

d. *1.107: Jurors Must Decide the Facts Based on the Evidence.* This is a new instruction. Mr. Carney thought the instruction was too choppy and suggested alternative wording. Mr. Shea suggested deleting the instruction as covered elsewhere. Mr. Fowler proposed amending instruction 1.102 (role of the judge, jury and lawyers) to add that the evidence is the testimony heard and the exhibits received. The committee decided to delete instruction 1.107 and to leave instruction 1.102 unchanged.

e. *1.110: Service Provider for Juror with a Disability; and 1.111: Duty to Abide by Official Translation.* These are new instructions, based on California instructions. Mr. Dewsnup noted that instruction 1.110 was consistent with the work of the committee on jury service, which has tried to make jury service available to a broader range of people, including those with disabilities. Mr. Simmons questioned what the instruction and oath of the service provider meant. Mr. Carney questioned why jurors were required to rely on the translation of an interpreter and not their own knowledge of a language. Mr. West questioned the need for the instructions. None of the committee members knew of a trial in which the instructions would have applied. Some committee members thought the instructions were premature and should not be considered without more guidance in a statute or rule. The committee reserved on the instructions.

Mr. Shea will research the legal bases for instructions 1.110 and 1.111.

f. *1.306: Stipulated Facts.* At Mr. Young's suggestion, the first sentence was deleted. An advisory committee note was added to the effect that the instruction should not be given until a stipulation is entered in the record. "Before the trial" was therefore deleted from the second paragraph. The last paragraph was revised to read: "Since the parties have agreed on these facts, you must accept [not "treat"] them as true for purposes of this case."

g. *1.307: Judicial Notice.* At the suggestion of Mr. Young and others, the instruction was revised to read: "I have taken judicial notice of [fact] for purposes of this trial. This means that you must accept the fact as true." An advisory committee note was added to say that the instruction should not be given until the court takes judicial notice. The staff note was deleted, and a reference to Utah Rule of Evidence 201 was added.

h. *1.401: Preponderance of the Evidence.* The instruction was compared to the new California instruction 200. Mr. Dewsnup, Dr. Di Paolo and Mr. Fowler expressed a preference for the Utah instruction. Mr. Dewsnup, however, expressed some concern that the instruction overemphasized the plaintiff's burden and suggested adding the words, "however slightly." Mr. Carney thought the matter was best left to argument. Mr. Shea suggested reversing the order of the sentences in the fourth paragraph. At Mr. Shea's suggestion, the first sentence of the third paragraph was revised to read: "Another way of saying this is proof by the greater weight of the evidence, however slight." Messrs. Ferguson and Nebeker expressed some reservations about this change.

After a break, Mr. King joined the committee.

4. *Negligence Instructions.* The committee reviewed the following draft negligence instructions:

a. *2.101: "Fault" Defined.* Messrs. Young and Carney presented a revised instruction 2.101 defining "fault." Mr. Ferguson noted that the first paragraph assumes that the plaintiff was harmed, which may be a contested issue of fact. Mr. Belnap suggested deleting the sentence in the third paragraph, "There may be more than one cause of the harm," because it is covered in another instruction and fits better there. Several committee members noted that not every act or omission causing harm is "fault." Therefore, "wrongful" was added to the first sentence of the second paragraph, before "act or failure to act." Mr. West suggested deleting the third paragraph. The committee discussed whether the jury should be directed to the special verdict form at this point in the instructions. The consensus was that the concept should be explained to them, but the court should leave the explanation of the verdict form until later. Mr. Carney noted that the instruction may have to be given in some form at different parts of the trial. After further discussion, the instruction was revised to read:

2.101. "Fault" defined.

Your goal as jurors is to decide whether [plaintiff] was harmed and, if so, whether anyone was at fault for that harm. If you decide that more than one person is at fault, you must then allocate fault among them.

Fault means any wrongful act or failure to act that causes harm to the person seeking recovery. The wrongful act or failure to act alleged in this case is [negligence, etc.].

Your answers to the questions on the verdict form will determine whether anyone is at fault. We will review the verdict form in a few minutes.

Instruction 2.101a, which tracked instruction 2.101 but used the term "responsibility" for "fault," was deleted.

b. *2.102: Standard of Care Required Generally.* The title of the instruction was revised to read, "Negligence defined." Mr. West thought that the last paragraph could be confusing: jurors might confuse comparing the conduct of a party with that of a hypothetical reasonable person with the comparisons they are required to make to allocate fault. Mr. Carney suggested that the first part of that paragraph ("You must decide whether [names of persons on the verdict form] were negligent") be the first sentence of the instruction and that the rest of the paragraph be omitted. Dr. Di Paolo thought this

sentence fit better as the last sentence of the instruction rather than the first. The committee agreed to make the paragraph regarding physical disabilities a separate instruction.

c. *2.103: Standard of Care Required When Children Are Present; 2.104: Standard of Care Required by Children; 2.105: Standard of Care Required for a Child Participating in an Adult Activity; and 2.107: Standard of Care Required in Controlling Electricity.* The titles of these instructions were all revised to delete the words "Standard of."

d. *2.108: "Cause" Defined.* Mr. Carney noted that the subcommittee had chosen to follow the California approach and use the term "cause" rather than "proximate cause" or "legal cause" because of the confusion the latter terms engender. Mr. Young suggested adding an explanation for the change to the advisory committee note. Mr. Ferguson noted that the first sentence of the instruction presumes that the defendant has done a wrongful act. The first paragraph was revised to read: "Remember, I have instructed you before that the concept of fault includes a wrongful act or failure to act that causes harm. You must decide whether [name of defendant or defendants]'s act or failure to act was a 'cause' of [name of plaintiff's] harm." Dr. Di Paolo suggested putting the word "and" between subparagraphs (1) and (2) on a separate line. Mr. King thought the word should be "or," not "and." Mr. Young noted that subparagraph (1) covered two concepts: (a) a direct cause of the harm, and (b) an indirect cause. Mr. Young thought that the instruction was inaccurate and incomplete because it did not include the concept of "unbroken by an efficient intervening cause." Mr. King and some committee members thought that intervening cause was an affirmative defense and that the plaintiff did not have the burden of proving the absence of a superseding cause. Other committee members disagreed. Mr. Ferguson noted that a "natural and continuous sequence" was equivalent to the lack of an intervening cause. Some questioned whether the concept had to be expressed twice--once in the positive and once in the negative. Dr. Di Paolo questioned what an "efficient" intervening cause was. Superseding causes are covered by another instruction. Ms. Blanch and Dr. Di Paolo suggested adding "unbroken" to the instruction. Mr. Shea and Mr. Jemming thought that the term "continuous" covered the concept. Mr. Carney and Mr. West thought that adding "unbroken" would add confusion, particularly in cases where there may be multiple causes of a person's harm. Mr. Carney indicated that he would define cause as simply an act or failure to act "but for" which the harm would not have occurred. Mr. Young suggested repeating the phrase "the person's act or failure to act" at the beginning of both subparagraph (1) and subparagraph (2) and deleting it from the first part of the sentence. "Remember" was deleted from the last sentence of the instruction.

e. *2.110: Superseding Cause.* Mr. Shea noted that this instruction, which is new, was his effort to restate MUJI 3.16. Mr. Carney noted that the instruction was wrong. If an intervening cause is foreseeable, it is not a superseding cause. Some questioned whether MUJI 3.16 is still good law in light of the Utah Liability Reform Act.

f. *2.111: Allocation of Fault.* The committee discussed alternative introductory sentences. Dr. Di Paolo suggested that the second paragraph also needed an introductory sentence. The instruction was revised to read:

2.111. Allocation of fault.

If you decide that more than one person is at fault, you must decide each person's percentage of fault. This allocation of fault must be done on a percentage basis, and must total 100%. Each person's percentage should be based upon how much that person's fault contributed to the harm.

You may also decide to allocate a percentage of fault to the plaintiff. [Name of plaintiff]'s total recovery will be reduced by the percentage of fault that you attribute to [him/her/it/them]. If you decide that [name of plaintiff]'s fault is 50% or greater, [name of plaintiff] will recover nothing.

When you answer the questions on damages, do not reduce the award by [name of plaintiff]'s percentage of fault. I will make that calculation later.

Mr. Shea's proposed alternative instruction, 2.111a (Allocation of Responsibility) was deleted.

5. *Damage Instructions.* The committee reviewed the following draft damage instructions. (A revised set of draft instructions was circulated at the meeting. The instruction numbers are the numbers of this revised set, and not necessarily the numbers of the set circulated before the meeting. The committee reviewed yet another revised set of instructions at the meeting, which were shown on a screen and used a different numbering system. The numbers of the instructions the committee actually reviewed are indicated in brackets.)

a. *15.101[1]: Introduction to Personal Injury Damage. Liability Contested.* Mr. Humpherys noted that the subcommittee had decided to use the terms "economic damages" and "non-economic damages" instead of "special damages" and "general damages." Mr. Carney added an advisory committee note to that effect. At Dr. Di

Paolo's suggestion, the first phrase was revised to read, "If you decide that [defendant's] fault" instead of "the fault of [name of defendant]." At Mr. West's suggestion, "legal" was deleted before "cause." At Mr. West's and Mr. King's suggestion, "you must award the damages, if any . . ." was revised to read, "you must decide how much money will fairly and adequately compensate [name of plaintiff] for his harm." At Mr. Fowler's and Mr. Young's suggestion, the word "damages" in the first sentence was replaced with "harm," to link the instruction to the prior, liability instructions, which talk about "harm" rather than "damages."

b. *15.125 [25]: Introduction to Personal Injury Damage. Liability Decided.*

Mr. Shea will revise the instruction to mirror the changes to instruction 15.101.

c. *15.102 [2]: Personal Injury--Economic Damage. Medical Care.* At Mr. Ferguson's suggestion, "medically related care" was replaced with "medical care and other related expenses." "Legally" was deleted from before "caused." The committee debated the meaning of "necessary" or "necessarily incurred." The instruction was revised to read:

15.102. Personal Injury--Economic Damage. Medical Care.

Economic damages include reasonable and necessary expenses for medical care and other related expenses. You should award the value of those expenses incurred in the past and for those that will probably be incurred in the future.

d. *15.102.5 [2A]: Personal Injury--Economic Damage. Medical Care.* Mr. Belnap did not think such an instruction should be given. Mr. Dewsnup noted that the introductory phrase ("The fact, if it be a fact") was stilted and archaic. Mr. Carney thought that the instruction should specify what the unnamed sources of payment were: "If any of the plaintiff's expenses were paid by health insurance, workers' compensation or other sources, this does not diminish [name of defendant's] responsibility to pay for them." At Mr. Humpherys suggestion, the committee decided to drop this instruction in favor of a more generic instruction, instruction 15.136.

e. *15.103 [3]: Personal Injury--Economic Damage. Loss of Earnings.* The committee noted that the instruction was confusing. A clearer distinction needs to be made between past and future damages and between lost earnings (and benefits) and lost future earning capacity. The committee reserved on the instruction.

Mr. Humpherys will review the law on lost earnings and loss of earning capacity and revise the instruction.

f. *15.104 [4]: Personal Injury--Economic Damage. Loss of Household Services.* Mr. Ferguson asked whether household services needed to be defined. The consensus of the committee was that they did not have to be defined in the instruction. Jurors should understand what they are, and they will generally be identified in the damage expert's economic report. Mr. Shea thought the second sentence was confusing; it implies that the plaintiff must prove both the reasonable value of the household services the plaintiff has been unable to do and the reasonable value of the services that he will likely be unable to do in the future to recover either past or future damages. Dr. Di Paolo thought that the difference between past and future should be explained, that is, that the jury should be told that "past" means between the time of the injury and the time of trial. The instruction was revised to read:

15.104. Personal Injury--Economic Damage. Loss of Household Services.

Economic damages also include loss of household services. To recover damages for this loss, [name of plaintiff] must prove the reasonable value of the household services that he has been or will be unable to do since the harm.

g. *15.105 [5]: Non-economic Damages.* The committee thought that the instruction was confusing. Mr. Ferguson suggested making bullet points for each factor the jury may consider in assessing non-economic damages. Mr. Fowler asked whether there was authority for awarding damages for "loss of enjoyment of life" and reserved the right to research the issue further. The committee decided to use "determine" for "award." Mr. Shea suggested dropping the phrase "and the damages you fix shall be just and reasonable in light of the evidence" from the end of the second paragraph. Mr. Fowler and Ms. Blanch thought that the instruction went too far, that the jury has no duty to award non-economic damages in every case but only to consider them. Mr. King suggested that the committee needed more research on whether the jury must award non-economic damages if it finds that a defendant was at fault. The committee tentatively revised the instruction to read:

15.105. Non-economic Damages.

In awarding non-economic damages, among the things that you may consider are:

(1) the nature and extent of injuries;
(2) the pain and suffering, both mental and physical;
(3) the extent to which [name of plaintiff] has been prevented from pursuing his ordinary affairs;
(4) the degree and character of any disfigurement;
(5) the extent he has been limited in the enjoyment of life.

You may consider whether the consequences of these injuries will, with reasonable probability, continue in the future. If so, you should award such damages as will fairly and adequately compensate him throughout his life expectancy.

Non-economic damages are not capable of being exactly determined, and there is no fixed rule, standard or formula for them. Even though they may be difficult to compute, non-economic damages must still be awarded where sustained. It is your duty to make this determination with calm and reasonable judgment. The law does not require the testimony of any witness to establish the amount of non-economic damages.

While you may not award damages based upon mere speculation, the law requires only that the evidence provide a reasonable basis for assessing the damages and does not require a mathematical certainty.

Next Meeting. The next meeting will be Monday, June 13, 2005, at 4:00 p.m. The committee will continue its review of the damage instructions. There will be no meeting in July.

The meeting concluded at 5:35 p.m.

MINUTES

Advisory Committee on Model Civil Jury Instructions

June 13, 2005

4:00 p.m.

Present: John L. Young (chair), Paul M. Belnap, Juli Blanch, Ralph L. Dewsnup, Marianna Di Paolo, L. Rich Humpherys, Jonathan G. Jemming, Paul M. Simmons and David E. West

Excused: Francis J. Carney, Timothy M. Shea

Damage Instructions. The committee reviewed the following damage instructions:

1. *15.103. Personal injury--economic damage. Medical care collateral source.* The committee noted that this instruction has been dropped in favor of the general collateral source instruction, 15.123.

2. *15.104. Personal injury--economic damage. Loss of earnings.* Mr. Humpherys read from *Clawson v. Walgreen Drug Co.*, 162 P.2d 759, 764 (Utah 1945), regarding the distinction between lost earnings and loss of earning capacity. Mr. Simmons suggested adding a sentence after the first sentence of the third paragraph to say, "A person may have lost earning capacity even if he was not employed at the time of the injury." Mr. Belnap thought the sentence was argument. Messrs. Simmons and Dewsnup and Dr. Di Paolo thought the sentence was helpful because the paragraph's emphasis on actual earnings diminished the reference to the plaintiff's "potential to earn income." Ms. Blanch suggested adding to subpoint (2) of the third paragraph the phrase "and the likelihood that he would have continued in his chosen profession." Mr. Young thought that a transition was needed between the second paragraph (talking about lost earnings) and the third paragraph (talking about loss of earning capacity). Mr. Belnap suggested splitting the instruction into two instructions: one on lost earnings and one on loss of earning capacity. Mr. Young noted that MUJI included separate instructions on each concept. Mr. West pointed out that the concepts are generally combined on the verdict form: There is one line for past lost earnings or loss of earning capacity, and another for future lost earnings or loss of earning capacity. A given case, however, may involve only one or the other (that is, either lost earnings or lost earning capacity but not both). Mr. Belnap suggested that future damages are always damages for loss of earning capacity, whereas past damages may be for loss of actual earnings or loss of earning capacity. Mr. Jemming suggested additional language for the third paragraph, based on *Clawson:* "Lost earnings is the amount a person might reasonably have earned in pursuit of his ordinary occupation." Mr. Belnap expressed a preference for the original MUJI instructions. Mr. Dewsnup noted that lost earnings should also include lost benefits. Mr. Belnap thought that benefits were covered by the term "earnings," but other committee members thought that jurors need to be specifically instructed on lost benefits, or they may think they cannot award them. Mr. Humpherys noted that another case the subcommittee relied on for the instruction, *Dalebout v. Union Pacific Railroad Co.*, 980 P.2d 1194, 1200 (Utah Ct. App. 1999), included the ability to weather economic storms as part of lost earning capacity, but *Dalebout* was a FELA case, and Mr. Humpherys was not sure whether it accurately reflected Utah law on

damages. Messrs. Belnap, Young and West were confident that FELA cases are governed by state damage law. Mr. Simmons asked how other jurisdictions' pattern jury instructions explain lost earnings and earning capacity. After further discussion, the committee decided to separate the two concepts into separate instructions and to defer further discussion until the damages subcommittee has had an opportunity to revise the instructions.

Mr. Jemming will e-mail Mr. Humpherys proposed language for the instructions.

3. *15.105. Personal injury--economic damage. Loss of household services.* The committee approved the draft instruction.

4. *15.106. Non-economic damages.* Mr. Young suggested revising the language in the second full paragraph stating that future damages should be awarded "throughout [the plaintiff's] life expectancy," since some future damages are resolved before death. Ms. Blanch suggested deleting the phrase and adding the phrase "and for how long" to the first sentence of that paragraph. Mr. Simmons asked whether "with reasonable probability" meant something different from "probably" or "more likely than not." Messrs. Young, Belnap and Humpherys suggested using the term "preponderance of the evidence" in the instruction, to reemphasize the standard of proof. After further discussion, the second paragraph was revised to read:

> You may consider whether the consequences of these injuries will, by a preponderance of the evidence, be likely to continue in the future and for how long. If so, you should award such damages as will fairly and adequately compensate him.

Mr. Young and Dr. Di Paolo thought the phrase "where sustained" in the third full paragraph was cumbersome and confusing. At Mr. Humpherys' suggestion, the second sentence of that paragraph was revised to read:

> Non-economic damages must still be awarded even though they may be difficult to compute.

At Mr. Young's suggestion, "mere" was deleted from the last paragraph. Dr. Di Paolo noted that she was still not clear how the jury is to compute non-economic damages. Nevertheless, the instruction was approved as revised.

5. *15.107. Personal injury damages. Susceptibility to injury.* Dr. Di Paolo asked how this instruction differed from instruction 15.108 (aggravation of pre-existing conditions). Mr. Simmons suggested that "is" in the last line be replaced with "may be." Mr. Young thought that the jury needed to make a finding as to whether or not the plaintiff is more susceptible to

injury and that "is" was therefore appropriate. Other committee members thought the only issue for the jury to decide was causation and not susceptibility. After further discussion, the committee replaced "is" in the last sentence with "may be."

6. *15.108. Personal injury damages. Aggravation of pre-existing conditions.* The committee deleted "legally" before the word "caused" in the last line, consistent with its approach to the issue of proximate causation. At Mr. Young's suggestion, the committee deleted "from another's fault" from the first line of the last paragraph. The committee revised the first part of the sentence to read, "When a pre-existing condition makes the outcome of the injuries greater than they would have been . . ." Dr. Di Paolo suggested replacing "attributable to" in the next sentence with "a result of," but Ms. Blanch thought that "resulting from" was a different standard than "attributable to" and not an accurate statement of the law. The committee reserved further discussion of the instruction.

Other. At Mr. Dewsnup's suggestion, the committee commended Dr. Di Paolo for her dedicated service and acknowledged her invaluable contributions to the committee's work.

Next Meeting. The next meeting will be Monday, August 8, 2005, at 4:00 p.m. There will be no meeting in July.

The meeting concluded at 5:45 p.m.

MINUTES
Advisory Committee on Model Civil Jury Instructions
August 8, 2005
4:00 p.m.

Present: John L. Young (chair), Honorable William W. Barrett, Jr., Paul M. Belnap, Juli Blanch, Francis J. Carney, Marianna Di Paolo, Phillip S. Ferguson, L. Rich Humpherys, Jonathan G. Jemming, Colin P. King and Paul M. Simmons

Excused: Ralph L. Dewsnup, Tracy H. Fowler, Timothy M. Shea

Damage Instructions. The committee reviewed the following damage instructions:

1. *15.108. Personal injury damages. Aggravation of pre-existing conditions.* Judge Barrett noted that the instruction uses "damages" in two different senses. Mr. Ferguson noted that at least one court has drawn a distinction between "damage" and "damages." He will try to find the case for the next meeting. The committee questioned whether the words "aggravation," "susceptible," "attributable" and "determination" used in the instruction are plain English. Mr. Belnap questioned whether the last sentence was an accurate statement of the law. He thought that if the jury found a pre-existing condition and aggravation of that condition, the jury necessarily must have made an apportionment between the two. Other committee members disagreed. Mr. Carney asked whether the instruction would apply in a failure-to-diagnose case. The committee agreed that failing to diagnose a condition and hence stopping its natural progression was different from the aggravation of a pre-existing condition. The former is covered by the loss of chance doctrine; the latter is covered by this instruction. Mr. Young and Mr. King questioned whether the instruction implied that the jury must make a specific finding on apportionment or whether its apportionment is implicit in its determination of the amount of damages. Mr. King suggested adding an advisory committee note to the effect that it is not intended that the jury be asked to make a specific finding on the verdict form as to the amount of damages attributable to the pre-existing condition and the amount attributable to the aggravation. The instruction was revised to read as follows:

> A person who has a physical [or emotional] condition before the time of [described event] is not entitled to recover damages for that condition or disability. However, the injured person is entitled to recover damages for any aggravation of the pre-existing condition that is caused by another's fault, even if the person's pre-existing condition made him more vulnerable to physical [or emotional] harm than the average person. This is true even if another person may not have suffered any harm from the event at all.
>
> When a pre-existing condition makes the damages from injuries greater than they would have been without the condition, it is your duty, if possible, to determine what portion of the plaintiff's disability, impairment, pain, suffering, or other damage was caused by the pre-existing condition and what portion was caused by the [described event]. If you are not able to make such an

> apportionment, then you must conclude that the entire disability, impairment, pain, suffering or other damage was caused by the defendant's fault.

Mr. Belnap was excused.

2. *15.109. Personal injury damages. Aggravation of dormant pre-existing condition.* Ms. Blanch questioned whether the instruction was an accurate statement of the law. She asked what constitutes a dormant or asymptomatic condition. Must the condition have been asymptomatic at all times before the accident or only at the time of the accident, and if the latter, how long before the accident can the condition have been symptomatic and still be considered "dormant"? Mr. Ferguson suggested that the subcommittee research what "dormant" means. He also pointed out that the last sentence of the instruction was incomplete. Mr. Simmons and Mr. Humpherys asked whether the instruction should be combined with 15.108, as a specific application of 15.108. The committee agreed that, depending on the facts of the case, a court may want to give 15.108, 15.109 or both, particularly if reasonable minds could differ on whether the plaintiff's pre-existing condition was "dormant." Mr. Carney asked whether the instruction should say that the plaintiff cannot recover for any preexisting condition that did not result from the defendant's fault. Mr. Simmons thought the concept was covered in other instructions that tell the jury to award only those damages that were caused by the defendants' fault. At Mr. Humpherys suggestion, the committee agreed to add the first sentence of instruction 15.108 to 15.109 in brackets, to be used whenever 15.109 is given alone. The instruction was revised to read:

> [A person who has a physical [or emotional] condition before the time of [described event] is not entitled to recover damages for that condition or disability.] If a person has a pre-existing condition that does not affect him, he may recover the full amount of damages legally caused by an aggravation of that condition. In other words, when a pre-existing condition does not cause pain or disability, but [describe the event] causes the person to suffer pain, disability or other problems, then the plaintiff may recover all the damages caused by the event.

3. *15.110. Personal injury damages. Mitigation of damages.* Mr. Simmons asked whether the phrase "even if his efforts were unsuccessful" should be added to the end of the instruction. At Mr. Ferguson's suggestion, the instruction was revised to read:

> [Name of plaintiff] has a duty to exercise reasonable diligence and ordinary care to minimize the damages caused by [name of defendant]'s fault. Any damages awarded to [name of plaintiff] should not include damages that [name of plaintiff] could have avoided by taking reasonable steps. It is [name of defendant]'s burden to prove that [name of plaintiff] could have minimized his

> damages, but failed to do so. If [name of plaintiff] made reasonable efforts to minimize his damages, then your award should include the amounts he reasonably incurred to minimize his damages.

Mr. Young asked whether the burden of proof needed to be explained more fully. The committee members thought that it was sufficiently explained in the preliminary instructions.

4. *15.111. Personal injury damages. Life expectancy.* Mr. Humpherys noted that there may be an issue as to the proper date for measuring life expectancy, that is, whether it should be measured from the date of trial or the date of injury. The committee agreed that it should be measured from the date of trial, since it relates to future damages, and future damages are measured from the date of trial, not the date of injury. Mr. Ferguson asked whether this was an issue of law that the Utah Supreme Court has not yet ruled on and whether the committee would be invading the province of the court if it included a note to that effect. A majority of the committee thought the issue was not subject to serious dispute. Mr. Carney added an advisory committee note to explain the purpose of the instruction and from what point life expectancy is to be determined. Mr. Carney noted that California includes the life expectancy tables in its instructions. The committee saw no reason to do so. Mr. Simmons suggested that the first sentence be modified to make it clear that mortality tables do not purport to predict any specific person's life expectancy. The instruction was revised to read:

> According to the mortality tables, an average person of the plaintiff's age, race and sex can expect to live ____ more years. You may consider this fact in deciding the amount of future damages. A life expectancy is merely an estimate of the average remaining life of all persons in our country of a given age and gender, with average health and exposure to danger. Some people live longer and others die sooner. You may consider all other evidence bearing on the expected life of [name of plaintiff], including his occupation, health, habits, life style, and other activities.

Next Meeting. The next meeting will be Monday, September 12, 2005, at 4:00 p.m.

The meeting concluded at 6:00 p.m.

MINUTES
Advisory Committee on Model Civil Jury Instructions
September 12, 2005
4:00 p.m.

Present: Honorable William W. Barrett, Jr., Juli Blanch, Francis J. Carney, Ralph L. Dewsnup, Marianna Di Paolo, Phillip S. Ferguson, Tracy H. Fowler, L. Rich Humpherys, Jonathan G. Jemming, Colin P. King, Timothy M. Shea, Paul M. Simmons and David E. West

Excused: John L. Young (chair)

Mr. Carney conducted the meeting in Mr. Young's absence.

Damage Instructions. The committee reviewed the following damage instructions:

1. *15.103. Personal injury--economic damage. Loss of earnings.* Mr. Shea will try to split the instruction into two instructions, one covering lost earnings and one covering loss of earning capacity.

2. *15.108. Personal injury damages. Aggravation of pre-existing conditions.* Mr. Shea suggested using the term "harm" in place of "disability, impairment, pain, suffering or other damage" in the second and third paragraphs. Judge Barrett and Mr. Humpherys questioned whether "harm" conveyed the same meaning. Judge Barrett suggested that the court specify the type of harm involved in the particular case. On Mr. Carney's suggestion, the phrase was replaced with "[specific injury]." Mr. Shea also suggested changing the first sentence of the second paragraph to read "you must first try to" rather than "it is your duty, if possible." Mr. Dewsnup suggested that the sentence read, "it is your duty to determine to the fullest extent possible." The committee discussed whether the sentence should be restated in terms of the burden of proof. After further discussion, the phrase was amended to read, "it is your duty to try to determine . . ." Mr. Dewsnup also pointed out that the word "that" needed to be inserted in the fourth line ("any aggravation of the pre-existing condition *that* was caused"). At Mr. Shea's suggestion, the phrase "or not" in the last line of the advisory committee note was replaced with "if any." The instruction was approved as amended.

Dr. Di Paolo joined the meeting.

3. *15.109. Personal injury damages. Aggravation of dormant pre-existing condition.* At Mr. Shea's suggestion, the phrase "pain, disability or other problems" was replaced with "[specific injury]." Mr. Shea asked whether 15.109 could be consolidated with 15.108 into one instruction. The former deals with asymptomatic pre-existing conditions, while the latter deals with symptomatic pre-existing conditions. The committee chose to keep them separate. Mr. Jemming noted that *Biswell*, one of the cases cited as authority for instruction 15.109, referred to a "lighting up" of an asymptomatic condition. The committee added the

phrase "or a lighting up" after "aggravation" in the second paragraph. Mr. Dewsnup questioned whether the instruction was stated in sufficiently plain English.

Mr. King joined the meeting.

4. *15.110. Personal injury damages. Mitigation of damages.* Mr. Ferguson, citing *American Jurisprudence 2d* as authority, noted that "damage," "damages" and "harm" are distinct concepts. "Damage" is physical injury; "harm" is an invasion of a legal right; and "damages" are money awarded for harm. He asked whether the duty to mitigate is a duty to mitigate harm, damages or both. The committee decided not to change "damages" to "harm." Dr. Di Paolo asked whether "damages" needs to be defined in this instruction. The committee thought it is adequately explained in other instructions that will be fresh in jurors' minds. Mr. Dewsnup noted that the word "damages" was used six times in the instruction. Mr. Carney changed the second sentence to read, "Any damages awarded . . . should not include those that [name of plaintiff] could have avoided . . ." and changed the last sentence to read, ". . . your award should include the amounts that he reasonably incurred to minimize them." The committee approved the instruction as amended.

5. *15.111. Personal injury damages. Life expectancy.* Mr. Humpherys noted that there may be an issue as to the proper date for measuring life expectancy, that is, whether it should be measured from the date of trial or the date of injury. Mr. Simmons noted that life expectancy tables are rarely current, so for a trial held in 2005, for example, the jury may be considering life expectancies from a 2000 table. Mr. King thought that there may be cases (such as failure to diagnose cases) where life expectancy should be measured from the time of the event giving rise to the claim and not the time of trial, since part of the plaintiff's damages may be the reduction in life expectancy. Judge Barrett noted that in such cases, the life expectancy tables would not apply, and the plaintiff's life expectancy would become a matter of expert testimony. The committee added the word "race" to the fourth line ("of a given age, *race*, and gender") and approved the instruction as amended.

6. *15.112. Personal injury damages. Wrongful death claim. Adult.* Dr. Di Paolo suggested adding the last sentence of the advisory committee note to the instruction. Mr. Humpherys noted that it is not clear who has claims for funeral, burial and medical expenses and property damage--that is, whether the claims belong to the decedent's estate or to the wrongful death beneficiaries. Mr. Shea thought subparagraph (1) was confusing because it mixed fixed items of damage (loss of financial support) with conditional items (loss of the right to receive financial support). Dr. Di Paolo suggested combining the two sentences of subparagraph (1). Mr. Carney compared the equivalent California instruction. After further discussion, subparagraph (1) was revised to read, "The loss of financial support, past and future, that [name of plaintiff] would likely have received or been entitled to receive from [name of decedent] had [name of decedent] lived." The second sentence of subparagraph (1) was deleted. Mr. Simmons asked whether an instruction needed to be included on when someone is "entitled to receive"

support or whether that would be a matter of evidence. The committee thought that a separate instruction was not necessary. Mr. Dewsnup and Mr. Carney thought that subparagraphs (2) and (4) were redundant. Mr. Jemming noted that the case law lists them as separate items of damage. Mr. Humphery thought that subparagraph (4) was more a comment on the evidence. The committee decided to delete subparagraph (4). The committee reviewed the instruction as modified.

Messrs. Jemming and West were excused.

7. *15.113. Wrongful death claim. Minor.* The committee questioned whether another instruction was needed for the wrongful death of an emancipated minor. The committee thought that emancipated minors could best be covered in an advisory committee note. The first sentence of subparagraph (1) was revised to read, "The loss of financial support, past and future, that [name of plaintiff] would likely have received from [name of decedent] had [name of decedent] lived." The second sentence of subparagraph (1) was deleted. The committee also deleted subparagraph (4). The committee also considered whether loss of inheritance should be listed as a separate item of damages. Although loss of inheritance from a minor would be rare, the committee added a subparagraph that reads, "The loss of inheritance from [name of decedent] that [name of plaintiff] is likely to suffer because of [name of decedent]'s death." With these changes, Mr. Humpherys questioned whether we need separate instructions on the wrongful death of an adult and the wrongful death of a minor. Mr. Carney noted that in the latter case, there is a reduction in damages for the cost of supporting the minor. Mr. Shea noted that that difference could be handled by bracketed language in a consolidated instruction. Mr. Humpherys noted that there may also be a difference in funeral, burial and medical expenses as an item of damages. In the case of a minor's death, the parents are responsible for those expenses and may recover them, whereas in the case of an adult, a claim for those expenses may belong to the estate and not to the heirs in their own right. After further reflection, Mr. Humpherys thought that attorneys will expect separate instructions since there are separate statutes governing the two claims. The committee therefore decided to keep instructions 15.112 and 15.113 separate. Instruction 15.113 was approved as modified.

8. *15.114. Personal injury damages. Survival claim.* Mr. Humpherys noted that survival claims raise two issues: How long must the person survive, and what must the quality of his life be during that period of time? For example, if someone survives but is unconscious the whole time, do his heirs have a claim for pain and suffering or just for his medical expenses? Mr. Ferguson noted that there is little Utah case law explaining the parameters of a survival claim. The advisory committee note was amended to read, "There is no Utah case law at the time . . ." Mr. Carney thought that more research was needed on the instruction.

The meeting concluded at 6:00 p.m.

Next Meeting. The next meeting will be the third Monday in October, October 17, 2005, at 4:00 p.m.

MINUTES

Advisory Committee on Model Civil Jury Instructions

October 17, 2005

4:00 p.m.

Present: Paul Belnap, Juli Blanch, Phillip S. Ferguson, Tracy H. Fowler, Stephen Nebeker, Timothy M. Shea, John L. Young (chair)

Excused: Honorable William W. Barrett, Jr., Francis J. Carney, Ralph L. Dewsnup, Marianna Di Paolo, L. Rich Humpherys, Jonathan G. Jemming, Colin P. King, Paul M. Simmons, David E. West

Mr. Young called the meeting to order. Mr. Shea distributed copies of Instruction 15.109. Personal injury damages. Aggravation of dormant pre-existing condition, which was omitted from the advance materials. Mr. Shea distributed new drafts from the Damages Subcommittee on lost earnings and lost earning capacity.

Damage Instructions. The committee reviewed the following damage instructions:

1. *15.109. Personal injury damages. Aggravation of dormant pre-existing condition.* The committee discussed whether a mental condition is covered by the use of the phrase "emotional condition." The committee decided that a mental condition is different. Although aggravation of a mental condition would be rare, the instruction ought to allow for the possibility. The committee decided to include "mental" along with "physical or emotional" condition in this instruction and in 15.108. The committee inserted "pre-existing" before the phrase "condition or disability" at the end of the first sentence, and in the second sentence changed "but" to "however."

The committee discussed whether "lighting up" a dormant condition would be understood by jurors. Members thought that the phrase would not be understood, but questioned whether the instruction should omit a phrase used in the case law. After discussion, the committee decided to omit the phrase. The committee agreed to the following wording: "However, if a person has a pre-existing condition that does not cause pain or disability, but [describe the event] causes the person to suffer [describe the specific harm], then he may recover all damages caused by the event." The instruction was approved as amended.

2. *15.112. Personal injury damages. Wrongful death claim.* The committee discussed whether Paragraph (5) needs to be included as a "catch-all" to be used as the evidence warrants. The committee decided that Paragraph (5) is needed and to include a reference to it in the second paragraph of the committee note. In paragraph (4) the committee decided to insert the phrase "or reduction" after "The loss." Mr. Shea will draft an additional committee note to the effect that the judge should include only those paragraphs for which there is evidence to support the loss. The instruction was approved as amended.

3. *15.114. Personal injury damages. Survival claim.*

4. 15.115. Personal injury damages. Survival claim. Disputed cause of death. Mr. Jemming will be asked to research the law for these two instructions to try to determine the nature and extent of damages recoverable in a survival claim.

5. *15.104. Personal injury. Economic damage. Loss of earnings.* Mr. Young suggested inserting "lost" before the word "benefits." The committee agreed. The instruction was approved as amended.

6. *15.104A. Personal injury. Economic damage. Past loss of earning capacity.* Ms. Blanch suggested that "fact" in item number (4) be plural. The committee agreed. Mr. Young suggested deleting the third sentence and breaking the second sentence into two. The second sentence would read: "Lost earning capacity means the lost potential to earn increased income." The committee approved the instruction as amended.

7. *15.105B. Personal injury. Economic damage. Future loss of earning capacity.* Mr. Young asked whether future earning capacity is the same as future earnings. Mr. Belnap responded that any losses in the future are considered lost earning capacity. Ms. Blanch asked how future lost capacity would be reflected on the verdict form. Mr. Belnap said that the subcommittee had not discussed that. Mr. Nebeker said that future damages reduced to present cash value would be part of general damages. Mr. Ferguson cited Section 78-27-44, which says that pre-judgment interest includes lost earnings and lost earning capacity before trial, but not after trial. Mr. Fowler suggested dividing the instructions between special and general damages using the date of the trial as the line between the two. Mr. Belnap will take the committee's observations to the subcommittee and prepare another draft.

8. *15.116. Personal injury damages. Effect of settlement.* Mr. Shea suggested deleting the phrase "You have heard evidence that." Mr. Young said that an earlier instruction tells the jurors of settlements. Mr. Young suggested replacing the phrase "any amount that he may or may not have" with "what the plaintiff." The committee approved the following wording: "[Name of plaintiff] has settled his claim against [name of settled party]. Your award of damages to [name of plaintiff] should be made without considering what he received under this settlement. After you have returned your verdict, I will make the appropriate adjustment to your award of damages."

9. *15.117. Arguments of counsel not evidence of damages.* The committee approved the instruction as drafted.

10. *10. 15.118. Personal injury damages. Proof of damages.* Mr. Young suggested deleting the last paragraph. Mr. Young suggested that the phrase "who should bear" in the fourth paragraph should be "who bears." The committee agreed. Some members questioned whether the

instruction is needed. It may leave the impression that proving the amount of damages is subject to a lower burden of proof than proving that damages occurred. Mr. Young observed that the requirement to prove the amount of damages necessarily includes proving that damages occurred.

The meeting concluded at 6:00 p.m.

Next Meeting. The next meeting will be the November 14, 2005, at 4:00 p.m.

MINUTES
Advisory Committee on Model Civil Jury Instructions
November 14, 2005
4:00 p.m.

Present: Honorable William W. Barrett, Jr., Paul M. Belnap, Francis J. Carney, Phillip S. Ferguson, L. Rich Humpherys, Jonathan G. Jemming, Colin P. King, Stephen B. Nebeker, Timothy M. Shea, Paul M. Simmons, David E. West and John L. Young (chair)

Excused: Juli Blanch, Ralph L. Dewsnup, Marianna Di Paolo, Tracy H. Fowler

Mr. Young called the meeting to order.

Damage Instructions. Mr. Young discussed with the committee the idea of including a definition of economic and non-economic damages in the first instruction on damages as a way of introducing the concepts. He observed that the instructions contain a series of examples of economic and non-economic damages, but not a definition. The committee agreed that defining the terms is a good idea. Mr. Shea will provide a draft at the next meeting.

The committee reviewed the following damage instructions:

1. *15.119. Personal injury damages. Present cash value.* The committee debated whether to add a sentence to the committee note stating that there must be expert testimony to support giving the instruction. Mr. Carney noted that the California instruction states that expert testimony is usually required, unless there are tables. Mr. Young questioned what table or tables could be used and how they would get into evidence. Mr. Young thought that the issue was one of evidence and was beyond the scope of the instructions and comments. Mr. Carney asked whose burden it is to put on evidence of present value. Mr. King joined the meeting. Mr. Humpherys noted that the committee cannot resolve these issues but should alert attorneys to them. He suggested adding to the advisory committee note a statement to the effect that there is no Utah law on whether expert testimony, government tables or other competent evidence is required before the instruction can be given. Mr. Carney volunteered to research the issue. Mr. Carney also reviewed the cases cited in the advisory committee note and concluded that they were not controlling or helpful, so the committee decided to strike the case discussions. *Bennett v. Denver & Rio Grande Western R. Co.*, 213 P.2d 325 (Utah 1950) is more on point. Mr. Ferguson suggested that *Gallegos ex rel. Rynes v. Dick Simon Trucking, Inc.*, 2004 UT App 322, 110 P.3d 710, *cert. denied* (Utah 2005), might also be relevant. Mr. Jemming suggested striking "and frugally" from the last paragraph. The committee decided to replace references to frugality with references to safety. The committee also deleted the phrase "not necessarily risk free." Mr. Young thought the last phrase referring to the effects of inflation was confusing. The committee struck it. The last paragraph now reads:

> To reduce an award for future damages to present cash value, you must determine the amount of money needed today that, when reasonably and safely

> invested, will provide [name of plaintiff] with the amount of money needed to compensate [name of plaintiff] for future economic losses. In making your determination, you should consider the earnings from a reasonably safe investment.

Mr. Shea will revise the advisory committee note. Mr. Carney will research further what evidence is required before the instruction should be given.

2. *15.120. Introduction to tort damages. Liability established.* Mr. King noted that, more often than not, when liability is established at trial it is by stipulation and not by the court. Mr. West suggested revising the introductory phrase to read, "It has been determined . . ." Mr. Young suggested putting alternative openings in brackets, which could be used depending on whether liability was established by a directed verdict, a pretrial ruling or stipulation. The committee agreed that the instruction should follow 15.101 ("Introduction to tort damages. Liability contested").

3. *15.121. Loss of use of personal property. Economic damage.* Mr. Humpherys suggested taking out the bracketed sentence before the numbered subparagraphs. Mr. Young and others noted that subparagraph (1) really covered two different items--rental value and lost income. The committee agreed to separate them into two subparagraphs and to revise the last sentence of the first paragraph to read, "You may consider the following factors [as applicable]:" At Mr. Shea's suggestion, the phrase "under all the circumstances" was deleted from the first paragraph. Mr. Ferguson noted that general damages are not allowed for loss of use of personal property.

4. *15.122. Damage to personal property. Economic damage.* Mr. Jemming suggested that 15.122 precede 15.121. Mr. Shea suggested adding "reasonably" before "restore." Mr. King noted that "reasonably" may not place the plaintiff in the position he was in before the damage. Mr. Jemming suggested "restore to the extent possible." The committee had the same objection to "to the extent possible." The committee decided not to modify "restore." Mr. Ferguson noted that the instruction uses "damage" and "damages" interchangeably. The instruction was revised to use "damage" to refer to injury to property and "damages" to refer to money damages awarded for injury to property. Mr. King and Mr. West suggested revising the second sentence of the second paragraph to read: "If the property can be repaired to its condition before the damage, then the measure of damages is the difference in fair market value immediately before and immediately after the damage or the cost of repair, whichever is less."

Mr. Shea will revise the instruction in light of the committee's discussion.

5. *15.123. Collateral source payments.* At Mr. Ferguson's suggestion, the reference to the medical malpractice statute (section 78-14-4.5) was deleted. Mr. King hoped that the

instruction would not preclude a plaintiff from raising the issue of collateral sources with the jury and from informing the jury of the plaintiff's responsibility to repay from any damages awarded such collateral source payments as workers' compensation. The committee agreed that that issue was beyond the scope of the instruction. The instruction was approved.

6. *15.124. "Fair market value" defined.* Mr. Ferguson and Mr. Carney noted that the relevant market is an issue of fact. Mr. Simmons suggested moving the instruction to follow 15.122 ("Damage to personal property. Economic damage").

7. *15.117. Arguments of counsel not evidence of damages.* Mr. Shea questioned whether the instruction was necessary, since it is also covered in the preliminary instructions on what is evidence. The committee agreed that it would be good to repeat the idea in the damage instructions.

Mr. Humpherys asked what damage instructions remain. He suggested instructions on loss of consortium and real property but wondered if the real property instructions would be covered by another subcommittee.

Mr. West volunteered to draft an instruction on damage to real property.

Mr. Belnap noted that the committee also needs to review punitive damage instructions. Mr. Carney suggested an instruction on loss of chance but withdrew his suggestion, noting that it would be covered in the medical malpractice instructions.

The meeting concluded at 6:00 p.m.

Next Meeting. The next meeting will be Monday, December 12, 2005, at 4:00 p.m. The items to be covered at the next meeting include a review of damage instructions 15.103, 15.104, 15.114, 15.115 and 15.118 and the employment law instructions.

MINUTES
Advisory Committee on Model Civil Jury Instructions
December 12, 2005
4:00 p.m.

Present: Honorable William W. Barrett, Jr., Paul M. Belnap, Juli Blanch, Francis J. Carney, Marianna Di Paolo, Phillip S. Ferguson, L. Rich Humpherys, Jathan Janove (chair of the employment instruction subcommittee), Timothy M. Shea, Paul M. Simmons, David E. West and John L. Young (chair)

Excused: Ralph L. Dewsnup, Tracy H. Fowler, Jonathan G. Jemming, Colin P. King, Stephen B. Nebeker

Mr. Young called the meeting to order.

Damage Instructions. The committee reviewed the following damage instructions:

1. *15.101. Introduction to tort damages. Economic and non-economic damages.* Mr. Simmons thought the construction of the first sentence was awkward. The committee thought the advisory committee note that says to modify the instruction to fit the situation is sufficient and deleted the first two bracketed phrases. Mr. Humpherys noted that the sentence telling the jury to restore the plaintiff to the position he was in before the harm applies only in some property damage cases and not to personal injury cases or cases involving unique property. The committee deleted the sentence. The instruction was revised to read:

> If you decide that [name of defendant's] fault caused [name of plaintiff]'s harm, you must decide how much money will fairly and adequately compensate [name of plaintiff] for that harm. There are two kinds of damages: economic and non-economic.

The instruction was approved as modified.

2. *15.102. Economic damages defined.* Mr. Carney questioned whether the instruction should read "damages is" or "damages are." The consensus was "damages are." Mr. Humpherys questioned whether jurors would understand "pecuniary." At Mr. Shea's suggestion, "pecuniary losses" was changed to "losses of money or property." Mr. Young and Mr. Carney questioned whether the last sentence of the draft instruction was necessary. The committee decided to drop it, so that the instruction now reads:

> Economic damages are the amount of money that will fairly and adequately compensate [name of plaintiff] for measurable losses of money or property caused by [name of defendant]'s fault.

The instruction was approved as modified.

3. *15.103. Non-economic damages defined.* "Is" was changed to "are" in the first line. At Mr. Simmons's suggestion, the fourth paragraph was revised and made subparagraph (6), so the third and fourth paragraphs now read:

> In awarding non-economic damages, among the things that you may consider are:
>
> . . .
>
> (6) whether the consequences of these injuries are likely to continue in the future and for how long.

The last sentence of the former fourth paragraph was deleted.

At Dr. Di Paolo's suggestion, the last phrase of the following paragraph was revised to read "but does not require a mathematical certainty." The instruction was approved as modified.

4. *15.104. Proof of damages.* Mr. Carney questioned whether the substance of instruction 15.104 was covered in 15.103. The committee decided it was not. Mr. Belnap questioned whether the first sentence of the last paragraph was accurate and necessary. He thought the concept was covered better in the following sentence. The committee debated whether the burden of proof shifted once the plaintiff established the fact of damage. At Dr. Di Paolo's suggestion, the last sentence ("While the standard . . .") was moved to the end of the third paragraph. The sentence was revised to read:

> While the standard for determining the amount of damages is not so exacting as the standard for proving that damages actually occurred, there still must be evidence, not just speculation, that provides a reasonable, even though not precise, estimate of the amount of damages.

At Mr. Young's suggestion (as modified by other committee members), the last paragraph was then replaced with the following language:

> In other words, if you find [name of plaintiff] has proved that he has been damaged and has established a reasonable estimate of those damages, [name of defendant] may not escape liability because of some uncertainty in the amount of damages.

The instruction was approved as modified.

Ms. Blanch and Mr. West were excused. When it became apparent that the committee would not get to the employment instructions, Mr. Janove was also excused.

5. *15.106 & 15.107. Economic damages. Lost earnings. [Lost earning capacity.]* Mr. Simmons questioned whether two instructions on lost earnings were necessary. The second and third paragraphs of both instructions were identical. The jury needs to be instructed to make separate findings for past and future lost earnings (and earning capacity), but they do not have to understand the reason for doing so (namely, so that the court can award prejudgment interest on past lost earnings). Mr. Shea suggested that the jury needs to be told what lost earnings are recoverable and needs to be given an ending date for future lost earnings. Mr. Belnap questioned whether the jury needs to be told to award lost benefits, since former MUJI 27.4 and 27.5 did not refer to benefits. The committee thought that the jury needed to be told that lost earnings includes lost benefits or it may think it cannot award anything for lost benefits. After further discussion, instructions 15.106 and 15.107 were combined into a single instruction that reads:

> Economic damages also include past and future lost earnings, including lost benefits [and lost earning capacity], for the work [name of plaintiff] was not able to do [and/or will not be able to do].
>
> Past lost earnings are calculated from the time of the harm until the trial.
>
> Future lost earnings are calculated from the time of trial forward.
>
> [Lost earning capacity is not the same as lost earnings. Lost earning capacity means the lost potential to earn increased income. In determining lost earning capacity, you should consider:
>
> [(1) [name of plaintiff]'s actual earnings;
>
> [(2) his work before and after [describe event];
>
> [(3) what he was capable of earning had he not been injured; and
>
> [(4) any other facts that relate to employment.]

The first sentence of the advisory committee note was revised to read:

> The special verdict form should include separate findings for lost earnings and lost earning capacity before and after the trial.

The instruction was approved as modified.

6. *15.110. Economic damages. Injury to real property.* The committee deferred discussion of instruction 15.110 until Mr. West, its author, could be present.

7. *15.115. Survival claim.* Mr. Humpherys thought that the instruction carried some implication that the jury should not award anything in certain death cases. Dr. Di Paolo suggested starting the instruction with, "You should award the decedent's economic and non-economic damages if you find (1) . . . and (2) . . ." Mr. Belnap suggested eliminating the numerical designations. At Mr. Young's suggestion, the instruction was revised to read:

> If [name of decedent] died from injuries caused by [name of defendant]'s fault, then you should award economic and non-economic damages for the period of time that he lived after the injuries.

The committee approved the revised instruction.

8. *15.116. Survival claim. Disputed cause of death.* The committee revised this instruction to read:

> If [name of decedent]'s death was not caused by [name of defendant]'s fault, you may award only the economic damages caused by that fault. You may not award non-economic damages.

Mr. Simmons noted that the instruction applies not only where the cause of death is disputed but also where it is undisputed that the defendant's fault did not cause the death. The advisory committee note was therefore revised to read:

> This instruction applies only to a claim made under Utah Code Section 78-11-12(1)(b).

9. *15.121. Present cash value.* Mr. Ferguson and Mr. Humpherys noted that the issue of present value came up recently in a case tried by their partner, Mark Anderson, in which Judge Fratto initially was not going to allow the jury to consider the cost of future surgery because no economist had testified as to present value but later reversed his ruling because the evidence showed that the plaintiff needed the surgery immediately. The case highlighted some of the issues involved, namely, whether an economist is necessary to establish present value in every case, or may the jury use tables or accept lay testimony (such as the testimony of the plaintiff) as to the value of future losses; how remote must the future losses be before their present value must be established by expert testimony; and who has the burden of proof on the issue of present value. The committee deferred further discussion of the instruction until the next meeting.

MINUTES
Advisory Committee on Model Civil Jury Instructions
January 9, 2006
4:00 p.m.

Present: Juli Blanch, Francis J. Carney, Marianna Di Paolo, Phillip S. Ferguson, Tracy H. Fowler, Jathan Janove (chair of the employment instruction subcommittee), Timothy M. Shea, Paul M. Simmons, David E. West and John L. Young (chair)

Excused: Honorable William W. Barrett, Jr., Paul M. Belnap, Ralph L. Dewsnup, Colin P. King

Mr. Young called the meeting to order.

1. *Damage Instructions.* The committee reviewed the following damage instructions:

a. *15.109. Economic damages. Injury to real property.* Mr. Young asked whether stigma damages only apply in the case of repair, since any stigma would presumably be included in the fair market value of the property if the property cannot be repaired. The committee reviewed the case allowing for recovery of stigma damages (*Walker Drug v. La Sal Oil*, 972 P.2d 1238 (Utah 1998)). Mr. Young suggested that the last, bracketed sentence of the instruction be moved to the advisory committee note and that the last paragraph be placed in brackets. He also suggested making the last sentence of the second paragraph the first sentence of the last paragraph. Mr. Shea suggested changing the order of the last sentence and stating, "if the plaintiff proves by a preponderance of the evidence" rather than "if the evidence establishes." The committee rejected this last suggestion on the grounds that the burden of proof is adequately explained in other instructions. In the first sentence of the second paragraph, "is" was changed to "are." After further discussion, the last paragraph of the instruction was revised to read:

> If the property can be repaired for a lesser amount, then the damages would be the reasonable cost of repair. [In addition, if the evidence establishes that the repaired property will not return to its original value because of a lingering negative public perception that was caused by the injury, you may award stigma damages for any reduction in the value of the property.]

The following advisory committee note was added: "The bracketed sentence should be given only if there is evidence to support a claim of lingering negative public perception." As modified, the instruction was approved.

b. *15.120. Present cash value.* At Mr. Simmons's suggestion, the phrase "and even recommended" was deleted from the last paragraph of the advisory committee

note. The committee noted that the issues raised in the advisory committee note cannot be resolved by the committee but will have to be resolved by the court. The committee deferred further discussion of the instruction.

2. *Employment Instructions.* Mr. Shea noted that two employment law instructions included in the current MUJI--instructions 18.7 regarding the provisions of an implied employment contract, and instruction 18.10 defining public policy--appear to have been omitted. Jathan Janove, the chair of the employment law subcommittee, thought that they were covered in substance by the revised instructions. Mr. Young asked whether the determination of public policy is made by the court or the jury. Mr. Janove believed that as a practical matter it is generally determined as a matter of law by the court on summary judgment but acknowledged that there may be situations in which a jury would have to decide factual issues related to public policy.

After a brief introduction by Mr. Janove, the committee reviewed the following employment law instructions:

a. *18.101. Definition of employment contract.* Mr. Shea suggested that an instruction on the elements of breach of an employment contract be given as an introductory instruction. Mr. Janove thought that the instructions adequately covered the elements of a cause of action. At Mr. Fowler's suggestion, the phrase "express or implied" was added after "an agreement" in the first line. Mr. Young and Mr. Shea suggested adding an introductory sentence stating that the plaintiff is the employee and the defendant is the employer. Mr. Simmons noted that in some cases there may be an issue of fact as to whether an employer-employee relationship exists, making such a statement inappropriate, so no introductory sentence was added.

b. *18.102. Corporation as person.* The committee thought this instruction should be included in the general instructions, since it is not specific to employment law. The instruction was added to the beginning of instruction 1-201. Dr. Di Paolo suggested substituting the term "actual" for "natural" before "person." At Mr. Young's suggestion, the phrase "a natural person or" was deleted so that the instruction now reads: "A person means an individual or a corporation, organization, or other legal entity." As modified, the instruction was approved.

c. *18.103. Creation of express employment contract. Burden of proof.* At Mr. Shea's suggestion, the phrase "orally or in writing" was deleted from the second line on the grounds that it was adequately covered in instruction 18.101. Mr. Simmons suggested making the last sentence a separate instruction on burden of proof, not limited to express contracts. The committee rejected the suggestion and approved the instruction as modified.

d. *18.104. Creation of implied employment contract. Elements of proof.* Mr. Simmons suggested that the instruction needed an introductory sentence defining an implied contract. Mr. West suggested revising the instruction to follow the structure of instruction 18.103 on express contracts. Dr. Di Paolo asked what difference it makes whether an employment contract or provision is express or implied. She noted that the elements of an implied employment contract as stated in the instruction are not what an average person would understand from the term "implied," since they require that the employer clearly communicate his intent to the employee. For that reason, she suggested putting the term "implied" in quotation marks, to cue jurors that "implied" was being used in a special way. Mr. Young did not think that quotation marks were necessary. Mr. Janove agreed that the elements would seem to be those for an express contract and noted that the differences between express and implied employment contracts are not clearly defined in Utah. Mr. West noted that subparagraph (1) was broader than its counterpart in the old MUJI 18.6, which said that the employee's employment would not be terminated "except for certain conduct or pursuant to certain procedures." Mr. Janove noted that the change was intentional, since the *Cook* case extended the concept of implied employment provisions beyond cases of termination. Dr. Di Paolo asked how subparagraphs (2) and (3) differed. Mr. Ferguson noted that a contract requires a meeting of the minds; subparagraph (2) focuses on the employer, while subparagraph (3) focuses on the employee. Mr. Shea questioned whether the instruction should spell out the types of evidence the jury may consider, since the instructions do not do so for other areas of the law. The committee thought that it was appropriate to list them in this case. Ms. Blanch noted that the evidence enumerated in the last paragraph can apply to each element of the claim and is not limited to evidence of the employer's intention. After further discussion, the instruction was revised to read:

> An implied employment contract is created when:
>
> (1) the employer intended that the employee's employment would include [describe terms in dispute]; and
>
> (2) the employer communicated its intent to the employee; and
>
> (3) the communication was sufficiently clear and definite to create a reasonable belief by the employee that his employment would include [describe terms in dispute].
>
> A party seeking to establish the existence of an implied contract has the burden of proving these things. Evidence may be derived from the employment manuals, oral statements, the conduct of the parties, announced personnel policies, practices of a particular trade or industry,

> and other circumstances. However, an implied contract cannot contradict a written contract term.

e. *18.105. Breach of employment contract.* The instruction was approved as drafted.

f. *18.106. Employment contract may be terminated at will.* Mr. Young suggested adding an introductory sentence to the effect that the defendant claims that the plaintiff was an at-will employee. Mr. Janove thought that such a sentence might imply that the employer has the burden of proving that the relationship was at will. Mr. Young also suggested simplifying the second sentence. Mr. Ferguson suggested making it the third sentence. Mr. Shea suggested striking the phrase "by the employer or the employee" in the second sentence, since the concept was covered in the first sentence. He also suggested limiting the instruction to the party claiming wrongful termination. Mr. Janove and Mr. Carney thought that it was important for the instruction to state that the relationship could be terminated by either side with or without cause. After further discussion, the instruction was revised to read:

> You must decide whether the employment here was an "at-will" relationship. An employment relationship is presumed to be at will if the employment is for an unspecified time and without other restrictions on either the employer's or the employee's ability to terminate the relationship. When the employment relationship is "at will," there does not have to be any reason for the termination other than the employer's or the employee's desire to discontinue the employment relationship. It may be terminated at any time, for any reason or for no reason, with or without cause. [However, it may not be terminated for an illegal reason.]

An advisory committee note was added that reads, "The bracketed final sentence should be used only when a claim is made for termination for an illegal reason." As modified, the instruction was approved.

The meeting concluded at 6:00 p.m.

Next Meeting. The next meeting will be Monday, February 13, 2006, at 4:00 p.m.

MINUTES
Advisory Committee on Model Civil Jury Instructions
February 13, 2006
4:00 p.m.

Present: Honorable William W. Barrett, Jr., Paul M. Belnap, Juli Blanch, Marianna Di Paolo, Phillip S. Ferguson, L. Rich Humpherys, Jathan Janove (chair of the employment instruction subcommittee), Jonathan G. Jemming, Timothy M. Shea, Paul M. Simmons, David E. West and John L. Young (chair)

Excused: Francis J. Carney, Ralph L. Dewsnup, Tracy H. Fowler, Colin P. King, Stephen B. Nebeker

Mr. Young called the meeting to order.

Report on Meeting with Supreme Court. Mr. Young and Mr. Shea met with the Utah Supreme Court and provided the court with a status report. As soon as the committee completes the employment law instructions, it will publish its work up to that point. The instructions will be posted on the web in a way that will facilitate copying and pasting. The instructions will also be presented at the district court judges' meeting in May. Mr. Shea has drafted a proposed introduction and will invite comments on it.

Employment Law Instructions. The committee continued its review of the employment law instructions:

1. *18.106. Rebutting the "at-will" presumption.* Mr. West asked whether the instruction needs to define "presumption." Mr. Young pointed out that the previous instruction (18.105) explains the presumption. The two instructions should be given together (18.105 followed by 18.106). At Dr. Di Paolo's suggestion, the first part of the instruction was revised to read: "An employee may defeat the presumption that his employment may be terminated at will by establishing . . ."

2. *18.107. Rebutting the "at-will" presumption. Express or implied agreement.* At Mr. Young's suggestion and consistent with other instructions, "by a preponderance of the evidence" was deleted from the first paragraph. Mr. Young suggested dividing subparagraph (1) into subparts and revising the order of subparagraphs (1) and (2). The committee struggled with clearer language for the phrase "unless pursuant to certain procedures." The last part of the instruction was revised to read as follows:

> This requires the employee to establish that:
>
> (1) the employer communicated its intent to the employee that the employee's employment would not be terminated–
>
> (a) except for certain conduct,

(b) until after a certain time period, or

(c) unless applicable procedures were followed; and

(2) the communication was sufficiently clear and definite to create a reasonable belief by the employee that his employment could not be terminated "at will."

3. *18.108. Rebutting the "at-will" presumption. Intent of the parties.* Mr. Ferguson suggested that the first sentence be revised to read: "In deciding whether the parties intended to create an employment contract that could not be terminated 'at will,' you must consider all of the circumstances of employment as a whole." Mr. West thought the instruction duplicated instruction 18.103. Other committee members pointed out that 18.103 deals with evidence of an implied employment contract, whereas 18.108 deals with evidence that an employment relationship cannot be terminated at will. The same jury may not get both instructions. Mr. Young suggested that the last sentence be bracketed and an advisory committee note added to the effect that the last sentence need not be given if 18.103 is also given. Dr. Di Paolo thought it was okay to repeat the concept. Mr. Belnap suggested that Mr. Janove take the committee's comments back to his subcommittee and see if instructions 18.103, 18.107 and 18.108 can be combined. Mr. Janove pointed out that instructions 18.103 and 18.108 are not duplicative; they cover different situations. But his subcommittee will consider combining instructions 18.107 and 18.108.

4. *18.109. Rebutting the "at-will" presumption. Violation of public policy.* Mr. West suggested eliminating gender-specific pronouns. Judge Barrett asked why subparagraph (1) was necessary, since a termination is presumed. Dr. Di Paolo asked what the difference was between subparagraphs (3) and (4). Mr. Shea suggested deleting subparagraph (3), but Mr. Janove thought that the case law made it significant. According to Mr. Janove, the cases suggest that the trier of fact must consider exactly what the employee was doing and its relation to public policy before reaching the question of causation. Mr. Ferguson asked whether the phrase "brought the policy into play" was understandable to the average juror. Other words were suggested, including "triggered," "related to," "covered" and "implicated." Mr. Humpherys asked whether the existence of a clear and substantial public policy was a question of fact for the jury to decide or a question of law for the court to decide. If the latter, he suggested that the instruction read: "The court has determined that public policy is [or requires] . . ." or "The court has determined that [describe the policy] is a clear and substantial public policy." The jury must then decide whether the employee's conduct brought the policy into play. Ms. Blanch asked whether the jury must also decide whether the public policy is "clear and substantial." Mr. Young suggested that the instruction read, "The court has determined that a substantial public policy exists, namely, . . . To establish a violation of that public policy, you must decide . . . ." Mr. Janove suggested that the instruction start out, "The employee alleges that he was fired

because [describe the relevant public policy]." Mr. Young compared the instruction to former MUJI 18.11, which is substantially different. Mr. Janove thought 18.11 was too general and that its language was out of date. Mr. Humpherys asked whether the standard for causation is a "substantial factor" (the standard under 18.11) or "at least in part" (the standard under 18.109). Mr. Janove said that if a public policy violation was at least part of the reason for the discharge, the burden shifts to the employer to prove that the employee would have been discharged anyway. Mr. Janove noted that the Utah Supreme Court will hear argument this spring in a case addressing discharges in violation of public policy and suggested that the instruction be tabled until the court's decision is issued. The committee suggested that Mr. Janove take the instruction back to his subcommittee for revisions in light of the committee's discussions.

5. *18.110. Violation of public policy. Shifting burdens.* Mr. Humpherys suggested combining instruction 18.110 with 18.109 and adding to the end of current 18.109 the sentence, "However, if the employer shows a legitimate reason for the employee's termination, then the employee must show that the public policy was a substantial factor in his termination." Dr. Di Paolo asked whether the jury must decide the issues in stages. Mr. West questioned whether the law in this area was clear. Mr. Humpherys asked what the relationship was between the instruction and federal employment law. Mr. Janove suggested that the instruction could read, in effect: "The plaintiff alleges that he was fired because [of a violation of public policy, which the court should describe]. The defendant alleges that the plaintiff was fired because [of a legitimate reason, which the court should describe]. You must decide whether the plaintiff was fired because of [the reason that violates public policy] or [the legitimate reason]." Mr. Young and Mr. Ferguson suggested leaving instructions 18.109 and 18.110 open until the Utah Supreme Court provides further clarification. Mr. Janove will present the issues to his subcommittee and see if the subcommittee wants to try to rewrite the instructions before the court decides the issues.

6. *18.111. Implied employment contract. New terms.* At the suggestion of Messrs. Ferguson and Young, "prospectively" was deleted from the first line. At the suggestion of Messrs. Humpherys and Shea, the last sentence was deleted, and the last line was revised to read, ". . . a new or modified employment contract is formed that includes the new terms."

Numbering System. Mr. Shea circulated with the meeting materials a memorandum outlining a proposed numbering system.

The meeting concluded at 6:00 p.m.

Next Meeting. The next meeting will be Monday, March 13, 2006, at 4:00 p.m. At the next meeting, the committee will consider proposed instructions on loss of consortium and intervening or superseding cause, among other things.

MINUTES
Advisory Committee on Model Civil Jury Instructions
March 13, 2006
4:00 p.m.

Present: Paul M. Belnap, Juli Blanch, Francis J. Carney, Ralph L. Dewsnup, Marianna Di Paolo, Tracy H. Fowler, Colin P. King, Jonathan G. Jemming, Timothy M. Shea, Paul M. Simmons, David E. West and John L. Young (chair)

Excused: Honorable William W. Barrett, Jr., Phillip S. Ferguson, Jathan Janove (chair of the employment instruction subcommittee)

Mr. Young called the meeting to order. Because Mr. Janove could not be present, the committee deferred further discussion of the employment law instructions.

1. *Web Demonstration and General Comments.* Mr. Shea circulated with the meeting materials a memorandum explaining the process for approval and publication of the jury instructions. He demonstrated the proposed website that will contain the jury instructions. The goal is for it to be up and running before the district court judges' conference in May 2006. The instructions will not be in .pdf format, so attorneys can cut, paste and edit the instructions to suit their needs. Mr. Shea noted that attorneys will be able to designate the instructions they want for their particular case and then cut and paste them as a group into a new document, in the order in which they appear online. Mr. Carney suggested including on the website the jury instructions actually used in trials. The committee asked whether some of the instructions should be designated for use before trial. Mr. Shea pointed out that the introduction to the instructions says that they should be given when they would do the most good. Mr. Carney asked how instructions would be revised or corrected. Mr. Shea noted that the instructions would be published without a comment period. Mr. Young noted that it would be the committee's responsibility to review any comments or suggestions for changes to the instructions and modify the instructions accordingly. By publishing them electronically, it will be easier to amend them. Mr. Dewsnup suggested that there be a citation to controlling law for each instruction.

Committee members were encouraged to review the instructions posted on the committee website and propose references or comments for them.

Mr. Carney asked how the bar would be advised of the new instructions. Mr. Shea noted that they could be the topic of CLE classes. Mr. Young asked how attorneys can tell which instructions are available, since they will be published before the committee has completed its work. Mr. King suggested printing the links to completed instructions in boldface. Mr. Carney asked how attorneys will be able to tell when an instruction that was in MUJI 1st has been deliberately omitted. Mr. King suggested including an introduction to each section that says, "The committee has omitted the following instructions that were found in MUJI 1st for the following reasons: . . ." Mr. Dewsnup suggested including a history such as appears in the Utah Code Annotated, showing which instructions have been effectively repealed. Mr. Shea pointed out that that would only work if the same numbering system were kept, and a new numbering

system has been proposed for MUJI 2d. Mr. Fowler suggested a table cross-referencing instructions from MUJI 1st to MUJI 2d. The committee questioned whether the instructions should be available to the public generally. If they are, jurors may look up instructions before the case is submitted to them, and they may be influenced by instructions that do not apply to the particular case. Mr. Shea thought that the instructions could not be confined to just attorneys and judges. Mr. Carney noted that special verdicts will need to be included with the instructions. Mr. Shea was not sure whether case captions could be included. Mr. Young noted that the instructions will be sent to the Utah Supreme Court piecemeal, in packages. He hopes to submit the first package after the committee completes its review of the negligence and damage instructions. They will be followed by the employment, products liability and medical malpractice instructions.

Dr. Di Paolo and Mr. Jemming joined the meeting.

2. *Superseding Cause Instruction.* The committee considered a proposed instruction on superseding cause. Mr. Dewsnup felt that it needed a lot of work. The committee discussed whether the doctrine of superseding causation survived the enactment of the Utah Liability Reform Act, whether intentional acts can be superseding causes and whether negligent acts can be superseding causes. Mr. King thought that the Liability Reform Act superseded the doctrine of superseding cause and questioned whether intentional misconduct can be a superseding cause. He noted that the Utah Supreme Court suggested in *Jedrziewski v. Smith*, 2005 UT 85, that the Liability Reform Act may not cover intentional torts, and the Utah legislature recently rejected a bill that would have made it clear that intentional acts can be compared with negligent acts under the Liability Reform Act. Mr. Dewsnup noted that the Utah Court of Appeals quoted section 442B of the Restatement (Second) of Torts with approval in *Bansanine v. Bodell*, 927 P.2d 675 (1996). That section states that a later act does not relieve an earlier actor of liability for negligence unless the harm is intentionally caused by a third person and is outside the scope of the risk created by the defendant's conduct. From this, Mr. Dewsnup concluded that the doctrine of superseding cause may only apply to intervening acts where the intervening actor intended to cause harm and that negligent intervening acts are governed by the Liability Reform Act. Mr. Jemming, who drafted the proposed instruction, noted that the language "relieved from liability" was taken from *Mitchell v. Pearson Enterprises*, 697 P.2d 240 (Utah 1985). Mr. Dewsnup noted that *Mitchell* preceded the Liability Reform Act. Mr. Dewsnup thought that the instruction should define "superseding cause." Ms. Blanch noted that, because superseding cause relieves a defendant from liability, the jury must decide the issue of superseding cause before it apportions fault. Mr. King thought that absolute defenses like contributory negligence, last clear chance and superseding cause are no longer valid in light of the Liability Reform Act. Mr. Young noted that the Liability Reform Act keeps the doctrine of proximate causation, and the traditional definition of proximate cause includes the language "unbroken by an efficient intervening cause," suggesting that superseding causation may still be a viable doctrine under the Liability Reform Act. Mr. Young and Mr. Carney suggested that, if the committee could not agree on the effect of

the Liability Reform Act on the doctrine of superseding causation, perhaps it should include alternative instructions, with a committee note explaining the disagreement. Mr. Belnap and Ms. Blanch noted that they had not requested superseding causation instructions and thought the issue may not arise much but asked for more time to review the issue. The committee continued its discussion of superseding causation until the next meeting.

Any committee member who wants to may propose an alternative instruction on superseding causation to be considered at the next meeting.

3. *Damage Instructions*. Mr. Shea noted that he had edited some of the damage instructions to try to make the wording consistent. The instructions variously read, "you may award," "you should award," "you must award," "you shall award," and "the plaintiff must prove." Mr. Shea revised the instructions to read, "To recover damages for . . . , [name of plaintiff] must prove . . ." Mr. Dewsnup thought the revised instructions unduly emphasized the plaintiff's burden; the jury might think that the plaintiff must be the one who introduced the evidence, whereas the evidence that meets the plaintiff's burden may be introduced by any party. Mr. Young and Mr. Shea noted that the instruction on burden of proof says that the jury may consider all the evidence, regardless of who presented it. Mr. Dewsnup suggested revising the instructions to put them in the passive voice (e.g., "the value of the expenses must be proved"). He noted that such a construction would also eliminate the third-person pronoun ("he" or "she"). Mr. Fowler and Mr. King noted that the committee has preferred the active voice to passive voice throughout. Mr. Young and Mr. Simmons noted that putting the sentences in passive voice does not clearly show who has the burden of proof. Dr. Di Paolo questioned whether the jury would understand what it was supposed to do if the instruction just reads, "The plaintiff must prove . . ." Mr. King suggested simply listing and defining the different elements of damage. Mr. Young suggested dealing with the burden of proof in the opening instruction and rephrasing the other instructions so as not to overemphasize the burden of proof. At Mr. King's suggestion, instruction 2002 was revised to read:

> Before you may award damages, [name of plaintiff] must prove two points:
>
> First, that damages occurred. . . .
>
> Second, the amount of damages. . . .

Mr. Shea noted that he had deleted the fourth paragraph of instruction 2004 and incorporated it into instruction 2002, where it seemed to fit better, since it does not apply exclusively to non-economic damages. Mr. Fowler thought that, because of the nature of non-economic damages, the concept should be retained in instruction 2004.

Mr. Carney was excused.

Mr. Fowler thought that if the instructions simply say, "award the plaintiff . . . ," the jury may think that it should award damages even if they have not been adequately proved. Mr. Young suggested addressing this concern as well in the opening damage instruction.

Mr. Shea will revise the damage instructions to address the committee's concerns.

4. *Loss of Consortium Instruction.* Mr. Belnap moved to defer discussion of the proposed loss of consortium instruction till the next meeting. Mr. Humpherys, the subcommittee chair who circulated the proposed instruction, was not present to comment on it, and Mr. Belnap had concerns with the opening paragraph and the definition of "consortium." Mr. Dewsnup suggested reviewing Justice Durham's dissent in *Hackford v. UP&L* for a definition of consortium. Mr. West suggested looking at JIFU for a definition. He noted that early Utah cases seemed to recognize a claim for loss of consortium, and JIFU included an instruction on the claim. But Judge A. Sherman Christensen distinguished those cases, and later Utah decisions held that the claim did not exist in Utah. The committee deferred further discussion of the issue until the next meeting.

The meeting concluded at 6:00 p.m.

Next Meeting. The next meeting will be Monday, April 10, 2006, at 4:00 p.m.

MINUTES
Advisory Committee on Model Civil Jury Instructions
May 8, 2006
1:00 p.m.

Present: Paul M. Belnap, Juli Blanch, Francis J. Carney, Ralph L. Dewsnup, Marianna Di Paolo, Phillip S. Ferguson, Tracy H. Fowler, L. Rich Humpherys, Jathan Janove (chair of the employment law subcommittee), Colin P. King, Timothy M. Shea, Paul M. Simmons, David E. West and John L. Young (chair)

Excused: Honorable William W. Barrett, Jr.

Mr. Young called the meeting to order.

Draft Instructions

The committee reviewed the following instructions.

1. *210. Superseding cause.* The committee note says that whether negligent conduct can be a superseding cause is an open issue. Mr. Young suggested revising the second paragraph of the instruction to make the alternatives clearer. Mr. Simmons suggested changing "negative conduct" to "fault." He also noted that the phrase "his conduct" at the end of the second paragraph was ambiguous, because it could refer to the defendant or the third party. Mr. King and Mr. Humpherys thought that the question of whether the harm was within the scope of the risk created was a question for the court and not the jury. Mr. King also suggested deleting "particular" before "harm." He noted that it came from Restatement (Second) of Torts § 442B. Dr. Di Paolo asked what "particular" meant in the context of the instruction. Mr. Shea and Mr. Ferguson said it referred to the injury the plaintiff suffered. Mr. King thought that the law should be that the third party's act must create an increased risk of the same harm. Mr. Belnap questioned whether the last paragraph of the instruction and the first paragraph of the advisory committee note were accurate. Mr. Carney noted that the "extraordinary" requirement of the last paragraph came from Restatement (Second) of Torts § 442. Mr. Ferguson read the former instruction (MUJI 3.16). Mr. West suggested returning to MUJI 3.16 but adding a committee note saying that some members of the committee think the instruction should not be used at all in light of the Utah Liability Reform Act (LRA). Mr. Carney read the California instruction on superseding cause (CACI 432). Ms. Blanch and Dr. Di Paolo thought the structure of the California instruction was easier to follow. Mr. Humpherys, however, thought the California instruction's definition of foreseeability in the third paragraph (that the defendant "did not know and had no reason to expect") created a subjective standard and was too restrictive. Mr. Dewsnup thought the instruction should read that the defendant "did not and could not foresee." Dr. Di Paolo noted that "did not foresee" was unnecessary. She also suggested keeping the extraordinary and foreseeable requirements separate, as they are in the California instruction. Mr. King thought that the latter standard should be an objective one (i.e., that the actor knew or had reason to know). On further reflection, Mr. Humphery approved of the California instruction, noting that the issue is not the liability of the third party but whether the third party's

conduct should relieve the defendant from liability. Mr. Young suggested adding a reference to *Harris v. UTA*, 671 P.2d 217 (Utah 1983). Mr. Shea questioned whether *Mitchell*, a pre-LRA case, should be cited as authority. Mr. Simmons suggested deleting the phrase "rather than allocating his fault under the LRA" from the last paragraph of the committee note. The instruction was ultimately revised to read as follows:

> [Name of defendant] claims that he is not liable for [name of plaintiff]'s harm because of the later fault of [name of third party]. To avoid liability for the harm, [name of defendant] must prove all of the following:
>
> (1) that [name of third party]'s conduct occurred after [name of defendant]'s conduct;
>
> (2) that a reasonable person would consider [name of third party]'s conduct extraordinary;
>
> (3) that [name of defendant] could not foresee that [name of third party] would act in
> [Alternative A: an intentional]
> [Alternative B: a negligent]
> manner; and
>
> (4) that the harm resulting from [name of third party]'s conduct was different from the kind of harm that could have been reasonably expected from [name of defendant]'s conduct.

2. *2012. Noneconomic damages. Loss of consortium.* Mr. Simmons noted that loss of "financial support" is not part of loss of consortium. Dr. Di Paolo suggested making the last sentence of the first paragraph the second sentence, since it defines loss of consortium. Mr. West reviewed the history of loss of consortium under Utah law. Some committee members thought that the last paragraph of the instruction was covered by other instructions. Others thought the last paragraph was necessary so that the jury would not award damages for loss of consortium where it found the spouse less than 50% at fault but the injured party (or the injured party and spouse combined) more than 50% at fault. Mr. Shea thought that, if that was the intent, the last paragraph could say so more clearly. Mr. Humpherys noted that the statute does not clearly require that the fault of both spouses be combined. Mr. Ferguson and Mr. Fowler thought that that was the clear intent of the statute; otherwise, the statute would be redundant to the LRA. Mr. King noted, however, that if the spouses' fault is combined, the injured spouse could recover, but the other spouse could not, which, he felt, was nonsensical. Mr. Ferguson and Ms. Blanch thought this result was fair because a spouse's claim for loss of consortium only arises because of the claimant's marital status, and that status can fairly limit his or her claim as well.

Mr. Humpherys and Mr. King suggested noting a difference of opinion on this issue in the advisory committee note. They also thought that the instruction should explain to the jury the effect of its allocation of fault, as the last paragraph attempted to do. Mr. Fowler thought the instruction should also make clear who has the burden of proof. Mr. King objected to the use of the term "loss" in the first paragraph; he thought it implied a complete loss. The committee, however, noted that a "loss" of benefits can be a partial loss. Mr. Dewsnup suggested deleting the last paragraph of the advisory committee note, relating to filial consortium. The instruction was revised to read:

> Noneconomic damages include loss of consortium. Loss of consortium is loss of the benefits that one spouse expects to receive from the other, such as companionship, cooperation, affection, aid and sexual relations.
>
> To award damages for loss of consortium, it must be proven that [name of plaintiff] has suffered
>
> (a) a significant permanent injury that substantially changes his lifestyle and
>
> (b) one or more of the following:
>
> (1) a partial or complete paralysis of one or more of the extremities;
>
> (2) significant disfigurement; or
>
> (3) incapability of performing the types of jobs he performed before the injury.
>
> [You must decide whether [name of spouse] was [name of plaintiff]'s spouse at the time of [name of plaintiff]'s injury. "Spouse" means the legal relationship established between a man and a woman as recognized by the laws of Utah.]
>
> You must allocate fault as I have instructed you in Instruction 211 including [name of spouse] in your allocation. If you decide that the [combined] fault of [name of plaintiff] and [name of spouse] is 50% or greater, [name of spouse] will recover nothing for loss of consortium. If you decide that [name of plaintiff] has no claim against [name of defendant], then [name of spouse] also has no claim. As with other damages, do not reduce the award by [name of plaintiff]'s and [name of spouse]'s percentage of fault. I will make that calculation later.

3. *Employment Instructions.* Jathan Janove, the chair of the employment law subcommittee, joined the meeting.

a. *1911. Breach of employment contract. Just cause.* Dr. Di Paolo questioned whether "pretextual" was plain English. Others also questioned "capricious." Suggested synonyms included "phony," "sham," "untrue," "without basis," "contrived," and "bad faith." Mr. Humpherys thought that "bad faith" was misleading because it suggests a malicious motive, which the law does not require. Mr. Janove thought the concept was covered by the requirement that the termination be "fair and honest" and by a prior instruction stating that the plaintiff claims he was fired for a certain reason and further claims the reason was a pretext. The instruction was revised to read:

> Termination is for just cause if it is for a fair and honest cause or reason, made in good faith, as opposed to one that is trivial, unrelated to business needs or goals, or is a pretext for a capricious, illegal or bad-faith termination.

Ms. Blanch was excused.

b. *1913. Fiduciary duty.* Mr. Ferguson questioned whether the instruction belonged in the employment instructions or should be included in another section. Mr. Carney suggested keeping the instruction at least until a more general instruction is approved. Mr. Young suggested making the third paragraph the first paragraph. Mr. Simmons questioned whether the existence of a fiduciary duty was a question of law or a question of fact or a mixed question of law and fact. Mr. Ferguson and Mr. King thought that the instruction failed to spell out the elements of a claim and the consequences of the jury's finding. Mr. Ferguson moved (Mr. King seconding the motion) that the instruction be tabled until a later meeting. The motion passed without opposition.

c. *1914. Damages. Express and implied contract claim.* Mr. Young thought that the instruction was covered by the general damage instructions on economic and noneconomic damages. Mr. Ferguson pointed out that "general" damages has a different meaning in contract law than it does in tort law. Mr. Humpherys questioned whether the tort damage instructions included in the general damage instruction fit in an employment case. Mr. Ferguson suggested having two categories of damages for employment cases--contract damages, and non-contract or tort damages. Mr. Young asked whether instructions 1914 through 1916 should be combined to make it clear that they are all contract damages? Mr. Shea suggested changing the titles of the instructions to draw the necessary distinctions. Mr. Young suggested deleting the second paragraph of the instruction. Instruction 1914 was revised to read:

1914. Contract damages. Introduction.

If an employer has wrongfully terminated the employee in breach

of a contract, you may award the employee damages. Damages recoverable for breach of contract include general damages and consequential damages.

I will now explain what general damages and consequential damages mean.

d. *1915. Damages. General damages.* Mr. Young suggested that instructions 1915 and 1916 spell out the elements of general and consequential damages, respectively. He also suggested keeping mitigation of damages separate from the instructions on the elements of damage. The instruction was revised to read:

1915. Contract damages. General damages.

General damages are those that flow naturally from the breach of the employment contract. In other words, those damages which, from common sense and experience, would naturally be expected to result from [name of defendant]'s breach.

To recover general damages, [name of plaintiff] must prove:

(1) [the amount of wages or salary that [name of plaintiff] would have received from [name of defendant] during the period you find the employment was reasonably certain to have continued;]
(2) [the amount of benefits during the same period;] and
(3) [other items of damage in evidence].

Dr. Di Paolo was excused.

e. *1916. Damages. Consequential damages.* Mr. Humpherys questioned whether the phrase "within the contemplation of the parties" was clear to average jurors. Mr. Dewsnup suggested "thought about" or "anticipated." Mr. Humpherys also questioned whether the damages had to have been contemplated "at the time the contract was made," or whether that phrase unduly limited damages in cases of contracts that were modified or renewed. Mr. Janove noted that the relevant time is the time the promise that was breached was made. Mr. Shea suggested deleting the last sentence of paragraph 1. Others suggested also deleting the preceding sentence. Mr. West thought the "contemplation" test was outdated and that modern cases use a foreseeability test. Mr. Carney thought that "reasonably anticipated" was better than "contemplation." Mr. Ferguson noted that in litigated cases the damages disputed are almost never contemplated in fact. Mr. Dewsnup suggested that the distinction was not important

because the instruction gives alternative tests: "within the contemplation of the parties *or* were reasonably foreseeable." Mr. Simmons questioned whether the "reasonable certainty" standard for the amount of damages was a higher standard than a preponderance of the evidence. Someone questioned the use of the phrase "absolute precision" and suggested "mathematical precision." The committee agreed to say that the amount of consequential damages must be shown "with reasonable approximation, not with absolute precision." The instruction was revised to read:

1916. Contract damages. Consequential damages.

Consequential damages are those damages that were contemplated by [name of plaintiff] and [name of defendant] or were reasonably foreseeable by them at the time the terms of the employment contract were made.

To recover consequential damages, [name of plaintiff] must prove:

(1) that the consequential damages were caused by the breach;
(2) that the consequential damages were contemplated or reasonably foreseeable at the time the terms of the employment contract were made; and
(3) the amount of the consequential damages with reasonable approximation, not with absolute precision.

f. *1917. Compensatory damages. Public policy wrongful termination.* Mr. Humpherys suggested renaming the instruction "Tort damages." The committee was not clear when the instruction would apply; for example, can there be tort damages in a contract setting? Mr. Young and Mr. Humpherys asked whether the instruction should be renamed "Noneconomic damages." Several committee members suggested deleting the last two paragraphs of the instruction. Mr. Humpherys suggested using some of the language from the general damage instructions. Mr. Young suggested adding a committee note regarding the standard of proof for the different types of damages. The instruction was revised to read:

1917. Damages for wrongful termination in violation of public policy.

If [name of defendant] terminated [name of plaintiff] in violation of public policy, [name of plaintiff] is entitled to recover:

(1) general damages that flow naturally from the breach;
(2) consequential damages that were contemplated or reasonably

foreseeable by [name of plaintiff] and [name of defendant] at the time the terms of the employment contract were made; and

(3) noneconomic damages.

I will now explain what each of these means.

[Give Instruction 2002 regarding proof of damages.]
[Give Instruction 1915 regarding general damages.]
[Give Instruction 1916 regarding consequential damages.]
[Give Instruction 2004 regarding noneconomic damages.]

g. *1918. Damages. Breach of the implied covenant of good faith and fair dealing.* Mr. West noted that the instruction does not define the elements of damage. Mr. Janove said there was no specific employment case. The instruction was based on *Beck v. Farmers Insurance Exchange*, an insurance bad-faith case. The case law does not specify the duties that the implied covenant requires in a non-insurance context. Mr. Young and Mr. King thought the instruction could be covered in the contract instructions and that a separate instruction for employment contracts was unnecessary. Mr. Humpherys suggested adapting MUJI 26.30 to an employment setting.

Mr. Humpherys will check with Karra Porter of his office to see if there is any case law applying the duty of good faith in the employment context, and, if there is, he may submit a proposed instruction to replace 1918.

h. *1919. Damages. Employee duty to mitigate damages.* Mr. King thought the instruction misstated the employer's burden and that the third paragraph should say the employee "could reasonably have" obtained comparable employment, not "might" have obtained. Mr. Humpherys suggested replacing "employer" and "employee" with the names of the parties. Several committee members noted that the third and fourth paragraphs were inconsistent on whose burden it is to prove mitigation or lack thereof. Mr. West questioned whether the other work a party must take to mitigate damages must be comparable. Mr. Janove said that it must and suggested factors that the jury should consider. Mr. Humpherys thought that the instruction should clearly explain that the jury, not the judge, should make any reduction in damages for failure to mitigate. The instruction was revised to read:

An employee who has lost wages as a result of termination has a duty to make reasonable efforts to find comparable employment, but the employee is not required to make every effort possible to avoid the damages.

> If [name of plaintiff] found new employment, deduct the amount earned from any damages awarded. If [name of plaintiff] through reasonable efforts could have found comparable employment, deduct the amount that he could have earned from any damages awarded.
>
> [Name of defendant] has the burden of proving that [name of plaintiff] obtained or reasonably could have obtained comparable employment of a similar character.

i. *1920. Special damages. Unemployment compensation.* Mr. Young suggested changing the title to "Collateral sources." Although there is a general instruction on collateral sources, Mr. Humpherys thought that a more specific instruction for employment cases was necessary because evidence of employment benefits may come in at trial. Mr. Ferguson suggested changing "financial" to "economic." Mr. West asked whether there is a general instruction on whether damages are taxable. Some committee members thought that there should be.

4. *Damage Instructions.* Mr. Shea reviewed a number of damage instructions, which he has edited for consistency and style.

a. *2002. Proof of damages.* Mr. Belnap suggested leaving out the last paragraph. Messrs. Ferguson, Fowler and Dewsnup agreed. Mr. Humpherys, Mr. King and Mr. Simmons, however, thought that the last paragraph explained a new concept, namely, that any uncertainty in the amount of damages should be resolved against the defendant.

b. *2008. Economic damages. Injury to personal property.* Mr. Simmons suggested changing "would be" to "are" in this instruction and instruction 2009.

c. *2009. Economic damages. Injury to real property.* Mr. Humpherys suggested using "land" instead of "real property." Others noted, however, that the injury does not necessarily have to be to the land itself but can be to improvements on the land. Mr. Humpherys thought that "real property" needed to be defined. Mr. Simmons suggested adding "as a result of the negative perception" to the end of the instruction.

d. *2013. Wrongful death claim. Minor. Factors for deciding damages.* Mr. Simmons questioned why funeral and burial expenses were listed in instruction 2013 but not in instruction 2012 (for the wrongful death of an adult). Committee members responded that, under Utah law, for the heirs of an adult to recover funeral and burial expenses the estate must be impecunious.

Other Matters.

5. Mr. Shea reported that the instructions that the committee has approved to date will now be available on-line for courts and practitioners to use.

6. Mr. Shea reported that there will be a presentation on May 25, 2006, to the district court judges of the on-line instructions, at which he will ask the judges for feedback on the instructions. Several committee members expressed an interest in attending the presentation. Mr. Shea will see if they can attend.

7. Mr. Young reported that the next areas the committee will cover will be products liability and medical malpractice.

The meeting concluded at 6:00 p.m.

Next Meeting. The next meeting will be Monday, July 10, 2006, at 4:00 p.m. The committee will not meet in June 2006.

MINUTES
Advisory Committee on Model Civil Jury Instructions
September 11, 2006
4:00 p.m.

Present: Paul M. Belnap, Francis J. Carney, Ralph L. Dewsnup, Marianna Di Paolo, Phillip S. Ferguson, Tracy H. Fowler, L. Rich Humpherys, Jonathan G. Jemming, Stephen B. Nebeker, Karra J. Porter, Timothy M. Shea, Paul M. Simmons, David E. West, Robert H. Wilde, and John L. Young (chair)

Excused: Honorable William W. Barrett, Jr.

Publicity

The committee discussed the need to educate members of the bench and bar about the new instructions and to encourage their use. Mr. Shea noted that he and other committee members had made presentations to the district court judges and to the Utah Trial Lawyers Association and will be making another presentation to UTLA on Friday. Mr. Carney noted that he and Mr. Humpherys are writing an article about the new instructions for the *Utah Bar Journal,* with introductions by Mr. Young and (it is to be hoped) by Chief Justice Durham.

Draft Instructions

The committee continued its review of the employment instructions. Mr. Humpherys introduced Ms. Porter from his firm, who was invited to attend the meeting to address her concerns with the instructions.

1. *1911. Breach of employment contract. Just cause.* Ms. Porter noted that just cause does not have to be shown in the majority of employment cases. She had concerns with the term "fair." She thought that juries should not be asked to determine fairness for themselves, that the standard was more akin to an abuse of discretion standard, and that jurors should not second-guess employment decisions made in good faith. She thought the test was more subjective: was the employer's action reasonable from the employer's perspective based on what he knew at the time? She also thought that the last part of the instruction (referring to pretext) was superfluous or redundant, since the jury must determine the real reason for the termination. Messrs. Carney and Wilde pointed out that the instruction was a direct quote from *Uintah Basin Medical Center v. Hardy,* the only Utah appellate decision defining "just cause" in the employment context. Mr. Humpherys thought that the *Hardy* standard was not stated in plain English. Mr. Young suggested rewriting the instruction based on ¶ 22 of the *Hardy* decision. The instruction may also need a committee note.

Mr. Wilde and Ms. Porter will confer and suggest a revised instruction.

Mr. Ferguson joined the meeting.

2. *1913. Fiduciary duty.* Ms. Porter thought that the instruction did not belong because fiduciary duties are not limited to employment situations and in fact are rare in employment cases. Mr. Humpherys noted that, just because a breach-of-fiduciary-duty claim may also appear in other contexts, does not mean that it should not also be included in the employment instructions. Mr. Wilde noted that breach of fiduciary duty is often asserted as an affirmative defense or counterclaim in employment cases. It is typically the employer who claims that an employee breached a fiduciary duty. Mr. Dewsnup therefore suggested using the terms "employer" and "employee" rather "plaintiff" and "defendant." The committee debated whether the existence of a fiduciary duty was a question of law for the court to decide or a question of fact for the jury to decide. Ms. Porter and Mr. Belnap thought it was always a question of law. Mr. Wilde thought it may depend on the facts that the jury finds. He also thought that the jury may have to decide the extent of any fiduciary duty. The committee asked whether the jury would have to make piecemeal determinations; for example, the jury would be asked to determine whether certain facts existed; if the jury found they existed, it would then be instructed on the fiduciary duty that those facts give rise to and be asked to determine whether that duty had been breached and, if so, what damages flowed from the breach. Ms. Porter thought that the problem could be handled through the special verdict form. Mr. Belnap suggested adding a comment to the effect that the instruction presupposes that the judge has found that a fiduciary duty exists. Mr. Shea suggested revising the instruction to read, "I have found that the employee owed the employer a duty of . . . ." Ms. Porter thought this would imply that the judge was siding with one side over the other. Mr. Young suggested the language: "Under the circumstances of this case, the employee owed the employer a duty of . . . ."

Dr. Di Paolo joined the meeting.

Mr. Nebeker noted that lay people do not understand what is meant by "fiduciary duty." Mr. Dewsnup suggested revising the instruction to read, "For the employer to prevail on his claim of breach of fiduciary duty, the employer must prove that the employee violated an extraordinary duty of fidelity, confidentiality, honor, trust, or dependability." Mr. Wilde noted that the cases use the terms in the conjunctive ("*and* dependability"). Ms. Porter suggested bracketing the terms and telling the court to use only those terms that are at issue (e.g., confidentiality). Mr. Humpherys suggested revising the instruction to read, "If you find that there was an extraordinary relationship between the employee and the employer, then the employee owed the employer a duty of . . . ."

Mr. Belnap was excused.

Mr. Young noted that in MUJI 17.10 (fraudulent omission--confidential or fiduciary relationship) the jury is asked to determine the existence of a duty. He suggested that the instruction should be structured as follows: A preliminary statement to the effect that the employee owed the employer a fiduciary duty to do (or not do) something (specify); then tell the

jury that it must decide whether the employee breached that duty. He suggested that the instruction be rewritten. He noted that the scope of the duty in any case will be fact specific.

Mr. Jemming was excused.

Mr. Wilde suggested revising the instruction to ask the jury to determine whether there was a fiduciary relationship (rather than a fiduciary duty). The instruction could define the types of fiduciary relationships that give rise to fiduciary duties in the employment context. The committee noted that the last sentence of 1913 is no longer accurate in light of the recent decision in *Sorensen v. Barbuto*, 2006 UT 340.

The instruction will be revised.

3. *1915. Contract damages. General damages.* Ms. Porter asked why the committee was using the terminology "general damages" and "consequential damages" (instruction 1916). Some committee members thought the use of the terms could only confuse the jury. Mr. Dewsnup noted that all damages are consequential in the sense that they are a consequence of the breach of duty. Mr. Young asked why the terms used in the tort damage instructions--economic and noneconomic damages--could not be used. Some committee members noted that in the employment or contract context, both general and consequential damages are generally economic. It is generally only where the breach of contract gives rise to an independent tort that the plaintiff is entitled to also recover noneconomic damages. Mr. Young asked what items of damage general damages include besides wages and benefits. Mr. Wilde suggested that diminution in retirement benefits and attorney fees may be recoverable in some cases. Mr. Humpherys suggested revising the instruction to say, "The items of damages are . . . ," and then simply list the damages claimed. He thought that the phrase "naturally flowing from the breach" was unnecessary and would not be understood by jurors. Ms. Porter noted that emotional distress may "naturally flow" from the breach, but is not generally recoverable. Dr. Di Paolo asked what the jury needed to know to do its job. Mr. Humpherys suggested that it only had to be told, "If you find a breach of contract, then you may award the following damages: . . ." It could then be told, "You may also award those damages that were contemplated by or reasonably foreseeable to the parties at the time the contract was made." Mr. West and Mr. Young suggested combining the damage instructions (1914-16) into one instruction. Mr. Simmons circulated a proposed draft that did that.

Mr. Shea will revise Mr. Simmons's draft in light of the committee discussion and circulate the revised instruction before the next meeting.

Mr. West suggested adding a comment to let judges and attorneys know that the committee has decided not to use the terms "general" and "consequential" damages but that

items 1 through x are what we used to call "general damages," and the other items are what we used to call "consequential damages."

Mr. Ferguson asked whether there might be tort and contract damages in the same case. If so, the instruction may need to be modified.

Ms. Porter noted that breach of contract cases in the employment context are not limited to termination cases, so the instruction should be worded broadly enough to cover other types of breaches.

4. *1917. Damages for wrongful termination in violation of public policy.* Mr. Humpherys thought that if both contract and tort damages are awardable in the same case, the jury should be instructed not to award double damages. Ms. Porter thought the problem could be handled through the special verdict form. Mr. Simmons thought that the jury should award damages for each of the plaintiff's theories and that any impermissible duplication should be eliminated by the court when the judgment is entered.

Mr. Shea will revise the instruction in light of the committee discussion and the other instructions on damages.

Mr. Wilde suggested that a reference to *Peterson v. Browning,* 832 P.2d 1280 (Utah 1992), be added to the references.

5. *1918. Damages. Employee duty to mitigate damages.* Ms. Porter thought that an employee has a duty to mitigate damages regardless of whether the employment he can find is "comparable." Messrs. Wilde and Dewsnup disagreed. They thought that a corporate vice-president who loses his job is not required to "sling hash at McDonald's" to mitigate his damages. Mr. Dewsnup thought that "comparable" included comparable compensation. Mr. Ferguson asked whether "comparable employment" is a term of art and whether the jury should be instructed in the factors it should consider in deciding whether or not other employment is "comparable." Mr. Wilde thought not. Mr. Young asked whether the instruction should address future damages (front pay). Ms. Porter noted that in Title VII employment cases, the Tenth Circuit has held that front pay is equitable, to be determined by the court and not by the jury. Mr. Humpherys thought the instruction was broad enough to cover both past and future damages. Dr. Di Paolo thought that the last sentence (on the burden of proof) should come before the second paragraph. Other committee members thought it fit better where it was because it applied to the instruction as a whole. At Mr. Shea's suggestion, the phrase "and the amount that could have been earned" was added to the end of the last sentence. Mr. Fowler suggested revising the instruction to read: "The employer claims that the employee has not mitigated his damages. The employer has the burden of proving that . . ."

Mr. Carney was excused.

Mr. Shea asked whether the instruction applies to pre- or post-trial actions. Mr. Young suggested that, if the law is not clear, the issue should be raised in a comment.

6. *1919. Special damages. Unemployment compensation.* Ms. Porter suggested bracketing the specific collateral sources, since not all will apply in every case. She also suggested revising the title of the instruction so that it does not appear to be limited to unemployment compensation. Mr. Young asked how evidence of collateral sources would have come into evidence in the first place, to even provide a basis for the instruction. The hour being late, the committee deferred further discussion of this instruction for a later meeting.

7. *Other*. Mr. Dewsnup asked whether there should be a jury instruction on the tax implications of employment awards.

The meeting concluded at 6:10 p.m.

Next Meeting. The next meeting will be Monday, October 16, 2006, at 4:00 p.m. This is the third Monday in October since the courts will be closed the second Monday in October for Columbus Day.

MINUTES
Advisory Committee on Model Civil Jury Instructions
October 16, 2006
4:00 p.m.

Present: Ralph L. Dewsnup, Marianna Di Paolo, Phillip S. Ferguson, L. Rich Humpherys, Stephen B. Nebeker, Timothy M. Shea, Paul M. Simmons, Robert H. Wilde, and John L. Young (chair)

Excused: Honorable William W. Barrett, Jr., Paul M. Belnap, Juli Blanch, Francis J. Carney, Tracy H. Fowler, Jathan Janove, Jonathan G. Jemming, Colin P. King, David E. West

Draft Instructions

The committee continued its review of the employment instructions.

1. *1911. Breach of employment contract. Just cause.* Mr. Wilde presented a revised instruction 1911, which was rewritten in light of *Uintah Basin Medical Center v. Hardy*, 2005 UT App 92, 110 P.3d 168. Mr. Ferguson reported that Karra J. Porter of his office thought that the revised instruction improperly put the burden of proof on the employer to prove just cause, rather than requiring the plaintiff to prove that he was terminated without just cause. She suggested rewriting the instruction to place the burden on the plaintiff to show the lack of just cause. The committee debated who has the burden to show that a termination was or was not for just cause. Mr. Wilde thought that Utah courts would follow the burden-shifting analysis of the *McDonald-Douglas* case, analogizing an employee whose employment contract requires just cause for termination to an employee in a protected class. Thus, if he shows that his contract requires just cause for termination and that he was terminated, he has established a prima facie case, and the burden should shift to the employer to provide a legitimate reason for the termination. If he does not, the employer loses, but if he does, the burden then shifts back to the employee to show that the proffered reason is pretextual. Mr. Ferguson (and Ms. Porter) thought that just cause for a termination was not an affirmative defense and that to establish a prima facie case the plaintiff must show that he was terminated for something other than just cause. Mr. Young read the comparable California instructions (CACI 2404 and 2405), which appear to say that, if the employee makes out a prima facie case of wrongful termination, the burden shifts to the employer to justify the termination. The employee can then show that the asserted justification is pretextual. Mr. Wilde thought that Utah would follow the California approach, since the California case cited as authority (*Cotran v. Rollins Hudig Hall Int'l, Inc.*, 948 P.2d 412 (Cal. 1998)) was cited with approval in the *Uintah Basin* case. Messrs. Young and Simmons suggested leaving the instruction as is but with a committee note saying that it should only be given after the court determines that the plaintiff has made out a prima facie case of wrongful termination. Mr. Humpherys asked, If the burden shifts and the employer does not put on any evidence, does that mean the plaintiff is entitled to a directed verdict? The committee asked whether Ms. Porter had authority for her position. Mr. Humpherys called Ms. Porter, and she explained her views to the committee by telephone. In her opinion, breach of contract cases are

different from Title VII cases. The plaintiff has the burden of proving a breach of contract, which means proving that he was terminated for a reason other than just cause. He can do this by proving that the asserted reason for his termination was pretextual, but the burden never shifts to the employer to establish just cause. There is no Utah authority adopting either approach. The committee decided to draft a note stating that it had discussed differences between statutory title VII cases and common law claims, and it is not clear which approach the Utah Supreme Court would adopt.

Messrs. Shea and Wilde will draft a committee note explaining the issue.

2. *1913. Fiduciary duty.* Mr. Ferguson reported that Ms. Porter thought that there should be a committee note stating that some relationships are fiduciary as a matter of law. The committee debated whether to use the term "fiduciary" in the instruction, since it is not a term familiar to jurors. Mr. Dewsnup suggested "relationship of trust." Mr. Young thought that the title should refer to fiduciary duties so that lawyers and judges will understand what the instruction is intended to cover. He suggested calling the instruction, "Special duty of trust (fiduciary duty)." Mr. Young also questioned whether the term "fidelity" would be understood. Mr. Dewsnup suggested "faithfulness" or "loyalty." Mr. Humpherys expressed concern with referring to the duty as a special duty of trust and then defining it using other words.

Dr. Di Paolo joined the meeting.

Mr. Dewsnup thought that, by the end of the case, the jury would understand what the term fiduciary means. Mr. Humpherys, however, thought that the term would only be used by the lawyers and not be explained by the evidence. Dr. Di Paolo thought it is okay to use specialized terms if they are defined up front. Mr. Young suggested reversing the order of the first two sentences. Mr. Ferguson thought the first sentence was okay but that the second sentence should start out, "A fiduciary duty means . . ." Mr. Dewsnup thought that the instruction as written adequately defined fiduciary duty. Mr. Shea pointed out that the second paragraph uses the term "extraordinary relationship," rather than "fiduciary duty" (or "relationship"), without defining it. Mr. Humpherys suggested using one term consistently. Mr. Shea asked whether there is a difference between a fiduciary duty and a fiduciary relationship. Mr. Simmons questioned whether the existence of a fiduciary duty was a question for the court or the jury. The committee thought that it may depend on the facts, in which case it would present a jury question. Mr. Dewsnup suggested revising the second sentence of the instruction to read: "To prevail on this claim, [name of defendant] must prove that [name of plaintiff] both had and violated an extraordinary duty of fidelity, confidentiality, honor, trust and dependability." At Dr. Di Paolo's suggestion, "fidelity" was moved to follow "trust." Messrs. Nebeker and Shea thought the instruction did not adequately tell the jury what the effect is if it finds a breach of fiduciary duty. Mr. Young asked whether there were any defenses to a breach of fiduciary duty, or, once a breach

is found, the case is over. Mr. Ferguson thought that comparative fault is a defense. The committee agreed that the effect of a finding of breach may depend on the pleadings and the evidence. Messrs. Dewsnup and Humpherys thought that the instruction should say as much. Mr. Young thought that the matter could be handled by the special verdict form. After further discussion, the committee agreed to add a comment to the effect that a claim of breach of fiduciary duty may arise in several ways--for example, as an affirmative defense, as a counterclaim, or as a claim for a setoff--and that the court and the parties will need to fashion a follow-up instruction telling the jury the appropriate remedy if it finds a breach, based on the pleadings and the evidence.

3. *1914. Contract damages.* Mr. Shea noted that he had combined former instructions 1914 through 1916 into one instruction and had incorporated instruction 2002 on proof of damages. Mr. Humpherys thought the first two sentences were redundant, and Mr. Wilde pointed out that the instruction relates only to contract damages, not to damages for wrongful termination in violation of public policy. Accordingly, the first two sentences were revised to read:

> If you find that [name of defendant] breached the contract with [name of plaintiff], then you may award damages--
>
> (1) for the salary and other benefits that [name of plaintiff] would have received . . . .

Mr. Young suggested adding a committee note specifying the other benefits that are possible, such as medical benefits, retirement benefits, etc. The committee note should also explain that for other employment claims, other damages are available, and cross-reference applicable instructions. For example, tort damages are available for wrongful termination in violation of public policy (instruction 1917), and statutory damages are available for a title VII violation.

Mr. Wilde will prepare such a note.

At Mr. Dewsnup's suggestion, the phrase "reasonably certain" was changed to "reasonably likely." Mr. Dewsnup also suggested adding "also" to the fourth paragraph, so that it reads, "To be entitled to damages, [name of plaintiff] must also prove two points," since the plaintiff must first prove liability. Dr. Di Paolo noted that the fifth and sixth paragraphs seemed to say the same thing, that neither the fact of damage nor the amount of damage can be left to speculation. Mr. Humpherys suggested deleting the phrase "not just speculation" from both paragraphs. Mr. Nebeker noted that the word "fault" at the end of the fifth paragraph should be changed, since the instruction deals with breach of contract, not a tort. Mr. Dewsnup suggested replacing it with "defendant's conduct." Mr. Young suggesting reversing the order of the sentences in paragraph six, to read: "Although the law does not require damages to be proved to a mathematical

certainty, there must be evidence that gives a reasonable estimate of the amount of damages. The level of evidence required to prove the *amount* of damages is not as high as what is required to prove the *occurrence* of damages." Mr. Shea asked if instruction 2002 should be amended to conform to the changes to instruction 1914. The committee did not think it needed to be modified.

4. *1917. Damages for wrongful termination in violation of public policy.* At Mr. Humpherys' suggestion, the first paragraphs were revised in accordance with the changes to instruction 1914. They now read:

> If you find that [name of defendant] wrongfully terminated [name of plaintiff], then you may award economic damages to [name of plaintiff]--
>
> (1) for the salary and other benefits that [name of plaintiff] would have received . . . .
>
> (2) for other items of damage.

The language "that you find were contemplated by the parties or reasonably foreseeable . . ." was deleted, since it states a standard for contract damages and not tort damages.

Mr. Wilde will provide Mr. Shea with a list of other items of damage that are recoverable for wrongful termination.

Mr. Wilde noted that punitive damages may also be available. Mr. Humpherys noted that "noneconomic damages" are only meaningful to the extent they are contrasted with "economic damages." Mr. Dewsnup noted that someone had questioned the use of the terms "economic" and "noneconomic" damages at a recent CLE presentation because all damages are economic in the sense that they are monetary compensation. Dr. Di Paolo noted that she was also troubled by the use of the terms and asked where they came from. The committee noted that they are used in Utah's medical malpractice statute and in California's new jury instructions. Mr. Young thought use of the terms would not be a problem for jurors because they will be defined in the jury instructions. The bigger question is whether by substituting "economic" and "noneconomic" for "special" and "general" damages (or "general" and "consequential" damages), we are changing the law or creating two different vocabularies--one for juries and one for other areas of the law. If so, use of the terms may have unintended consequences. Mr. Young noted that in drafting pleadings and other legal papers, it would probably be a good idea to use both terms, for example, "The plaintiff prays for economic (general) and noneconomic (special) damages."

The meeting concluded at 6:10 p.m.

Next Meeting. The next meeting will be Monday, November 13, 2006, at 4:00 p.m.

MINUTES
Advisory Committee on Model Civil Jury Instructions
November 13, 2006
4:00 p.m.

Present: Honorable William W. Barrett, Jr., Juli Blanch, Kamie F. Brown (member of the Products Liability subcommittee), L. Rich Humpherys, Tracy H. Fowler, Jathan Janove (by telephone), Jonathan G. Jemming, Colin P. King, Stephen B. Nebeker, Timothy M. Shea, Paul M. Simmons, David E. West, Robert H. Wilde, and John L. Young (chair)

Excused: Paul M. Belnap, Francis J. Carney, Ralph L. Dewsnup, Marianna Di Paolo, Phillip S. Ferguson.

Draft Instructions

The committee continued its review of the employment instructions.

1. *1911. Breach of employment contract. Just cause.* Mr. Wilde drafted a committee note in accordance with the discussion at the October meeting. Mr. Simmons pointed out that the instruction did not track the note. The instruction says that the defendant has the burden of proof to show that the termination was for just cause, whereas the note sets out a burden-shifting approach similar to that used in disparate treatment discrimination cases under *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973). Mr. Young suggested drafting an instruction applying the *McDonnell Douglas* approach and including it as 1911A. Mr. Simmons did not think that would solve the problem. Mr. Wilde thought that 1911 is a proper instruction in cases involving direct evidence of a dismissal for other than just cause and that the burden-shifting approach is proper where there is only indirect evidence of the employer's intent. Mr. Simmons thought that if there was unrebutted, direct evidence of the employer's bad intent, then the issue should not go to the jury and that in all other cases the burden-shifting approach would apply.

Mr. Janove and Ms. Brown joined the meeting.

The committee discussed whether alternatives should be included in the same instruction, whether they should be separate instructions designated "A" and "B," or whether they should be given separate, consecutive numbers, as in MUJI 1st. Mr. Shea pointed out that in other instructions alternatives have been listed in the same instruction, as "A" and "B," and that the numbering of the instructions cannot be changed once the instructions are approved, because they are then published on the courts' website.

Mr. Jemming joined the meeting.

Mr. Nebeker asked whether "objective good faith reason" had to be defined. Mr. Wilde thought not. Mr. Young read the comparable California instruction (CACI 2405).

Mr. Wilde will draft an instruction explaining the *McDonnell Douglas* burden-shifting approach, and the committee will revisit the issue at a later meeting.

2. *1913. Fiduciary duty.* Mr. Simmons suggested separating the jury's determination of the existence of a duty from its determination of a breach of the duty. Mr. Humpherys questioned whether the jury finds the existence of a fiduciary duty. The existence of a duty is a question of law for the court; the jury just finds whether the factual predicate for the existence of a fiduciary duty exists. The committee discussed how best to instruct the jury on its proper role. Mr. Young suggested that the matter be handled through the special verdict form. Mr. Humpherys suggested that the jury be instructed that, if it finds certain facts, then they give rise to a fiduciary duty, that is, to an extraordinary duty of confidentiality, etc. Then the jury must decide whether that duty has been breached. The jury would not have to deliberate twice, but can be guided through the two-step process by the special verdict form, just as they are guided through the necessary determinations in a negligence case, where they are required to determine, first, whether the defendant was negligent and, second, whether the defendant's negligence was a proximate cause of the plaintiff's injuries. Mr. Humpherys suggested that the jury be instructed first on when a fiduciary duty arises and second on what constitutes a breach of the duty. Mr. Janove noted that the claim usually arises as a contract claim or a trade secret claim and that the line for when an employee breaches a fiduciary duty may not be clear; it may depend on such things as the employee's position and the way the allegedly confidential information the employee took was compiled, which could involve disputed issues of fact. The committee agreed that the instruction needed to be modified so that the jury is not asked to determine the existence of a duty. Mr. King suggested deleting the phrase "both had and" from the third line. He and Mr. Young also suggested adding a comment to the effect that in some cases the jury may have to be instructed to find the necessary facts giving rise to a duty, but that such an instruction should be case specific. Mr. Young thought that the instruction itself should presuppose that the court has found that a fiduciary duty exists and should just instruct the jury to determine whether or not the duty has been breached. Mr. Young also thought that the instruction should include three elements–(1) a breach of duty, (2) harm, and (3) causation. Mr. King questioned whether the duty should be described as an "extraordinary" duty, and he and Mr. Young questioned whether it needs to be defined at all. The committee thought that the duty needs to be defined because most jurors will not know what "fiduciary" means. Ms. Blanch questioned whether the duty should be defined in the disjunctive ("confidentiality, honor, . . . *or* dependability"), rather than the conjunctive (*"and")*. Mr. Humpherys asked whether it is a breach for an employee to fail to "honor" his employer if he does not breach a duty of confidentiality, loyalty, or trust. Mr. Wilde noted that an employment relationship without more does not create a fiduciary duty. Mr. Humpherys suggested that the instruction be more generic, with blanks for the court and counsel to fill in based on the facts of the case, for example: "[Name of defendant] claims that [name of plaintiff] breached a duty of [insert specific duty, e.g., confidentiality, loyalty, or trust]. . . ." Mr. Young compared California's instruction on breach of

fiduciary duty in an attorney-client context (CACI 605). Mr. West suggested rewriting the instruction to read: "A fiduciary duty exists in this case if [insert the relevant factual predicate that the jury must find]."

Mr. Wilde will rewrite the instruction in light of the committee's comments.

Mr. Simmons noted that the last paragraph of the committee note was misplaced. It belongs in instruction 1914. The committee made that change.

3. *1914. Contract damages.* Mr. Humpherys questioned the sentence "The level of evidence required to prove the *amount* of damages is not as high as what is required to prove the *occurrence* of damages." He thought a jury would not understand the concepts "level of evidence" and "high." Mr. Young suggested deleting the sentence. Mr. Fowler asked whether the same change needed to be made in the comparable tort damage instruction (no. 2002). Mr. Young suggested incorporating instruction 2002 into 1914. Mr. Wilde thought that the last paragraph of the instruction should be included.

Mr. Humpherys was excused.

Mr. Simmons noted that the comment refers to statutory damages under title VII and asked whether we needed instructions covering title VII claims. Mr. Young checked the California instructions and noted that they apparently do not include instructions on federal statutory causes of action. Mr. Young thought that if federal law governs a claim, the court should use federal instructions. Mr. Simmons noted that there is no single approved set of federal instructions.

Mr. Nebeker was excused.

4. *1917. Damages for wrongful termination in violation of public policy.* Mr. Shea noted that he had revised the instruction to incorporate the instruction on noneconomic damages in tort actions but that some of the elements of noneconomic damages in a personal injury case may not apply in a wrongful termination case. Judge Barrett suggested that noneconomic damages in a termination case may be limited to item (2) (mental and physical pain and suffering). Mr. Fowler suggested that damage to reputation might also be included, although some of that damage may be economic. Mr. Young thought that item (1) (the nature and extent of injuries) covered damage to reputation. The committee decided to leave that part of the instruction as written, on the grounds that it was broad enough to cover any noneconomic damages that might arise in such a case. At Mr. Simmons's suggestion, the first part of the instruction was revised to read:

> If you find that [name of defendant] wrongfully terminated [name of plaintiff], then you may award [name of plaintiff] both economic and noneconomic damages. Economic damages are damages--
>
> (1) for the salary and other benefits . . . ; and
>
> (2) for [list other items of damage].
>
> Noneconomic damages are the amount of money that will fairly and adequately compensate [name of plaintiff] for losses other than economic losses. . . .

Mr. Wilde noted that the explanatory note was missing something.

Mr. Wilde will look for his original note and resend it to Mr. Shea.

Mr. Simmons noted that the comments to instructions 1914 and 1917 were inconsistent. The former says that punitive damages are not available for breach of contract, and the latter says that they are. The comment to 1917 was revised to say that punitive damages are available for termination in violation of public policy (a tort). Mr. Young asked whether a separate instruction on punitive damages should be added.

5. *1918. Duty to mitigate damages.* At Mr. Simmons's suggestion, the committee struck "comparable" from the first line of the third paragraph, on the grounds that the plaintiff is not entitled to recover damages to the extent he has actually earned other income, regardless of whether the other employment was comparable or not. The instruction was approved as modified.

6. *1919. Special damages.* At Mr. Jemming's suggestion, "payment" was struck from the fourth line. Mr. Young questioned whether the instruction was necessary, since evidence of collateral sources should not come into evidence. Messrs. King, Wilde, and Simmons thought the instruction was necessary to prevent the jury from speculating on the effect of unemployment or workers' compensation, even where there is no evidence of such benefits. At Mr. Young's suggestion, an advisory committee note was added that says: "The collateral source rule normally prohibits the introduction of such evidence." As modified, the instruction was approved.

The hour being late, the committee reserved discussion of the products liability instructions for its next meeting, which Mr. Fowler will conduct. Remaining issues with the employment instructions were reserved for the January 2007 meeting.

The meeting concluded at 5:50 p.m.

Next Meeting. The next meeting will be Monday, December 11, 2006, at 4:00 p.m.

MINUTES
Advisory Committee on Model Civil Jury Instructions
December 11, 2006
4:00 p.m.

Present: Juli Blanch, Francis J. Carney, Ralph L. Dewsnup, Phillip S. Ferguson, Tracy H. Fowler, Colin P. King, Stephen B. Nebeker, Timothy M. Shea, Paul M. Simmons, David E. West, and Kamie F. Brown

Excused: John L. Young

Mr. Fowler, the chair of the Products Liability subcommittee, conducted the meeting in Mr. Young's absence. Mr. Fowler explained that the Products Liability subcommittee has been working on instructions in four areas: (1) strict liability, (2) negligence, (3) breach of warranty, and (4) defenses. Mr. Shea noted that the instructions will not be posted on the court's website for use until the whole section on products liability has been approved.

Draft Instructions

The committee reviewed the draft instructions on strict products liability.

1. *1001. Introduction.* Mr. Dewsnup did not like defining "defective" in terms of "a defect" and suggested revising the second paragraph to read: "A product may be defective in one or more of three ways." Others pointed out that the jury does not have to be instructed on all the ways a product can be defective but only on the way or ways at issue in the case. Mr. King suggested revising the instruction to read, "[Name of plaintiff] claims that the product is defective in [manufacture] [and/or] [design] [and/or] [because of a failure to adequately warn]." Other committee members pointed out that the instruction would then simply duplicate subsequent instructions on each type of product defect, which begin, "[Name of plaintiff] claims . . ." Mr. Fowler questioned whether the instruction was necessary.

Mr. Shea suggested bracketing "product" so that the court could use the name of the product instead. Mr. Fowler thought the practice should be consistent throughout the instructions.

Mr. Shea asked whether the comment was necessary, given courts' citations to the statute. Mr. Simmons pointed out that no Utah appellate court has squarely addressed the issue of whether those portions of the statute that were declared unconstitutional in *Berry v. Beech Aircraft* and never repealed or reenacted are effective.

Mr. Fowler asked if a reference to *Sanns v. Butterfield Ford* should be added to the last paragraph of the note. Mr. King and Mr. Simmons thought not, since the comment is merely talking about nomenclature and not the law of retailer liability.

Someone asked if there was a corresponding instruction in MUJI 1st. There is not, but the first paragraph of the comment has a counterpart in the comment to MUJI 12.12. Mr. Carney noted that the medical malpractice subcommittee is preparing a table cross-referencing MUJI 1st to MUJI 2d and explaining why some instructions in MUJI 1st are not included in MUJI 2d. The committee thought it would be a good idea to do the same for all instructions. Mr. Shea noted that the table should exist separately from the committee notes. The usefulness of the table will diminish over time, as courts and attorneys become more familiar with MUJI 2d and begin to use it exclusively. Mr. Fowler noted that MUJI 12.1 has not been replicated and that the subcommittee has avoided using "strict liability" in the text of the instructions.

Mr. Ferguson joined the meeting.

The draft instructions do not say that lack of privity and the exercise of reasonable care are not defenses. Mr. Simmons asked whether the committee had found that jurors are concerned about privity. The committee thought they were not. Mr. Fowler noted that an instruction on the exercise of care may be necessary where theories of strict liability and negligence both go to the jury. In those cases, the court and parties may need to craft an instruction explaining the difference between the two theories.

2. *1002. Strict liability. Elements of claim for manufacturing defect.* The committee noted that the comment to instruction 1002 applies to strict liability claims generally and not just to manufacturing defect claims. Mr. Fowler suggested moving the comment up to instruction 1001. Mr. Carney suggested making an introductory note for the whole topic. Mr. King and Ms. Brown noted that comments relevant to one theory of products liability may not be relevant to another and suggested having introductory notes for each subsection, such as one for strict liability and one for negligence.

Mr. King volunteered to have the subcommittee revise its notes.

Mr. Dewsnup expressed a concern about the structure of the instructions. He noted that the elements of a strict liability claim are (1) a defect, (2) that made the product unreasonably dangerous, (3) that was present at the time the product left the defendant, and (4) that caused the plaintiff's injuries. He thought there should be a generic instruction on the elements, followed by instructions defining each of the different types of product defects, followed by an instruction defining "unreasonably dangerous," followed by instructions on the other elements. Mr. Dewsnup thought that the first element as stated in instruction 1002 ("that a defect made the product unreasonably dangerous") should be broken out into two elements ("defect" and "unreasonably dangerous"). He also questioned whether the definition of "unreasonably dangerous" is different depending on the type of defect. Mr. Simmons noted that the elements as stated in instruction 1002 were taken from the Utah Supreme Court's statement of the elements of a strict liability claim. The committee thought, however, that it was not bound to state them in

the same language as the supreme court but could restate them to make them clearer to jurors. Ms. Brown defended the structure of the draft instructions, noting that the elements as stated in 1002 may not be helpful in a failure to warn case.

Mr. Shea volunteered to work with Ms. Brown to reformat the instructions in the way Mr. Dewsnup suggested so that the committee can compare the two approaches. Mr. Dewsnup offered to help.

The committee then focused on the language of instruction 1002. Mr. Dewsnup questioned whether "identical" should be "the same." Mr. Fowler did not think the distinction was significant or that any difference was intended thereby. Mr. Ferguson noted that most manufacturing has reasonable tolerances for variations.

Mr. King suggested that the subcommittee reconsider the issue.

Ms. Blanch was excused.

Mr. Ferguson noted generally that the products liability instructions seemed to be written for those with a higher level of education than those for whom the other instructions are written, which may be because the subject matter requires more sophistication.

3. *1003. Strict liability. elements of claim for design defect.* Mr. Dewsnup suggested that, for the sake of symmetry and simplicity, the instructions should refer to "design defect" throughout, rather "defective in design."

4. *1004. Definition of "unreasonably dangerous."* Mr. Nebeker questioned whether the notes should refer to "some subcommittee members." Mr. Dewsnup suggested saying, "There is an issue as to . . ." Mr. Carney suggested, "The drafting committee was not unanimous. The instruction should be reviewed with caution." Mr. Shea questioned whether there should be any note where some members merely disagree with a decision, such as *Brown v. Sears, Roebuck & Co.* Mr. Simmons pointed out that *Brown* is not a Utah decision but a Tenth Circuit decision and therefore is not a definitive statement of Utah law. Mr. Shea suggested saying, "Utah state courts are silent on the issue, but federal courts have said . . ." Mr. King suggested saying, "There is a question as to whether the Tenth Circuit's opinion of Utah law is correct." Mr. Fowler noted that the disagreements among committee members may be because there is no Utah law on point, or they may disagree on the interpretation of Utah law. After further discussion, the committee thought that it was appropriate to present alternative instructions for instruction 1004.

5. *1005. Strict liability. Elements of claim for failure to warn.* Mr. Dewsnup questioned whether the term "hazard" should be "risk." Mr. Ferguson thought the two terms

were not synonymous, that "hazard" refers to a potential mechanism of injury, and "risk" refers to the likelihood of the hazard occurring.

Mr. Fowler asked whether there needs to be a definition of what constitutes an "adequate" warning. Mr. Ferguson thought so. Some committee members thought that no definition of the adequacy of a warning could be given since it depends on the facts of the particular case. Mr. Carney suggested looking at the case law on the adequacy of warnings to determine the standard.

Mr. King offered to check the California pattern instructions (CACI) to see how they address the adequacy of a warning.

Mr. Dewsnup asked whether inadequate instructions for the use of a product are treated as a failure to warn.

6. *1008. Failure to warn. Presumption that warning will be read and heeded.* Mr. Shea questioned whether alternative instructions were necessary. The difference between the two alternatives is primarily on the question of whether the presumption arises for any warning (alternative A) or only for an adequate warning (alternative B). Mr. King noted that alternative A was based on comment *j* to the Restatement (Second) of Torts § 402A and suggested that the adequacy of the warning was not an issue at that time. Messrs. Carney, King, Simmons, and West all thought that an adequate warning is a prerequisite for the presumption to apply. Mr. Fowler thought there was some difference of opinion worth preserving but suggested that alternative instructions may not be the best way to present that difference.

7. *1011. Strict liability in tort. Component part manufacturer. Defective part incorporated into finished product.* Mr. Shea suggested presenting alternative instructions rather than burying the alternative in the note.

8. *1012. Defective condition of FDA approved drugs.* Mr. Dewsnup thought the presumption stated in this instruction should be rebuttable. Mr. Carney thought there should be no presumption, given the way the FDA works.

9. *1013. Defect not implied from injury alone.* Mr. Dewsnup noted that his subcommittees had made a concerted effort not to state the negative of propositions. He thought that instruction 1013 was improper and should not be given. Messrs. Carney, King, Simmons, and West agreed. Mr. Fowler suggested leaving the instruction in but including a warning against using it. Mr. Shea and Mr. Simmons thought that if the instruction were included, attorneys would think that the committee had endorsed its use.

The meeting concluded at 6:00 p.m.

Next Meeting. The next meeting will be Monday, January 8, 2007, at 4:00 p.m.

MINUTES
Advisory Committee on Model Civil Jury Instructions
January 8, 2007
4:00 p.m.

Present: Juli Blanch, Francis J. Carney, Ralph L. Dewsnup, , Tracy H. Fowler, Colin P. King, , Timothy M. Shea, David E. West, Jonathan Jemming, Marianna Di Paolo, and Kamie F. Brown

Excused: John L. Young, Phillip S. Ferguson, Paul M. Simmons

Mr. Fowler, the chair of the Products Liability subcommittee, conducted the meeting in Mr. Young's absence.

Survey by the National Center for State Courts

Mr. Shea explained that the NCSC is planning to sponsor a conference in 2008 of plain language pattern jury instructions. The NCSC is surveying committees such as ours to determine which topics should be included. The committee agreed that topics dealing with juror comprehension and use of instruction should have a high priority and that topics dealing with committee operations and procedures would have less relevance in Utah. Mr. Shea will respond to the survey on behalf of the committee.

Draft Instructions

Mr. Dewsnup presented his proposed alternative reorganization of the first six product liability instructions. This alternative includes definitions for "design defect," "manufacturing defect" and "unreasonably dangerous" and a single statement of the elements for both design and manufacturing defects. It then states the definitions and elements for failure-to-warn. Mr. Dewsnup tried not to change the substance of the instructions, but to present them in an order that preserved their symmetry. Mr. Dewsnup proposed that the disputed element of a design defect – the availability of a safer alternative – would be better included in the definition of a design defect, rather than among the elements.

After discussion, the committee agreed with Mr. Dewsnup's proposal, but that the order should place the elements of the claim immediately before the definitions. The order will be:

Introduction
Elements of claim for a [design/manufacturing] defect.
Definition of "design defect" and "unreasonably dangerous."
Definition of "manufacturing defect" and "unreasonably dangerous."
Elements of claim for failure to adequately warn.
Definition of "failure to warn" and "unreasonably dangerous."

The committee noted that the instructions use “hazard,” “risk” and “danger” somewhat interchangeably. Mr. Fowler and Ms. Brown will propose a uniform term at the next meeting.

The committee noted that there should be a definition of “adequate” warning so that jurors might better decide whether a warning is adequate. Mr. Fowler and Ms. Brown will propose a definition at the next meeting.

The committee discussed whether 1001. Introduction was needed. The committee decided to keep the instruction at least for cases in which more than one theory is presented to the jury.

In discussing the definition of “unreasonably dangerous,” the committee agreed that there should be just one alternative. Most members favored Alternative A. Mr. Fowler and Ms. Brown will propose a definition at the next meeting.

The meeting was adjourned.

MINUTES
Advisory Committee on Model Civil Jury Instructions
February 12, 2007
4:00 p.m.

Present: John L. Young (chair), Honorable William W. Barrett, Jr., Juli Blanch, Ralph L. Dewsnup, Marianna Di Paolo, Phillip S. Ferguson, Tracy H. Fowler, L. Rich Humpherys, Timothy M. Shea, Paul M. Simmons, David E. West, and Kamie F. Brown

Excused: Paul M. Belnap

The committee continued its review of the products liability instructions.

1. *1001. Strict liability. Introduction.* Mr. Simmons noted that the reference in the last line of the first paragraph of the comment should be to § 78-15-6, not -3. Mr. West suggested changing *and* at the end of subparagraph (2) to *and/or*. Mr. Dewsnup suggested deleting *and* altogether. Mr. Young suggested adding a provision to the note saying that a given case may involve any of the three theories or any combination of them and that the court should give only the alternatives that apply to the case.

Mr. Shea will propose additional language for the note.

Subparagraph (3) referred to "hazards involved in [the product's] foreseeable use." Mr. Shea had suggested using one term throughout rather than using *hazard, danger,* and *risk* interchangeably. Mr. Fowler noted that he and Ms. Brown had opted for *danger* but that MUJI 12.6 and 12.7 refer to "substantial danger." Mr. Dewsnup thought that adding *substantial* was a substantive change. Mr. Simmons noted that *House v. Armour of America*, a more recent pronouncement on liability for failure to warn, simply talks of a failure to warn of "a risk." Mr. West thought that *danger* was sufficient for the introductory instruction. After further discussion, subparagraph (3) was revised to read, "(3) in the way that its users were warned." Mr. Shea asked if the instruction was necessary. The consensus was that it was needed, particularly where a plaintiff has multiple theories of defect. Mr. Fowler questioned whether the committee note belonged with this instruction, whether it should be in an introduction to the whole section, or whether it should be repeated for each instruction that referred to the Products Liability Act. The committee decided to leave it where it is. At Ms. Brown's suggestion, the reference to "some subcommittee members" was changed to "some committee members."

2. *1002. Strict liability. Elements of claim for a [design/manufacturing] defect.* Mr. Shea asked whether the fifth element mentioned in the note should be added to the text of the instruction. Mr. Simmons noted that it is not included in the Utah Supreme Court's most recent restatements of the elements of the claim. The committee thought that if it were added to the text, we would also need to add instructions explaining what elements the jury should consider in determining whether one was "engaged in the business of selling" a product. The committee thought that in most cases the issue would be resolved pretrial, as a matter of law. Because it

would arise so infrequently at trial and because there is no Utah law explaining what factors the jury should consider when the issue does arise, the committee decided to leave it in the note. At Ms. Brown's suggestion, a reference to the "occasional seller" defense was added to the note.

Ms. Blanch was excused.

At Mr. Ferguson's suggestion, *contained* in the first line was replaced by *had.* Dr. Di Paolo asked whether *danger* should be replaced by *unreasonable danger* throughout the instructions, since the instructions also refer to *unreasonably dangerous*. Mr. Fowler noted that *unreasonably dangerous* is a term of art in products liability actions and suggested that it may be confusing to use *danger* in place of *hazard* and *risk* where the instructions also use *unreasonably dangerous.* The committee decided to keep both terms (*danger* and *unreasonably dangerous).* Mr. Shea noted that the California model instruction includes as an element that the product was used in a way that was reasonably foreseeable to the defendant. The committee thought that the concept of foreseeable use was adequately covered in other instructions. At Ms. Brown's suggestion, the reference to Restatement (Third) of Torts § 2, notes, was deleted from this instruction.

3. *1003. Strict liability. Definition of "design defect" and "unreasonably dangerous."* At Mr. Shea's suggestion, approved by Mr. Fowler, *intended* was deleted from both subparagraphs (1). Mr. West questioned whether the second subparagraph (2) was an accurate statement of the law. He gave the example of an employee who is required by his employer to use equipment without necessary protections. He may know the product is dangerous, but Mr. West thought that the law would allow him to recover, that his knowledge does not mean that the product is not unreasonably dangerous but only goes to comparative fault (*e.g.,* of the employer, employee, or both). Mr. Fowler noted that the instruction follows the Tenth Circuit's prediction of Utah law. Mr. Simmons noted that the Tenth Circuit's interpretation of Utah law does not track the language of the Utah statute and thought that the instruction should follow the statute and not the Tenth Circuit's gloss on the statute.

Mr. Simmons will draft alternative instructions to 1003 and 1004 tracking Utah Code Ann. § 78-15-6(2).

Mr. Humpherys thought that the last subparagraph (2) was too broad. A plaintiff may know of dangers involved in the use of the product, but unless he knows of the particular danger that causes his injury, his knowledge should not affect his claim. Yet, as the instruction is currently drafted, one could argue that knowledge of any defect defeats a claim. Mr. Young suggested adding an introductory sentence: "[Name of plaintiff] claims that [the product] had the following design defect: [Describe the claimed defect]." Mr. Humpherys thought it may be too hard to define the claimed defect simply in a sentence or two. The committee debated whether such an introductory sentence should appear in this instruction or in the general instructions on the nature of the parties' claims. Mr. Humpherys and Mr. Young thought it should go in an introductory

instruction regarding the parties' claims. The committee revised the last subparagraph to read, "(2) [name of plaintiff] did not have actual knowledge, training, or experience sufficient to know the dangers associated with the claimed defect."

Mr. Dewsnup was excused.

Dr. Di Paolo thought that the instructions were confusing and asked whether instruction 1003 should be integrated into instruction 1002, that is, whether the concepts of "defect" and "unreasonably dangerous" should be defined when they are first stated as elements of the claim. Mr. Fowler suggested handling the difficulty by adding a sentence to the end of instruction 1002 to the effect that the court will now explain what "defect" and "unreasonably dangerous" mean. Mr. Humpherys suggested deleting the last paragraph of the comment. Mr. Young suggested adding a cross-reference to the alternative instruction instead. The committee also deleted *or lack of instructions or warnings* from the second subparagraph (1). At Ms. Brown's suggestion, the second sentence of the committee note was revised to read that no Utah appellate court has considered whether a safer alternative design must be proved. At Mr. Simmons's suggestion, the sentence was further revised to say that the Tenth Circuit has required this element (not that it has "recognized this element as essential"). At Ms. Brown's suggestion, the second reference to *Brown v. Sears, Roebuck* in the References section was deleted.

4. *1004. Strict liability. Definition of "manufacturing defect" and "unreasonably dangerous."* The committee revised instruction 1004 to track the changes to instruction 1003. Mr. Shea asked whether the term *manufacturer's* in the first line should be *designer's*. Mr. Fowler noted that the instructions say to substitute the appropriate term for *manufacturer,* depending on the facts of the case. Mr. Fowler noted that, under MUJI 12.2, the injury has to arise from a foreseeable use of the product. He thought this concept should be included in instruction 1004. Mr. Humpherys thought the first sentence was confusing because it could allow the jury to find a manufacturing defect where the product complied with specifications. The first paragraph was revised to read:

> The [product] had a manufacturing defect if it
>
> [(1) differed from the manufacturer's design or specifications]
>
> [(2) differed from products from the same manufacturer that were intended to be identical.]

Dr. Di Paolo asked whether *actual* was needed before *knowledge* in the last subparagraph, or whether it could be revised to read "did not have enough knowledge . . . to know . . . ." Mr. Simmons thought that *actual* was used to distinguish the knowledge from constructive knowledge. Mr. Humpherys suggested "enough actual knowledge." Dr. Di Paolo thought that

jurors would not understand the phrase, but Judge Barrett thought that if it allowed the attorneys to argue the difference between actual and constructive knowledge and did not confuse the jury, it was worth maintaining. The committee debated whether *sufficient* was in the right place. Mr. Fowler suggested changing *[name of plaintiff]* in the last subparagraph to *[name of user]*. He noted that it may not be the plaintiff's knowledge that is at issue; it could be the knowledge of the plaintiff's decedent or other user.

5. *1005. Strict liability. Elements of claim for failure to adequtely warn.* Dr. Di Paolo thought the instruction was unclear. She was was not sure whether subparagraphs (2) and (3) were meant to define subparagraph (1). Mr. Humpherys noted that the adequacy of a warning and the lack of a warning at the time of sale were separate issues. The committee reserved further discussion of instruction 1005 till the next meeting.

6. *Next Meeting.* The next meeting will be Monday, March 12, 2007, at 4:00 p.m.

The meeting concluded at 6:00 p.m.

MINUTES
Advisory Committee on Model Civil Jury Instructions
March 12, 2007
4:00 p.m.

Present: John L. Young (chair), Honorable William W. Barrett, Jr., Juli Blanch, Francis J. Carney, Marianna Di Paolo, Jonathan G. Jemming, Colin P. King, Timothy M. Shea, Paul M. Simmons, and Kamie F. Brown

Excused: Tracy H. Fowler

The committee continued its review of the products liability instructions.

1. *1003. Strict liability. Definition of "design defect" and "unreasonably dangerous."* Mr. Simmons proposed an alternative to subparagraph (2) of the definition of design defect, which Mr. Shea thought was more easily understood. Ms. Brown insisted that the definition include the concepts of technical and economic feasibility and availability. Mr. Simmons thought these concepts were not required in every case and were best left for argument. Mr. Young thought that jurors would not understand the phrase "practicable under the circumstances." At Mr. Shea's suggestion, instruction 1003 was divided into two instructions: 1003 (definition of "design defect") and 1005 (definition of "unreasonably dangerous"). Subparagraph (2) of the instruction 1003 was revised to read:

> [(2) at the time the [product] was designed, a safer alternative design was available that was technically and economically feasible under the circumstances.]

As modified, the instruction was approved.

Mr. King joined the meeting.

2. *[New] 1005. Strict liability. Definition of "unreasonably dangerous."* Mr. Simmons proposed an alternative instruction based on Utah Code Ann. § 78-15-6(2). Dr. Di Paolo asked what the difference was between alternative A and alternative B. Ms. Brown, Mr. Shea, and Mr. Simmons explained that under alternative A the jury considers the product's characteristics and the user's knowledge separately, and, if the user knew or should have known of the dangers associated with the product, it is not unreasonably dangerous as a matter of law; the user's knowledge can only work against him and never help him. Under alternative B, the jury considers all of the factors listed, but it is up to the jury to decide what weight or effect to give them; the user's knowledge of a product does not necessarily mean that the product was not unreasonably dangerous. Dr. Di Paolo thought that alternative B was not as understandable as alternative A. At Dr. Di Paolo's suggestion, the phrase *that were* was added to subparagraph (1) of alternative A between *uses* and *foreseeable*. The introductory phrase to each alternative was revised to read, "A [product] with a [design/manufacturing] defect was unreasonably dangerous if . . ." Mr. King moved to reverse the order of the alternatives, placing alternative B (the statutory definition) first. Mr. Simmons and Mr. Carney seconded the motion. Ayes: Messrs.

Young, Carney, King, and Simmons. Nays: Ms. Blanch, Dr. Di Paolo, and Ms. Brown. The motion carried. The instruction was approved as modified.

Mr. Shea will add a statement to the introduction to the effect that the order of alternative instructions is not meant to be significant.

3. *1004. Strict liability. Definition of "manufacturing defect."* The alternatives were taken out of instruction 1004 and are now covered by instruction 1005. As so modified, the instruction was approved.

Mr. Shea will divide up the references and advisory committee notes to correspond to the new instructions 1003, 1004, and 1005.

4. *[New] 1006. Strict liability. Elements of claim for failure to adequately warn.* Dr. Di Paolo thought that subparagraph (2) was awkward. Mr. Carney suggested replacing *at the time* in subparagraph (2) with *when.* Mr. Simmons suggested revising it to say, "the product had an inadequate warning when it was [manufactured/distributed/sold]." Mr. King suggested combining subparagraphs (1) and (2).

Mr. Jemming joined the meeting.

At Mr. Shea's suggestion, the phrase *of a danger involved in its foreseeable use* was dropped from the introductory paragraph. Mr. Shea asked whether the instruction should be revised to cover inadequate instructions as well as inadequate warnings. The committee thought that a sentence could be added to the advisory committee notes to the effect that the terms *instruct* and *instructions* could be substituted for *warn* and *warnings* in an appropriate case. Mr. Carney thought that the last paragraph of the instruction was argument and should not be included. Mr. King and Mr. Simmons agreed. Mr. Young questioned whether it stated a specific defense for failure-to-warn cases. Ms. Brown thought so. Mr. King pointed out that it was not an affirmative defense but simply negated an element of the plaintiff's prima facie case (causation) and therefore did not justify an instruction, since the jury will have already been instructed on the elements of a prima facie case. The paragraph was deleted from instruction 1006, with the understanding that the committee could revisit the issue later. At Mr. Simmons's suggestion, a sentence was added to the end of the instruction. The revised instruction reads:

> [Name of plaintiff] claims that [he] was injured by a [product] that was defective and unreasonably dangerous because it lacked an adequate warning. You must decide whether:
>
> (1) [name of defendant] failed to provide an adequate warning at the time the product was manufactured;

> (2) the lack of an adequate warning made the [product] defective and unreasonably dangerous; and
>
> (3) the lack of an adequate warning was a cause of [name of plaintiff]'s injuries.
>
> I will now explain what the terms "defective" and "unreasonably dangerous" mean.

Judge Barrett joined the meeting.

5. *1006 [new 1007]. Strict liability. Failure to warn. Definition of adequate warning and defect.* Ms. Brown circulated a new proposed instruction 1006 defining an inadequate warning. The elements were taken from *House v. Armour of America.* Mr. Carney noted that *House* was quoting a federal case and that the committee was not limited to the exact language from *House.* Ms. Blanch suggested that the phrase *justified by the magnitude of the danger* be replaced with *commensurate with the danger.* Mr. Carney suggested *proportionate to the danger.* Dr. Di Paolo suggested *equal to* or *matches* or *that corresponds to the level of the danger.* At Mr. King's suggestion, *designed so that it can* was deleted from subsection (1), and *consumer* was replaced with *user.* Mr. Carney suggested deleting *be comprehensible and* from subsection (2), since if a warning was not comprehensible it would not give a fair indication of the danger involved. Mr. Young suggested replacing *comprehensible* with *reasonably understandable.* Mr. Carney suggested the following language, taken from a monograph explaining Nevada warning law:

> To be adequate, a warning must catch the user's attention, be understandable, indicate the specific risks of using the product, and be sufficiently intense to match the magnitude of the risk.

Ms. Brown wanted to review the proposed language and compare it with *House* before approving it. Mr. King asked how the California model instructions handled the adequacy of a warning. Mr. Shea and Mr. Carney noted that California does not have a specific instruction explaining how to determine the adequacy of a warning. Dr. Di Paolo asked what the phrase *members of the community who use the product* in the second paragraph meant. She suggested alternatives: *who ordinarily use the product, foreseeable users of the product,* or *expected users of the product.* Mr. Carney noted that the concept was that a manufacturer does not have to warn the whole world but only those likely to come in contact with the product. He suggested *people who use the product.* Dr. Di Paolo thought that *people* was too broad. Dr. Di Paolo suggested making the second paragraph element (4), but Ms. Brown noted that it modifies elements (1) through (3) and needs to stand alone. Mr. Simmons suggested revising the third paragraph to read, "A product that has an inadequate warning is defective," since a defective product (not a defective warning)

is an element of the claim. At Mr. Jemming's suggestion, the order of the paragraphs was reversed, so the instruction now reads:

> A product that has an inadequate warning is defective.
>
> The adequacy of the warning given must be judged in light of the ordinary knowledge common to foreseeable users of the product.
>
> To be adequate, a warning must catch the user's attention, be understandable, indicate the specific risks of using the product, and be sufficiently intense to match the magnitude of the risk.

Ms. Blanch thought the instruction was misleading because it did not address other elements of the claim, such as causation. Mr. Simmons pointed out that the instruction was not meant to state the elements of the claim but just to define one of those elements (an inadequate warning that makes the product defective). The elements are explained in new instruction 1006.

> **Mr. Shea will revise the instruction in light of the committee's discussion, and the committee will review the revised instruction at a later meeting.**

6. *1007 [new 1008]. Strict liability. Failure to warn. Definition of unreasonably dangerous.* Ms. Brown circulated a new proposed instruction 1007 defining "unreasonably dangerous" in a failure-to-warn claim. Several committee members thought that the phrase *beyond that which would be contemplated* in the subparagraph (1) was awkward. Mr. King suggested deleting *characteristics or* from that subparagraph. Mr. Carney suggested substituting *a danger from the product's foreseeable use* or *unexpected danger.* Mr. King noted that the concept was that the danger must be greater than an ordinary person would know about. Mr. Young and Dr. Di Paolo suggested *involved with the product's foreseeable use that a reasonable user would not expect.* Mr. Jemming noted that the danger may not arise from the use of the product but from its storage or mere presence, such as asbestos or some other product that emits toxins. Mr. King and Mr. Carney suggested *involved with the product* (or *involved with the product or its foreseeable use).* Ms. Brown, Mr. Young, Mr. King, and Mr. Jemming thought it was important to include the concept of foreseeable use. Dr. Di Paolo asked whether one harmed by the mere presence of a product is a "user" of the product. Ms. Brown thought that *user* would be the proper term for most cases, but the advisory committee note could mention that *user* may have to be replaced with another term in certain cases. Mr. Simmons thought that subparagraph (2) was not part of the definition of "unreasonably dangerous." As the elements are stated, the product must be both "defective" and "unreasonably dangerous," and, under new proposed instruction 1007, the inadequacy of the warning goes to defect, not unreasonable danger. In other words, the jury must first determine whether the warning was inadequate. If it

was, the product was defective. It then must determine whether the inadequacy of the warning made the product unreasonably dangerous. For the second step, it should not have to determine the adequacy of the warning again. Mr. Carney asked why a separate definition of "unreasonably dangerous" for failure-to-warn cases was even necessary when there is a statutory definition of "unreasonably dangerous." Mr. Simmons noted that some subcommittee members thought the instruction was unnecessary for that very reason. What instruction 1007 adds is that the manufacturer must have known or should have known of the danger he was required to warn of. Also, there may need to be alternative instructions, along the lines of new instruction 1005, in light of the Tenth Circuit's decision in *Brown* interpreting the Utah statute. The committee deferred further discussion of instruction 1007 till a later meeting.

7. *Next Meeting.* The next meeting will be Monday, April 9, 2007, at 4:00 p.m.

The meeting concluded at 6:00 p.m.

MINUTES
Advisory Committee on Model Civil Jury Instructions
April 16, 2007
4:00 p.m.

Present: Honorable William W. Barrett, Jr., Francis J. Carney, Phillip S. Ferguson, Tracy H. Fowler, Colin P. King, Timothy M. Shea, and Paul M. Simmons

Excused: John L. Young (chair)

1. Mr. Shea circulated with the meeting materials a revision of the introduction that included a new paragraph explaining why alternative instructions were sometimes included. The committee approved the new paragraph.

2. The committee then continued its review of the products liability instructions.

a. *1007. Strict liability. Definition of "adequate warning."* Mr. Shea had rewritten this instruction in light of the article on Nevada law regarding the adequacy of warnings discussed at the last meeting. Mr. Simmons noted that the law the Nevada Supreme Court relied on was identical to the law quoted by the Utah Court of Appeals in *House v. Armour of America*, 8886 P.2d 542, 551 (1994). Messrs. Ferguson and Fowler thought the first element (that the warning "catch the user's attention") was misleading. The warning may not catch the user's attention for reasons that do not have to do with the adequacy of the warning. This element was changed to read, "(1) be designed to reasonably catch the user's attention." Mr. Ferguson thought the phrase "ordinary knowledge common to foreseeable users" in the second element was cumbersome. At Mr. Shea's suggestion, the second element was revised to read, "(2) be understandable to foreseeable users." Mr. Ferguson thought that the third element was misleading in that it suggested that a manufacturer may have a duty to warn about dangers that could arise from unforeseeable uses of its product. He suggested changing it to read, "(3) identify dangers from the [product]'s foreseeable use." Mr. Carney suggested revising it to read simply, "(3) identify the specific danger." The committee noted that the phrase "identify the specific danger from the [product] or from its foreseeable use" was meant to require warnings for products that could be dangerous without being used and those that were only dangerous when used; it was not meant to require warnings of dangers that arose only from unforeseeable uses. Mr. King noted that "hazard," "risk," and "danger" were sometimes used interchangeably and suggested that we use one term consistently. Mr. Shea noted that the instructions use "danger." Mr. Shea asked whether the third element should say "identify" or "indicate." The committee did not have a strong preference for one word over the other. Based on the authority cited for the instruction, the third element was revised to read, "(3) fairly indicate the danger from the [product] or its foreseeable use." Mr. Fowler thought that the word "intense" in the fourth element was inapt. At his suggestion, it was changed to "conspicuous." At Mr. Ferguson's and Mr.

Shea's suggestion, the last paragraph of the instruction was deleted, and the third paragraph was made new instruction 1008.

b. *1008 [renumbered 1009]. Strict liability. Definition of "unreasonably dangerous" in failure-to-warn cases.* Mr. Ferguson asked whether the instruction should say that a product "was" unreasonably dangerous or "is" unreasonably dangerous. Mr. Shea noted that he had tried to use the past tense throughout the instructions because it fit better in most cases. Mr. Shea noted that alternative A was the regular instruction on "unreasonably dangerous," based on Utah Code section 78-15-6(2); the first paragraph of alternative B was based on the Utah Supreme Court's decision in *House*, 929 P.2d 340 (Utah 1996), and the second paragraph was based on *Brown v. Sears, Roebuck & Co.*, 328 F.3d 1274 (10th Cir. 2003). Mr. King questioned the need for a separate definition of "unreasonably dangerous" for failure-to-warn cases. Mr. Fowler noted that, if *House* established a new standard for failure-to-warn cases, the instruction did not capture it because the instruction was not substantially different from instruction 1005. Mr. King proposed doing away with instruction 1008 and having a single instruction (1005) defining "unreasonably dangerous." The phrase "[or inadequate warning]" could be added to the introductory sentences of alternatives A and B in instruction 1005.

Mr. Shea will revise instruction 1005, and the committee will review the revised version and compare it to instruction 1008 at the next meeting.

c. *1009. Strict liability. Failure to warn. Heeding presumption.* Judge Barrett questioned whether jurors would understand the word "heeding." The committee noted that the presumption is referred to as the "heeding presumption" in the case law but suggested synonyms for "heeded," including "followed" and "obeyed." Mr. King noted that he agreed with the substance of the instruction but questioned whether it needed to be given at all since the issue rarely comes up. Mr. King also suggested revising the first sentence of the advisory committee note to say, "This instruction is appropriate only if it cannot be demonstrated what the plaintiff would have done if he had been adequately warned." Mr. Simmons thought that a plaintiff should have the benefit of the presumption where he could not say what he would have done, since he had been deprived of the opportunity to know what he would have done by not having been given an adequate warning; any testimony as to what the plaintiff would or would not have done would be speculative. Other committee members thought that if the plaintiff could not say what he would have done, he could not meet his burden of proof and that the presumption only applied where the plaintiff was unable to say what he would have done because of the nature of his injuries (such as where he had lost his memory or was dead). Mr. Shea noted that the instruction required "some extreme mental gymnastics" because of its structure--three conditional "if" clauses, one of which negates the other two. Mr. Carney questioned whether the first clause was necessary. Mr. King suggested revising

the instruction to read, "You can presume that if [name of defendant] had provided an adequate warning, [name of plaintiff] would have heeded it." Mr. Fowler noted that that version assumes that the warning was not adequate. Mr. Shea suggested revising the instruction to read, "If you find that [name of defendant] did not provide an adequate warning, you can presume that [name of plaintiff] would have followed an adequate warning." Mr. King suggested another alternative: "In this case, there is no evidence of what the plaintiff would have done if [name of defendant] provided an adequate warning. Therefore, you should presume that [name of plaintiff] would have followed an adequate warning." Mr. Ferguson asked whether there were other instructions that explained to the jury what a presumption was and its effect. Committee members were not aware of any. Mr. Simmons noted that the law is not clear on the effect of a presumption. He read passages from *House v. Armour of America*, 886 P.2d 542, 552 (Utah Ct. App. 1994), which says the heeding presumption "shifts the plaintiff's burden on causation," and from *Mecham v. Allen*, 1 Utah 2d 29, 262 P.2d 285, 290-91 (1953), which suggests that a presumption meets the plaintiff's burden of establishing a prima facie case but disappears when contrary evidence is presented. He concluded from these cases that the effect of the presumption may vary, depending on whether the presumption just establishes a prima facie case, in which case it disappears as soon as the other side comes forward with contrary evidence, and the jury should not be instructed on the presumption, or whether it shifts the burden of proof, in which case, the jury should probably be instructed on the changed burden of proof. Mr. King suggested that the committee re-read the two decisions in *House v. Armour of America*, 886 P.2d 542 (Utah Ct. App. 1994), and 929 P.2d 340 (Utah 1996), before the next committee meeting.

3. *Next Meeting.* The next meeting will be Monday, May 14, 2007, at 4:00 p.m.

The meeting concluded at 6:00 p.m.

MINUTES
Advisory Committee on Model Civil Jury Instructions
May 21, 2007
4:00 p.m.

Present: Juli Blanch, Francis J. Carney, Marianna Di Paolo, Phillip S. Ferguson, Tracy H. Fowler, L. Rich Humpherys, Colin P. King, Timothy M. Shea, Paul M. Simmons, and John L. Young (chair). Also present: Kamie F. Brown and John A. Anderson

1. *Committee Members*. Mr. Young noted that the committee will be losing two of its members--Paul M. Belnap and Ralph L. Dewsnup--who will be leaving to preside over missions for the Church of Jesus Christ of Latter-day Saints. Mr. Young asked committee members to come to the next meeting with suggestions for attorneys who could replace Messrs. Belnap and Dewsnup on the committee. The new members do not necessarily have to have the same specialties as Messrs. Belnap and Dewsnup and do not necessarily have to take over their subcommittee assignments as well.

2. *Summer Schedule*. The committee agreed to cancel the meetings scheduled for July 9 and August 13, 2007. The June 11 meeting will be held as planned. The next meeting after that will be September 10, 2007.

3. *Products Liability Instructions*. Mr. Fowler introduced Mr. Anderson, who serves on the products liability subcommittee. The committee continued its review of the products liability instructions. Mr. Fowler and Ms. Brown distributed proposed revisions to instructions 1006 through 1010:

a. *1006. Strict liability. Duty to warn*. Mr. Fowler and Ms. Brown thought that a preliminary instruction was necessary so that the jury could first determine whether a warning was even necessary under the facts of the case, before determining whether any warning was adequate. Mr. Ferguson and Mr. Simmons questioned whether the jury should be instructed on the "duty to warn," since the question of duty is a question of law for the court to decide. Mr. Fowler thought that it was a mixed question of law and fact and that the jury may need to find the underlying facts giving rise to a duty to warn. Mr. Young asked whether the instruction was appropriate only where the defendant had failed to provide a warning, since, if the defendant provided a warning, he may have implicitly acknowledged that he had a duty to warn. Mr. Young suggested adding a committee note saying that the instruction should not be given if a warning was in fact given.

Mr. Fowler will draft a proposed committee note saying that the court should consider whether the parties' claims and the facts of the case require the instruction.

Mr. Carney asked what the difference was between a danger "from the product" and one "from its foreseeable use." The committee thought that "foreseeable use" was sufficient to cover all dangers for which a warning is required.

Mr. Shea will review other instructions to see that they are worded consistently.

At Dr. Di Paolo's suggestion, as modified by the committee, the instruction was revised to read:

> . . . You must first decide if [name of defendant] was required to provide a warning.
>
> a. [Name of defendant] was required to warn about a danger from the [product]'s foreseeable use of which [he] knew or reasonably should have known and that a reasonable user would not expect.
>
> b. [Name of defendant] was not required to warn about a danger from the foreseeable use of the [product] that is generally known and recognized.

Mr. Carney asked whether the phrase "generally known and recognized" was necessary. The committee thought it was. Mr. Carney then suggested shortening the phrase to "generally known." Dr. Di Paolo thought that this was a case where redundancy was not bad and that saving two words may not make the instruction more understandable to jurors. Mr. Humpherys asked whether there was a difference between the concepts of foreseeability and expectation in subparagraph a. The committee thought there was and that the terms were used appropriately in subparagraph a ("foreseeable" for the defendant and "expect" for the user).

b. *1007. Strict liability. Elements of claim for failure to adequately warn.* Mr. Fowler noted that new instruction 1007 was the same as the former instruction 1006 except for the first sentence, which is now covered by the first sentence of new 1006. The committee approved the instruction.

c. *1008. Strict liability. Definition of "adequate warning."* Mr. Fowler and Ms. Brown added a sentence to the end of the instruction that reads: "The overall adequacy of the warning given must be judged in light of the ordinary knowledge common to members of the community who use the product." Dr. Di Paolo thought that this sentence should precede the elements of

an adequate warning. Mr. Humpherys expressed concern that it gave the jury an out to find a warning inadequate that met all of the elements of an adequate warning. Mr. Young questioned whether the last sentence contradicted the statute (Utah Code Ann. § 78-15-6(2)), which makes the user's subjective knowledge relevant. Ms. Brown pointed out that the statute defines "unreasonably dangerous," whereas this instruction is meant only to explain how the jury is to judge the adequacy of a warning. Mr. Anderson thought that the instruction on the adequacy of a warning should also incorporate the user's knowledge. Mr. Simmons disagreed. He pointed out that, under the statute and the Tenth Circuit's interpretation of the statute, the user's subjective knowledge goes only to whether a product was unreasonably dangerous, which is covered in another instruction (1005). It is not a hurdle that the plaintiff should have to jump over twice. Mr. Anderson conceded that he did not have any authority for his position. Mr. Humpherys thought that the user's knowledge is best handled as part of the causation analysis. Mr. Young noted that the user's knowledge is also covered in the instruction on the sophisticated user defense (1049), which he thought would be given in every case where the effect of the user's knowledge was an issue. Mr. Humpherys agreed. Mr. Anderson pointed out that it is the plaintiff's burden to show that a warning was not adequate, and the sophisticated user defense is an affirmative defense on which the defendant has the burden of proof. Dr. Di Paolo noted that the last sentence of 1008 was inconsistent with a sophisticated user defense. Mr. Ferguson noted that the test for the adequacy of a warning cannot be a subjective test, or no warning could be found adequate.

Mr. Anderson will propose a comment stating his view that it may be appropriate to instruct on the user's subjective knowledge of the product's dangers in a particular case.

Mr. Humpherys pointed out that the instruction could be misread as requiring the defendant to prove that a warning was adequate, not as requiring the plaintiff to prove that a warning was inadequate. After further discussion the instruction was revised to read:

> A [product] with an adequate warning is defective.
>
> A warning is inadequate if, in light of the ordinary knowledge common to members of the community who use the product, it:
>
> (1) was not designed to reasonably catch the user's attention;
>
> (2) was not understandable to foreseeable users;

(3) did not fairly indicate the danger from the [product]'s foreseeable use; or

(4) was not sufficiently conspicuous to match the magnitude of the danger.

Mr. Fowler noted that he and Ms. Brown had also added a new paragraph to the end of the advisory committee note.

d. *1009. Strict liability. Failure to warn: Heeding presumption (presumption in favor of plaintiff).* Mr. Fowler noted that the instruction tells the jurors that in the right circumstances they can presume that an instruction would have been read and heeded. Mr. Carney asked whether there was a general instruction on presumptions. (There is not.) Mr. Shea asked whether the instruction should indicate that it is only to be used where there is no evidence going to the issue of whether the plaintiff would have read and heeded a warning. Mr. Fowler thought the committee note covered that. Mr. King noted that the presumption gives plaintiffs a disincentive to put on relevant but weak evidence as to whether the plaintiff read and heeded warnings. Mr. Humpherys asked if the presumption would apply where there was conflicting evidence. Mr. Fowler and Ms. Brown noted that the effect of the presumption is to substitute for evidence, and if there is any evidence, then there is no presumption. Mr. Humpherys asked whether a plaintiff could still rely on the presumption if he chose not to put on evidence in his case-in-chief but rebutted the defendant's contrary evidence. Mr. King thought that the first paragraph of the note was confusing. At Mr. Simmons's suggestion, the phrase "In that case," was added to the beginning of the second sentence of that paragraph.

Mr. Shea will revise the note to try to eliminate the phrase, "Some members of the subcommittee do not believe . . ."

Mr. Simmons asked whether the jury is instructed on the effect of a presumption (that is, what it means to say, "You can presume . . ."). Mr. Fowler and Ms. Brown thought it may be impractical to do so since the effect of a presumption may vary. Mr. Shea asked whether we needed a separate instruction on the learned intermediary doctrine (discussed in the second paragraph of the note). The committee noted that there is little Utah law on the subject. Mr. Simmons asked whether, where no warning is given to a learned intermediary, there should be a presumption that the learned intermediary would have read the warning and passed it on to his patient, particularly where the learned intermediary may not

be available to testify. Mr. King thought that direct advertising of prescription drugs to consumers has undermined the learned intermediary doctrine.

e. *1010. Strict liability. Failure to warn: Presumption that warning will be read and followed (presumption in favor of defendant).* The phrase "you are instructed that" was deleted from the first sentence, and a typographical error (*it* for *if)* was corrected in the second sentence. Messrs. King and Simmons thought that *adequate* should be added before *warning*. They thought no presumption should arise if the warning was not likely to have been seen and understood (for example, because it was too small, in the wrong place, or in the wrong language). Mr. Fowler and Ms. Brown thought that if the warning was adequate, there would be no need for the presumption because there would be no liability. But the adequacy of the warning will generally be a question of fact for the jury to decide. They noted that the instruction tracks the language of comment *j* to Restatement (Second) of Torts § 402A. Messrs. Humpherys, King, and Simmons thought the instruction could confuse the jury. For example, Mr. Humpherys noted, a literal reading of the instruction would allow the jury to presume that a warning would be read and followed even though the warning was so general as to be useless (e.g., "Don't do anything dumb."). Mr. Humpherys also questioned whether a comment should be added similar to the comment to 1009 that the instruction should not be given if there is any evidence going to the issue. Mr. King asked in what circumstances the instruction would be given. He thought that once the plaintiff introduces evidence of the inadequacy of any warning, the jury should not be instructed on any "reading" presumption. Mr. Anderson agreed that it would apply in only limited circumstances, but he thought it would apply where, for example, a manufacturer warns about X and Y but not about Z, and the accident could have been prevented if the plaintiff had read and heeded the warning about X and Y. Mr. Young suggested that the instruction needs an extensive committee note. He thought there was a significant question as to whether it should even be included in the products liability instructions. Mr. Ferguson suggested combining instructions 1009 and 1010. Dr. Di Paolo agreed that the instructions were confusing. She thought that jurors would not understand the relationship between instruction 1008 and 1010 and would argue over which one should govern. The committee reserved further discussion on instruction 1010 for a later meeting.

4. *Next Meeting*. The next meeting will be Monday, June 11, 2007, at 4:00 p.m.

The meeting concluded at 6:15 p.m.

MINUTES
Advisory Committee on Model Civil Jury Instructions
June 11, 2007
4:00 p.m.

Present: Honorable William W. Barrett, Jr., Juli Blanch, Francis J. Carney, Marianna Di Paolo, Tracy H. Fowler, Jonathan G. Jemming, Timothy M. Shea, Paul M. Simmons, David E. West, and John L. Young (chair). Also present: Kamie F. Brown

Excused: Paul M. Belnap, Ralph L. Dewsnup, and Colin P. King

1. *Committee Meetings*. Mr. Young referred to his e-mails to the committee of May 22 and 27, 2007, which reminded committee members to provide proposed instructions and related materials to Mr. Shea at least 10 days before committee meetings and established a format for the participation of subcommittee members in committee meetings. He emphasized that debates over the substantive law should be resolved in subcommittee meetings whenever possible so that the full committee can focus on the language of the instructions.

2. *Products Liability Instructions*. The committee continued its review of the products liability instructions.

a. *1005. Strict liability. Definition of "unreasonably dangerous."* Mr. West said that he was troubled by alternative B, which says that a product is not unreasonably dangerous if the user knew about the danger. He thought it conflicted with instruction 1054 on assumption of risk. He noted that an employee may be required to use what he knows is a dangerous product but have no choice in the matter. He did not think the product manufacturer should be relieved from liability in that situation. Mr. Carney did not think alternative B could be the law. Otherwise, a manufacturer that built a car with no seatbelts and no brakes could not be liable for putting a defective product on the market. Mr. Young noted that there was apparently no dispute over alternative A, which tracks the statute (Utah Code Ann. § 78-15-6(2)), and alternative B accurately restates the Tenth Circuit's interpretation of the statute in *Brown v. Sears, Roebuck & Co.,* 328 F.3d 1274 (2003). He suggested approving the instruction and letting the courts decide whether to use alternative A or alternative B. Ms. Blanch moved to approve instruction 1005; Judge Barrett seconded the motion. The motion passed, with Judge Barrett, Ms. Blanch, Mr. Jemming, Dr. Di Paolo, and Mr. Fowler voting in favor of it, and Messrs. Carney and West opposing the motion. Mr. Young suggested adding a committee note to the effect that the committee was not unanimous that alternative B should be given and that some members thought it was inconsistent with the assumption of risk instruction. Ms. Blanch thought that to do so would make a new precedent, that the mere fact of alternative instructions shows that the committee could not agree on a single instruction. Mr. Young thought it would still be helpful to note the disagreement over alternative B. Mr. Fowler noted that not all committee members agreed that

alternative A was a correct statement of the law. Mr. Shea recommended against including the committee vote in any note. Ms. Brown noted that no explanation was given for the alternatives in instruction 1003 other than to explain the difference between the alternatives. The committee ultimately concluded that the general explanation in the introduction to the instructions about why some instructions have alternatives was sufficient.

b. *1008. Strict liability. Definition of "adequate warning."* John Anderson of the products liability subcommittee was going to propose a comment for instruction 1008 stating his view that it may be appropriate to instruct on the user's subjective knowledge of the product's dangers in a particular case. The committee deferred further discussion of the instruction until Mr. Fowler can check with Mr. Anderson to see if he still intends to propose a committee note. The instruction was later approved, subject to the addition of any note. (*See* ¶ 2.d, *infra.)*

c. *1009. Strict liability. Failure to warn. Presumption that a warning would have been read and followed.* Mr. Carney thought the committee note (that says the instruction is appropriate only if it cannot be demonstrated whether the injured party would have read and followed a warning) was an incorrect statement of the law. He noted that the *House* opinion cited, as authority for the note, does not say that it only applies where the plaintiff is not available to testify. (The citation in the note to *House* was corrected to cite to the court of appeals' decision in that case, not the supreme court decision.) *House* cited a New Jersey case where the plaintiff was alive and well. Mr. Carney reviewed an A.L.R. annotation (38 A.L.R.5th 683) that cites cases in which the presumption applied even where the plaintiff had testified. Mr. Jemming suggested revising the note to read, "This instruction is appropriate when [rather than "only if"] it cannot be demonstrated . . ." Mr. Shea suggested changing "it cannot be demonstrated" to "it is not demonstrated." Mr. Fowler thought the note was vague. Mr. Simmons thought the second sentence of the note was misleading, since it suggests that the injured party only has the burden of proof when he can testify, and should be deleted. He further suggested deleting the whole first paragraph of the note. Dr. Di Paolo was not comfortable with the instruction itself. The first sentence says the jury can make the presumption, but the second sentence suggests there are circumstances when it cannot. At Mr. Simmons's suggestion, the instruction was revised to read:

> You can presume that if [name of defendant] had provided an adequate warning, [name of plaintiff] would have read and followed it unless the evidence shows that [name of plaintiff] would not have read or followed such a warning.

Mr. Simmons expressed concerns about whether a heeding presumption should apply in the case of a learned intermediary, a situation addressed in the second paragraph of the committee note. At Mr. Young's suggestion, the last three sentences of the committee note were deleted.

d. *1010. Strict liability. Failure to warn. Presumption that a warning will be read and followed.* Dr. Di Paolo asked how instructions 1009 and 1010 were related. Mr. Fowler explained that 1009 is a presumption in favor of the plaintiff, whereas 1010 is a presumption in favor of the defendant. Dr. Di Paolo asked whether they could both be given in the same case. The committee thought not, since the heeding presumption (1009) arises where an adequate warning is *not* given, and the so-called reading presumption (1010) arises where an adequate warning *is* given. Mr. West and Mr. Simmons thought the last sentence of the instruction was misleading, since a product may still be defective in manufacture or design, even if it contains an adequate warning. Ms. Brown suggested adding "for failure to warn" to the end of the sentence. Ms. Blanch suggested revising it to say that a product "cannot be defective on the basis of a failure to warn; however, it can still be defective based on a manufacturing or design defect." Mr. Young asked whether the clarification would be better handled by a committee note. He also suggested revising the last sentence to read, "With respect only to plaintiff's claim of failure to warn, a [product] that contains an adequate warning is not defective or unreasonably dangerous." At Mr. Shea's suggestion, the sentence was deleted from instruction 1010 and moved to the beginning of instruction 1008 (defining "adequate warning"). Mr. West and Mr. Simmons thought that merely moving the sentence to 1008 did not satisfy their concerns. As modified, instruction 1008 was approved, subject to the subcommittee submitting a further comment.

Based on a staff note, Mr. Simmons thought that instruction 1010 was unnecessary. The instruction says that a seller who gives a warning may presume that it will be read and followed. The presumption goes to the issue of causation (whether the plaintiff should have read and followed a warning that was given). A product that contains an adequate warning is not defective, so the jury does not have to reach the question of causation (i.e., it does not have to decide whether the plaintiff should have read and followed the warning) if it finds that an adequate warning was given. Mr. Fowler thought the instruction was necessary because a form of it was included in MUJI 1st, and it is taken from comment *j* to Restatement (Second) of Torts § 402A. In addition, Mr. Simmons's argument only applies if the warning must be adequate for the presumption to apply, and Mr. Fowler did not think that the adequacy of the warning is a prerequisite for the presumption to apply. Mr. Simmons disagreed that a so-called reading presumption arises where the warning is inadequate, that is, where it is not

reasonably calculated to catch the user's attention. Mr. Young suggested that the subcommittee review the issue further.

e. *1013. Strict liability. Defective condition of FDA approved drugs.* The first sentence was revised to read, "If a drug product conformed with the United States Food and Drug Administration (FDA) standards . . . ." Mr. Simmons noted that the presumption only applies to design claims and suggested revising the last part of the sentence to read, "the product is presumed to be free of any design defect." Ms. Brown suggested, "the product is not defectively designed." Dr. Di Paolo suggested, "the product is free of any design defect." Mr. Simmons asked what the effect of the presumption was. If it is a rebuttable presumption, then the instruction should not say that the product is free from any design defect because the plaintiff may be able to rebut the presumption. Mr. Young suggested revising the next sentence to read, "However, [name of plaintiff] may still prove that the product was defective and unreasonably dangerous due to a manufacturing defect or an inadequate warning." Dr. Di Paolo questioned whether the second sentence was necessary. Mr. Carney asked what the source of the instruction was--a statute or case law. The committee agreed that the instruction was based on *Grundberg v. Upjohn Co.,* 813 P.2d 89 (Utah 1991), and not on any statute. Mr. Carney did not think that the FDA approval process was adequate to warrant the presumption.

f. *1014. Strict liability. Defect not implied from injury alone.* Mr. Young asked if anyone was in favor of keeping instruction 1014. Ms. Blanch and Mr. Fowler were. They thought that there was a significant difference between a strict products liability claim and a negligence claim such as the claims involved in *Green v. Louder,* 2001 UT 62, 29 P.3d 638, and *Randle v. Allen,* 862 P.2d 1329 (Utah 1993), in which the Utah Supreme Court disapproved of nearly identical instructions. They thought that lay people are more likely to infer a product defect from the mere happening of an accident than they are to infer negligence. Mr. Simmons noted that the Liability Reform Act treats both negligence and strict products liability as "fault." He read from *Green,* in which the supreme court said, "we explicitly direct trial courts to abandon the use of this instruction ['The mere fact that an accident or injury occurred does not support a conclusion that the defendant or any other party was at fault or was negligent.'] hereafter." Mr. Young thought that the court's reasoning in *Green* applied equally to negligence and products liability claims. (Mr. Jemming was excused.) Mr. West moved to delete instruction 1014. Mr. Simmons seconded the motion. The motion carried, with Messrs. Carney, Simmons, and West voting to delete the instruction, and Mr. Fowler voting to keep it.

g. *1046. Prefactory comment*. This instruction was deleted. It is now covered by the comment to instruction 1001.

h. *1049. Sophisticated user*. Mr. Simmons thought the instruction was inconsistent with the Tenth Circuit opinion in *Brown v. Sears, Roebuck*. Mr. Young questioned whether the instruction would be given if the court gave alternative B of instruction 1005. Messrs. Simmons and West thought that the knowledge or sophistication of the user should be part of the comparative fault equation and not a complete defense. But Mr. Simmons conceded that the *House* opinion said that there was no duty to warn a sophisticated user. At the suggestion of Dr. Di Paolo and Mr. Shea, the instruction was revised to read:

> In this case, [name of defendant] claims that [name of plaintiff] was a sophisticated user of the product.
>
> To prove this defense, [name of defendant] must prove that [name of plaintiff] either:
>
> (1) had special knowledge, sophistication or expertise about the dangerous or unsafe character of the product; or
>
> (2) belonged to a group or profession that reasonably should have had general knowledge, sophistication or expertise about the dangerous or unsafe character of the product. . . .

3. *New Committee Members*. Mr. Young noted that he had received the following suggestions to replace Mr. Belnap: Gary Johnson or Joe Minnock. Mr. Johnson has expressed interest in serving but will not be available until October 2007. Mr. Young asked for suggestions to replace Mr. Dewsnup. Mr. Carney suggested Pete Summerill, and Mr. West suggested Roger Hoole. Mr. Young asked that, if committee members have any other suggestions, to e-mail them to him.

4. *Summer Schedule*. The committee agreed to cancel the meetings scheduled for July 9 and August 13, 2007.

5. *Next Meeting*. The next meeting will be Monday, September 10, 2007, at 4:00 p.m.

The meeting concluded at 5:55 p.m.

MINUTES

Advisory Committee on Model Civil Jury Instructions
September 10, 2007
4:00 p.m.

Present: Honorable William W. Barrett, Jr., Juli Blanch, Dr. Marianna Di Paolo, Phillip S. Ferguson, Tracy H. Fowler, Jonathan G. Jemming, Stephen B. Nebeker, Timothy M. Shea, Paul M. Simmons, and John L. Young (chair). Also present: Kamie F. Brown

Excused: Francis J. Carney, Colin P. King

1. *Products Liability Instructions.* The committee continued its review of the products liability instructions.

a. *CV 1001. Strict liability. Introduction.* Mr. Simmons noted that he had proposed a revision to the second paragraph of the committee note, to reference the recent decision in *Egbert v. Nissan North America, Inc.*, 2007 UT 64, which clarified that the constitutionality of those portions of the Products Liability Act that were not reenacted after *Berry v. Beech Aircraft* is still an open question. The committee approved the proposed revision. Mr. Young asked whether the products liability instructions also reference the recent decision in *Tabor v. Metal Ware Corp.*, 2007 UT 71. Mr. Fowler noted that the decision was issued after the subcommittee last met, so it has not been accounted for.

b. *CV 1007. Strict liability. Elements of claim for failure to adequately warn.* Mr. Simmons noted that CV 1007 presupposes that the court also gives CV 1006 regarding the duty to warn. Where the duty to warn does not raise a jury issue but is decided by the court as a matter of law, CV 1006 will not be given. Mr. Simmons therefore proposed that the words "If you find that a warning was required" and "next" in the first line of CV 1007 be bracketed and the committee note be revised to say that the bracketed language should not be used if the court does not give CV 1006. The committee approved the change.

c. *CV 1008. Strict liability. Definition of "adequate warning."* Mr. Simmons noted that the first sentence of the instruction ("A [product] with an adequate warning is not defective or unreasonably dangerous.") was misleading, since a product with an adequate warning can still be defectively designed and manufactured. Dr. Di Paolo suggested dropping the first paragraph. The committee agreed with her suggestion and deleted the last paragraph as well, since it restated the misleading first paragraph. Dr. Di Paolo also noted that CV 1007 says that the court will define "adequate warning," but CV 1008 defines "inadequate warning." She asked whether the jury would be confused if the instruction were phrased in terms of an "adequate" warning if all the evidence and arguments are stated in terms of an "inadequate" warning. The committee did not think so. After some discussion, the committee revised the instruction to

say when a warning is "adequate," rather than "inadequate." The committee approved the instruction as revised.

d. *CV 1011. Strict liability. Component part manufacturer. Part defective only as incorporated into finished product.* The committee approved the instruction as drafted.

e. *CV 1012. Strict liability. Component part manufacturer. Defective part incorporated into finished product.* Mr. Fowler explained that the instruction offers alternatives because the members of the subcommittee could not agree whether a component part manufacturer and the manufacturer of the finished product should have their fault compared (alternative A) or whether they can be jointly liable (alternative B). There is no Utah appellate court decision on point. The committee discussed when alternative instructions should be used. Some thought that a disagreement among committee members alone was insufficient and that alternatives should be offered only when there is a conflict in the controlling case law. Others thought that alternatives are appropriate when there is no controlling law on point and the committee cannot agree that one position accurately states the law. Mr. Jemming suggested that the disagreement within the committee or subcommittee should be substantial, and that one member's unsupported opinions should not be enough to warrant an alternative instruction. Mr. Simmons noted that the subcommittee was pretty evenly divided on this instruction, hence the alternatives. Mr. Ferguson noted that a trial court had denied his request for an instruction substantially in the form of alternative A. Mr. Fowler thought that alternative B should be relegated to the committee note. Mr. Simmons thought that, if the committee could not agree that alternative A accurately stated the law, the committee should offer courts and practitioners an alternative. He agreed, however, that there was no Utah law to support alternative B but noted that there was law from other jurisdictions with similar statutory schemes that would support alternative B. Mr. Young noted that the committee note can be as long as we would like. The committee agreed to move alternative B to the committee note, with an explanation.

Mr. Simmons will revise the committee note to CV 1012 to include alternative B and explain the rationale for the alternative.

f. *CV 1014. Negligence. "Negligence" defined.* Dr. Di Paolo noted that the instruction does not define "negligence," as its title promises. Instead, it defines "reasonable care." She thought that it needed a sentence saying that negligence is the failure to use reasonable care. Mr. Shea compared the instruction with the general negligence instruction (CV 202). Mr. Jemming asked whether CV 202 was meant to be given with CV 1014. Mr. Fowler said that

the intent was to have a stand-alone instruction for products liability cases. At the suggestions of Messrs. Young and Shea, the second paragraph of the instruction was deleted, and the third paragraph was revised to read:

> Negligence means that a [manufacturer/designer/tester/inspector/seller/distributor] did not use reasonable care in [designing/manufacturing/testing/inspecting] the product [to avoid causing a defective and unreasonably dangerous condition] [to eliminate any unreasonable risk of foreseeable injury]. Reasonable care means what a reasonably careful [manufacturer/designer/tester/inspector] would do under similar circumstances. A person may be negligent in acting or failing to act.

Mr. Shea asked whether the alternative "to" phrases were necessary. Mr. Fowler thought they were, based on alternative views of the statute and case law. Mr. Shea suggested changing the word "causing," since causation as used in the instructions has a specific legal meaning. Mr. Fowler suggested "creating" for "causing." Mr. Shea also asked whether "prudent" should be replaced by "careful," since "prudent" is a less common word. Dr. Di Paolo thought that "prudent" implied more expertise and wisdom than "careful." Mr. Shea noted that the first synonym for "prudent" in the on-line thesaurus was "careful," but "prudent" was not listed as a synonym for "careful." (The first synonym for "careful" is "cautious.") The committee changed "prudent" in the third paragraph to "careful" but left "prudent" in the following paragraph, to suggest that the words were meant to be synonymous. Mr. Simmons suggested adding "seller/distributor" to the bracketed language beginning "manufacturer." Mr. Fowler and Ms. Brown thought that distributors were adequately covered in other instructions, but Mr. Simmons pointed out that those instructions do not purport to define "negligence." Mr. Young suggested that the subcommittee decide whether to include sellers and distributors in CV 1014 or in a separate instruction. The instruction as modified was approved, subject to further action by the subcommittee.

g. *CV 1015 through CV 1021. Negligence instructions.* Mr. Simmons thought that the instructions were based on a misunderstanding of the relationship between strict liability and negligence and that CV 1014 and the general negligence instructions would suffice. Instructions CV 1015 through 1021 add the elements of a claim for strict products liability to those for a negligence claim. Mr. Fowler thought that the critical element in any products liability claim, whether it sounds in strict liability or negligence, is a defect that makes the product unreasonably dangerous. Ms. Brown thought that this result was required by *Bishop v. GenTec, Inc.*, 2002 UT 36, 48 P.3d 218, but Mr. Simmons

thought it was based on a misreading of *Bishop* and was inconsistent with *Slisze v. Stanley-Bostitch*, 1999 UT 20, 979 P.2d 317. At Mr. Young's suggestion, the committee decided to leave the instructions as they are and let the judge decide the issue in each case. The committee thought the dispute was adequately identified in the committee notes to CV 1014 and 1015.

h. *CV 1016. Negligence. Duty to warn.* Mr. Simmons noted that this instruction was essentially the same as CV 1006. Mr. Ferguson noted that the instructions are different. Under CV 1006, the issue is whether the product was defective because there was no adequate warning; under CV 1016, the issue is whether the defendant was negligent because there was no adequate warning. But product defect is also an element of a negligence claim as stated in the first alternative in CV 1014. Dr. Di Paolo suggested adding a committee note to the effect that the court would probably only give CV 1006 or CV 1016, not both. Subject to that addition, the instruction was approved.

i. *CV 1017. Negligence. Elements of claim for failure to adequately warn.* At Mr. Simmons's suggestion, the instruction was revised in accordance with the changes to CV 1007. Mr. Simmons also questioned whether the first element accurately stated the law. It implies that the lack of an adequate warning is prima facie evidence of negligence. At Dr. Di Paolo's suggestion, the first subparagraph was revised to read, "(1) [name of defendant] failed to exercise reasonable care because [he/she/it] did not provide an adequate warning."

j. *CV 1018. Negligence. Definition of "adequate warning."* At the suggestion of Messrs. Young and Ferguson, CV 1018 was revised in accordance with the changes to CV 1008.

k. *CV 1019. Negligence. Duty of designer/manufacturer.* Mr. Young asked whether the subcommittee should reconsider this instruction in light of the Utah Supreme Court's adoption of part of the Restatement (Third) of Torts: Products Liability in *Tabor v. Metal Ware Corp.*, 2007 UT 71. Dr. Di Paolo noted that the instruction was hard to process because it contained so many negatives. The committee revised the second paragraph of the instruction to read:

> However, a manufacturer may market a nondefective product even if a safer model is available. There is no duty to make a safe product safer. A [designer/manufacturer] has no duty to inform the consumer of the availability of the safer model.

Mr. Jemming questioned whether a "nondefective" product is necessarily a "safe" product. At Mr. Shea's suggestion, "[name of defendant]" was substituted for "[designer/manufacturer]."

2. *Next Meeting*. The next meeting will be Monday, October 15, 2007, at 4:00 p.m. (This is the third Monday in October, since the second Monday is Columbus Day.)

The meeting concluded at 6:05 p.m.

MINUTES

Advisory Committee on Model Civil Jury Instructions
October 15, 2007
4:00 p.m.

Present: Juli Blanch, Francis J. Carney, Phillip S. Ferguson, Tracy H. Fowler, Jonathan G. Jemming, Gary L. Johnson, Colin P. King, Stephen B. Nebeker, Timothy M. Shea, Paul M. Simmons, and John L. Young (chair). Also present: Kamie F. Brown

1. *New Committee Members.* Mr. Young welcomed Gary L. Johnson to the committee. Mr. Carney nominated Pete Summerill to take Mr. Dewnsup's place on the committee. The committee approved the nomination.

2. *Minutes of September 10, 2007, Meeting.* Mr. Young noted that the minutes of the last meeting indicated that the products liability subcommittee was going to consider whether to include sellers and distributors in CV 1014 or in a separate negligence instruction. The subcommittee has not met since the last committee meeting. Mr. Young also noted that the minutes did not clearly reflect whether CV 1017 was approved. The committee agreed that the minutes should show that it was approved.

3. *Products Liability Instructions.* The committee continued its review of the products liability instructions.

a. *CV 1020. Negligence. Drug manufacturer's duty to warn.* Mr. Nebeker asked whether the duty extended beyond a duty to warn the medical profession. Mr. Fowler noted that the instruction was a corollary to the learned intermediary doctrine, under which a drug manufacturer may discharge its duty by informing health-care providers of potential problems with its product. Mr. Ferguson questioned whether "adverse reaction reports" should be defined. Mr. Fowler thought they would be adequately explained by the evidence at trial. Mr. Young asked whether adverse reaction reports should be the subject of a committee note. Mr. Ferguson did not think so; he considered it a question of juror comprehension and not an issue of law for the court. Ms. Blanch was troubled by the phrase "and other available means of communication." Ms. Brown noted that the language came from *Barson v. E.R. Squibb & Sons.* Mr. Carney cautioned the committee not to rely too heavily on quotations from cases, which are not necessarily written with prospective jurors in mind. Mr. Johnson thought it was implicit in the phrase that the other "means of communication" be trustworthy. [Mr. King joined the meeting.] Mr. Shea suggested replacing "pertaining to" (in the second paragraph) to "about." He also thought that the last sentence of the instruction restated the first sentence. Mr. Fowler pointed out that they deal with different duties: a duty to stay current on information about the drug (the last sentence), and a duty to communicate its knowledge to the medical community (the first sentence).

The subcommittee will review CV 1020 in light of the *Barson* decision and the committee's concerns.

b. *CV 1019. Negligence. Duty of designer/manufacturer.* Mr. Fowler noted that the reference to the *Hunt* decision should be to page 1137, not 1127.

c. *CV 1021. Negligence. Retailer's duty.* Mr. Fowler noted that this instruction was an effort to deal with *Sanns v. Butterfield Ford*, 2004 UT App 203, 94 P.3d 301. Mr. Simmons noted that CV 1049 also deals with *Sanns* and asked whether both instructions were necessary. Mr. Fowler agreed that they should be merged into one instruction. Mr. Young suggested that, in that case, the instruction be referred back to the subcommittee. Mr. King agreed that the instructions needed more work and noted that CV 1021 was more limited than CV 1049, which he thought was better. Mr. Simmons noted that CV 1021 is based on Restatement (Second) of Torts §§ 401 and 402 as well as *Sanns*, whereas CV 1049 is based solely on *Sanns*. Mr. Fowler noted that *Sanns* may not present a question for the jury. Mr. King noted that the jury may have to decide whether a seller of a product was a passive retailer or something more. Mr. King suggested deleting the first sentence of CV 1021 and beginning with "If [name of defendant] knew or had reason to know . . ." Mr. Fowler said he did not want the jury speculating about what the defendant could have done under the "reason to know" language. For example, he did not want the jury to think that a retailer had "reason to know" because he could have opened the packaging and inspected the product, when the retailer had no duty to inspect the product. Mr. Shea noted that CV 1021 refers to the "buyer," whereas other products liability instructions refer to the "user" and suggested that we use one term consistently. Mr. Fowler agreed that the instructions should refer to the "user" of the product.

The subcommittee will reconsider CV 1021 and CV 1049 in light of *Sanns* and the committee's discussion.

Mr. Young noted that CV 1021 is a negligence instruction, but there are no instructions clearly explaining the differences between strict products liability and negligence. He asked if there should be. Mr. Fowler thought the distinction could be made clear to the jury through the instructions explaining the parties' contentions and the special verdict form. Mr. Young thought there needed to be some transition between the strict liability instructions and the negligence instructions. He noted that, if he were representing a passive seller, for example, he would want it to be clear to the jury that the instructions on strict products liability did not apply to his client. Mr. Carney suggested separate instructions to the court and indicated that the medical malpractice subcommittee was crafting such instructions.

d. *CV 1022. Breach of warranty. "Warranty" defined.* Mr. Fowler noted that CV 1022 was the beginning of the warranty instructions and that it was ironic that an area of the law that almost never goes to the jury has so many instructions. He further noted that the subcommittee had not tried to deal with the UCC as a whole but only as it related to products liability actions. Mr. Fowler noted that there had been much disagreement within the subcommittee. The committee note to CV 1022 tries to explain the disagreements. The principal area of disagreement was whether there needed to be separate instructions for a breach of warranty claim sounding in contract and one sounding in tort. Mr. Simmons noted that the UCC is broad enough to cover tort claims for breach of warranty and that no other jurisdiction has separate warranty instructions for tort and contract breach-of-warranty claims. Mr. Young did not like the phrase "that something is so" in the second sentence of the instruction. He suggested that the first two sentences be more specific to the product and the parties' claims. Mr. Carney suggested replacing the phrase with "that the product is safe for its intended use." Other committee members noted, however, that the instruction was meant as an overview of warranty claims and could apply to express warranties as well as implied warranties of merchantability or fitness for a particular purpose, and an express warranty may be broader or more specific than that the product is safe for its intended use. Messrs. Young and Jemming suggested saying that a warranty is a promise or guarantee regarding the condition or performance of a product. Ms. Brown wanted to add reliance to the definition, but Messrs. Young, King, and Simmons did not think reliance was part of the definition. The committee debated whether the definition needed to include both "promise" and "guarantee" and concluded that it did. Mr. Carney asked whether the definition needed to include both "condition" and "performance." The committee concluded that it did, since some breaches of warranty, for example, warranties about the purity of food or a drug, relate to the product's condition and not necessarily to its performance. At Mr. Shea's suggestion, the instruction was revised to read in whole: "[Name of plaintiff] claims that [name of defendant] breached a warranty. A warranty is a promise or guarantee about the condition or performance of a product." The rest of the instruction was deleted.

Mr. Simmons suggested changes to the committee note. He suggested deleting the first sentence of the second paragraph, since it implied that a warranty claim under the UCC only sounded in contract and not in tort. Mr. King suggested deleting the second paragraph in its entirety. After further discussion, the committee agreed to delete the first sentence only. Mr. Simmons also suggested revisions to the fourth paragraph: In the sentence "Utah courts have stated that when brought under a tort theory, the elements of strict liability and breach of warranty 'are essentially the same,'" he suggested replacing "warranty" with "implied warranty of merchantability," since that is what *Ernest W. Hahn,*

Inc. v. Armco Steel Co., the principal authority cited for the proposition, said. The change was approved, subject to further review by Mr. Fowler and Ms. Brown. Mr. Simmons also suggested deleting the phrase "which was the predecessor of Utah's Product's Liability Act" from the parenthetical following the citation to *Grundberg v. Upjohn Co.*, since it implied that the Products Liability Act replaced section 402A. At Mr. Young's suggestion, the phrase was revised to read "which preceded enactment of Utah's Product's Liability Act." At the suggestion of Messrs. Johnson and Simmons, the sentence beginning, "Utah courts have concluded . . ." was revised to read, "Courts interpreting Utah law have concluded . . ." And the reference to "Utah Code Ann (2006)" at the end of the paragraph was dropped. Mr. Shea suggested breaking up the fourth paragraph into two paragraphs. Mr. Fowler pointed out that "principle" in the third line of paragraph five should be "principal." Finally, at Mr. Simmons's suggestion, the phrase "These committee members believe" was dropped before "the Utah Supreme Court has stated that the Products Liability Act does not subsume all claims involving products."

e. *CV 1023. Breach of express warranty. How an express warranty is created.* Mr. Young suggested that the title should say, "Creation of an express warranty." Mr. Shea asked whether the phrase "makes a promise or representation" in subparagraph (1) should be "makes a promise or guarantee," to track CV 1022. The UCC says, "promise or affirmation." Mr. Johnson thought that an "affirmation" was more than a "representation." Ms. Blanch agreed. She thought that the party making an "affirmation" vouches for the product. But the committee agreed that juries would likely not understand "affirmation" or not understand the distinction. Mr. Ferguson suggested that the question the jury must decide is whether a given statement was an "affirmation" about the product or only the seller's opinion. Mr. Shea searched for synonyms for "affirmation." The committee finally settled on "The seller of a product makes a promise or statement of fact about the condition or performance of a product that reasonably induces . . ." Mr. Johnson said he would prefer "verify" or "certify" to "makes a statement," but the instruction was approved as revised. Mr. Carney noted that section 2-313 of the UCC was broader than CV 1023. Mr. Simmons pointed out that the additional material in section 2-313 is covered in CV 1025. Mr. Johnson suggested adding a "puffing" instruction.

4. *Next Meeting.* The next meeting will be Monday, November 10, 2007, at 4:00 p.m.

The meeting concluded at 6:00 p.m.

MINUTES

Advisory Committee on Model Civil Jury Instructions
January 14, 2008
4:10 p.m.

Present: John L. Young (chair), Juli Blanch, Francis J. Carney, Dr. Marianna Di Paolo, Tracy H. Fowler, L. Rich Humpherys, Gary L. Johnson, Timothy M. Shea, Paul M. Simmons, and Peter W. Summerill. Also present: Kamie F. Brown

Excused: Colin P. King

Mr. Young noted that the committee has been at work going on five years and has only completed three sections of instructions out of the proposed twenty-eight sections. It took only four years to produce MUJI 1st. Mr. Carney noted that there has been a growing sense of frustration among members of the bench and bar. Mr. Young presented a proposal for completing the committee's work more expeditiously. Each subcommittee would be given a deadline for completing its instructions. The subcommittee should see that the instructions accurately state the law and are stated in plain English. The draft instructions would then be reviewed by three members of the whole committee, none of whom is a member of the subcommittee. They would review the draft instructions to make sure they are understandable to lay jurors. Mr. Shea suggested that they also look at the organization of the instructions within a section. Mr. Summerill suggested that the group of three use Google Docs to review the instructions and coordinate their changes. If the three members have questions or changes, they would resolve them with the chairperson of the subcommittee. Then the instructions would be presented to the whole committee for review and approval in a single meeting. Mr. Carney suggested that the subcommittees need to be flexible and enlist the help of other attorneys if necessary to get their work done on time. Mr. Carney also noted that, for the committee to get through a complete set of instructions in one meeting, everyone will have to have read the instructions before the meeting and come to the meeting prepared to present any changes or suggestions. As groups of instructions are completed, they can be published. It was suggested that judges be given loose-leaf binders of the instructions, which can be updated yearly.

The committee adopted Mr. Young's proposal and adopted the following schedule:

Products Liability:

The draft instructions will be reviewed by Mr. Summerill (who will act as point person), Mr. Johnson, and Mr. Ferguson.

The subcommittee will have any changes to the group of three by **January 22, 2008.**

The group of three will have their changes to Mr. Shea by **February 4, 2008,** so that he can distribute them to the full committee for consideration at the **February 11, 2008,** meeting.

Medical Malpractice:

The draft instructions will be reviewed by Mr. Humpherys (who will act as point person), Mr. Simmons, and Mr. Shea.

The subcommittee will have any changes to the group of three by **February 11, 2008.**

The group of three will have their changes to Mr. Shea by **March 3, 2008,** so that he can distribute them to the full committee for consideration at the **March 10, 2008,** meeting.

Commercial Contracts:

The draft instructions will be reviewed by Mr. Johnson (who will act as point person), Dr. Di Paolo, and Mr. Ferguson.

The subcommittee will have any changes to the group of three by **March 10, 2008.**

The group of three will have their changes to Mr. Shea by **April 7, 2008,** so that he can distribute them to the full committee for consideration at the **April 14, 2008,** meeting.

Motor Vehicle Accidents:

The committee suggested the following attorneys to serve on the Motor Vehicle Accidents subcommittee: Lynn Davies, Warren Driggs, Victoria Kidman, William Stegall, someone from Petersen & Associates, Bryan Larson, Steve Sullivan, Ray Ivie, and Mark Flickinger.

The draft instructions will be reviewed by Mr. Humpherys (who will act as point person), Mr. King, and Mr. West.

The subcommittee will have any changes to the group of three by **April 14, 2008.**

The group of three will have their changes to Mr. Shea by **May 5, 2008,** so that he can distribute them to the full committee for consideration at the **May 12, 2008,** meeting.

Premises Liability:

The draft instructions will be reviewed by Mr. Simmons (who will act as point person), Mr. Ferguson, and Mr. Fowler.

The subcommittee will have any changes to the group of three by **May 12, 2008.**

The group of three will have their changes to Mr. Shea by **June 2, 2008,** so that he can distribute them to the full committee for consideration at the **June 9, 2008,** meeting.

Employment:

Mr. Young will speak to Erik Strindberg about chairing the Employment subcommittee. Other attorneys suggested as subcommittee members were Maralyn

Reger at Snow, Christensen & Martineau, Karra Porter at Christensen & Jensen, and David P. Williams at Snell & Wilmer.

The draft instructions will be reviewed by Ms. Blanch (who will act as point person), Dr. Di Paolo, and Mr. Ferguson.

The subcommittee will have any changes to the group of three by **June 9, 2008.**

The group of three will have their changes to Mr. Shea by **August 4, 2008,** so that he can distribute them to the full committee for consideration at the **August 11, 2008,** meeting. (There will be no committee meeting in July 2008.)

Insurance Litigation:

Mr. Humpherys chairs the Insurance Litigation subcommittee. The following attorneys were suggested as members of the subcommittee: Gary Johnson, Peter Summerill, Alan Bradshaw, Alma Nelson, and Stuart Schultz.

The draft instructions will be reviewed by Mr. Carney (who will act as point person), Mr. Simmons, and Mr. Fowler.

The subcommittee will have any changes to the group of three by **August 11, 2008.**

The group of three will have their changes to Mr. Shea by **September 2, 2008,** so that he can distribute them to the full committee for consideration at the **September 8, 2008,** meeting.

Construction Contracts:

The draft instructions will be reviewed by Mr. Young (who will act as point person), Mr. Carney, and Mr. Shea, with Dr. Di Paolo acting as a consultant.

The subcommittee will have any changes to the group of three by **September 8, 2008.**

The group of three will have their changes to Mr. Shea by **October 6, 2008,** so that he can distribute them to the full committee for consideration at the **October 14, 2008,** meeting.

Fraud, Deceit, and Other Intentional Torts:

The committee suggested George Haley and Bob Anderson to serve on the subcommittee.

The draft instructions will be reviewed by Mr. Johnson (who will act as point person), Dr. Di Paolo, and Mr. Humpherys.

The subcommittee will have any changes to the group of three by **October 14, 2008.**

The group of three will have their changes to Mr. Shea by **November 3, 2008,** so that he can distribute them to the full committee for consideration at the **November 10, 2008,** meeting.

Eminent Domain:

The draft instructions will be reviewed by Ms. Blanch (who will act as point person), Mr. Young, and Mr. Simmons.

The subcommittee will have any changes to the group of three by **November 10, 2008.**

The group of three will have their changes to Mr. Shea by **December 1, 2008,** so that he can distribute them to the full committee for consideration at the **December 8, 2008,** meeting.

Probate:

The draft instructions will be reviewed by Mr. Carney (who will act as point person), Mr. King, and Mr. West.

The subcommittee will have any changes to the group of three by **December 8, 2008.**

The group of three will have their changes to Mr. Shea by **January 5, 2009,** so that he can distribute them to the full committee for consideration at the **January 12, 2009,** meeting.

Professional Liability of Attorneys, Accountants, and Design Professionals:

The draft instructions will be reviewed by Mr. Johnson, Mr. Summerill, and Ms. Blanch.

The subcommittee will have any changes to the group of three by **January 12, 2009.**

The group of three will have their changes to Mr. Shea by **February 2, 2009,** so that he can distribute them to the full committee for consideration at the **February 9, 2009,** meeting.

The committee discussed whether to include a section on civil rights instructions. Some committee members thought that such a section would not be necessary because civil rights claims are governed by federal law, and federal pattern instructions sufficiently cover them. Mr. Summerill thought it would be helpful to include a section of civil rights instructions because some civil rights claims may be based on state constitutional law.

Mr. Young will check with Judge Barrett and Mr. Nebeker to see if they would like to be on any of the reviewing committees of three committee members.

Mr. Young will also send an annual report to the Chief Justice with a spreadsheet showing the schedule the committee has adopted. Mr. Carney suggested that a copy of the report and spreadsheet also be sent to the presiding district court judges.

Next Meeting. The next meeting will be Monday, February 11, 2008, at 4:00 p.m.

The meeting concluded at 5:40 p.m.

MINUTES

Advisory Committee on Model Civil Jury Instructions
February 12, 2008
4:00 p.m.

Present: John L. Young (chair), Juli Blanch, Francis J. Carney, Dr. Marianna Di Paolo, Phillip S. Ferguson, Tracy H. Fowler, Jonathan G. Jemming, Gary L. Johnson, Timothy M. Shea, Paul M. Simmons, Peter W. Summerill, and David E. West. Also present: Kamie F. Brown

1. *Products Liability Instructions.* Pursuant to the procedure adopted at the last meeting, the products liability instructions that had not yet been approved by the committee were reviewed before the meeting by a subcommittee of three (Messrs. Summerill, Ferguson, and Johnson). The draft of the instructions distributed to the committee before the meeting also contained suggested additions and deletions by Mr. Shea, shown in blueline. The committee considered the revised instructions.

a. *CV 1021A. Negligence. Retailer's duty.* Mr. Shea added "dangerous and" before "defective" in the last line of the first paragraph. At Mr. Simmons's suggestion, the phrase was amended to "unreasonably dangerous and defective condition." Mr. Young suggested deleting "merely" from the second sentence, but Dr. Di Paolo thought the word aided understanding, and it was left in. Mr. Young questioned the use of the phrase "then [name of defendant] can be liable" in the second paragraph. The committee revised it to read, "then [name of defendant] may be at fault." The instruction was approved as modified.

b. *CV 1021B. Negligence. Retailer's duty.* At Ms. Brown's suggestion, the committee note to 1021B was moved to 1021A. The phrase "then [name of defendant] can be liable" in the second paragraph was changed to, "then [name of defendant] may be at fault." At Dr. Di Paolo's suggestion, "its dangerous condition" in the third line of the second paragraph was changed to "the danger." The instruction was approved as modified.

c. *CV 1022. Breach of warranty. "Warranty" defined.* The instruction was approved as written.

d. *CV 1023. Breach of express warranty. Creation of an express warranty.* The instruction was approved (with Mr. Shea's edits).

e. *CV 1024. Breach of express warranty. What is not required to create an express warranty.* The instruction was approved (with Mr. Shea's edits).

f. *CV 1025. Breach of express warranty. Objective standard to create an express warranty.* The instruction was approved as written.

g. *CV 1026. Breach of express warranty. Essential elements of claim. (Contract.)* At Mr. West's suggestion, the word "essential" was deleted from the title of this instruction and CV 1027, 1028, 1029, 1031, and 1032. In the last paragraph, the phrase "may be liable" was changed to "may be at fault." Subparagraph (5) was returned to its original form. As modified, the instruction was approved.

h. *CV 1027. Breach of express warranty. Essential elements of claim. (Tort.)* The same changes that were made to CV 1026 were also made to CV 1027. As modified, the instruction was approved.

i. *CV 1028. Breach of implied warranty. Essential elements of implied warranty of merchantability claim. (Contract.)* Subparagraphs (2)(a) and (5) were returned to their original form. Mr. Young thought subparagraph (2)(b) was awkward, but the committee did not come up with better language. At Mr. West's suggestion, "or" was added after subparagraphs (2)(a) and (b). Dr. Di Paolo thought "merchantable" would not be understandable to an average juror. She suggested revising the second sentence to read, "To establish that the product was unmerchantable, [name of plaintiff] must prove all of the following." Mr. Shea and Mr. Simmons recommended leaving the sentence the way it was, and, after some discussion, the committee agreed. Mr. Carney thought there needed to be something in the instructions telling courts and attorneys that the instructions need to be tailored to the facts of the case. Mr. Shea noted that the introduction contained such a statement. The committee approved this instruction as modified, but Dr. Di Paolo still thought it was not understandable to a lay audience.

j. *CV 1029. Breach of implied warranty. Essential elements of implied warranty of merchantability claim. (Tort.)* The same changes that were made to CV 1028 were also made to CV 1029. As modified, the instruction was approved.

k. *CV 1030. Breach of implied warranty. Creation of an implied warranty of fitness for a particular purpose.* Mr. Shea questioned whether the terms "buyer" and "seller" should be changed to "plaintiff" and "defendant" throughout. The committee thought "buyer" and "seller" were more appropriate for this instruction. Mr. West asked whether "if" should be moved to the end of the second line, but the committee thought it would change the meaning to do so. Mr. Young questioned the use of the word "contracting" at the end of the first paragraph and suggested replacing it with "sale." Mr. Johnson thought there was a distinction between a contract and a sale and thought that "contracting" (the statutory language) was more accurate. Dr. Di Paolo suggested that the

distinction could be covered in a committee note, which could say that the statute says "at the time of contracting," that in most cases this will also be the time of sale, but in cases where the distinction is important, "contracting" can be substituted for "sale." Over Mr. Johnson's objection, the committee voted to change "contracting" to "sale," a term the committee thought would be more easily understood. As modified, the instruction was approved.

l. *CV 1031. Breach of implied warranty. Essential elements of claim for breach of an implied warranty of fitness for a particular purpose. (Contract.)* Mr. Young thought the phrase "bought it for" in subparagraph (3) was awkward, but Dr. Di Paolo and other committee members thought it was clear. Mr. Shea struck "suitable or" in the second line and changed "caused" to "was a cause of" in subparagraph (5). Dr. Di Paolo thought "suitable or fit" was okay, but did not feel strongly about deleting "suitable or." The instruction was approved with Mr. Shea's edits.

m. *CV 1032. Breach of implied warranty. Essential elements of claim for breach of an implied warranty of fitness for a particular purpose. (Tort.)* Mr. Shea made the same changes to this instruction as he made to CV 1031. The instruction was approved with Mr. Shea's edits.

n. *CV 1033. Breach of implied warranty. Warranty implied by course of dealing or usage of trade. (Contract.)* The committee changed the phrase "between the parties" in the third paragraph to read "between the plaintiff and defendant." As modified, the instruction was approved.

o. *CV 1034. Breach of warranty. Allergic reaction or hypersensitivity.* Mr. Simmons suggested striking the second sentence ("There is no breach of warranty when a [product] is harmless to a normal person"), because, standing alone, it was not an accurate statement of the law and the law was adequately stated in the rest of the instruction. Dr. Di Paolo suggested moving the sentence to the end of the instruction and inserting "Otherwise," at the beginning of the sentence. The committee deleted the sentence. Mr. Simmons also thought that the instruction should say that a defendant can be liable if he knows of the plaintiff's hypersensitivity or allergy and knows that his product is dangerous to someone with such a hypersensitivity or allergy. The other committee members thought that that conclusion followed from the second paragraph and went without saying. The second paragraph was revised to read: "If you find that [name of plaintiff]'s injuries in this case resulted from an allergy or physical hypersensitivity that most people do not have and that [name of defendant] did not know about, then there is no breach of warranty." The instruction was approved as modified.

p. *CV 1035. Breach of warranty. Improper use.* Mr. Young suggested starting the second sentence with, "If you find that [name of plaintiff] improperly used the product, which was a cause of his harm, . . ." The committee decided to leave the instruction as it was and approved the instruction with Mr. Shea's suggested changes.

q. *CV 1036. Breach of warranty. Effect of buyer's examination.* Mr. Shea noted that the committee note should have been a staff note and reflected his confusion with the instruction as written. Other committee members thought that the instruction as written more accurately stated the law than Mr. Shea's proposed alternative instruction and thought it would be understandable to a lay juror. At Mr. Simmons's suggestion, "[he]" in the third line was replaced with "[name of plaintiff]." Messrs. Shea and Jemming suggested deleting the first sentence of the second paragraph, but Messrs. Fowler and Simmons thought it was important to keep it in. The instruction was approved as modified.

r. *CV 1037. Breach of warranty. Exclusion or modification of express warranties by agreement.* Mr. Shea suggested changing "buyer" and "seller" to "plaintiff" and "defendant," but the committee thought that the instruction was accurate and understandable as written. At Mr. Shea's suggestion, "shall" or "can be" was replaced with "are" or "is," and "has been made" was changed to "can be made." As modified, the instruction was approved.

s. *CV 1038. Breach of warranty. Validity of disclaimer.* The instruction was approved as written, with Mr. Shea's edits.

t. *CV 1039. Breach of warranty. Notice of breach.* Mr. Simmons questioned whether the word "(Contract)" should be added at the end of the title, as with other instructions, such as 1031, 1033, 1041, and 1042. He said he knew of no requirement for notice of breach in an action not governed by the UCC. Mr. Fowler and Ms. Brown noted that the UCC can apply to tort actions as well as contract actions. The committee thought that, if there is a breach of warranty claim that is not governed by the UCC, the instruction would not apply and would not be given. The committee approved the instruction as edited by Mr. Shea.

u. *CV 1040. Breach of warranty. Definition of "goods."* Mr. West questioned whether this was a proper subject for a jury instruction, since whether or not a particular product is considered a "good" within the meaning of the UCC will generally be a question of law, for the court to decide. Ms. Brown noted that MUJI 1st contained a similar instruction. The committee note says that this instruction and the following instructions (1041-43) should only be used when

there is a disputed issue of fact as to whether the statutory requirement has been met. The committee approved the instruction as written.

v. *CV 1041. Breach of warranty. Definition of "sale." (Contract.)* The committee approved the instruction as written.

w. *CV 1042. Breach of warranty. Definition of "sample" or "model." (Contract.)* The committee approved the instruction as edited by Mr. Shea.

x. *CV 1043. Breach of warranty. Description of goods.* At Mr. Simmons's suggestion, the instruction was moved to follow instruction 1023 (breach of express warranty: creation of express warranty). The committee approved the language of the instruction as written.

y. *CV 1044. Sophisticated user.* The committee approved the instruction as edited by Mr. Shea.

z. *CV 1045. Conformity with government standards.* Mr. Simmons thought that the second sentence was an inaccurate statement of the law. In effect it said that if the plaintiff proved that the product was defective, the jury could still find that the product was not defective, based on the presumption of nondefectiveness. If the plaintiff proves that the product was defective, then the jury must find it is defective. Mr. Simmons and Mr. Summerill thought that the rebuttable presumption created by the statute meant that if the plaintiff came forward with evidence that the product was defective, the presumption disappeared, and the jury had to weigh the evidence on each side of the issue, unaided by the presumption. Mr. Fowler and Ms. Brown thought that the instruction was mandated by *Egbert v. Nissan,* 2007 UT 64, but Mr. Simmons noted that *Egbert* only held that the jury should be instructed on the presumption and that the presumption could be overcome by a preponderance of the evidence, not clear and convincing evidence. *Egbert* did not sanction any particular form of instruction. Mr. Ferguson asked whether the instructions should say "a preponderance of the evidence" or "the greater weight of the evidence." The committee noted that "preponderance of the evidence" has been used in other instructions and is defined in the general instructions. After further discussion, the instruction was revised to read:

> If the manufacturer of a [product] complies with federal or state laws, standards, or regulations for the industry regarding proper design, inspection, testing, manufacture, or warnings, it is presumed that the [product] is not defective. However, if you find that [name of plaintiff] has established by a preponderance of

> evidence that the [product] was defective even though the manufacturer followed government laws, standards, or regulations, then a presumption that the product is not defective no longer applies.

The committee approved the instruction as revised.

aa. *CV 1046. Product misuse.* The committee approved the instruction as edited by Mr. Shea.

bb. *CV 1047. Product alteration.* The committee approved the instruction as edited by Mr. Shea.

cc. *CV 1048A. Comparative fault.* The committee approved the instruction as edited by Mr. Shea. At Ms. Brown's suggestion, a reference to Utah Code Ann. §§ 78-27-37 through -41 was added under "References."

dd. *CV 1048B. Comparative fault.* The committee approved the instruction as edited by Mr. Shea. At Mr. Simmons's suggestion, *Mulherin v. Ingersoll-Rand Co.,* 628 P.2d 1301 (Utah 1981), was added to the references.

ee. *CV 1049. Unreasonable use. (Assumption of risk.)* Mr. Summerill suggested deleting "Assumption of risk" from the title. Other committee members thought that "assumption of risk" was still a viable defense; it is just not a complete defense but is to be considered as a form of comparative fault. CV 1048B refers to "assumption of risk" as a defense. Mr. Young suggested that CV 1049 be moved to precede the comparative fault instructions (CV 1048A & B). The committee approved the instruction as edited by Mr. Shea.

ff. *CV 1050. Industry standard.* Mr. Simmons noted that the instruction does not state a defense but only tells the jury what evidence it may consider in determining whether a product is defective. At Mr. Simmons's suggestion, it was moved to follow CV 1004. Dr. Di Paolo asked whether it meant that the jury could consider industry standards in the absence of evidence of such standards. To eliminate this ambiguity, the instruction was revised to read:

> In deciding whether the [product] is defective, you may consider the evidence presented concerning the design, testing, manufacture, and type of warning for similar products.

The committee approved the instruction as revised.

gg. *CV 1051. Product unavoidably unsafe.* The committee substituted "at fault" for "liable for any injuries the product caused" at the end of the first sentence and lowercased "rabies" in the last sentence. The committee approved the instruction as modified.

hh. *CV 1052. Learned intermediary.* Mr. Simmons thought that, because the instruction says that manufacturers of prescription drugs have a duty to warn only the prescribing physician, the instruction should also explain that, if the manufacturer fails to provide the physician with an adequate warning, the manufacturer can be liable to the plaintiff. The rest of the committee thought that conclusion would be self-evident when the instruction was read in context and did not have to be stated. The committee approved the instruction as edited by Mr. Shea.

ii. *CV 1053. Spoliation.* Mr. Young questioned whether spoliation should be the subject of a jury instruction. Mr. Carney noted that Utah Rule of Civil Procedure 37 has been amended to allow the jury to draw an adverse inference from spoliation. The committee agreed that there should be an instruction on spoliation but also agreed that it belongs in the general instructions and is not unique to products liability actions.

jj. *CV 1054. Definition of "state of the art."* Mr. Simmons thought that the instruction was unnecessary because it was adequately covered in other instructions, including 1050 and 1051. He thought that "state of the art" is not a defense, that a product can comply with the state of the art and industry standards and still be defective. He circulated a proposed alternative instruction, based on the treatise *Jury Instructions on Products Liability*. Mr. Fowler, Mr. Johnson, and Ms. Brown disagreed. They thought that "state of the art" was a defense to a products liability action. The products liability subcommittee had disagreed on this point. Dr. Di Paolo thought the last sentence was hard to understand and suggested changing it to say that a manufacturer does not have a duty to incorporate into its products "all of the [instead of "only those"] features representing the ultimate in safety." The committee deleted the words "only those" from that sentence. Ms. Blanch thought that the sentence was better covered in CV 1056, but some committee members thought that CV 1056 should not be used. The committee concluded that CV 1054 was an accurate statement of the law and approved the instruction as modified.

kk. *CV 1055. Subsequent remedial measures. Standards and purchases.* Mr. Simmons thought that Utah Rule of Evidence 407 made it clear that a "subsequent" remedial measure was a measure taken after the incident and not after the product was designed or manufactured. Mr. Fowler and Ms. Brown,

however, thought that the question was unresolved under Utah law and that alternatives were therefore necessary. Mr. Summerill thought that the term "accident" should be replaced with "incident." The committee approved the instruction as written.

ll. *CV 1056. The manufacturer is not an insurer.* Messrs. Carney and West thought the instruction was the type of instruction the Utah Supreme Court has held should not be given, akin to an "unavoidable accident" instruction (*Randle v. Allen,* 862 P.2d 1329 (Utah 1993)) and a "mere fact of an accident" instruction (*Green v. Louder,* 2001 UT 62). Other committee members thought it was distinguishable from the instructions in *Randle* and *Green.* Mr. Simmons noted that the committee had voted in June 2007 to delete the instruction. The committee voted again to delete the instruction, with Messrs. Young, Carney, Simmons, Summerill, and West voting to delete it, and Ms. Blanch and Messrs. Fowler, Ferguson, and Johnson voting to keep it.

Mr. Fowler was excused.

mm. *CV 1057. Safety risks.* Mr. Simmons thought that the instruction was unnecessary, since it merely stated the converse of what a plaintiff must prove in a strict products liability action. In that respect, it was similar to the language he had proposed adding to the learned intermediary instruction and which the committee thought was unnecessary. Mr. Carney agreed and thought the instruction was argumentative and should not be used. Ms. Brown thought the instruction was supported by *Slisze v. Stanley-Bostitch,* 1999 UT 20, but Mr. Carney noted that just because an instruction may find support in the language of a case does not mean that it should be given. Mr. Johnson noted that he would still request such an instruction, even if it were not included in MUJI. Dr. Di Paolo asked if it should come earlier in the instructions. Mr. Young thought the instruction was in conflict with CV 1005. Ms. Blanch suggested adding language to CV 1005 saying that a product is not defective or unreasonably dangerous merely because it could have been made safer or because a safer model is available and deleting the rest of CV 1057. The committee deferred further discussion of the instruction until the next meeting.

2. *Next Meeting.* The next meeting will be Monday, March 10, 2008, at 4:00 p.m., at which time the committee will consider CV 1057 and the medical malpractice instructions. Mr. Young asked whether the committee meetings should start at 3:30 p.m. instead of 4:00 p.m. A majority of the committee preferred starting at 4:00 p.m. and going later if necessary rather than starting earlier.

The meeting concluded at 6:25 p.m.

MINUTES

Advisory Committee on Model Civil Jury Instructions

March 10, 2008

4:00 p.m.

Present: Judge William Barrett, Juli Blanch, Francis J. Carney, Marianna Di Paolo, Phil Ferguson, Tracy Fowler, Rich Humpherys, Jonathan Jemming, Gary Johnson, Timothy M. Shea, Pete Summerill, David E. West

Excused: John L. Young, Paul M. Simmons

Mr. Shea conducted the meeting in Mr. Young's absence.

Mr. Fowler commented that the minutes of the February meeting accurately reflected the discussion of Instruction 1056, but the discussion itself contained an error. In the discussion and in the minutes, Mr. Simmons stated that the committee had earlier voted to delete the instruction. Mr. Fowler reported that it was actually a different instruction that the committee had voted to delete.

The committee deferred discussion of Instruction 1057, Safety risks, until the April meeting.

Introductory Committee Note. The committee discussed whether the cases cited in the committee note supported the principles for which they are cited. Mr. Summerill suggested the subcommittee review the note.

CV 301. The committee decided to change the title of the instruction to conform to its content. The committee decided to remove "nurse" because nurses are covered in CV302. The committee decided to leave "in good standing." The committee decided to strike "duties required under the." The committee approved the instruction as amended.

CV 302. The committee decided to amend the title of the instruction and add "in good standing" to parallel CV 301. The committee approved the instruction as amended.

CV 303. The committee added "to the patient" to clarify the danger to whom. The committee approved the instruction as amended.

CV 304. The committee changed "adversely affect [name of plaintiff's] welfare" to "make [name of plaintiff]'s health worse." The committee amended the committee note. The committee approved the instruction as amended.

CV 305. The committee move "reasonably" so that the phrase reads: "could reasonably have been made." The committee approved the instruction as amended.

CV 306. The committee added in brackets "[to the area treated]" since the duty to warn does not extend to injuries generally. The committee approved the instruction as amended.

CV 307. The committee added as item (6) “notify the attending physician of any changes in [name of plaintiff]'s symptoms or condition that would be relevant to a reasonable physician.” The committee bracketed the last paragraph and amended the committee note to instruct the judge to include it only if there is an employment relationship between the hospital and the physician. The committee approved the instruction as amended.

CV 308. With the changes to CV 307, the committee deleted CV 308. Subsequent instructions will be renumbered before publication.

CV 309. The committee changed “is entitled to” to “may.” The committee approved the instruction as amended.

CV 310. The committee amended the committee note and approved the instruction as drafted.

CV 311. The committee inserted in item (6) “that was not consented to.” The committee approved the instruction as amended.

CV 312. The committee added “to the care” to the end of the instruction, made two other minor changes and approved the instruction as amended.

The meeting was adjourned.

MINUTES

Advisory Committee on Model Civil Jury Instructions
April 14, 2008
4:00 p.m.

Present: John L. Young (chair), Francis J. Carney, Dr. Marianna Di Paolo, Phillip S. Ferguson, Tracy H. Fowler, L. Rich Humpherys, Gary L. Johnson, Colin P. King, Timothy M. Shea, Paul M. Simmons, Peter W. Summerill. Also present: Curtis Drake, Elliott Williams

1. *Products Liability Instructions*. The committee considered CV 1056, "The manufacturer is not an insurer," and CV 1057, "Safety risks." Mr. Young noted that the issue is whether these are the kinds of instructions the Utah Supreme Court has said should not be given. He proposed an amendment to CV 117, "Preponderance of the evidence," to say that, if the jury finds that the evidence regarding a fact is evenly balanced or preponderates against the fact, then the jury must find that the fact has not been proved "and the party has therefore failed to meet its burden of proof to establish that fact." **The committee approved this amendment to CV 117.** Mr. Young asked whether this change satisfied the need for CV 1056 and 1057. Mr. Fowler thought that CV 1057 was still needed. It addresses an issue that arose in *Slisze v. Stanley-Bostitch,* 1999 UT 20, which held that a product is not necessarily defective just because a safer model is available. Mr. Fowler did not think that the issue should be left to argument because of the danger that jurors will think that, because a safer alternative is available, the product must be defective. Mr. Carney questioned how CV 1056 and 1057 were different from the instructions disapproved in *Green v. Louder* and *Randle v. Allen*. Mr. Fowler noted that those cases were negligence cases and dealt with matters of common knowledge, whereas products liability is an area of the law not familiar to most jurors. He suggested that the instructions be left in with a committee note saying that the committee did not agree on whether the instructions should be used. Mr. Humpherys thought that CV 1057 was misleading. He read it to say that a product that may present some safety risks is not defective as a matter of law, which he did not think was an accurate statement of the law. Mr. Carney thought that the instructions should tell the jury what the law is and not what it is not. He and Mr. Summerill thought the instructions merely restated the converse of the burden of proof. Mr. Shea thought that the first clause of CV 1057 was such a negative statement of the elements a plaintiff must prove and suggested limiting the instruction to the second clause, which is taken from *Slisze*. Mr. Young concluded that the instruction needed more work and deferred further discussion on it.

2. *Medical Malpractice Instructions*. The committee continued its review of the medical malpractice instructions.

a. *Advisory committee note*. At Mr. Summerill's suggestion, the fourth paragraph (explaining what instructions were omitted because there is no Utah appellate authority for them) was deleted. Mr. Carney asked how specific

instructions must be under *Mikkelsen v. Haslam,* 764 P.2d 1384 (Utah Ct. App. 1988), which said that the mere giving of abstract instructions on negligence without adapting them to the specific duties in the case may be error. Mr. Humpherys and Mr. Drake thought that the specific duties alleged in the case could best be handled by instructions on the parties' contentions. Mr. Humpherys thought that detailed statements of the duties involved (*e.g.,* "The defendant had a duty to tie off the cystic duct.") were not statements of the law but application of the law (*viz.,* that the defendant had a duty to use reasonable care under the circumstances) to the facts of the case and the medicine involved.

Mr. King joined the meeting.

b. *CV 301. "Standard of care" defined. "Medical malpractice" defined. Elements of claim for medical malpractice.* Mr. Shea noted that he has deleted all references to "nurses" in CV 301. Nurses are covered in CV 302. Dr. DiPaolo suggested striking the phrase "a form of fault known as." Other committee members pointed out that the phrase was needed so that the jury could relate the medical malpractice instructions to other instructions that are phrased in terms of "fault." Mr. Drake questioned the use of the phrase "a cause." He thought it cut out part of the definition of proximate cause, namely, legal causation, and shortened proximate cause to cause in fact. Messrs. Fowler and Carney pointed out that "cause" is defined in other instructions (including CV 310) to mean what was formerly called "proximate cause."

c. *CV 304. Duty to disclose material medical information.* Dr. DiPaolo thought that the last sentence defining "material" was unnecessary because materiality was built into the definition of duty in this instruction. At her suggestion, the instruction was revised to read:

> [Name of defendant] had a duty to disclose to [name of plaintiff] information concerning [name of plaintiff]'s condition that was unknown to [name of plaintiff], if the information would be important to a reasonable person in making decisions about health care, and if disclosure of the information would not be expected to make [name of plaintiff]'s health worse.

The instruction was approved as revised.

Mr. Ferguson joined the meeting.

d. *CV 307. Duties of hospitals to patients.* Mr. Simmons asked whether the existence of an employment relationship between a hospital and a

physician would ever be a jury question. The instruction presupposes that the court has already decided whether or not an employment relationship exists. Mr. Carney thought the issue generally did not present a jury question except in cases of apparent authority. Mr. Williams thought the last sentence of the note was ambiguous; he read it as referring to subparagraph (6). The phrase "last paragraph" in the last sentence of the note was changed to "bracketed paragraph." Mr. Carney questioned whether the instruction on hospital duties should more closely track the instructions for other health-care providers rather than spelling out all of the duties a hospital could breach. He will draft a more general instruction on hospitals' duties.

e. *CV 310. "Cause" defined.* Mr. Fowler noted that the instruction should be broader than just the defendant's fault; it should also apply to the fault of the plaintiff and third parties. Mr. Carney considered listing in this instruction all the ways a plaintiff could be at fault but decided against it. He will revise the instruction and present it to the committee at a later meeting.

f. *CV 311. Elements of an informed consent claim;* and *CV 312. Duty to obtain informed consent. "Informed consent" defined.* At Mr. Simmons's suggestion, the order of CV 311 and 312 was reversed.

g. *CV 314. Standard for judging patient's consent.* Mr. Young thought the phrase "you must use the viewpoint" was awkward. At Dr. DiPaolo's suggesting, "use" was replaced with "take." Mr. King thought the instruction was backwards, that it should read, "To determine whether a patient would have consented . . . , you must take the viewpoint of a reasonable person in the plaintiff's position . . . ." Other committee members thought the instruction was fine as written. Dr. DiPaolo noted that the reference to "patient" in the main clause was confusing since the only "patient" all the jurors know is the plaintiff. Mr. Carney noted that the statute refers to the "viewpoint of *the* patient." At Dr. DiPaolo's suggestion, the instruction was revised to read:

> To determine whether a reasonable person would have consented to the care, you must take the viewpoint of a reasonable person in [name of plaintiff]'s position before the care was provided and before any harm occurred.

At Mr. Simmons's suggestion, the first line was revised to say, "would not have consented," to track the language of CV 311. The instruction was approved as amended.

h. *CV 315. Oral consent valid.* Mr. Humpherys asked why "refusal of treatment" was included. Mr. Ferguson noted that the plaintiff's claim may be that the defendant was negligent for *not* treating him. The title of the instruction was changed to "Consent or refusal of treatment." The instruction was revised to read:

> A [consent to/refusal of] treatment is binding even if it is not in writing.

The instruction was approved as modified.

i. *CV 316. Consent is presumed.* Mr. Young suggested moving the phrase "unless proven otherwise" to the end of the instruction. Mr. Humpherys asked why the phrase was needed at all. The committee thought we needed a general instruction on presumptions. Messrs. Humpherys and Ferguson thought the instruction should read, "There is a presumption that, when a person submits to health care, the care was authorized." The effect of the presumption could then be explained in a general instruction on rebuttable presumptions. Dr. DiPaolo thought that one term ("presumption" or "presumed") should be used consistently throughout the instructions and recommended that the committee use "presumption." Mr. Humpherys thought that if the jury is instructed on the presumption, it should also be instructed on how the presumption can be rebutted. Mr. Williams thought that the presumption was a presumption of actual consent, which would be a defense to a claim of battery, and not a presumption of informed consent, so the committee note should be struck. Others, however, thought that the statute is not clear as to whether the presumption also covers informed consent. Mr. Carney struck the committee note. Mr. Summerill noted that the committee was getting bogged down in debates about the law and recommended that the instruction be sent back to the subcommittee for further review.

j. *CV 317. Patient's negligence in failing to follow instructions.* and *CV 318. Patient's negligence in giving medical history.* Mr. Carney asked whether an instruction on comparative fault should include a laundry list of all the ways that a patient may be comparatively negligent (as with the draft instruction on hospital negligence, CV 307), or be stated more generally, in a single paragraph. Mr. Humpherys thought that depended on whether the laundry list of duties are really legal duties or applications of the general legal duty (the duty to use reasonable care for one's own health and safety) to the evidence and the facts of the case. Mr. Humpherys also questioned whether expert testimony is required to establish that a patient breached his or her legal duty. Mr. Williams thought not, that what patients are required to do is within

the knowledge of the average juror, whereas what health-care providers are required to do is not. Mr. Young suggested using a general instruction with a contention instruction, for example: "[Name of patient] had a duty to use reasonable care to take care of himself. In this case, [name of defendant] claims that [name of plaintiff] failed to use reasonable care in the following ways: . . ." Mr. Williams noted that, merely because someone makes a claim does not mean that the other side actually had a duty. Mr. Humpherys thought that, in instructing the jury on the duties of health-care providers and patients, we should be consistent and only state as duties those duties defined by statute or case law. CV 317 and 318 were sent back to the subcommittee to reconsider, in light of the committee's discussion.

k. *CV 319. Patient's fault: preexisting conditions.* Messrs. King and Summerill noted that the instruction was an application of the principle that a defendant takes the plaintiff as he finds him. Mr. Johnson questioned whether that principle had been modified by a later decision, *Ortiz v. Geneva Rock Products, Inc.,* 939 P.2d 1213 (Utah Ct. App. 1997). Others thought, however, that *Ortiz* allowed a plaintiff's preexisting condition to be considered only on the issue of causation, not comparative fault. The committee approved the language of CV 319, but, at Mr. Young's suggestion, the subcommittee will revise the committee note.

l. *CV 320. Use of alternative treatment methods.* Mr. Humpherys questioned use of the phrase "it may not be negligence" and suggested substituting "fault," "medical malpractice," or "below the standard of care" for "negligence" to make the instruction consistent with other instructions. Mr. Drake thought the instruction should say "is not" negligence rather than "may not be" and asked why the language of MUJI 6.29 was changed. Mr. Williams agreed. He thought that if the jury finds that the treatment was appropriate in the case and was approved by a respectable portion of the medical community, then the treatment was not negligent as a matter of law. Mr. Humpherys asked how the instruction related to the doctrine of negligence per se. Messrs. Johnson and Drake said that it did not; negligence per se is based on a violation of a statute. Mr. Summerill thought that the instruction should not say that use of an accepted alternative treatment is not negligence because the treatment may be accepted for reasons other than its safety or efficacy, such as to cut costs. He and Mr. Carney pointed out that, just because a particular treatment is "approved by a respectable portion of the medical community," does not mean it is not negligent; advances in medicine may make treatments that were "approved" at one time no longer acceptable. Messrs. Young and King noted that the instruction does not define "approved by a respectable portion of the medical community." It does not answer such questions as, Approved by whom? or By

what percentage of the community? Mr. King thought the instruction would make the standard of care depend on whether a particular treatment is used by a threshold percentage of providers. He thought the standard should be whether a treatment meets the minimum standard of care and not whether it is used by a certain percentage of providers. Dr. DiPaolo thought that the instruction did not tell jurors what they have to decide. Mr. Carney noted that there is no Utah law to support the instruction. The only Utah case cited, *Butler v. Naylor,* 1999 UT 85, 987 P.2d 41, said that it was harmless error to give the instruction, which, Mr. Summerill thought, meant that it was error to give it. Mr. Humpherys thought that the committee should not include the instruction if there was no Utah law to support it. That would not preclude attorneys requesting such an instruction in a given case. Mr. Humpherys also asked about the burden of proof. The instruction seems to put the burden of proof on the defendant to prove he used an "approved" method of treatment. Mr. Humpherys questioned why the burden should not be on the plaintiff to prove that the defendant's choice of treatment was not "approved." Mr. Johnson noted that the instruction sets out an affirmative defense, on which the defendant bears the burden of proof. The plaintiff already has the burden of proving that the defendant's conduct fell below the applicable standard of care. Messrs. Humpherys and Summerill thought the matter should be left for argument and should not be covered by a jury instruction; they thought the instruction went too far without any Utah authority to support it. The instruction was sent back to the subcommittee to see if there is Utah law to support it.

3. *Next Meeting*. The next regularly scheduled meeting is Monday, May 12, 2008, at 4:00 p.m. However, because the committee is behind the schedule that it set for itself in January 2008, Mr. Young called a special meeting for Thursday, May 1, 2008, at 4:00 p.m. to finish its consideration of the medical malpractice instructions and to approve the commercial contract instructions.

The meeting concluded at 6:00 p.m.

MINUTES

Advisory Committee on Model Civil Jury Instructions
May 11, 2008
4:00 p.m.

Present: Juli Blanch, Francis J. Carney, Mariana Di Paolo, Phillip S. Ferguson, Tracy H. Fowler, John R. Lund, Stephen B. Nebeker, Timothy M. Shea, Paul M. Simmons

Excused: John L. Young (chair)

Mr. Shea conducted the meeting in Mr. Young's absence.

1. Mr. Shea noted that he and Mr. Young talked to the Utah Supreme Court in April about getting feedback from judges and attorneys. They also suggested that the court enter an order requiring trial courts to use a MUJI 2d instruction if one applies, unless the trial court decides that the instruction is not an accurate statement of the law.

2. *CV1802. Negligent misrepresentation.* At the last meeting, the instruction was returned to the subcommittee to answer the question of whether the standard of proof is a preponderance of the evidence or clear and convincing evidence. Mr. Shea noted that the subcommittee did not respond. Mr. Carney said that some jurisdictions apply a preponderance standard, and some apply a clear-and-convincing standard and that he had not found any Utah case on point. Mr. Shea will add parentheticals to the case citations in the committee note to indicate which approach each case adopted. Mr. Lund thought that to require a plaintiff to prove by clear and convincing evidence that a defendant "should have known" that a representation was false would be a hybrid standard. The committee revised the elements of the claim to read:

(1) [name of defendant] represented to [name of plaintiff] that an important fact was true;

(2) [name of defendant]'s representation of fact was not true;

(3) [name of defendant] failed to use reasonable care to determine whether the representation was true;

(4) [name of defendant] was in a better position than [name of plaintiff] to know the true facts;

(5) [name of defendant] had a financial interest in the transaction;

(6) [name of plaintiff] relied on the representation, and it was reasonable for him to do so; and

(7) [name of plaintiff] suffered damage as a result of relying on the representation.

The committee approved the instruction and committee note as revised.

Dr. Di Paolo joined the meeting.

3. The committee continued its review of the attorney negligence instructions.

a. *CV402. Elements of claim for attorney's negligence.* Mr. Simmons thought that the second element (that the defendant owed a duty to the plaintiff) should not be included in the instruction because it presented a question of law for the court to decide, not a question of fact for the jury. Mr. Lund suggested combining the first two elements. Mr. Ferguson suggested revising the instruction to read: "You must find that [name of plaintiff] had an attorney-client relationship with [name of defendant]. If you find such a relationship, then [name of defendant] owed [name of plaintiff] a duty to use reasonable care. Then you must also find whether [name of defendant] breached that duty and whether any breach caused any harm to [name of plaintiff]." Mr. Carney noted that the new Restatement of Law Governing Lawyers is well written and clearly sets out the elements of a legal malpractice claim. Mr. Fowler suggested deleting the second element and expanding the fourth. Mr. Shea suggested deleting the second element and revising the remaining two elements to read:

(2) [name of defendant] failed to use the same degree of care, skill, judgment and diligence used by qualified lawyers under similar circumstances; and

(3) [name of defendant]'s failure to use that degree of care was a cause of [name of plaintiff]'s injury, loss or damage.

The committee changed "qualified lawyers" in subparagraph (2) to read "reasonably careful lawyers." Dr. Di Paolo suggested revising the introductory sentence to say that the plaintiff "must prove all of the following" or "must prove three things:" The committee re-approved the instruction as modified.

b. *CV403. Attorney-client relationship.* Mr. Simmons asked whether the attorney's statements must have been made to the plaintiff. Dr. Di Paolo and Mr. Lund thought they did not, that the fact that the statements may have been made to someone else goes to the reasonableness of the plaintiff's belief that he had an attorney-client relationship with the defendant but does not preclude an

attorney-client relationship from arising. At Mr. Simmons's suggestion, the committee note was revised to read, "If the attorney-client relationship is not disputed, rather than give this instruction, the court should instruct the jury that there is an attorney-client relationship." The committee re-approved the instruction and the committee note as modified.

c. *CV404. Duty of care.* Mr. Shea asked whether the instruction was necessary in light of the changes to CV402. Mr. Ferguson thought there was no harm in including the instruction. The committee changed "qualified lawyers" to "reasonably careful lawyers," to match CV404, and deleted the last sentence of the instruction. The committee re-approved the instruction as modified.

d. *CV405. Scope of representation.* Dr. Di Paolo noted that the instruction did not define "scope of representation" and asked what it meant. Mr. Lund noted that an attorney may limit what he will do for a client. Dr. Di Paolo suggested adding an appositive--"that is, what [he] will do in the case." The instruction was revised to read:

> In general, a lawyer has no duty to act beyond the scope of representation. "Scope of representation" means what the lawyer will do for the client. [Name of defendant] may limit the scope of representation if the limitation is reasonable and if [name of plaintiff] gives informed consent.

Dr. Di Paolo asked whether "informed consent" needed to be defined. Mr. Shea noted that it was only defined in the medical malpractice instructions. Mr. Carney noted that the phrase comes from Utah Rule of Professional Conduct 1.2, but the rule does not define the term. Mr. Lund asked whether informed consent required independent legal advice. The committee added a sentence to the committee note to the effect that the court may need to draft an instruction defining "informed consent" because rule 1.2 does not define the term. The committee approved the instruction as modified.

e. *CV406. Standard of care for plaintiff.* Messrs. Shea and Lund noted that the instruction does not define a standard of care but talks about comparative fault. The committee changed the title to read, "Plaintiff's actions." Ms. Blanch suggested that the instruction take the form: "[Name of defendant] claims that [name of plaintiff] was at fault. In determining whether [name of plaintiff] was at fault, you may consider . . . . You may not consider . . . ." Mr. Shea noted that the instruction presupposes instructions on comparative fault and asked whether the general negligence instructions on comparative fault were sufficient. Mr. Carney thought not. He and Mr. Fowler suggested adding a cross-

reference to CV211 ("allocation of fault"), with a notation to insert CV406 into CV211 if comparative fault is at issue. The committee revised the instruction to read:

> [Name of defendant] claims that [name of plaintiff]'s actions were a cause of the harm. In deciding whether [name of plaintiff] was at fault,
>
> (1) you may not consider [his] actions before hiring [name of defendant]; however,
>
> (2) you may consider [his] actions after hiring [name of defendant].

The committee approved the instruction as modified.

f. *CV407. Fiduciary relationship.* The committee questioned whether the jury had to find a fiduciary relationship between the attorney and client. The committee thought that a fiduciary duty was a given if there was an attorney-client relationship. The committee questioned the need for the instruction. Mr. Carney quoted from *Kilpatrick v. Wiley, Rein & Fielding,* 909 P.2d 1283 (Utah 1996), that "legal malpractice" is a generic term for three different causes of action: (1) breach of contract; (2) breach of fiduciary duty; and (3) negligence. Mr. Fowler asked if we needed to add breach of contract instructions to this section. Mr. Ferguson noted that a party may plead a claim for breach of fiduciary duty because it may have a different statute of limitations, may give rise to an award of attorney's fees, and may give rise to punitive damages. Mr. Simmons suggested that the instruction track the format of CV402:

> [Name of plaintiff] claims that [name of defendant] breached a fiduciary duty. To succeed on this claim, [name of plaintiff] must prove that--
>
> (1) [he] and [name of defendant] had an attorney-client relationship;
>
> (2) [name of defendant] breached a duty to [name of plaintiff] by--
>
> (a) taking advantage of [name of defendant]'s legal knowledge and position;
>
> (b) failing to have undivided loyalty to [name of plaintiff];
>
> (c) failing to treat all of [name of plaintiff]'s matters as confidential;
>
> (d) concealing facts or law from [name of plaintiff]; or

(e) deceiving [name of plaintiff]; and

(3) [name of defendant]'s breach was a cause of [name of plaintiff]'s injury, loss or damage.

Next Meeting. The next meeting is Monday, June 8, 2009, at 4:00 p.m.

The meeting concluded at 6:00 p.m., to the strains of "Back in the Saddle Again" wafting from Mr. Carney's computer.

MINUTES
Advisory Committee on Model Civil Jury Instructions
June 9, 2008
4:00 p.m.

Present: John L. Young (chair), Honorable William W. Barrett, Francis J. Carney, Phillip S. Ferguson, Tracy H. Fowler, L. Rich Humpherys, Colin P. King, Stephen B. Nebeker, Timothy M. Shea, Paul M. Simmons, Peter W. Summerill, David E. West

1. *Products Liability and Medical Malpractice Instructions*. Mr. Young announced that the products liability and medical malpractice instructions that have been approved will be published on the courts' website, subject to supplementation.

2. *CV 1057. Safety risks*. The committee considered CV 1057. Some committee members thought it was not a proper instruction in light of *Randall v. Allen* and *Green v. Louder*. Mr. Shea suggested revising the instruction to read: "A [product] is not defective or unreasonably dangerous merely because it could have been made safer or because a safer model of the [product] is available." Mr. West questioned whether this was an accurate statement of the law. He thought that if a product could be made safer economically, it should be. Mr. Fowler said that was not the law, citing *Slisze v. Stanley-Bostitch,* 1999 UT 20. Mr. Young suggested adding a committee note outlining the differing views of committee members and noted that the validity of the instruction would be up to the courts to decide.

Mr. Fowler and Mr. King volunteered to work on a committee note to accompany the instruction.

Mr. West suggested replacing "is not" in the first line with "may not be." Mr. Summerill thought the instruction was an accurate statement of the law but should not be given as a jury instruction. Mr. King cautioned against jury instructions that emphasize the negative of certain elements of a claim. The committee voted on whether to include the instruction. The vote was 5-5, with Messrs. Barrett, Ferguson, Fowler, Humpherys, and Nebeker voting in favor of the instruction, and Messrs. Carney, King, Simmons, Summerill, and West voting against it.

Mr. Young indicated that he would break the tie after he sees the committee note that Mr. Fowler and Mr. King will propose.

3. The committee continued its review of the contract instructions. Mr. Ferguson was the only member of the reviewing subcommittee present, so he led the discussion:

a. *CV 2126. Fraudulent inducement*. Mr. Summerill questioned the use of the terms "induce" and "representation." Mr. Ferguson noted that Dr. Di Paolo did not think the terms were too confusing for lay jurors. Mr. King

suggested "statement" for "representation," but other committee members thought that "representation" denoted more than "statement." Mr. Humpherys asked whether actions or nondisclosure can give rise to fraudulent inducement. Mr. Young suggested asking the contract instructions subcommittee to define "representation." He then suggested leaving it to the court to determine whether conduct or failure to disclose can constitute a "representation" in a particular case. Mr. Young also suggested revising subparagraph (1) to read, "[Name of plaintiff] made the following representation:" The committee approved the instruction as modified.

b. *CV 2128. Impossibility/Impracticability.* Mr. Ferguson noted that Dr. Di Paolo was comfortable with the term "impracticable." Mr. Simmons noted that the first paragraph says that performance must be "highly impracticable," but the second paragraph only defines "impracticable," not "highly impracticable." He asked whether "highly" should be struck from the first paragraph or whether the second paragraph should be revised to define "highly impracticable." Mr. Carney checked the cases cited, which use the phrase "highly impracticable." At Mr. Young's suggestion, "highly" was added before "impracticable" in the second and sixth paragraphs. Mr. Young asked whether a supervening event can occur before or after the contract is made. Mr. Humpherys thought that if it occurred before, it would be a case of mutual mistake, not impossibility. At Mr. Simmons's suggestion, the last paragraph was revised to make it clear who has the burden of proof: "If you decide that [name of defendant] has proved that the circumstances just described are a supervening event, . . ."

c. *CV 2129. Frustration of purpose.* Mr. Young cited Dr. Di Paolo for the proposition that only people can be "frustrated," not contracts. At the suggestion of Messrs. Humpherys and Simmons, the third paragraph was revised to read: "To prevail on this claim, [name of defendant] must show: . . ."

d. *CV 2130. Unconscionability.* Mr. Summerill suggested breaking the instruction into two instructions--one for substantive unconscionability, and one for procedural unconscionability. Mr. Ferguson noted that his subcommittee had considered doing so but thought there would rarely be a case involving both types of unconscionability. Mr. Young suggested keeping one instruction but adding a comment saying that if the case only involves one form of unconscionability, the court should use only the relevant part of the instruction. The committee thought it best to divide the instruction into two instructions. Mr. Humpherys asked if there was a better word than "unconscionable." The committee could not come up with one, and Mr. Ferguson noted that Dr. Di Paolo was comfortable with "unconscionable." Mr. King suggested that the instructions

start out: "[Name of party] claims that the contract is [substantively/procedurally] unconscionable." Messrs. West and Summerill did not think the last sentence of the second paragraph accurately stated the law. Mr. Ferguson noted that the reviewing committee did not try to figure out if the instructions accurately stated the law. Mr. West asked whether unconscionability was a question of law or fact. Mr. Summerill said it was a mixed question of law and fact. Mr. Humpherys objected to use of the phrase "For example." He said we should not be giving a laundry list of factors to consider if they do not apply in the particular case. Mr. King suggested leaving the examples to the facts of the particular case.

The committee will send the instruction back to the contracts subcommittee for further consideration in light of the committee's discussion.

Mr. Summerill noted that he had an alternative draft instruction that the subcommittee can consider.

e. *CV 2131. Mutual mistake.* Mr. Humpherys asked whether the third element (that the defendant would not have agreed to the contract if he had known of the mistake) is judged by an objective or subjective standard. He thought it should be an objective standard; otherwise, the element would be unnecessary because the defendant will always claim that he would not have entered into the agreement had he known about the mistake. Mr. King agreed. Mr. Ferguson thought that it was a subjective standard, based on the language of the instruction.

The committee approved the instruction, subject to the contracts subcommittee's answer to the following question: Is the third element judged by a subjective or an objective standard?

f. *CV 2132. Unilateral mistake.* Mr. Humpherys thought "unconscionable" in subparagraph (2) needed to be defined. Mr. Ferguson thought that "unconscionable" would be defined by giving the instructions on unconscionability, but if those instructions were not given, the definition of substantive unconscionability could be repeated in this instruction. Mr. King asked why CV 2131 and CV 2132 did not use the same language. The former refers to "a basic assumption or vital fact upon which [the parties] based their bargain," whereas the latter refers to a matter "related to an important feature of the contract." He thought the latter was a lower burden. Messrs. Young and Ferguson thought it should be a higher standard, that is, that it should be harder

to prove a unilateral mistake than a mutual mistake. At Mr. Humpherys's suggestion, subparagraph (5) was revised to read: "(5) [name of plaintiff] can be put back in the position [he] was in before the contract, losing only the benefit of the bargain." Mr. West thought this element would generally be a question for the court, not the jury.

The committee decided to send the instructions on mutual and unilateral mistake back to the contracts subcommittee to say whether the second element of CV 2131 and the third element of CV 2132 should be the same.

g. *CV 2133. Third-party beneficiary.* At Mr. Young's suggestion, the first part of the instruction was revised to read:

> [Name of plaintiff] claims that [he] is a third-party beneficiary of a contract between [list parties to the contract]. To be a third-party beneficiary of a contract, [name of plaintiff] must prove that the parties to the contract intended the contract to benefit [name of plaintiff]. The intentions of the parties to benefit [name of plaintiff] must be clear from the terms of the contract. . . .

Judge Barrett thought the third paragraph (defining "incidental beneficiary") was awkward. Mr. King asked what rights an incidental beneficiary has. He thought that if he has none, then the jury did not need to be instructed on incidental beneficiaries. Mr. Humpherys questioned whether the last sentence of the second paragraph was necessary. He also thought it was an incomplete statement of the law, that a third-party beneficiary can only enforce a contract to the extent of his personal rights.

Mr. Shea will revise the instruction.

Mr. Young was excused. Mr. Carney took over for Mr. Young.

h. *CV 2134. Assignment.* At Mr. Summerill's suggestion, the first sentence of the second paragraph was revised to read: "If [name of assignor] assigned [his] rights under the contract to [name of assignee], then [name of assignee] had the right to demand that [name of other party] do [specify contractual obligations at issue]." Mr. Humpherys asked who must consent to the assignment. Mr. Ferguson said the other party to the contract (the party that is not making the assignment). Mr. Humpherys suggested that the instruction use the parties' names, to be less confusing. The committee approved the instruction as revised.

i. *CV 2135. Delegation.* Mr. Carney asked how this instruction differed from CV 2134 (Assignment). Mr. Ferguson explained that contractual rights are assigned, and contractual duties are delegated. Mr. Humpherys suggested putting CV 2134 and 2135 in context by adding an introductory sentence: "[Name of party] claims that [name of party's] [rights/duties] under the contract were [assigned/delegated] to [name of party]." Mr. King asked who had the burden of proof to show an assignment or delegation. Mr. Ferguson thought the burden was on the party claiming that there was an assignment or delegation. Mr. Humpherys asked how the instruction would apply, since a delegation does not excuse the delegator from performance. Mr. Summerill said the issue arises in premises cases, where a landowner may delegate his responsibility for snow removal, for example, to a third party. Mr. King noted that it also comes up in structured settlements. Mr. King questioned whether the instruction accurately stated the law. He thought a party to a contract could always delegate duties unless the contract said that they were nondelegable or personal. Mr. Summerill thought the problem with the instruction was that it did not tell the jury what it was supposed to do with the information. Is the question for the jury whether or not there was a delegation, whether or not the delegator is liable, whether or not the delegatee is liable, or whether or not the duty was nondelegable, and, if the latter, isn't that a question of law for the court?

The committee decided to send the instruction back to the contracts subcommittee to answer the following questions: (1) What is the jury being asked to do? and (2) is it actually the law that the delegator remains liable on the contract? If so, why would the issue ever come up?

j. *CV 2136. Modification.* Mr. Ferguson asked what the jury was being asked to do. Mr. Summerill suggested changing the instruction to read: "[Name of party] claims that [he] and [name of other party] changed their contract. If you find that both parties agreed to change the contract and agreed on the new terms, then any old terms that conflict with the new terms cannot be enforced." Mr. West questioned whether the instruction accurately stated the law. He said that if a contract has to be in writing to comply with the statute of frauds, then any modification of the contract must also be in writing. He suggested adding a committee note to that effect. But some committee members noted that a contract may be taken out of the statute of frauds by part performance. And, Mr. Ferguson noted, if the statute of frauds does not apply, the parties may orally change a contract requirement that any modification be in writing. Mr. Carney asked what the issue for the jury would be--whether the contract is one that must comply with the statute of frauds? The committee

approved the instruction, subject to the addition of a committee note telling the court and counsel to consider the application of the statute of frauds.

k. *CV 2137. Abandonment.* Mr. Shea asked whether it will always be the plaintiff who is claiming that a contract was abandoned. The committee agreed that it would not be. Mr. Fowler noted that the phrase "One way a contract can be abandoned" was problematic. The committee revised the instruction to read:

> [Name of party] claims that [he] and [name of other party] abandoned their contract. To prove abandonment, [name of party] must prove that--
>
> (1) the parties agreed to abandon their contract, or
>
> (2) the parties acted as if the contract no longer existed.
>
> If you find that the parties abandoned their contract, then the parties have no further obligation to do what they promised to do.

Mr. King asked whether there was some time element to abandonment by acting as if the contract no longer existed. Mr. West thought there was a recent case that spelled out the elements for abandonment. The committee approved the instruction as modified.

l. *CV 2138. Nominal damages.* The committee revised the first paragraph to read: "A party damaged by [the other party's] breach of the contract has a right to recover the damages caused by the breach." At Mr. Simmons's suggestion, the instruction will be moved to follow the other damage instructions.

m. *CV 2139. Damages related to expected benefits.* At Mr. Humpherys's suggestion, "a party" was replaced by "[name of party]." Mr. King questioned the use of the term "general damages." He suggested calling them "contractual damages" (as opposed to "consequential damages"). Mr. Humpherys objected to the phrase "expected to receive." He noted that a party may have unreasonable expectations. The committee revised the instruction to read:

> If [name of party] is damaged by a breach of a contract, then [he] has a right to recover damages that follow naturally and normally from the breach, measured as follows: . . ."

Next Meeting. There is no meeting scheduled for July 2008. The next regularly meeting is Monday, August 11, 2008, at 4:00 p.m.

The meeting concluded at 6:00 p.m.

MINUTES

Advisory Committee on Model Civil Jury Instructions
August 11, 2008
4:00 p.m.

Present: John L. Young (chair), Francis J. Carney, Dr. Marianna Di Paolo, Phillip S. Ferguson, Tracy H. Fowler, Gary L. Johnson, Stephen B. Nebeker, Timothy M. Shea, Paul M. Simmons, Peter W. Summerill. Also present: P. Bruce Badger, Katie Carreau, Todd Shaughnessy, Elliott J. Williams

1. *Medical Malpractice Instruction CV324. Use of alternative treatment methods.* Mr. Carney noted that he had cleaned up the instruction and the committee note. He indicated that the instructions were generally agreed to as a group and that the defense attorneys on the medical malpractice subcommittee had made concessions. Mr. Carney noted that this was an instruction that the defense bar felt strongly about. Mr. Carney was concerned that, if the instruction was rejected, the defense bar may want to go back and revisit all the medical malpractice instructions. Mr. Carney noted that he personally might not favor the instruction in the abstract, but he recommended that the committee approve the instruction. Mr. Williams spoke in favor of the instruction, noting that it has a long history, beginning with a California pattern instruction and continuing through JIFU and MUJI 1st. He said the instruction was an effort to give effect to what doctors would expect the law to be. He said that the plaintiffs' attorneys on the MUJI 1st committee did not have a problem with it. He noted that the subcommittee voted 3-1 in favor of the instruction. The committee voted to approve the instruction, with Messrs. Carney, Fowler, Johnson, and Nebeker voting in favor of the instruction, and Mr. Simmons abstaining. Mr. Williams was excused.

Messrs. Ferguson and Summerill joined the meeting. Mr. Summerill expressed concern that the committee had voted on the instruction without him. He objected to the phrase in the instruction that says "it is not medical malpractice" to select an approved alternative method of treatment and proposed revising the instruction to read:

> When there is more than one method of [diagnosis/treatment etc.] that is approved by a respectable portion of the medical community, and no particular method is used exclusively by all providers, you may consider that in determining whether or not the physician failed to follow the standard of care as outlined above. The provider has the burden to prove that the method used is approved by a respectable portion of the medical community.

He also proposed cross-referencing CV301, which defines the standard of care. Mr. Young was reluctant to reopen the matter since Mr. Williams had not seen the proposal and had been excused, but he indicated that Mr. Summerill could bring the matter back to the committee at its next meeting if the subcommittee approved it. Mr. Carney said that he would be willing to take Mr. Summerill's proposal back to the subcommittee and see if the subcommittee would be willing to revisit the issue.

2. *Product Liability Instruction CV1057. Safety risks.* Mr. Young noted that the committee had deadlocked on this instruction at the last meeting. Mr. Young indicated that he would not break the tie at this time but asked the subcommittee to revisit the instruction and explain why it was not covered by CV1005 and CV1009. He noted that the instruction appeared to be an attempt to make the issue of duty a matter of instruction rather than a question of law for the court to decide.

Dr. Di Paolo joined the meeting.

3. *Contract Instructions.* The committee continued its review of the contract instructions. Mr. Young welcomed Mr. Badger, the chair of the contracts subcommittee, and Mr. Shaughnessy and Ms. Carreau to the meeting. Mr. Badger had responded in writing to some of the questions that the committee had raised the last time it considered the contract instructions, and Mr. Shea had circulated his responses to the committee.

a. *CV2103, Creation of a contract, & CV2107, Consideration.* The committee had suggested a note saying that the instructions apply only to executory contracts and not to unilateral contracts. Mr. Badger asked whether the committee meant "bilateral" contracts, instead of "executory contracts." The committee said it did. The subcommittee will propose comments for these instructions.

b. *CV2109. Unspecified time of performance.* The committee had asked what role the plaintiff's expectations play in determining time of performance. Mr. Badger noted that the case law says that what constitutes a reasonable time must be determined from all the relevant circumstances but does not specify what circumstances are relevant. The subcommittee recommended the following substitute instruction:

> When a provision in a contract requires an act to be performed without specifying the time to perform the act, the act must be done within a reasonable time under the circumstances.
>
> Because the contract does not require [name of defendant] to [describe the act] by a particular date or time, you will need to decide, based on all of the circumstances, what a reasonable date or time was for [name of defendant] to [describe the act].

At Mr. Shaughnessy's suggestion, "name of defendant" was changed to "name of party." As modified, the substitute instruction was approved.

c. *CV2113. Disputed condition precedent.* The committee had asked whether the instruction was limited to verbal or implied conditions. The subcommittee thought that whether a contract contains a condition precedent is a question of law if the contract is in writing, and that the only time a jury needs to decide if a condition precedent exists is if the contract is oral or implied. If the court determines that the written contract is unambiguous, then the existence of the condition precedent is a matter of law, and the jury only decides if the condition has been satisfied. But if the court determines that the contract is ambiguous, then the jury decides whether the contract contains a condition precedent. Accordingly, the subcommittee recommended revising the instruction to read as follows:

> [Party's name] claims that [he] did not have to [describe the obligation] unless [describe the alleged condition] occurred first. Based on the evidence, you must decide whether the parties intended that this condition was part of the contract. If you decide that this condition was part of the contract, then [party's name] had to [describe the obligation] before [other party's name] was required to perform his contract obligations.

The committee approved the revised instruction.

d. *CV2114, Performance excused by material breach, & CV2118, Material breach.* Ms. Carreau suggested dropping CV2114 in favor of CV2118, which she thought was a clearer statement of the law. Dr. Di Paolo thought that CV2114 was clearer because it defined "material," whereas CV2118 uses "material" without explaining it. Dr. Di Paolo suggested that CV2118 would be clearer if it were broken up into paragraphs. The committee revised CV2118 to read:

> You must decide if there was a material breach of the contract.
>
> A breach is material if a party fails to perform an obligation that was important to fulfilling the purpose of the contract.
>
> A breach is not material if the failure was minor and could be fixed without difficulty.
>
> If you decide that [name of defendant] materially breached the contract, then [name of plaintiff] was excused from doing what [he] had promised to do under the contract.

CV2118 was approved as revised, subject to a proposal from Dr. Di Paolo to modify the instruction if she chooses to make one. CV2114 was deleted.

e. *CV2119. Total breach.* At Mr. Badger's suggestion, the instruction was deleted as unnecessary.

f. *CV2115. When performance is not excused by other party's non-performance.* The committee had suggested a note on who has the burden of proof. Mr. Summerill noted that whoever claims that his performance was excused should have the burden of proof. The committee approved the instruction as written.

g. *CV2121. Anticipatory breach.* The committee had questioned what the standard of proof is to show an anticipatory breach. Mr. Badger noted that the case law consistently says that a party must "positively and unequivocally" show that he or she does not intend to perform the contract. Courts look to whether the party's language was sufficiently positive that it expressed a clear intent not to perform the contract. Mr. Simmons thought it was confusing to use "material breach" in this instruction when it is defined differently in CV2118. Mr. Shea noted that CV2118 defined "material breach" as a failure to do something, whereas this instruction deals with one party saying it will not do something. Messrs. Young and Shea suggested saying, "An anticipatory breach must be a material breach." Messrs. Carney and Ferguson and Ms. Carreau suggested not using the word "material." The subcommittee proposed a new instruction CV2121. Dr. Di Paolo suggested revising the first sentence of the new instruction to read, "[Name of plaintiff] claims that [name of defendant] breached the contract by making statements that he was not going to perform an important contract obligation." Mr. Badger suggested: "[Name of plaintiff] claims that [name of defendant] breached their contract by making statements that he was not going to perform a contract obligation that was important to fulfilling the purpose of the contract. A party must indicate positively and unequivocally that he does not intend to perform his contract obligations to materially breach the contract." Dr. Di Paolo thought that lay people take "positively" to mean "without any negatives," and to say, "I won't perform the contract" is a negative statement and therefore not a "positive" and unequivocal refusal to perform. Mr. Ferguson noted that "positively" is a philosophical term (related to "positivism") and may be misunderstood. Mr. Carney suggested a synonym, such as "definitively" or "unambiguously." Mr. Shea thought the instruction would be clear if it just said "unequivocally" or "clearly" and not "positively and unequivocally," perhaps with a committee note saying that the committee did not intend any substantive change in the law but was just trying to make the instruction understandable for lay people. Mr. Nebeker asked whether the cases distinguish between "positively"

and "unequivocally." Dr. Di Paolo noted that, if the instruction uses the term "positively," it should be defined in the instruction so that the jury does not use the wrong definition of it. Mr. Badger suggested making the second sentence of the first paragraph the last sentence. He proposed revising the first paragraph of the instruction to read:

> If a party merely says that he doesn't want to perform his contract obligations, or that he has misgivings about the contract, this isn't enough to constitute a material breach of contract. But when a party is supposed to perform his obligation at some time in the future, it is a material breach of contract if he manifests positively and unequivocally that he does not intend to perform his contract obligations when the time arrives. [Name of plaintiff] claims that [name of defendant] materially breached their contact by making statements that he was not going to perform his contract obligation.

Mr. Shaughnessy and Ms. Carreau suggested replacing "manifests" with "indicates." Mr. Young noted that the instruction is called "Anticipatory breach," yet the word "anticipate" (or any of its forms) does not appear in the instruction. The subcommittee noted that an anticipatory breach gives the nonbreaching party three options but did not think the jury needed to be instructed on the options. At Mr. Badger's suggestion, the instruction was referred back to the subcommittee for reconsideration in light of the committee's discussion.

h. *CV2122. Implied covenant of good faith and fair dealing*. Mr. Humpherys had expressed concerns about the instruction, but he was not at the meeting to explain his concerns. The committee noted that there will be separate jury instructions on insurance bad faith. Mr. Badger did not think that bad faith in other contractual situations required any more than what CV2122 provided. Mr. Summerill thought the instruction was unwieldy. Mr. Carney thought the instruction should make clear that the court should only instruct on the limits set out in the second paragraph that apply in the particular case. The subcommittee will revisit the instruction.

i. *CV2125, Duress, & CV2126, Improper threat*. Mr. Young asked whether the instructions cover economic duress. The subcommittee will revisit CV2125 and CV2126.

j. *CV2130, Substantive unconscionability, & CV2131, Procedural unconscionability*. The subcommittee was not prepared to discuss CV2130 and CV2131, so further discussion was deferred until the next meeting.

4. *New Committee Member*. Messrs. Young and Carney made a joint motion to add John Lund of Snow, Christensen & Martineau as a member of the committee. Mr. Johnson seconded the motion. There was no opposition.

5. *Next Meeting*. Mr. Young thought that the committee needed to meet twice in September and October to get back on schedule. The next meeting will be Monday, September 8, 2008, at 4:00 p.m. The committee will try to finish the contract instructions at that meeting. The committee will then meet on Monday, September 22, 2008, to discuss the motor vehicle accident instructions. The committee will also meet on Tuesday, October 14, 2008 (because Monday, October 13, is Columbus Day) and may meet again on Monday, October 27, 2008, if necessary.

The meeting concluded at 6:00 p.m.

MINUTES

Advisory Committee on Model Civil Jury Instructions
September 22, 2008
4:00 p.m.

Present: John L. Young (chair), Juli Blanch, Francis J. Carney, Dr. Marianna Di Paolo, Phillip S. Ferguson, Tracy H. Fowler, L. Rich Humpherys, Gary L. Johnson, Stephen B. Nebeker, Timothy M. Shea, Paul M. Simmons, Peter W. Summerill, David E. West. Also present: Lynn Davies, chair of the Motor Vehicle subcommittee.

1. *Motor Vehicle Instructions.* The committee reviewed the motor vehicle instructions.

a. *CV601. Introduction.* The committee approved CV601.

b. *CV602. Driver's general duty.* Mr. Summerill asked whether the instruction needed to define reasonable care. Mr. Davies noted that some general negligence instructions are typically given in motor vehicle cases. At Mr. Young's suggestion, a committee note was added referring users to the general negligence instruction defining reasonable care (CV202). The committee approved CV602.

Ms. Blanch and Dr. Di Paolo joined the meeting.

c. *CV603. Duty. Control of automobile.* Mr. Summerill did not think the driver's "ability to guide" the vehicle was a relevant factor; a driver has a duty to keep the vehicle under reasonable control even if he has a medical or other condition that would prevent him from doing so. The committee revised the instruction to read: "A driver has a duty to keep the vehicle under reasonable control and to operate the vehicle so as to avoid danger." The committee approved the instruction as revised.

Mr. Humpherys joined the meeting.

Mr. Davies noted that the instruction the subcommittee had prepared (5.4) had seven subsections. Mr. Davies acknowledged the desire to simplify the instructions and put them in plain English but thought that there should still be a general instruction on violations of the motor vehicle code that could be adapted to specific provisions of the code. The subcommittee's proposal had stated that the court should paraphrase the relevant statute in plain English. Mr. Nebeker thought the court should have the option of instructing in the words of the statute. Mr. Humpherys and Mr. Simmons noted that the subcommittee's general instruction was now CV625 and asked whether it should come earlier in the instructions. Mr. Shea suggested that there be a general committee note to all the motor vehicle instructions, as there is with the medical malpractice instructions. The committee deferred further discussion on the proposal.

Mr. Ferguson and Mr. Fowler joined the meeting.

d. *CV604. Lookout.* The instruction was revised to read: "A driver has a duty to keep a proper lookout for other traffic and hazards that can be reasonably anticipated." The committee approved the instruction as revised.

e. *CV605. Following at a safe distance.* Dr. Di Paolo did not like stating the driver's duty in the negative ("A driver has a duty not to follow . . ."). At Mr. Davies's suggestion, the instruction was revised to read: "A driver has a duty to follow another vehicle at a distance that is reasonable and prudent under all existing conditions and circumstances." Ms. Blanch questioned whether both "conditions" and "circumstances" were necessary. Dr. Di Paolo thought there was a distinction in meaning and that it did not hurt to include both. The committee approved the instruction as revised.

f. *CV606. Duty of maintenance.* At Mr. Davies's suggestion, the instruction was revised to read: "A driver [an owner] has a duty to drive [move] a vehicle [allow a vehicle to be driven/moved] on a roadway only if the vehicle is in a safe condition." Mr. Carney suggested deleting "on a roadway." Mr. Davies noted that the statute uses the term "highway," which is a defined term under the Motor Vehicle Code, but he thought jurors would have a different understanding of "highway" than the statutory definition and that the term "roadway" would be understood by most jurors to include those roads that come within the statutory term "highway" and was therefore acceptable. The committee debated whether there was a common-law duty not to move a vehicle in other circumstances if the vehicle is in an unsafe condition. Some committee members thought there was, but others (including Mr. Johnson) thought there was not. Someone suggested adding a committee note saying that the scope of any common-law duty was not clear. Mr. Humpherys thought no committee note was needed; if the instruction does not apply because the vehicle was not on a roadway, then the parties and the court will have to craft their own instruction, but no instruction is necessary to tell them that. Mr. Humpherys further noted that the duty of maintenance is a statutory duty that is subject to the statutory exceptions set out in CV625. He suggested having a general committee note at the beginning of the instructions saying that, if a person is alleged to have violated a statutory duty, the parties and court should consider CV625 dealing with violations of statutes and exceptions to and justifications for such violations. Mr. Davies suggested that a note to CV606 be added referring to the statute, since the statute itself says it does not apply to certain equipment, such as farm equipment. The committee noted was revised to read: "If there is an alleged violation of a particular statute regarding required equipment and circumstances (e.g., Utah Code section 41-6a-1601), instruction CV625 may be considered." The instruction was approved as revised.

g. *CV607. Speed.* Dr. Di Paolo said she did not understand what the jury was supposed to do with CV607. She suggested deleting the first sentence, but Mr. West preferred starting each instruction with the phrase, "A driver has a duty to . . ." Dr. Di Paolo also suggested revising the order of the sentences. Messrs. Carney and Humpherys noted that "negligence" should be replaced with "fault." Mr. Summerill thought, based on *Gaw v. State,* 798 P.2d 1130 (Utah 1990), that the instruction should say that driving faster than the posted speed limit "is" evidence of fault, not "may be" evidence of negligence. Others preferred the phrase "may be evidence," noting that *Gaw* uses both terms and further noting that driving above the speed limit may be subject to justification or excuse. Mr. Humpherys and Dr. Di Paolo thought that jurors would not distinguish between "is evidence of fault" and "is fault." Mr. Davies thought there should be a general committee note explaining that, if there is evidence of a justification or excuse for breaking the speed limit (or any other statutory violation), the court should instruct the jury according to CV625. Dr. Di Paolo noted that the last sentence of the instruction tells the jury that a driver may have to drive above or below the speed limit, depending on the circumstances, yet the sentence before tells the jury that driving above the speed limit is negligent. She asked whether the last sentence was meant to trump the preceding sentence. At Mr. Shea's suggestion, "posted" was dropped from the phrase "posted speed limit"; the committee noted that there are default speed limits that apply even where no speed limit is "posted." Mr. Summerill suggested adding a citation to *Gaw* to the reference section, but Mr. Carney thought that *Gaw* did not support the instruction and noted that it is already cited to support CV625. Mr. Summerill suggested replacing "accident" with "collision," for fear that jurors would interpret "accident" to mean that no one was at fault. Dr. Di Paolo did not think that fear was realistic, and Mr. Fowler pointed out that not all motor vehicle accidents involve collisions between vehicles; there may be a one-car rollover accident, for example. The committee revised the instruction to read:

> A driver has a duty to drive at a safe speed.
>
> The speed limit at the place of this accident was [___] miles per hour. Driving at a speed in excess of the posted limit may be evidence of fault. However, conditions and circumstances may allow a driver to drive at a [lower/greater] speed with proper regard for existing and potential hazards.

The committee approved the instruction as revised.

h. *CV608. Minimum speed.* Mr. West suggested starting the instruction, "A driver has a duty to not operate . . . ," but Dr. Di Paolo noted that

that construction was hard to make sense of. The committee revised the instruction to read: "A person may not drive at a speed so slow as to interfere with the normal and reasonable movement of traffic unless conditions or circumstances justify a reduced speed for safe operation." The committee approved the instruction as revised.

i. *Titles.* Mr. Summerill proposed deleting the word "Duty" from the titles of CV609 to CV624. Mr. Humpherys thought that the titles were not part of the instructions and would not be given to the jury. Mr. Carney, however, noted that the introduction to MUJI 2d says that "judges and lawyers should include the title of the instruction" in written instructions because they help jurors "organize their deliberation and decision-making." The committee decided to delete "Duty" from the titles of CV609 to CV624.

j. *CV609. Turning/lane change.* Mr. West thought that the instruction improperly implied that a driver has a duty to turn. The committee revised the instruction to read: "A driver may turn a vehicle [change lanes] only when it can be done with reasonable safety and after giving an appropriate signal." The committee approved the instruction as revised.

k. *CV610. Right of way. Left turns.* Mr. Young asked whether the phrase "yield the right of way" needed to be defined. The committee did not think so, since lay people must understand the phrase to get a driver's license. Mr. Young noted that some jurors may not be licensed drivers. After Mr. Davies read the statutory definition of "right-of-way" (Utah Code Ann. § 41-6a-102(50)), most of the committee thought it would only confuse the jury to attempt to define the term. Dr. Di Paolo offered to try to draft an instruction defining "right-of-way" if someone would send her the statutory language. Mr. Carney asked whether the phrase "the right of way" was necessary. Mr. Davies thought it had a well understood meaning among lay people. The committee approved the instruction as written, subject to any further instruction defining "right-of-way" that Dr. Di Paolo may suggest.

l. *CV611. Right of way. Unregulated intersection.* Mr. West questioned whether the last sentence was necessary. The committee decided to make the last two sentences separate paragraphs and to bracket them to indicate that they should only be included if they are supported by the facts of the case. At Mr. Simmons's suggestion, the first sentence of the second paragraph was revised to read: "When more than one vehicle enters or approaches the intersection at approximately the same time, the driver of the vehicle on the left has a duty to yield the right of way to the vehicle on [his] right." The committee approved the instruction as revised.

m. *CV612. Right of way. Traffic signals.* Mr. Humpherys noted that the first sentence was problematic. The duty of a driver faced with a red light is to stop, not to "yield the right of way." Mr. Shea thought the second sentence was too long. The committee revised the instruction to read:

> A driver who approaches an intersection with a red light has a duty to stop. The driver with the green light has the right to assume that traffic will not enter the intersection against a red light. However, if that driver sees, or in the exercise of reasonable care should see, that another vehicle is going to proceed against the red light, the driver with the green light has a duty to use reasonable care to avoid a collision.

At Mr. Davies's suggestion, references were added to the statutes on traffic control signals, Utah Code Ann. §§ 41-6a-304 & -305. The committee approved the instruction as revised.

n. *Additional instructions.* Mr. Davies noted that yellow lights are more problematic than red lights. The committee asked him to ask the subcommittee to propose an instruction on rights-of-way at yellow lights. Mr. Nebeker suggested that there should be instructions on flashing red and yellow lights. Dr. Di Paolo suggested that there should be an instruction on approaching an intersection where the lights are not operating. Mr. Humpherys and Mr. Davies did not think the latter situation resulted in much litigation.

o. *CV613. Intoxicated driver.* Mr. Humpherys noted that the reviewing committee (the so-called gang of three) had a question as to whether a blood alcohol level of 0.08 or greater resulted in strict liability or whether it only gives rise to a presumption that a driver was impaired. Mr. Davies read the subcommittee's response:

> With regard to all of our instructions setting forth Traffic Code provisions, including the .08 standard, the committee intended the negligence *per se* instruction (our MUJI 2d 5.5, which it appears you have renumbered [now CV625]) to be given, followed by the pertinent instruction(s) explaining the applicable Traffic Code provision. In the case of .08 intoxication, testing out at .08 is by statute legal intoxication. The presumption to which you refer is, we think, the rebuttable presumption that the testing equipment is accurate. *State v. Vigil,* 772 P.2d 469 (Utah App. 1989). Establishing .08 blood alcohol or breath alcohol is not a presumption; it shows intoxication. In addition, a driver whose

> blood alcohol is less than .08 can also be deemed intoxicated, if impairment can be shown.
>
> There is one caveat, which should perhaps be a Committee Note. There is an involuntary intoxication rule (see *State v. Gardner,* 870 P.2d 900 (Utah 1993), which could apply in the rare or unusual case. To keep the instructions as simple as possible, we have not attempted to write that exception into the main instruction. However, it does provide a defense to a claim of intoxication.

In other words, a blood alcohol content of .08 is negligence per se, but the plaintiff must still prove causation. At Mr. Shea's suggestion, the instruction was revised to read:

> A driver may not operate a vehicle
>
> [(1) if [he] has a blood or breath alcohol concentration of .08 grams or greater at the time of operation of the vehicle.]
>
> [(2) if [he] is under the influence of [alcohol, any drug, or the combined influence of alcohol and any drug] to a degree that the person cannot operate the vehicle safely.]

Mr. West thought there should be an "or" between subparagraphs (1) and (2). Other committee members thought that "or" was implied by putting the subparagraphs in brackets. Some committee members noted that it may not be an "either/or" situation, but both subparagraphs could apply in a particular case. Mr. Shea will see how the committee has treated similar situations. Subject to further revision to make the instruction consistent with prior practice, the committee approved the instruction as revised.

p. *CV614. Young drivers.* The instruction was revised to read: "A minor driving a motor vehicle is held to the same standard of care as an adult driver." The committee approved the instruction as revised.

q. *CV615. Drivers approached by emergency vehicle.* At Mr. Summerill's suggestion, "immediately" was dropped from the first line. Ms. Blanch recommended replacing the phrase "audible or visual" signals with "audio or visual" or "audible or visible," to be consistent. Dr. Di Paolo noted that the choice of words depends on whether the focus is on what is being emitted or what is being perceived. Ms. Blanch then suggested replacing the phrase with "horns, sirens, or lights." After Mr. Davies read the statutory language, which included

"bells" and "whistles," the committee decided to use "audio or visual warning devices" instead of "audible or visual signals." The committee revised the last paragraph to read: "In complying with these duties, a driver must use reasonable care under all of the conditions and circumstances."

The committee decided to continue its review of the motor vehicle instructions at the next meeting, to allow the subcommittee and the gang of three to address some of the remaining issues in the meantime and to allow the subcommittee to propose a general, introductory committee note explaining the importance of tailoring statutory instructions to the facts of the particular case and to instruct on justifications or excuses for statutory violations when there is evidence to support them.

2. *Next Meeting*. The next meeting will be Tuesday, October 14, 2008 (because of Columbus Day on Monday, October 13, 2008), at 4:00 p.m. The committee will finish its review of the motor vehicle instructions at that time. It will then take up the construction contact instructions at the October 27, 2008, meeting, since the premises liability and insurance obligations subcommittees have not yet finished their work.

The meeting concluded at 6:00 p.m.

MINUTES
Advisory Committee on Model Civil Jury Instructions
October 14, 2008
4:00 p.m.

Present: John L. Young (chair), Francis J. Carney, Dr. Marianna Di Paolo, Phillip S. Ferguson, Tracy H. Fowler, L. Rich Humpherys, Gary L. Johnson, Timothy M. Shea, Paul M. Simmons, Peter W. Summerill.

1. *Contract Instructions.* The committee continued its review of the motor vehicle instructions.

a. *CV6##. "Right of way" defined.* The committee revised the instruction to read:

> A [vehicle/pedestrian] has the right of way when [he] has the right to proceed in a lawful manner in preference to an approaching [vehicle/pedestrian].

The committee approved the instruction as revised.

b. *CV616. Emergency vehicles.* Mr. Ferguson thought the instruction did not clearly tell the jury what it was supposed to decide. At Mr. Ferguson's suggestion, the following changes were made: The following sentence was added to the beginning of the instruction: "You must decide whether [name of driver of an emergency vehicle] acted reasonably." The third paragraph was revised to read, "The law allows the driver of an emergency vehicle to disregard certain duties if each of the following is true:" And "but only" was deleted from the phrase starting "[drive through a stop signal . . .". **The committee approved the instruction as revised.**

c. *CV617. Pedestrians.* The committee deleted the phrase "at all times" and **approved the instruction as modified.**

Mr. Humpherys joined the meeting.

d. *CV618. Pedestrian crossing a roadway.* At Mr. Ferguson's suggestion, the committee replaced the first sentence of the instruction with the following: "You must decide whether [name of pedestrian] acted reasonably. You shall consider the following:"

Mr. Summerill joined the meeting.

Mr. Shea questioned whether the reference to unmarked crosswalks was necessary, since it appeared that all pedestrians must yield the right-of-way unless they are in a marked crosswalk. Mr. Carney looked up the statute, which gives the right-of-way to pedestrians in either a marked crosswalk or an

unmarked crosswalk at an intersection. The committee thought the definition of "unmarked crosswalk" was too cumbersome to include in the instruction and left it to the court and parties to craft an instruction defining "unmarked crosswalk" if that is an issue in the particular case. At the suggestion of Mr. Shea, subparagraph (1) was broken into two subparagraphs: one (subparagraph (1)) covering marked crosswalks, and the other (new subparagraph (2)) covering unmarked crosswalks, and the parenthetical referring to the statutory definition of unmarked crosswalks was placed at the end of new subparagraph (2). The phrase "shall yield" was replaced with "must yield," and the phrase "reasonably careful person in the position of a pedestrian" was replaced with "reasonable pedestrian."

Dr. Di Paolo joined the meeting.

Dr. Di Paolo suggested that the first sentence read: "To decide whether [name of pedestrian] acted reasonably, you must consider the following:" **The committee approved the instruction as modified.**

e. *CV619. Drivers toward pedestrians.* The committee revised the instruction to read:

> If traffic signals are [not in place/not in operation] a driver shall yield the right-of-way to a pedestrian:
>
> (1) if [he] is within a crosswalk on the half of the road where the driver is traveling, or
>
> (2) if [he] is approaching so closely from the opposite half of the road as to be in danger.
>
> Both a driver and a pedestrian have a continuing duty to use reasonable care for the safety of others and themselves, even when one has the right-of-way over the other.

Dr. Di Paolo asked whether subparagraphs (1) and (2) should be bracketed. Mr. Humpherys thought not, since the jury may have to decide whether the pedestrian fits within subparagraph (1) or (2), or both may apply in a given case. **The committee approved the instruction as revised.**

f. *CV620. Pedestrian signals.* Mr. Ferguson thought the instruction did not explain what the jury was supposed to do. He suggested starting the instruction with "You must decide whether [name of pedestrian] acted

reasonably." Mr. Young noted that the instruction should only be given if CV6## is given first. Mr. Young questioned whether the last paragraph was necessary. It was revised to read, "But both a driver and a pedestrian have a continuing duty to use reasonable care for the safety of others and themselves, even when one has the right-of-way over the other." The paragraph was moved to the end of CV6##. Mr. Ferguson asked what a pedestrian's duty is if the signal counts down to zero. At what point must the pedestrian not try to cross the street? Mr. Carney noted that there may be municipal traffic codes that address the issue. He looked up Salt Lake City's, which appears to let a pedestrian start crossing an intersection during the countdown. At Mr. Young's suggestion, a committee note was added that says, "The judge should adjust this instruction if the pedestrian signal uses a different technology or the case is controlled by a local ordinance." The committee discussed which modal to use ("may" or "shall"). Dr. Di Paolo noted that "shall" is not commonly used and not readily understood by lay people. Mr. Summerill thought that, if a statute defines the standard of care (that is, if it is being used to define negligence), the instruction should say a violation "is evidence" of negligence, but he noted that the committee has not followed that convention with other instructions, such as CV607, which says that driving over the speed limit "may be evidence of fault." He thought the committee should be consistent. Messrs. Young and Ferguson, however, thought that the speed limit law was different, that more flexibility was built into it; that is, the speed limit is just prima facie evidence of a reasonable speed. The last clause of subparagraph (2) was revised to read, "but a pedestrian who has started crossing keeps the right-of-way while continuing to a [sidewalk/safety island]." **The committee approved the instruction as revised. The question at the end of the instruction was deleted.**

g. *CV621. Driving near children.* At Dr. Di Paolo's suggestion, "around" was changed to "near." Mr. Humpherys suggested deleting "than a mature person" because he thought it was ambiguous and imprecise, but others thought it was necessary to answer the implicit question, More carefully than what? Messrs. Humpherys and Shea suggested changing the instruction to track CV204 and to include a cross-reference to CV204, so that the instruction would read: "A driver must anticipate the ordinary behavior of children and must be more careful when children are present than when only adults are present." **The committee approved the instruction as revised.**

h. *CV622. Bicyclist.* The committee revised the instruction to read:

> A bicyclist must use reasonable care to operate [his] bicycle safely under the circumstances, both for [his] own safety and for the safety of others.

> However, a driver should be more cautious when [he] knows or should know a bicyclist is riding in the vicinity.

The committee approved the instruction as revised.

i. *CV623. Bicycles. Three-foot rule.* The committee revised the instruction to read:

> A driver may not drive within three feet of a moving bicycle, unless it is necessary to drive closer and it can be done safely.

The committee approved the instruction as revised.

j. *CV624. Real property owner to remove obstruction impairing view.* Mr. Humpherys suggested "landowner" for "owner of real property," but Dr. Di Paolo thought most jurors would interpret "landowner" as someone owning a large estate or undeveloped property, such as a rancher. The introductory phrase, "The owner of real property," was changed to "A property owner." Mr. Ferguson asked whether the duty also applied to tenants and whether it extended to pedestrians. The committee note was deleted, and a citation to *Jones v. Bountiful City Corp.,* 834 P.2d 556 (Utah Ct. App. 1992),was added to the references. **The committee approved the instruction as revised.**

k. *CV625. Violation of statute, ordinance or safety law.* The committee noted that CV625 is substantially similar to CV212. Mr. Humpherys questioned whether a violation of a statute is or should be excused if the violator "was incapable of obeying the law" or "incapable of understanding what the law required." Mr. Ferguson asked what these phrases meant. Mr. Johnson offered an example--a 14-year-old driving a car. Mr. Summerill thought that a child engaged in an adult activity was held to the same standard of care as an adult. Mr. Johnson did not think that was necessarily the case. Messrs. Carney and Young thought that the committee did not have to resolve these issues, that they were legal questions for the court to decide. Mr. Humpherys asked why the jury should be instructed on them at all, then, if they were legal issues. Mr. Young noted that the legal question, which the committee cannot resolve, is whether inability to understand or obey the law is a legal justification or excuse for violating the law; Utah appellate decisions seem to say that it is. If someone disagrees, they will have to take the matter up with the Utah Supreme Court. What the jury must decide is the factual question of whether a person was unable to understand or obey the law in a particular case. Messrs. Young and Summerill thought that the instruction should be approved if it is consistent with CV212.

Mr. Johnson thought that the instruction should be moved up to precede the instructions on specific statutory duties. **The committee approved the instruction. Mr. Young asked committee members to give Mr. Shea their suggestions on where the instruction should be moved to.**

l. *CV626. Comply with all duties.* Mr. Ferguson thought that CV626 was redundant, given CV625. Mr. Carney thought the instruction lacked authority and was more argument than a proper jury instruction. Mr. Fowler wanted to know if the motor vehicle subcommittee thought the instruction was necessary and why. **The committee struck the instruction, subject to some justification by the subcommittee for including it.**

m. *CV627. Assuming obedience to law.* The committee revised the first part to read, "A driver has a right to assume that others will obey the law." Mr. Ferguson questioned whether the phrase "a good reason to believe otherwise" was sufficiently specific. Others did not have a problem with it. Mr. Shea thought the instruction fit better in the negligence instructions. **The committee approved the instruction.**

n. *CV628. Increased duty.* **The committee deleted the instruction** because it was not specific to motor vehicle accidents and was already included in the general negligence instructions.

o. *CV629. Owner who allows minor to drive.* Mr. Young thought the last sentence was unnecessary. Mr. Johnson thought it may be necessary under *Dixon v. Stewart*. Mr. Simmons noted that the law was an exception to the Liability Reform Act's abolition of joint and several liability, which the jury will be instructed on in other instructions, and that, if both the owner and the driver are listed separately on the special verdict form, the jury should probably be instructed as stated in the last sentence. Mr. Young called for a vote on whether the last sentence should be struck. **The committee voted to strike the last sentence,** with Messrs. Carney, Ferguson, Fowler, Humpherys, and Summerill voting in the affirmative.

p. *CV630. Negligent entrustment.* The committee asked what the authority for the instruction was. Mr. Summerill noted the following Utah cases on negligent entrustment: *Lane v. Messer,* 731 P.2d 488 (Utah 1986); *Wilcox v. Wunderlich,* 73 Utah 1, 272 P. 207 (1928); and *Utah Farm Bureau v. Johnson,* 738 P.2d 652 (Utah Ct. App. 1987). The committee revised the first paragraph to read:

> The owner of a motor vehicle who allows another person to [use/drive] [his] vehicle may be responsible under certain circumstances for the harm caused by the [user/driver] if the owner knew or a reasonable person should have known that it was unsafe to allow the driver to [use/drive] the vehicle.

Mr. Young questioned the need for the last paragraph. Mr. Humpherys suggested deleting the "such as" clause. Mr. Shea suggested changing "exercised reasonable care" to "is responsible." Mr. Young suggested, "may be responsible" or "may be at fault." Mr. Humpherys thought the last paragraph implied vicarious liability on the part of the negligent entrustor. At Mr. Young's suggestion, **the last paragraph was struck, and the instruction was sent back to the motor vehicle subcommittee to rewrite it in terms of fault.**

q. *CV631. Threshold.* Mr. Humpherys suggested adding "reasonable and necessary" before "medical expenses" in subparagraph (3). Mr. Summerill disagreed, noting that the phrase "reasonable and necessary" was not in the statute. Mr. Johnson thought that there is an unpublished Utah Court of Appeals decision (*Vaughn v. Anderson,* 2005 UT App 423) that says whether the expenses were reasonable and necessary is a question for the jury. Mr. Summerill thought there were cases that said that one can infer that medical expenses are reasonable and necessary if insurance has paid for them. At Mr. Summerill's and Mr. Young's suggestion, a committee note was added saying that whether the medical expenses must be "reasonable and necessary" is an open issue under Utah law. Dr. Di Paolo thought the second sentence should be stated in the positive. The second sentence was revised to read: "For a person to recover non-economic damages resulting from an automobile accident [he] must meet one or more of the following threshold injury requirements." **The committee approved the instruction as modified.**

r. *CV632. Police officer testimony.* Dr. Di Paolo questioned the need for the first three paragraphs. Mr. Johnson noted that the subcommittee agreed that there is a problem in how juries view police officers' testimony and that an instruction on the subject is needed. Dr. Di Paolo thought that the instruction nevertheless did not have to explain the difference between a fact witness and an expert witness, unless the jury had to decide whether the officer was testifying as a fact witness or an expert. And if that is what the jury must decide, the instruction does not tell the jury how to make that decision. Mr. Ferguson thought that the instruction left it to the jury to decide how an officer is testifying. Dr. Di Paolo suggested adding a sentence before the last paragraph that says, "[Name of officer] testified in this case as a [fact/expert] witness." Dr. Di Paolo said she did not have a problem with the instruction if it is clear to the jury that a

given officer testified as a fact witness or as an expert (or both). Other committee members thought it would be clear during the course of the trial. **The committee approved the instruction without changes.**

s. *CV633. Insurance.* Mr. Young asked whether the instruction was already covered by CV2024, on collateral source payments. Mr. Humpherys thought it was important to include the instruction in the motor vehicle instructions because all owners and operators of motor vehicles are required to have insurance, so jurors will be more likely to consider insurance in motor vehicle cases. **The committee decided to leave the instruction in and approved it as written.**

t. *CV634. Motorcycle helmet usage.* Mr. Ferguson asked whether the same rules apply to bicyclists. The answer was no. Mr. Humpherys said the problem with the instruction was that it did not tell the jury what to do with the information. Is the failure to wear a helmet when required by law a matter of strict liability or comparative fault, or does it go to damages? Mr. Johnson thought it went to damages, under the doctrine of avoidable consequences. Mr. Summerill noted that it can also go to the issue of causation. Mr. Humpherys asked whether a violation of the statute is subject to justification or excuse under CV625. Mr. Young thought that the instruction should not be included unless there is some Utah appellate decision saying what the jury is supposed to do with the information.

u. *CV635. Seatbelt usage.* Mr. Fowler thought that the instruction should have a committee note saying that it may not apply in crashworthiness cases. **Mr. Fowler will propose such a note.** Mr. Johnson thought that the seatbelt usage statute was unconstitutional, as a legislative encroachment on the judiciary's power to adopt rules of evidence. The committee rewrote the instruction to read:

> You must decide this case without regard to whether you believe that a [seatbelt/child restraint device] was either used or not used by any party in this case. If you have heard evidence or if you believe that any party in this case used or did not use seatbelts or child restraint devices, you should not consider such information in reaching a verdict.

The committee approved the instruction as revised.

2. *Next Meeting.* The next meeting will be Monday, October 27, 2008, to discuss the construction contract instructions.

The meeting concluded at 6:30 p.m.

MINUTES

Advisory Committee on Model Civil Jury Instructions

October 11, 2008

4:00 – 6:00 p.m.

Present: Judge William Barrett, Juli Blanch, Tracy Fowler, Gary Johnson, Stephen Nebeker, Timothy Shea, David West, John Young

Excused: Frank Carney, Professor Marianna Di Paolo, Phillip Ferguson, Rich Humpherys, Colin King, Paul Simmons, Peter Summerill

Guests: Lynn Davies

Mr. Young called the meeting to order.

Mr. Young reported that the construction contract instructions had been delayed. He asked Mr. Johnson to be ready to present the intentional tort instructions at the November meeting.

Mr. Young reported that due to the absence of several key people, the discussion of Instruction 1057, Safety risks, would be postponed to November.

Mr. Young reported that Frank Carney had proposed editing the Introduction and the committee note preceding the medical malpractice instructions because of reports that some lawyers are arguing to use the original MUJI rather than MUJI 2nd. Because Mr. Carney was unable to attend, these items will be postponed to November.

Mr. Young reported that Mr. Carney had also suggested amending Instruction 1052, Learned intermediary, because of the Supreme Court decision in *Downing v. Hyland Pharmacy*. This also was postponed to November, and Mr. Young suggested a separate instruction for pharmacists.

Mr. Johnson reported that he must resign from the committee. Mr. Young said that he has talked with John Lund about being a member, and Mr. Lund is willing. Mr. Young asked the committee to consider other possible replacements, and the committee will decide in November.

Instruction 615, Right of way. Flashing red light. Mr. Davies recommended adding a sentence in brackets "[The driver must yield the right-of-way to a pedestrian in a crosswalk.]" because the driver's duty at a flashing red light is the same as at a stop sign. Mr. Davies also recommended adding a citation to Utah Code Section 41-6a-902. The committee agreed.

Instruction 616, Right-of-way. Flashing yellow light. Because there are so many different circumstances, Mr. Young suggested adding "The driver must yield the right-of-way to [insert factual dispute]." The committee agreed.

Instruction 630, Owner who allows minor to drive. Mr. Davies recommended adding to the end of the instruction the sentence: "If you find that the driver is at fault, any judgment will be applied fully against both the driver and the vehicle owner." Mr. West asked whether a verdict form would be adequate to cover this point. Mr. Young thought

that the addition would confuse the jury. Mr. Davies argued that the jury should be told why the owner is in the case, and what will be the effect of the jury's verdict, citing *Dixon v. Stewart*. Mr. Young thought the new sentence restated the sentence before it.

Mr. Young suggested adding a new first paragraph that set up the opposing claims and what had to be decided.

After discussion, the committee approved the sentence recommended by Mr. Davies and added a new first paragraph:

> [[Name of plaintiff] claims that [name of owner] gave [name of driver] permission to drive the vehicle. [Name of owner] denies giving permission. You must decide whether [name of owner] gave [name of driver] permission to drive.]

The paragraph should be bracketed because permission might not be disputed.

Instruction 631, Negligent entrustment. After discussion, the committee agreed to replace the current committee note with a note suggested by Mr. Davies: "Liability for negligent entrustment is not imputed liability; rather, it is independent negligence for the act of entrustment. Therefore, the jury should apportion fault to the negligent entrustment tortfeasor pursuant to UCA 78B-5-818, -819 and -820."

Instruction 632, Threshold. Mr. Davies said that the subcommittee had recommended including "reasonable and necessary" to describe the necessary minimum medical expenses. He said that the subcommittee had discussed the point extensively. He argued that although Section 31A-22-309(1)(a) does not use the phrase, Section 31A-22-307 which describes the minimum personal injury protection coverage for reasonable and necessary medical expenses, establishes the formula for both -307 and -309. Mr. Young noted that Mr. Humphreys also had argued in favor of including "reasonable and necessary" at the previous meeting. After discussion, the committee decided to insert "reasonable and necessary" before "medical expenses in excess of $3,000" and delete the committee note.

Instruction 635, Seatbelt usage. The committee reviewed and approved the committee note proposed by Mr. Fowler.

The meeting was adjourned.

MINUTES

Advisory Committee on Model Civil Jury Instructions

November 10, 2008

4:00 – 6:00 p.m.

Present: Juli Blanch, Frank Carney, Phillip Ferguson, Tracy Fowler, Gary Johnson, Stephen Nebeker, Timothy Shea, Peter Summerill,

Excused: Judge William Barrett, Professor Marianna Di Paolo, Rich Humpherys, Colin King, Paul Simmons, David West; John Young

In Mr. Young's absence, Mr. Carney called the meeting to order.

The committee decided to defer consideration of all but the fraud instructions so more members could attend.

CV1701. Elements of fraud.

The committee decided in the second sentence to change "this claim" to "fraud."

The committee decided in item (2) to change "knew the statement was false" to "made the statement knowing it was false."

The committee approved the instruction as amended.

CV1702. Intentional or reckless false statement.

The committee deleted the first paragraph and deleted "intentional" from the title. The committee changed "a false statement is reckless" to a false statement is made recklessly."

The committee approved the instruction as amended.

CV1703. Opinion as statements of fact.

The committee decided to split the instruction into two separate instructions. 1703 would cover the general rule that recovery for fraud is limited to misrepresentation of facts. The committee redrafted the instruction to read:

"You must decide whether the defendant's statement was a representation of fact. Generally, a plaintiff may recover for fraud only if the defendant's statements were misrepresentations of facts and not opinions."

The committee deleted the committee note.

The committee created a new instruction to follow 1703 to focus on the special circumstances in which a plaintiff can recover for representations of an opinion. The committee drafted the instruction to read:

[Name of plaintiff] may recover for fraud for [name of defendant]'s statement of opinions if:

[Name of defendant] claimed to have special knowledge about the subject matter that [name of plaintiff] did not have.

[Name of defendant] made a representation in a way that implied the matter to be true, rather than just as an expression of belief.

[Name of defendant] had a relationship of trust and confidence with [name of plaintiff].

[Name of defendant] has some other special reason to expect that [name of plaintiff] would rely on [name of defendant]'s opinion.

The committee decided to return this instruction to the subcommittee.

CV1704. Promises and statements of future performance.

The committee changed "act in the future" to "future act."

The committee approved the instruction as amended.

CV1705. Important statement of fact or promise.

The committee deleted "or promise" from the title and approved the instruction as amended.

CV1706. Intent to induce reliance.

In the first sentence, the committee changed "you may find that" to "you must decide whether." The committee changed "intended to make plaintiff rely" to "intended plaintiff t rely." The committee changed "the false statement of fact" to "it."

In the first and second sentences, the committee changed "false statement about a fact" to "false statement."

The committee approved the instruction as amended.

CV1707. Reasonable reliance.

The committee amended the instruction to read: "In deciding whether [name of plaintiff]'s reliance on the false statement was reasonable, you must take into account all relevant circumstances, such as [his] age, mental capacity, knowledge, experience, and [his] relationship to [name of defendant]."

The committee approved the instruction as amended.

CV1708. Concealment or fraudulent non-disclosure.

In the second sentence, the committee changed "what you must decide is if" to "you must decide whether." In items (1), (2), and (3) the committee changed "an important fact" to "[describe the important fact]."

The committee approved the instruction as amended.

CV1709. Compensatory damages.

In Alternative B, the committee deleted paragraphs (2) and (3) and amended the remainder to read:

You may award damages for the harm [name of plaintiff] experienced because of [name of defendant]'s fraud as long as you determine that the damages were

reasonably foreseeable, and that [name of plaintiff] has proven these damages with reasonable certainty. [Name of plaintiff] claims the following damages:

[(1) loss of good will;]

[(2) expenditures in mitigation of damages;]

[(3) lost earnings;]

[(4) prejudgment interest;]

[(5) loss of interest on loans required to finance the business;]

[(6) lost profits;]

[(7) emotional distress;]

[(8) describe other items claimed.]

The committee deleted the last paragraph of the committee note.

The committee returned this instruction to the subcommittee to determine the standard of proof for emotional distress.

The meeting was adjourned.

MINUTES

Advisory Committee on Model Civil Jury Instructions
December 8, 2008
4:00 p.m.

Present: John L. Young (chair), Juli Blanch, Francis J. Carney, Dr. Marianna Di Paolo, Phillip S. Ferguson, L. Rich Humpherys, Colin P. King, Stephen B. Nebeker, Timothy M. Shea, Paul M. Simmons, and David E. West

1. *Fraud Instructions.* The committee continued its review of the fraud instructions.

a. *CV 1703. Recovery for misrepresentation of fact.* Mr. Shea asked whether "representation" in the first line should be "misrepresentation." The committee thought it should not; the instruction is meant to distinguish between representations of fact and opinions, not between representations and misrepresentations. The committee revised the instruction to read:

> You must decide whether the defendant's statement was a representation of fact as opposed to an opinion. Generally, a plaintiff may recover for fraud only if the defendant's statements were misrepresentations of facts.

The committee approved the instruction as revised.

b. *CV 1704. Recovery for statement of opinion.* Dr. Di Paolo suggested adding the following introductory language: "[Name of plaintiff] alleges that [name of defendant] stated an opinion as a fact. [Name of defendant] claims it was just a statement of opinion." At Mr. Young's suggestion, the first paragraph was replaced with the following: "Generally, a plaintiff may not recover for fraud if the defendant's statements were opinions. However, an opinion is treated as a representation of fact if:" The committee asked whether each of the subparagraphs has to be proved or only one of them. Citing the Restatement (Second) of Torts, Mr. Carney said that only one had to be proved. Messrs. King and Nebeker suggested adding a committee note to the effect that one or more conditions may apply in a given case. Mr. Humpherys noted that a given case may involve both a representation of fact and a statement of opinion. Each of the paragraphs after the new introductory paragraph was bracketed, to suggest that only those that have evidentiary support should be included. If more than one is included, they should be separated by "or." Dr. Di Paolo and Mr. Simmons thought that the instruction did not make it clear that the other elements of a fraud claim must also be met. They suggested that the instruction be clearly linked to CV 1701. Mr. Simmons also thought that the instruction was misleading because it implied that an opinion is fraudulent if it turns out to be wrong. He thought that an opinion is not fraudulent if it is honestly held. Dr. Di Paolo asked whether the requirement that the representation be made in a way that implies it is true rather than just an expression of belief applied to each of the

other bracketed paragraphs. Mr. Young noted that it is not the committee's position to argue over what the law is. At his suggestion, the committee sent the instruction back to the subcommittee to answer the committee's questions.

c. *CV 1710. Compensatory damages.* The committee noted that the difference between Alternative A and Alternative B is that the former applies to cases involving property, whereas the latter appears to apply to all other fraud cases. Mr. West asked whether the law is different for fraud cases involving property than for other fraud cases. Mr. Simmons questioned whether consequential damages should be available under Alternative A as well as Alternative B. At the suggestion of Messrs. Humpherys and King, the following language from Alternative A was added to Alternative B, and Alternative A was eliminated: "[(1) the difference between the value of the property that [name of plaintiff] [bought/sold] and the value the same property would have had if [name of defendant]'s statements about it had been true.]" The second paragraph of the committee note was also deleted. At Mr. West's suggestion, the committee deleted former subparagraph (4) ("prejudgment interest"), on the grounds that determining prejudgment interest is a job for the judge and not the jury. The subparagraphs were renumbered accordingly. Dr. Di Paolo thought that "expenditures in mitigation of damages" should be explained. Mr. Nebeker noted that there is a separate instruction on mitigation of damages. The committee deleted the second paragraph (beginning "In deciding how much money . . ."). Mr. Young noted that we need a special verdict form that itemizes the categories of damages. He will ask George Haley, the chair of the fraud subcommittee, to have the subcommittee prepare a suggested verdict form.

d. *Other instructions.* Mr. Humpherys thought there needed to be other fraud instructions, such as an instruction that says once one undertakes to speak, he has a duty to speak the whole truth, and an instruction telling the jury it can infer intent from the circumstances. Mr. Young asked whether there should be a "puffing" instruction. Mr. Ferguson noted that he and Mr. Johnson were in favor of including one but had been voted down. Mr. Young asked the committee members to get any suggestions for additional instructions to Mr. Shea, who can pass them on to the subcommittee. The committee suggested that the instructions also cover negligent misrepresentation.

2. *CV 1057. Safety risks.* Mr. Young reported that he was prepared to break the tie vote on CV 1057, but the matter was continued until the February 9, 2009, meeting, when both Mr. Fowler and Mr. King can be present.

3. *CV 1052. Learned intermediary.* Mr. Carney proposed adding a citation to the recent decision of *Downing v. Hyland Pharmacy,* 2008 UT 65. The committee

approved the recommendation. The medical malpractice subcommittee will consider whether there should be a separate instruction on *Downing*.

4. *Committee Membership*. Mr. Young reported that Mr. Carney would like to resign from the committee. Mr. Carney noted that he is no longer doing medical malpractice cases. He suggested that Jack Ray take his place on the committee and on the medical malpractice subcommittee. The committee approved Mr. Ray to take Mr. Carney's place on the medical malpractice subcommittee, but the committee prevailed on Mr. Carney to remain as a member of the committee, at least for the time being. Mr. Young proposed that John Lund take Mr. Johnson's place on the committee. The committee approved the proposal.

5. *Introduction*. Mr. Carney proposed adding language to the introduction to say that when a section of MUJI 2d appears, MUJI 1st should no longer be used. Mr. Shea recommended against the change. He noted that the introduction already says that MUJI 2d is intended to replace MUJI 1st. He thought that attorneys should be able to argue for a particular instruction based on whatever authority they can find for it. The committee thought that a statement that MUJI 1st should no longer be used would need to be approved by the Utah Supreme Court. Mr. Nebeker suggested that, where MUJI 1st instructions have not been carried over to MUJI 2d, the committee include a note explaining the reasons. Mr. Carney noted that the medical malpractice subcommittee did that with respect to the medical malpractice instructions. Mr. Young suggested a similar approach be taken in each section. As an alternative, he suggested that MUJI 2d include tables cross-referencing MUJI 1st and explaining why some MUJI 1st instructions have been omitted.

6. *CV 104. Order of trial. CV 101. General admonitions*. Mr. Humpherys proposed changes to CV 104 and 101, based on a recent trial he had. The committee approved his suggestions.

7. *CV 128. Objections and rulings on evidence and procedure*. At Dr. Di Paolo's suggestion, the last sentence of the first paragraph was revised to read: "And if a lawyer objects and I sustain the objection, you should disregard the question and any answer."

8. *Vicarious liability*. The committee approved John Lund to chair a subcommittee to draft instructions on vicarious liability.

9. *Verdict forms*. Mr. Young noted that special verdict forms are needed for each section. He suggested that the committee approve special verdict forms for the negligence section that can then be used as a template for preparing special verdict forms for other sections. Mr. Carney noted that the medical malpractice subcommittee

drafted special verdict forms. He suggested that the committee agree on the style and noted common issues, such as, how should the forms deal with the burden of proof and with special damages? He noted various ways of asking the jury whether the defendant was at fault, such as:

- Was the defendant at fault?
- Did the evidence establish that the defendant was at fault?
- Do you find by a preponderance of the evidence that the defendant was at fault?
- Did the plaintiff prove by a preponderance of the evidence that the defendant was at fault?

Mr. Humpherys cautioned against including long prefaces to the verdict forms. Mr. King thought the forms should focus on the process of arriving at a verdict rather than on the substantive law, which will be covered in the instructions.

10. The next meeting will be Monday, January 12, 2009, at 4:00 p.m. The next two meetings will focus on construction contract instructions.

The meeting concluded at 6:00 p.m.

MINUTES

Advisory Committee on Model Civil Jury Instructions
January 12, 2009
4:00 p.m.

Present: John L. Young (chair), Juli Blanch, Tracy H. Fowler, L. Rich Humpherys, Timothy M. Shea, Paul M. Simmons, Peter W. Summerill, and David E. West. Also present: Kent B. Scott, chair of the construction contract subcommittee

Excused: Phillip S. Ferguson, Colin P. King

1. *Preliminary Instructions*. The committee considered Mr. Humpherys's proposed additions to the general instructions:

a. *CV137. Selection of jury foreperson and deliberation*. The committee approved the instruction.

b. *CV138. Do not speculate or resort to chance*. At Mr. Carney's suggestion, a reference to *Day v. Panos,* 676 P.2d 403 (Utah 1984), was added. At Mr. Simmons's suggestion, the last sentence was revised to read, "You must not agree in advance to average the estimates." The committee approved the instruction as modified.

c. *CV139. Agreement on special verdict*. The committee approved the instruction.

2. *Construction Contract Instructions*.

a. *CV2201A. Committee notes to construction contract instructions*. Mr. Young suggested adding an eighth area: defective construction. Mr. Simmons asked whether it was already covered by "(5) claims," and "(6) defenses." Mr. Humpherys asked why the subcommittee had "determined that it would be best" not to address certain areas--because they are legal issues and not proper subjects for jury instructions? because they do not arise often enough to warrant instructions? or because they are not easily dealt with in jury instructions? Mr. Scott noted that the subcommittee had drafted instructions but had decided against proposing them because they were very fact intensive and the status of the law in Utah was uncertain. For example, there is no Utah law on whether a "paid if paid" clause is enforceable. Mr. West thought such clauses presented legal issues that would not go to the jury in any event. The fourth paragraph was revised to read: "The Advisory Committee decided not to draft pattern instructions on certain areas of law . . . ." Mr. Summerill noted that the third paragraph, which said that mechanic's lien and bond claims are "fact intensive," suggested that they should be covered by jury instructions. At Mr. Scott's suggestion, the committee struck the phrase "fact intensive and" from the

third paragraph. At Mr. Shea's suggestion, the committee struck the last paragraph. Mr. West suggested striking the third and fourth paragraphs as well. He thought there was no need to explain what subjects were not covered in the instructions. Mr. Scott thought it was necessary to explain why some areas were left out because attorneys will want to know where they can find instructions dealing with those areas. At Mr. Young's and Mr. Humpherys's suggestion, CV2201A was deleted. A general comment will be added to the introduction to the effect that if there is no Utah law on a subject, the subject has not been covered in the instructions.

b. *CV2201B. Compliance with public bidding instructions.* Mr. Scott noted that bidding on public contracts is governed by statute. Mr. Humpherys questioned the use of "responsive responsible bidder." Mr. Young noted that it was a statutorily defined term and thought it should be retained. The instruction deals with a claim by the lowest bidder; Mr. Young asked what happens to the bid the contractor accepted. It was thought that the contract was still enforceable, but the public entity would be liable in damages to the bidder whose bid was wrongly rejected. Mr. Young asked what the cause of action would be. Mr. Scott thought it would be akin to a breach of contract claim or a claim for damages for breach of the procurement code. Mr. Humpherys thought the instruction implied a form of strict liability. Mr. Scott noted that the instruction states the general rule for public construction contracts but noted that there are exceptions. The subcommittee decided not to include instructions on the exceptions because they are complicated and the law is not clear. Mr. Humpherys thought there should be a committee note to explain this. Mr. Shea added a committee note that says there are statutory exceptions to the general rule stated in the instruction. Mr. Scott will supply Mr. Shea with citations to the statutory exceptions. The committee revised the first and last paragraphs of the instruction to read:

> [Name of contractor] claims that [name of governmental entity] was required by law to award [him] the construction contract. [Name of governmental entity] claims that [describe claim]. If [name of governmental entity] did accept a bid, it was required to accept the lowest "responsive responsible" bid. The contractor who submitted the lowest responsive responsible bid is one who:
>
> . . .
>
> If you find that [name of contractor] submitted the lowest responsive responsible bid and that [name of governmental entity]

> accepted a different bid, you must find that [name of governmental entity] is liable to [name of contractor] for damages.

The committee approved the instruction as modified.

c. *CV2202. "Responsive bid" defined.* Mr. West asked whether the instruction was covered by CV2201B(2). Mr. Scott said the subcommittee tried to combine CV2202 through 2204 but thought they were too long and complex to be easily combined. Mr. Shea noted that the instructions could be written without using technical terms, but the committee thought the technical terms were necessary because they are so common in the industry. The committee approved the instruction.

d. *CV2203. "Responsible bid" defined.* The committee struck the last sentence of the instruction. Mr. Humpherys asked what the phrase "integrity and reliability that will support its good faith performance" meant. Mr. Summerill pulled the statute and noted that it requires "integrity and reliability." Mr. Fowler asked whether "good faith" needs to be defined. Mr. Scott thought the definition should be in the commercial contract instructions, not the construction contract instructions. Mr. Young suggested adding a committee note cross-referencing the commercial contract instruction. Mr. Humpherys suggested that the note simply say that good faith is not defined in the statute. The instruction was revised to read:

> A "responsible bid" is a bid made by a party who has the capability, integrity, and reliability to fully perform the contract requirements in good faith.

e. *CV2204. Owner's duty to inform.* Mr. Humpherys noted that in the fraud jury instructions the committee had used "important" instead of "material." Others suggested that "material" simply be deleted from the first sentence. In keeping with its practice of not repeating the standard of proof in instructions (unless the standard is something other than a preponderance of the evidence), the committee deleted the phrase "by a preponderance of the evidence" in the first paragraph. Mr. Humpherys asked whether the instruction should use the term "breached the contract." He thought "breach" may not be commonly understood by jurors. Mr. Simmons thought it should be used because the verdict form will ask them to decide whether the defendant breached the contract. The committee revised the instruction to eliminate the phrase. The revised instruction reads:

> [Name of contractor] claims that [name of owner] had a duty to disclose the following information before the bid was submitted: [Describe information.] You must decide whether [name of plaintiff] has proved that:
>
> (1) [name of owner] did not disclose the above-described information to [name of contractor];
>
> (2) the undisclosed information was important to [name of contractor]'s ability to perform the contract; and
>
> (3) [name of owner] had knowledge about the undisclosed information that was not available to [name of contractor].
>
> If you find that [name of contractor] has proved all of these facts, then [name of owner] is liable to [name of contractor] for damages.

The committee approved the instruction as modified.

f. *CV2205. Contractor's duty to investigate.* Ms. Blanch suggested that the instruction be stated in the active voice. Ms. Blanch was excused (for reasons totally unrelated to her comment). Mr. Humpherys asked what the consequence was if a contractor failed to investigate. Mr. Scott said that a failure to investigate relieves the owner from liability. Mr. Humpherys noted that the instruction will be awkward if there is a lot of information to describe. He also asked whether there is still a duty to investigate if the contractor has inquired and received reassuring answers to his inquiries. Mr. Young noted that the duty goes beyond just re-reading the contract. Mr. Humpherys asked whether the standard was subjective ("knew") or objective ("should have known"). Mr. Young proposed revising the instruction to read:

> [Name of owner] claims that he is not liable for damages because [name of contractor] knew or should have known [describe facts] that created a duty to reasonably [inquire about/investigate] the accuracy and completeness of the information provided by [name of owner].
>
> You must decide whether [name of owner] has proved that [name of contractor] knew of [describe facts] that required [name of contractor] to reasonably [inquire about/investigate] the

> accuracy and completeness of the information provided by the owner.
>
> If you find that [name of contractor] knew or should have known of these facts, then [name of contractor] had notice of all information that a reasonable [inquiry/investigation] would have revealed.

Mr. West was excused. Mr. Young suggested that a committee note be added to say that, depending on the circumstances, a contractor may have only a duty to inquire or also a duty to investigate. An inquiry may uncover facts that would require a reasonable contractor to do more investigating. At Mr. Summerill's suggestion, Mr. Scott will run the proposed changes and committee note by the subcommittee and will check the authority for the instruction. Mr. Humpherys was excused. Mr. Young asked Mr. Scott to ask the subcommittee (1) whether the contractor's duty is only to inquire, (2) under what circumstances it also has a duty to investigate, and (3) when does the contractor have a right to rely on what the owner says. Mr. Scott thought that perhaps there should be separate instructions on the duty to inquire and the duty to investigate.

3. The next meeting will be Monday, February 9, 2009, at 4:00 p.m.

The meeting concluded at 6:00 p.m.

MINUTES

Advisory Committee on Model Civil Jury Instructions
February 9, 2009
4:00 p.m.

Present: John L. Young (chair), Juli Blanch, Francis J. Carney, Marianna Di Paolo, Phillip S. Ferguson, Tracy H. Fowler, John R. Lund, Timothy M. Shea, Paul M. Simmons, and David E. West. Also present: Kent B. Scott, chair of the construction contract subcommittee

1. *New Member.* The committee welcomed John R. Lund, who is taking the place of Gary Johnson on the committee.

2. *Construction Contract Instructions.* The committee continued its review of the construction contract instructions.

a. *General instruction.* Mr. Carney thought the section on construction contracts needed a general instruction. Messrs. Scott and Shea noted that the commercial contract instructions contain general instructions on the issues in a breach of contract case and the elements of a breach of contract claim (CV2101 and CV2102). Mr. Carney suggested that a committee note be added to the construction contract section referring users to CV2101 and CV2102 for general instructions.

b. *CV2207. Contractor's right to withdraw bid.* Mr. Shea noted that he had changed "intentional" in subparagraph (2) to "unintentional." Mr. Lund asked whether "mathematical" would be more easily understood than "arithmetical." The committee approved the instruction as modified.

c. *CV2208. Mutual mistake.* Mr. Young thought the instruction belonged in the contract instructions, not the construction contract instructions. Mr. Scott noted that the instruction was similar to the commercial contract instruction (CV2129) but cited construction contract authorities. Some committee members thought the instructions would be more user friendly if both the commercial contract instructions and the construction contract instructions contained an instruction on mutual mistake. Mr. Lund noted, however, that if the instructions used different language, one may think that the law is different depending on the type of contract involved. Mr. Young suggested using the language of CV2129 for CV2208 but keeping the construction contract references. The committee approved his suggestion.

d. *CV2209. Unilateral mistake.* At Mr. Young's suggestion and on motion of Mr. Ferguson, the committee substituted the language of CV2130 for CV2209, but kept the references to construction contract cases.

e. *CV2210. "Material mistake" defined.* Mr. Young noted that the commercial contract instructions cover "material breach" but not "material mistake." The committee debated whether to use the term "material" or "important." Mr. Scott noted that the public bidding statute uses "material." Since the instructions on unilateral and mutual mistake now use the term "important," the committee thought that CV2210 was unnecessary and deleted the instruction, although some committee members questioned whether the instructions should define "important mistake."

Dr. Di Paolo joined the meeting.

f. *CV2211. Promissory estoppel.* The committee noted that CV2211 is similar to CV2114, but there is a difference in subparagraph (3). Mr. Scott reported that he had talked to Bruce Badger, the chair of the commercial contract subcommittee, and Mr. Badger agreed that CV2211 should be used for CV2114. The committee struck "by a preponderance of the evidence" from the first paragraph, in keeping with its practice of not restating the standard of proof in each instruction. At Mr. Ferguson's suggestion, "material" in subparagraph (1) was changed to "important." Mr. Lund questioned whether "induce" in subparagraph (3) was plain English. The committee discussed alternatives, such as "lead to," "cause the party to act or not act," "make," "prompt," "persuade," and "influence." Mr. Simmons suggested rephrasing subparagraph (3) to say that the party making the promise "expected that [name of party] would act or not act based on the promise." Mr. Lund and Dr. Di Paolo thought that shifted the focus of the instruction. The committee rewrote subparagraph (3) to read: "[name of other party] knew or should have expected that [his] promise would lead [name of party] to act or not act." The committee approved the instruction as revised.

g. *CV2212. Owner's duty not to interfere with construction.* At Mr. Ferguson's suggestion, "or delays" was deleted from subsection (3), on the grounds that the result of delays is damages. Mr. Young questioned whether "damages" should be "additional costs." Other committee members noted that there may be other damages besides "additional costs," such as consequential and incidental damages, and one can have damages without additional costs. The committee left "damages" in subsection (3) and approved the instruction as otherwise modified.

h. *CV2213. Implied warranty of fitness of plans and specifications.* Mr. Young noted that there is a recent Utah case on point that refers to the implied warranty as one of the "accuracy," not "fitness," of the plans and specifications. He noted that the case allowed the contractor to recover damages for additional costs incurred. Mr. Scott thought that the damages could best be

covered in a separate damage instruction. Mr. Shea questioned the use of "deficiencies" in the instruction. The committee changed "deficiencies" to "defects" and added at the end of the instruction "and may recover damages caused by defects in the plans and specifications." Mr. Young suggested that the subcommittee revise the instruction to explain the damages that are recoverable for a breach of the implied warranty. Mr. Shea noted that the instruction does not use the term "warranty" and suggested the title be revised to "Defective plans and specifications." The instruction was approved, subject to the subcommittee adding a section on damages.

i. *CV2214. Duty to provide for suitable working conditions.* The committee deleted "[he] is entitled to" from the first line. At Mr. Young's suggestion, it added "at the construction site" to the end of the first sentence and the end of subparagraph (1). and struck "by a preponderance of the evidence" from the second sentence. Mr. West questioned whether the owner is responsible for the site; he thought that responsibility belonged to the contractor. Mr. Scott noted that the owner must provide safe working conditions and give the contractor access to the site, but also noted that the subcommittee could not find any Utah authority for the instruction. Mr. Lund thought that responsibility for the site would be a matter of contract. Mr. Young thought that if the contract was silent, the owner had a duty. The committee ultimately decided to withdraw the instruction since there is no Utah law on point.

j. *CV2215. Duty to provide access to the worksite.* Mr. Young thought there was a Utah case on point (the *City of Fillmore* case). Mr. Scott offered to check for Utah authority for the instruction. Mr. West thought that the cases generally involve a general contractor (not an owner) failing to provide access to the worksite. At Mr. Lund's suggestion, the first sentence was revised to read: "[Name of contractor] claims [he] had additional costs because [name of owner] failed to provide access to the worksite." Mr. West suggested that a committee note be added to say that the instruction can be modified to cover subcontractor-contractor claims. Mr. Shea suggested that it be covered in a general note for the entire section. Mr. Lund asked whether the duty to provide access included an element of reasonableness. Mr. Young suggested saying "suitable access." Mr. Scott noted that the cases just refer to "access." Dr. Di Paolo thought that suitability is subsumed in the term "access." Mr. Simmons asked whether subparagraph (3) (which says that the owner had responsibility for lack of access) was a question of fact for the jury to decide or a question of law for the court to decide. Subparagraph (3) was deleted and replaced with "(3) [he] had additional costs." The instruction was approved as modified.

Mr. Fowler was excused.

k. *CV2216. Claim for extra work.* Messrs. Lund and Ferguson questioned the use of "[time/compensation]" in the first line. Mr. Ferguson noted that the jury cannot award "time." Mr. Scott noted that the intent was that the court and attorneys would adapt the instruction to the facts of the case. Some contracts may provide that there are no damages for delay, for example. The committee substituted "cost" for "compensation." The phrase "by a preponderance of the evidence" was deleted from the third line. At Mr. Young's suggestion, subparagraph (3) was changed to "[name of owner] knew or should have known that the work required additional [time/cost]." Dr. Di Paolo asked whether the owner must have known that the work would require additional time or cost at the time he directed the contractor to perform the additional work. Mr. Scott noted that the owner must have known (or should have known) before the work was completed but not necessarily when he ordered the additional work. Mr. Scott suggested that the jury be left to work out the timing issue, based on what is fair under the circumstances of the particular case. The committee approved the instruction as modified.

3. *Procedure.* Noting that the "perfect is the enemy of the good," Mr. Carney suggested a procedure for approving the instructions more quickly. He suggested that each set of instructions be approved by a smaller group than the whole committee. Mr. Young suggested that two groups of 3 or 4 members approve each set of instructions. The committee approved Messrs. Young, Scott, and Lund as the group to approve the construction contract instructions. Mr. Carney volunteered to take Mr. Johnson's place on the professional liability instruction subcommittee. Mr. Carney noted that, because the jury instruction revisions are ongoing, if there are mistakes in the instructions, they can be fixed later. Mr. Carney noted that we need feedback on the jury instructions to identify problem areas and tell where they need to be revised or fine-tuned. Dr. Di Paolo suggested that the court require all jury instructions actually given at trial to be posted somewhere. Mr. Shea noted that the committee's webpage can also be used as a blog page.

4. *Next Meeting.* The next meeting will be Monday, March 9, 2009, at 4:00 p.m.

The meeting concluded at 6:00 p.m.

MINUTES

Advisory Committee on Model Civil Jury Instructions
March 9, 2009
4:00 p.m.

Present: Honorable William W. Barrett, Jr., Francis J. Carney, Marianna Di Paolo, Phillip S. Ferguson, Tracy H. Fowler, John R. Lund, Timothy M. Shea, Paul M. Simmons, Peter W. Summerill, David E. West. Also present: Robert G. Gilchrist

Excused: John L. Young (chair)

Mr. Carney conducted the meeting in Mr. Young's absence.

1. *Procedure.* Mr. Carney led a discussion about the time it is taking to approve new instructions. At the last meeting, it was suggested that the "Gangs of Three" have the final approval of instructions in their subject areas, with perhaps a final review by Dr. Di Paolo and Mr. Shea. Mr. Shea noted that the instructions have been improved at each stage of review, including the review by the full committee. Mr. Ferguson suggested that one way to speed up the process is to circulate the instructions well in advance of the meeting and require committee members to raise any objections or proposed changes to the instructions before the meeting; if no one raises an issue before the meeting, the instruction is deemed approved. Mr. Carney stated that his ideal would be to have all of the jury instructions completed, and the committee meetings would only be used to act on suggestions to improve the instructions.

2. *MUJI 1st.* Mr. Carney noted that some judges have complained about the need to use both MUJI 1st and MUJI 2d to come up with a complete set of instructions in some cases. The committee discussed the possibility of putting the MUJI 1st instructions for a given area on the website (or links from the website to the MUJI 1st instructions) for those areas for which new instructions have not yet been approved. Mr. Shea noted that the Utah State Bar holds the copyright for MUJI 1st and has authorized the courts to use the MUJI 1st instructions. Mr. Carney wanted to see what Mr. Young thinks of the idea.

3. *Meeting with Utah Supreme Court.* Mr. Carney noted that Mr. Young, Mr. Shea, and he are going to meet with the Utah Supreme Court and asked what matters the committee would like them to discuss with the court. Mr. Ferguson noted that district court judges are still not using the MUJI 2d instructions consistently and that it would be helpful if the supreme court issued some directive. Mr. West suggested that the court tell the trial courts that the instructions are presumptively valid. Mr. Shea offered a proposed instruction, based on instructions from other jurisdictions, that said that a court is to use MUJI 2d to the exclusion of other jury instructions on the same subject if (1) there is an applicable MUJI 2d instruction, (2) it accurately states the law, and (3) one of the parties requests it, and further instructing the court to tailor the MUJI 2d instructions to fit the particular case. Mr. Fowler had reservations about the proposal. He noted that, because the MUJI 2d instructions have been drafted by

different subcommittees, they are not all of the same quality. Also, the committee has proposed instructions in areas where there is no Utah law on point and has been reluctant to propose alternative instructions. It has also made other changes such as substituting "cause" for "proximate cause" and "important" for "material." Therefore, Mr. Fowler thought that courts should not be required to use the MUJI 2d instructions, but there should be room for experimentation and improvement. Mr. Lund suggested categorizing the instructions into two sets: (1) those where the law is settled, and (2) those where the law is unsettled. Mr. Shea noted that sometimes the law is unsettled because there is a conflict in Utah case law. Mr. Carney said he was having second thoughts about abandoning the term "proximate cause." Mr. Shea disagreed. He thought that, if the jury does not understand the instructions, it will not follow the law but will do what it thinks is fair. Mr. Carney thought that, if "proximate cause" were defined the first time it is used, the jury could understand the concept, but Dr. Di Paolo thought that the jury would have to be told over and over again what an unfamiliar concept like "proximate cause" means. She noted that a person generally has to hear a word used appropriately seven times before he or she begins to understand it, and if a person doesn't understand a word or concept, he or she won't use it. Mr. West noted that the committee should not simply throw away all of its work and go back to square one. Dr. Di Paolo noted the need for feedback on the instructions and suggested that Messrs. Young, Carney, and Shea raise the issue with the court.

4. *Attorney Negligence Instructions.* The committee reviewed the attorney negligence instructions:

a. *CV401(A). Committee Note on Attorney Negligence Instructions.* The committee revised the note to include MUJI 1st 7.45 (duty of care of specialist) as well as 7.46 (error in judgment not necessarily negligence) because there is no Utah case law to support them. Messrs. Carney and Summerill noted that the latter instruction implies that one must prove something more than negligence, such as intent or bad faith, and that an error of judgment can be negligence.

b. *CV401(B). Elements of claim for attorney's negligence.* At Mr. Ferguson's suggestion, "negligently" was struck from subparagraph (3). He noted that an attorney can be liable for a breach of the standard of care, whether the breach was negligent or not. "Negligence" was replaced with "breach" in subparagraph (4). Dr. Di Paolo suggested revising the first sentence to read, "[Name of plaintiff] claims that [name of defendant] was negligent in performing legal services," but the committee did not approve the change. Mr. Carney asked whether the general negligence instruction should be repeated in the attorney negligence instructions. Mr. Summerill thought that CV401(B) defined negligence in the context of attorney malpractice. At Mr. Carney's suggestion,

CV401(A) was renumbered CV401, and CV401(B) was renumbered CV402, and the other instructions were renumbered accordingly.

c. *CV402. Attorney-client relationship.* The first sentence was revised to read, "An attorney-client relationship can be established by an express contract between the parties, or by an implied contract based upon [name of defendant's] statements or conduct." Mr. Lund questioned whether an attorney-client relationship can be based solely on the acts of one side. Mr. Carney noted that MUJI 1st 7.43 said that the relationship must be induced by the attorney's conduct. Mr. Shea suggested adding at the end of the instruction, "Unless reasonably induced by the attorney's statements or conduct, plaintiff's belief that an attorney-client relationship exists is not sufficient to create an attorney-client relationship," but the committee rejected the suggestion. The committee approved the instruction as modified.

d. *CV403. Duty of care.* At Mr. Ferguson's suggestion, the sentence "Failure to do so is negligence" was added to the end of the instruction. The committee approved the instruction as modified.

e. *CV404. Duty of care of specialist.* Mr. Carney asked whether the instruction was needed and whether there is a different standard of care for specialists. He noted that the instruction would protect attorneys who do the work of a specialist but do not hold themselves out as specialists. Dr. Di Paolo and Mr. Fowler noted the distinction between an attorney taking on a matter he or she is not competent to do and an attorney making an error in his or her area of specialty. Mr. Carney noted that the instruction was based on an analogy to medical malpractice. Mr. Summerill noted that in medical malpractice a doctor has a duty to refer a patient if the doctor does not have the training or expertise to deal with the problem and asked whether an instruction was needed on an attorney's duty to refer a client. The committee ultimately decided to delete the instruction because there is no Utah case law supporting it.

f. *CV405. Uncertain laws or judicial mistakes.* At Mr. Gilchrist's suggestion, "laws" in the second line was replaced with "decisions." Mr. Lund noted that the phrase "errors about laws" was ambiguous. It does not say whose error--the attorney's, the court's, or the law's. Mr. West thought that an attorney could be negligent for failing to tell a client that the law is uncertain or unsettled. Mr. Shea suggested adding to the instruction, "[Name of defendant] has a duty to advise [name of plaintiff] that the law is unsettled." Mr. Lund asked whether the instruction meant that an attorney is not liable for an error in judgment. The subcommittee rejected such an instruction from MUJI 1st. Mr. Fowler expressed concern that a jury could impose liability on an attorney because the attorney

turned out to be wrong on an unsettled or debatable issue of law. Mr. Lund thought there needed to be objective evidence of an error of law. Messrs. Carney and Summerill reviewed the cases cited as authority for the instruction (*Crestwood Cove Apartments,* 2007 UT 48, 164 P.3d 1247, and *Watkiss & Saperstein v. Williams,* 931 P.2d 840 (Utah 1997)). Mr. Carney noted that *Crestwood Cove* did not talk about negligence but about proximate causation, and Mr. Summerill noted that *Watkiss & Saperstein* held that whether the law is unsettled is a question of law. At Mr. Shea's suggestion, the first sentence was revised to read, "[Name of defendant] is not liable for decisions that result from mistakes by a judge," and the title was changed to "Judicial mistakes." Mr. Lund suggested that there be a separate instruction on unsettled laws to the effect that, if the law is uncertain, unsettled, or debatable, the defendant has a duty to inform the plaintiff that the law is uncertain. Mr. West suggested deleting the instruction altogether. Mr. Gilchrist thought that an attorney still has a duty to advise the client that the law is unsettled. Mr. Simmons asked what the jury is supposed to do--decide whether the judge made a mistake? decide whether the attorney made a decision that was induced by a judge's mistake? Mr. Shea thought the issue for the jury was one of causation. The plaintiff will be claiming that the defendant's negligence caused the plaintiff harm, and the defendant will be claiming that a judge's mistake caused the defendant to err. Mr. Shea asked whether fault could be apportioned to the judge who made the mistake. Mr. Summerill thought that if the law is uncertain, that would be a complete defense to a legal malpractice claim. Mr. Shea noted that *Crestwood* said that causation presented a question for the trier of fact. A sentence was added to the beginning of the instruction that reads, "You must decide the cause of the plaintiff's damages." The committee approved the instruction as modified.

The meeting concluded at 6:00 p.m.

Next Meeting. The next meeting will be Monday, April 13, 2009, at 4:00 p.m.

MINUTES

Advisory Committee on Model Civil Jury Instructions
April 13, 2009
4:00 p.m.

Present: Juli Blanch, Francis J. Carney, Marianna Di Paolo, Phillip S. Ferguson, Tracy H. Fowler, L. Rich Humpherys, Timothy M. Shea, Paul M. Simmons, Peter W. Summerill, David E. West

Excused: John L. Young (chair), John R. Lund

Mr. Carney conducted the meeting in Mr. Young's absence.

1. *Minutes.* The minutes of the March 9, 2009 meeting were approved.

2. *CV101B. Further admonition on electronic devices.* The committee approved CV101B, which Mr. Carney had proposed.

3. *Fraud and Deceit Instructions.* The committee continued its review of the fraud and deceit instructions:

a. *CV1803. Negligent misrepresentation.* Mr. Shea asked whether the instruction should be included somewhere else, such as in the negligence instructions. The consensus was that it belonged with the fraud instructions, but it was moved up as new CV1802 and retitled "Elements of negligent misrepresentation." Mr. Simmons thought that the first element should be eliminated because it presented a question of law for the court and not a question of fact for the jury to decide. The committee agreed and added a committee note to the effect that, if the question of duty depends on disputed facts, the court and counsel should craft an instruction explaining what factual questions the jury must answer.

Dr. Di Paolo and Mr. Humpherys joined the meeting.

Mr. Carney questioned whether CV1803 was an accurate statement of the law. He read Restatement (Second) of Torts § 552 and CACI 1903. Ms. Blanch and Mr. Fowler noted that the instruction does not include negligence (the failure to use reasonable care) as an element. Messrs. West and Summerill suggested adding as an element "[name of plaintiff] failed to use reasonable care in determining whether the representation was true or false." Mr. Ferguson thought the instruction was also missing the element of reasonable reliance. Mr. Shea suggested adding, "(5) [name of plaintiff] reasonably relied on the representation." Dr. Di Paolo thought "reasonably relied" was too hard for lay people to understand and suggested "It was reasonable for [name of plaintiff] to rely on the representation." Mr. Summerill noted that the Restatement says "justifiably relied." Mr. Humpherys thought "justifiably relied" was a more subjective standard than reasonable reliance that depended on the circumstances,

whereas "reasonably relied" was a more objective standard. Dr. Di Paolo thought "justifiably" connoted "thought out," whereas "reasonably" connoted a more emotional response. At Mr. Humpherys's suggestion, the instruction was sent back to the subcommittee to provide authority for the statement that the burden of proof is clear and convincing evidence.

Ms. Blanch was excused.

b. *CV1809. Reliance on statement of opinion.* Mr. Shea noted that CV1809 was his attempt to deal with the issue raised at the last meeting as to when a statement of opinion is actionable. He based CV1809 on the Restatement (Second) of Torts §§ 538A, 539, 542, and 543. It was noted that the other authority cited (*Baird v. Eflow Inv. Co.,* 289 P.2d 112 (Utah 1930)) did not support the instruction. Dr. Di Paolo questioned the use of the term "disinterested," noting that the lay understanding of "disinterested" is "uninterested." Mr. Humpherys questioned whether the standard of proof required is clear and convincing evidence. Mr. West thought that the first option could not be an accurate statement of the law. Mr. Humpherys and Mr. Simmons thought that the instruction should be omitted if there is no Utah law to support it. Mr. Ferguson thought that it should be referred to the subcommittee to review. The instruction will be omitted unless the subcommittee comes up with Utah authority to support it.

c. *CV1811. Compensatory damages.* Mr. Simmons asked why prejudgment interest was deleted. Mr. West noted that it was a question of law for the court to decide. At Mr. Fowler's suggestion, "Alternative B" was deleted from the references. On Mr. Summerill's motion, the committee approved the instruction as revised.

d. *CV18##. Intent.* Mr. Humpherys questioned the use of "infer." Mr. Summerill and Dr. Di Paolo suggested, "you may determine intent from the surrounding circumstances," with a cross-reference to the instruction on circumstantial evidence (CV122). Messrs. Fowler, Humpherys, and Summerill thought the phrase "because there is no way of knowing the operations of [a corporation] [the human mind]" was confusing. At Mr. Ferguson's suggestion, it was changed to "because there is no way to read people's minds." At Dr. Di Paolo's suggestion, "However," was added to the beginning of the next sentence. The committee approved the instruction as modified. Mr. Shea will place it where it makes the most sense.

e. *CV18##. Duty to speak the whole truth.* At Mr. Humpherys's suggestion "of fact" was deleted after "statement" in the second line. Messrs.

Humpherys and Ferguson thought the phrase "duty to tell the whole truth" was problematic. Mr. Ferguson suggested revising the instruction to read: "If [name of defendant] made a statement, then he had a duty to tell the truth about the matter [and] to make a fair disclosure [about the matter] and to prevent a partial statement from being misleading or giving a false impression." Mr. Fowler suggested replacing "to tell the truth" with "to be truthful." The committee approved Mr. Ferguson's suggestion.

f. *CV1899A & 1899B. Special verdict forms.* Mr. Humpherys noted that the committee needs a policy on how detailed the special verdict forms should be, so that they will be consistent. Mr. Carney noted that detailed special verdict forms may present a trap for the jury. Mr. Humpherys thought that version A was too detailed. Mr. Ferguson thought that version B was more orthodox. On Mr. Carney's motion, CV1899A was eliminated. Mr. Simmons noted that the verdict forms ask the jury to award "economic" and "noneconomic" damages, but those terms are not defined in the fraud instructions. He suggested revising CV1811 to say, "[Name of plaintiff] claims the following economic damages: . . . [Name of plaintiff] claims the following noneconomic damages: . . ." Mr. West noted that prejudgment interest is not available for all economic damages. Mr. Summerill suggested adding a committee note saying that the verdict form should separate the damage elements into those for which prejudgment interest is available and those for which it is not available. Mr. Fowler asked whether question (4) in CV1899B, which deals with punitive damages, should be eliminated, which raised the question of whether punitive damages follow as a matter of course if the jury finds fraud. Mr. Humpherys suggested that punitive damages be dealt with in the punitive damage section. He also suggested that there be a separate special verdict form for negligent misrepresentation, but it will have to wait for the subcommittee to resolve the issue of whether negligent misrepresentation must be proved by clear and convincing evidence.

4. *Next Meeting.* The next meeting will be Monday, May 11, 2009, at 4:00 p.m.

The meeting concluded at 5:50 p.m.

MINUTES

Advisory Committee on Model Civil Jury Instructions
May 11, 2008
4:00 p.m.

Present: Juli Blanch, Francis J. Carney, Mariana Di Paolo, Phillip S. Ferguson, Tracy H. Fowler, John R. Lund, Stephen B. Nebeker, Timothy M. Shea, Paul M. Simmons

Excused: John L. Young (chair)

Mr. Shea conducted the meeting in Mr. Young's absence.

1. Mr. Shea noted that he and Mr. Young talked to the Utah Supreme Court in April about getting feedback from judges and attorneys. They also suggested that the court enter an order requiring trial courts to use a MUJI 2d instruction if one applies, unless the trial court decides that the instruction is not an accurate statement of the law.

2. *CV1802. Negligent misrepresentation.* At the last meeting, the instruction was returned to the subcommittee to answer the question of whether the standard of proof is a preponderance of the evidence or clear and convincing evidence. Mr. Shea noted that the subcommittee did not respond. Mr. Carney said that some jurisdictions apply a preponderance standard, and some apply a clear-and-convincing standard and that he had not found any Utah case on point. Mr. Shea will add parentheticals to the case citations in the committee note to indicate which approach each case adopted. Mr. Lund thought that to require a plaintiff to prove by clear and convincing evidence that a defendant "should have known" that a representation was false would be a hybrid standard. The committee revised the elements of the claim to read:

(1) [name of defendant] represented to [name of plaintiff] that an important fact was true;

(2) [name of defendant]'s representation of fact was not true;

(3) [name of defendant] failed to use reasonable care to determine whether the representation was true;

(4) [name of defendant] was in a better position than [name of plaintiff] to know the true facts;

(5) [name of defendant] had a financial interest in the transaction;

(6) [name of plaintiff] relied on the representation, and it was reasonable for him to do so; and

(7) [name of plaintiff] suffered damage as a result of relying on the representation.

The committee approved the instruction and committee note as revised.

Dr. Di Paolo joined the meeting.

3. The committee continued its review of the attorney negligence instructions.

a. *CV402. Elements of claim for attorney's negligence.* Mr. Simmons thought that the second element (that the defendant owed a duty to the plaintiff) should not be included in the instruction because it presented a question of law for the court to decide, not a question of fact for the jury. Mr. Lund suggested combining the first two elements. Mr. Ferguson suggested revising the instruction to read: "You must find that [name of plaintiff] had an attorney-client relationship with [name of defendant]. If you find such a relationship, then [name of defendant] owed [name of plaintiff] a duty to use reasonable care. Then you must also find whether [name of defendant] breached that duty and whether any breach caused any harm to [name of plaintiff]." Mr. Carney noted that the new Restatement of Law Governing Lawyers is well written and clearly sets out the elements of a legal malpractice claim. Mr. Fowler suggested deleting the second element and expanding the fourth. Mr. Shea suggested deleting the second element and revising the remaining two elements to read:

(2) [name of defendant] failed to use the same degree of care, skill, judgment and diligence used by qualified lawyers under similar circumstances; and

(3) [name of defendant]'s failure to use that degree of care was a cause of [name of plaintiff]'s injury, loss or damage.

The committee changed "qualified lawyers" in subparagraph (2) to read "reasonably careful lawyers." Dr. Di Paolo suggested revising the introductory sentence to say that the plaintiff "must prove all of the following" or "must prove three things:" The committee re-approved the instruction as modified.

b. *CV403. Attorney-client relationship.* Mr. Simmons asked whether the attorney's statements must have been made to the plaintiff. Dr. Di Paolo and Mr. Lund thought they did not, that the fact that the statements may have been made to someone else goes to the reasonableness of the plaintiff's belief that he had an attorney-client relationship with the defendant but does not preclude an

attorney-client relationship from arising. At Mr. Simmons's suggestion, the committee note was revised to read, "If the attorney-client relationship is not disputed, rather than give this instruction, the court should instruct the jury that there is an attorney-client relationship." The committee re-approved the instruction and the committee note as modified.

c. *CV404. Duty of care.* Mr. Shea asked whether the instruction was necessary in light of the changes to CV402. Mr. Ferguson thought there was no harm in including the instruction. The committee changed "qualified lawyers" to "reasonably careful lawyers," to match CV404, and deleted the last sentence of the instruction. The committee re-approved the instruction as modified.

d. *CV405. Scope of representation.* Dr. Di Paolo noted that the instruction did not define "scope of representation" and asked what it meant. Mr. Lund noted that an attorney may limit what he will do for a client. Dr. Di Paolo suggested adding an appositive--"that is, what [he] will do in the case." The instruction was revised to read:

> In general, a lawyer has no duty to act beyond the scope of representation. "Scope of representation" means what the lawyer will do for the client. [Name of defendant] may limit the scope of representation if the limitation is reasonable and if [name of plaintiff] gives informed consent.

Dr. Di Paolo asked whether "informed consent" needed to be defined. Mr. Shea noted that it was only defined in the medical malpractice instructions. Mr. Carney noted that the phrase comes from Utah Rule of Professional Conduct 1.2, but the rule does not define the term. Mr. Lund asked whether informed consent required independent legal advice. The committee added a sentence to the committee note to the effect that the court may need to draft an instruction defining "informed consent" because rule 1.2 does not define the term. The committee approved the instruction as modified.

e. *CV406. Standard of care for plaintiff.* Messrs. Shea and Lund noted that the instruction does not define a standard of care but talks about comparative fault. The committee changed the title to read, "Plaintiff's actions." Ms. Blanch suggested that the instruction take the form: "[Name of defendant] claims that [name of plaintiff] was at fault. In determining whether [name of plaintiff] was at fault, you may consider . . . . You may not consider . . . ." Mr. Shea noted that the instruction presupposes instructions on comparative fault and asked whether the general negligence instructions on comparative fault were sufficient. Mr. Carney thought not. He and Mr. Fowler suggested adding a cross-

reference to CV211 ("allocation of fault"), with a notation to insert CV406 into CV211 if comparative fault is at issue. The committee revised the instruction to read:

> [Name of defendant] claims that [name of plaintiff]'s actions were a cause of the harm. In deciding whether [name of plaintiff] was at fault,
>
> (1) you may not consider [his] actions before hiring [name of defendant]; however,
>
> (2) you may consider [his] actions after hiring [name of defendant].

The committee approved the instruction as modified.

f. *CV407. Fiduciary relationship.* The committee questioned whether the jury had to find a fiduciary relationship between the attorney and client. The committee thought that a fiduciary duty was a given if there was an attorney-client relationship. The committee questioned the need for the instruction. Mr. Carney quoted from *Kilpatrick v. Wiley, Rein & Fielding,* 909 P.2d 1283 (Utah 1996), that "legal malpractice" is a generic term for three different causes of action: (1) breach of contract; (2) breach of fiduciary duty; and (3) negligence. Mr. Fowler asked if we needed to add breach of contract instructions to this section. Mr. Ferguson noted that a party may plead a claim for breach of fiduciary duty because it may have a different statute of limitations, may give rise to an award of attorney's fees, and may give rise to punitive damages. Mr. Simmons suggested that the instruction track the format of CV402:

> [Name of plaintiff] claims that [name of defendant] breached a fiduciary duty. To succeed on this claim, [name of plaintiff] must prove that--
>
> (1) [he] and [name of defendant] had an attorney-client relationship;
>
> (2) [name of defendant] breached a duty to [name of plaintiff] by--
>
> (a) taking advantage of [name of defendant]'s legal knowledge and position;
>
> (b) failing to have undivided loyalty to [name of plaintiff];
>
> (c) failing to treat all of [name of plaintiff]'s matters as confidential;
>
> (d) concealing facts or law from [name of plaintiff]; or

(e) deceiving [name of plaintiff]; and

(3) [name of defendant]'s breach was a cause of [name of plaintiff]'s injury, loss or damage.

Next Meeting. The next meeting is Monday, June 8, 2009, at 4:00 p.m.

The meeting concluded at 6:00 p.m., to the strains of "Back in the Saddle Again" wafting from Mr. Carney's computer.

MINUTES

Advisory Committee on Model Civil Jury Instructions
June 8, 2009
4:00 p.m.

Present: John L. Young (chair), Juli Blanch, Phillip S. Ferguson, Tracy H. Fowler, Stephen B. Nebeker, Timothy M. Shea, Paul M. Simmons, and Kent B. Scott (chair of the Construction Contract subcommittee)

Excused: Honorable William W. Barrett, Jr., Francis J. Carney, David E. West

1. *Legal Malpractice Instructions.* Mr. Shea asked what the section should be called--attorney negligence or attorney malpractice. Mr. Simmons suggested "legal malpractice," to make it parallel to the section on medical malpractice and because the section includes theories other than negligence. The committee agreed. The committee then considered the following instructions in this section:

a. *CV402. Elements of claim for attorney's negligence.* The committee had previously approved this instruction. Mr. Shea suggested changing "injury, loss or damage" at the end of the instruction to "harm," to be consistent with other instructions. The committee approved the change.

b. *CV403. Elements of claim for breach of fiduciary duty.* Mr. Ferguson noted that "his" in subparagraph (2)(A) was ambiguous. It was not clear whether it referred to the attorney or the client. Messrs. Young and Simmons suggested adding "to [name of plaintiff]'s detriment" to the end of the subparagraph. Mr. Fowler suggested adding "improper" before "advantage." The committee revised subparagraph (2)(A) to read, "took improper advantage of [his] superior legal knowledge and position." The committee also deleted the last sentence of the committee note as redundant. The committee approved the instruction as revised.

c. *CV407. "Cause" defined.* Mr. Shea noted that he had included the subcommittee's proposal (the first paragraph of CV407) and the instruction on causation from the general negligence instructions (CV209) (the rest of the instruction). Mr. Ferguson thought the subcommittee's proposal was hard to follow. Mr. Simmons noted that CV402, which sets out the elements of the claim, includes "harm," whereas the subcommittee's proposal talks about the loss of a benefit and asked whether the loss of a benefit is the same as "harm." Mr. Young suggested using both. The committee deleted the first two paragraphs of CV407 and added a new introductory paragraph: "[Name of plaintiff] claims that [name of defendant] caused [name of plaintiff] harm by [describe his act or failure to act]."

Ms. Blanch joined the meeting.

The committee approved the instruction as modified.

d. *Damage instructions.* Mr. Shea noted that the legal malpractice instructions do not include instructions on damages. He noted that MUJI 1st included an instruction (7.52) entitled, "Plaintiff Must Prove Damages Resulting from Attorney Negligence," but further noted that the instruction was more of a causation instruction. It said that the plaintiff must prove not only that the defendant attorney was negligent but also that, but for his or her negligence, the plaintiff would have prevailed in the underlying legal action (the so-called "case within a case" requirement). The subcommittee had tried to deal with the concept in its proposed causation instruction ("[Name of plaintiff] must prove that if [name of defendant] had done the act [he] failed to do, or not done the act complained about, [name of plaintiff] would have benefited."). Mr. Fowler asked whether the general instructions on tort damages would apply. Mr. Simmons thought that MUJI 7.52 was necessary. Mr. Young suggested replacing "negligence" with "fault" in the instruction. The committee decided to omit MUJI 7.52 but to add a note to CV407 saying, "In describing the act or failure to act, the instructions should describe the 'case within the case' requirement." Mr. Shea will also add a reference to the damage instructions for tort damages and damages for breach of contract.

e. *Publication.* Mr. Shea asked whether the legal malpractice instructions should be published now or whether he should wait to publish them until the other professional negligence instructions were completed. The committee thought they should be published now.

Mr. Scott joined the meeting.

2. *Construction Contract Instructions.* The committee continued its review of the construction contract instructions.

a. *CV2206. Contractor's right to rely on owner-furnished information.* The committee revised subparagraph (4) to read: "The information caused [name of contractor] to incur extra [time/costs]." The instruction was approved as modified.

b. *CV2207, Contractor's duty to inquire or investigate; CV2214, Contractor's damages for defective plans and specifications;* and *CV2218, Owner's damages for contractor's defective work.* Mr. Scott will re-write CV2207, CV2214, and CV2218, with Mr. Young's input.

c. *CV2215. Contractor's liability for defective work.* Mr. Ferguson asked whether the phrase "the contract requirements" in subparagraph (1) needed to be defined. The phrase was changed to "[describe the contract

requirements]." Mr. Ferguson also thought the instruction was ambiguous because it was not clear whether the owner had to prove either (1) or (2) in addition to (3) or whether he had to either prove (1) or else prove (2) and (3). Mr. Young noted that (1) and (2) will often be present in the same case. At Mr. Shea's suggestion, the committee bracketed subparagraphs (1) and (2) and deleted "OR." It also added a note saying that the court should instruct only on those elements ((1) or (2)) for which there is evidence. At Mr. Shea's suggestion, "the same or" was deleted from subparagraph (2). The committee approved the instruction as modified.

d. *CV2216. Duty to provide access to the worksite.* Mr. Scott will try to find a Utah case to cite as authority for the instruction.

e. *CV2219. Additional time or compensation for extra work.* Ms. Blanch and Mr. Simmons questioned whether the jury can award "time." Mr. Scott and Mr. Young assured them that it can. The committee approved the instruction.

f. *CV2220. "Waiver" defined.* Mr. Young asked whether the definition of "waiver" for construction contract cases was different from the definition of "waiver" generally. Mr. Shea noted that there is no waiver instruction in the commercial contract instructions. Mr. Nebeker asked whether the requirement in subparagraph (2) meant that the party must have read the contract. Mr. Young asked whether knowledge can be imputed. Mr. Ferguson thought so; if someone signs a contract, he is deemed to know what is in the contract. At Mr. Simmons's suggestion, "release" was replaced with "give [or giving] up" throughout the instruction. Mr. Young questioned whether jurors would understand the concept of implied intent. Ms. Blanch suggested revising the last paragraph to read, "The intent to give up a right may be determined by considering all relevant circumstances." The committee left the last paragraph as it was. At Mr. Ferguson's suggestion, the reference to *Jensen v. IHC Hospitals* was deleted, since it is not a construction contract case. The committee approved the instruction as modified.

g. *CV2221. Wavier of change notice.* Mr. Shea asked whether the phrase "by words or conduct" in the second sentence could be deleted. The committee thought not. Mr. Ferguson asked whether "extra work" needed to be defined. The committee thought that it was adequately defined in CV2217 and did not need to be defined again in CV2221. Mr. Simmons thought the instruction was missing an element, namely, that the owner intended to give up the right to insist on written notice. He thought that an owner could understand that extra work needed to be performed and would require a change to the

contract but could still insist that notice of the change be given in writing. Mr. Scott said that the case law makes it clear that there are just the two elements set out in the instruction. Messrs. Young and Scott explained how changes to a construction contract are made in practice and explained the difference between a change notice and a change order. At Mr. Young's suggestion, the title of the instruction was changed to "Owner's waiver of written change notice from the contractor," and a sentence was added to the beginning of the instruction stating, "The contract requires that change notices be made in writing." The committee approved the instruction as modified.

h. *CV2222, Extra work due to site conditions different from contract terms (Type 1 differing site condition),* and *CV2223, Extra work due to unusual site conditions unknown to the parties. (Type 2 differing site condition).* At Mr. Ferguson's suggestion, "actual" was added before "site conditions" in the first sentence of CV2222, in subparagraph (3) of that instruction, and in the second sentence of CV2223. At Mr. Simmons's suggestion, the phrase "and the different site conditions added to [name of contractor]'s [time/compensation]" was added to the end of CV2223. The committee approved the instructions as modified.

3. *Next meeting*. The next committee meeting will be August 10, 2009. There will be no committee meeting in July 2009.

The meeting concluded at 6:00 p.m.

MINUTES

Advisory Committee on Model Civil Jury Instructions
August 10, 2009
4:00 p.m.

Present: John L. Young (chair), Juli Blanch (by phone), Phillip S. Ferguson, L. Rich Humpherys, John R. Lund, Timothy M. Shea, Paul M. Simmons, Peter W. Summerill, and Kent B. Scott (chair of the Construction Contract subcommittee)

Excused: Honorable William W. Barrett, Jr., Tracy H. Fowler, Colin P. King, David E. West

1. *Construction Contract Instructions.* The committee continued its review of the construction contract instructions.

a. *CV2223. Extra work due to unusual site conditions unknown to the parties.* At Mr. Young's suggestion, "compensation" in subparagraph (2) was changed to "costs." The committee approved the instruction as modified.

b. *CV2224. Implied contract or unjust enrichment.* Mr. Ferguson asked how this instruction was different from CV2225, Cardinal changes. Messrs. Scott and Young explained that the difference was one of degree and remedy. If there is a cardinal change, the project becomes different in character from what was planned, and the contractor may re-price the entire contract, not merely recover the reasonable cost of extra work. The committee approved the instruction.

c. *CV2225. Cardinal changes.* Mr. Lund questioned whether jurors would understand the term "cardinal." Mr. Simmons suggested that the instruction be revised to follow the format of CV2224 and make it clear what the jury is to decide. Mr. Scott will rewrite CV2225 and add a comment to make it clear that cardinal change and unjust enrichment may be alternative claims in the same case.

Mr. Humpherys joined the meeting.

d. *CV2226. Excusable delay.* At Mr. Young's suggestion, "reasonably" was added before "foreseeable" in subsection (2), and "compensation" was replaced with "costs" in subsection (5). Messrs. Ferguson and Shea asked whether jurors would understand what it means to "assume[] or waive[]" the delay. Mr. Young thought it should be "waived the claim for delay." Mr. Ferguson noted that the instruction requires the contractor to prove a negative. Mr. Young asked whether there should be separate jury instructions depending on who is making the claim--the contractor or the owner--or whether delay is being raised as a claim or a defense. Messrs. Ferguson and Summerill thought

subparagraphs (3) and (4) stated affirmative defenses and not elements of a claim. Mr. Scott agreed to take them out. The instruction was revised to read:

> [Name of contractor] claims that [he] is entitled to extra [time/compensation] to complete the work because of delay. To succeed on this claim, [name of contractor] must prove that the delay:
>
> (1) was beyond [his] control;
>
> (2) was caused by events that were not reasonably foreseeable to [name of contractor]; and
>
> (3) required [name of contractor] to incur more [time/costs] to perform the work.

The committee approved the instruction as revised.

e. *CV2227. Inexcusable delay.* Mr. Shea and Mr. Simmons thought the instruction was simply the negation of the plaintiff's burden to prove excusable delay and could be deleted. Mr. Simmons thought that if the contractor had the burden of proving that the delay was excused and the owner had the burden of proving that the delay was not excused, it could result in confusion, particularly if the jury decided that neither party had met its burden. Mr. Young thought both instructions were necessary. Mr. Humpherys asked whether the instruction to be given (CV2226 or CV2227) depended on which party to the contract was the plaintiff. Mr. Lund noted that there was little difference between the instruction on excusable delay (CV2226) and the instruction on compensable delay (CV2228). The only difference is that, for delay to be compensable, the owner must have caused it. Mr. Ferguson asked whether there could be a case where the contractor was claiming that any delay was excused but was not seeking any damages; if not, then we would not need separate instructions on excusable and compensable delay. Mr. Scott said there could be. Mr. Scott suggested revising the delay instructions and calling them "Owner delay" and "Contractor delay," incorporating CV2228 in CV2226.

Mr. Scott will revise CV2226-28 in light of the committee's discussion.

f. *CV2229. Concurrent delay.* At the suggestion of Messrs. Young and Scott, the first sentence was deleted. Messrs. Lund and Humpherys asked whether concurrent delay was a form of contributory negligence. Mr. Scott

explained that there is a difference between concurrent delay and contributory negligence. The former is not a complete defense. In construction law, the court looks at each day of delay, and a party can only recover delay damages for those days for which it bore no responsibility for the delay. The committee approved the instruction as modified.

g. *CV2230. Acceleration.* Mr. Humpherys asked whether profit should be included in the damages. Mr. Young explained that profit was included in "costs." The committee revised the instruction to read:

> [Name of contractor] claims that he is entitled to recover extra costs incurred because [[name of owner] required him to perform the work in less time than required by the contract] [[name of owner] increased the scope of work and did not increase the contract time].
>
> To succeed on this claim, [name of contractor] must prove that:
>
> (1) [name of contractor] is not at fault for any delay related to the claim;
>
> (2) [name of owner] [ordered [name of contractor] to complete the work in less time than required by the contract] [increased the scope of the work, but did not grant [name of contractor] an extension of time]; and
>
> (3) [name of contractor] incurred extra costs.

The committee approved the instruction as modified.

h. *CV2231. Damages for delay.* Mr. Scott thought the instruction should be called "No damages for delay," since it deals with no-damages-for-delay provisions of the contract. The committee revised the instruction to read:

> [Name of contractor] claims damages for delays. The contract provides that [name of contractor] is entitled to extra time to complete the work but is not entitled to recover damages caused by the delay. However, there are circumstances in which [name of contractor] may recover damages for delay regardless of the contract.

> To succeed on this claim, [name of contractor] must prove [that [name of owner/owner's agent] caused the delay by direct interference, active interference, or willful interference with [name of contractor]'s work.] [that the parties did not contemplate the delay at the time they entered into the contract and the delay was excessive and unreasonable.]

Mr. Shea asked what the difference was between direct interference and active interference. Mr. Lund thought that the revised instruction, which changed the phrase "so excessive and unreasonable that it falls outside of the contract," changed the substance of the instruction and lessened the contractor's burden. Mr. Young, however, thought that "falls outside of the contract" was problematic. Mr. Simmons asked whether the standard was objective or subjective: What if the parties did not actually contemplate the delay, but the delay was reasonably foreseeable at the time of contracting? The committee approved the instruction as revised.

i. *CV2232. Right to suspend work for non-payment.* Mr. Simmons suggested adding as the first element: "(1) [name of owner] failed to make one or more payments required by the contract." Mr. Scott suggested deleting the next element (that the failure to make the payments was a material or important breach of the contract), but the committee thought it should stay in. The first sentence was revised to read, "[Name of contractor] claims [he] suspended the work because of nonpayment," and new subparagraph (1) was added. The committee approved the instruction as revised.

j. *CV2233. Right to suspend work for interference.* Mr. Lund suggested making the instruction parallel to CV2232. The committee revised the instruction to read:

> [Name of contractor] claims that [he] suspended the work because of interference by [name of owner]. To succeed on this claim, [name of contractor] must prove that--
>
> (1) [name of owner] [events within [name of owner]'s control] unreasonably interfered with [name of contractor]'s performance of [his] work, and
>
> (2) the interference was for an unreasonable period of time.

Mr. Simmons asked how the issue of suspension of work arises--is it a claim for damages, or an affirmative defense to a claim? Mr. Scott indicated that it can be

either a claim or a defense. If it is a claim, it should be followed by the appropriate damage instruction (CV2246).

Mr. Scott will draft a committee note to that effect.

k. *CV2234. Bad faith termination for convenience.* Mr. Ferguson questioned the use of the phrase "malicious or wrongful intent." Must the intent be both "malicious" and "wrongful"? What does "malicious" mean in this context? What is "wrongful" intent? At Mr. Scott's suggestion, the instruction was withdrawn. The committee agreed to use the general contract instruction on good faith and fair dealing instead.

l. *CV2235. Termination for cause.* At Mr. Ferguson's suggestion, subparagraph (1) was revised to read, "he gave timely and adequate notice of the alleged breach to [name of other party]." With regard to subparagraph (3), Mr. Humpherys asked, What if the terminating party had been in breach of the contract but had cured the breach before the termination? Messrs. Ferguson, Young, and Simmons thought the last paragraph, which said, "you must strictly apply the termination provisions of the contract against [name of terminating party]," was a legal determination for the court to make and not properly part of the jury instruction. Mr. Summerill asked about subcommittee member Melissa Orien's suggestion that the instruction be deleted because there is no Utah law on point. The committee deferred further discussion of the instruction to allow time to review the Utah case cited in the references (*Keller v. Deseret Mortuary Co.,* 455 P.2d 197 (Utah 1969)).

2. *Remaining Construction Contract Instructions.* Mr. Young said that the subcommittee would meet next week to finalize the construction contract instructions. They will e-mail their suggested changes to the committee members. Committee members should review their work and provide any substantive or stylistic feedback before the next committee meeting, so that the committee can review and approve the remaining instructions as quickly as possible.

3. *Next Meeting.* The next committee meeting will be Monday, September 14, 2009. The committee is scheduled to review the Accountant Negligence instructions then.

The meeting concluded at 6:00 p.m.

MINUTES

Advisory Committee on Model Civil Jury Instructions
September 14, 2009
4:00 p.m.

Present: John L. Young (chair), Honorable William W. Barrett, Jr., Juli Blanch, Francis J. Carney, Marianna Di Paolo, Phillip S. Ferguson, Tracy H. Fowler, L. Rich Humpherys, Stephen B. Nebeker, Timothy M. Shea, Paul M. Simmons, David E. West, and Kent B. Scott (chair of the Construction Contract subcommittee)

1. *Construction Contract Instructions.* The committee continued its review of the construction contract instructions.

a. *CV2207. Contractor's duty to inquire about or investigate specific information provided by owner.* Mr. Humpherys questioned whether jurors would understand "representation" and suggested that "statement" be used instead. Dr. Di Paolo asked whether all representations are statements or whether a schematic, for example, could be a representation. The committee revised the instruction to read:

> [Name of contractor] claims that [name of owner] made the following incorrect representations: [describe the representations].
>
> [Name of contractor] claims [he] is entitled to damages caused by relying on incorrect representations.
>
> [Name of owner], however, claims [he] is not liable for [name of contractor]'s damages because [name of contractor] should have investigated or inquired about the representations before submitting a proposal.
>
> In order for [name of contractor] to establish that there was no obligation to investigate or inquire about each representation, [name of contractor] must prove that:
>
> (1) the representations were incorrect;
>
> (2) [he] conducted a reasonable [inspection/inquiry] of the proposed work site and bid documents to confirm their accuracy before submitting a proposal;
>
> (3) [he] should not have reasonably been expected to recognize that the representation was incorrect; and
>
> (4) [name of owner] did not warn [name of contractor] that the representations may not be reliable and may require further investigation or inquiry.

Mr. Shea asked whether "investigate or inquire" were the same thing. Dr. Di Paolo and Mr. Scott said no (both from a linguistic perspective and a legal perspective). Mr. Fowler asked whether it should be "investigate and inquire." Dr. Di Paolo suggested saying "investigate and/or inquire." Mr. Young suggested adding a committee note to explain that a contractor does not have to both

investigate and inquire in every case. At Mr. Shea's suggestion, the instruction was changed to read "to investigate or inquire about each representation." The committee approved the instruction as modified. Mr. Fowler noted that the *Jack B. Parson* case cited as authority for the instruction is listed as a 1996 case in CV2207 and as a 1986 case in CV2206. Mr. Shea will correct the incorrect citation.

b. *CV2216. Duty to provide access to the worksite.* Mr. Young noted that the instruction, which had previously been approved, was revised to cover cases of delay as well as those involving additional cost. At Mr. Young's suggestion, the terms *he* and *his* in subparagraphs (1) through (3) were changed to *[Name of contractor]['s].* The committee approved the instruction as modified.

c. *CV2218. Contractor's liability for defective work.* Messrs. Young and Scott agreed that this instruction can be deleted.

d. *CV2225. Cardinal changes.* The phrase "contemplated by the original contract" in the first paragraph was changed to "described by the original contract." Dr. Di Paolo and Mr. Humpherys asked whether the term *abandoned* in subparagraph (3) needed to be defined or explained. Mr. Ferguson noted that it is defined in CV2134, a commercial contract instruction. Messrs. Scott and Humpherys questioned whether subparagraph (3) was even necessary. Messrs. Humpherys and Ferguson asked how the concept was different from a novation or an accord and satisfaction. Mr. Shea thought that whether the contract could be considered abandoned was a conclusion for the jury to draw. Mr. Humpherys noted that the original contract is not completely abandoned; it still exists; it is just not controlling. The committee revised subparagraph (3) to read, "the parties acted as if the contract no longer applied." The committee approved CV2225 as revised.

e. *CV2226. Excusable delay; contractor's claim for time.* Several committee members found the instruction confusing and asked how the issue would arise. Mr. Young noted that a claim of excusable delay may be either a claim or an affirmative defense but most often arises as a defense to a claim by the owner for liquidated damages. Mr. Scott explained that, depending on the reasons for a delay, the contractor may be entitled to (1) additional time to complete the contract; (2) additional time and money; or (3) no additional time or money. Mr. Nebeker asked whether an award of additional time automatically meant that the contractor was also entitled to additional money. Messrs. Scott and Young said no. The committee revised the instruction to read:

> [Name of contractor] claims that he was entitled to more time to perform the work because of an excusable delay. To succeed on this claim, [name of contractor] must prove that the events causing the delay:
>
> (1) were beyond [name of contractor]'s control;
>
> (2) were not reasonably foreseeable by [name of contractor] at the time the contract was made;
>
> (3) prevented [name of contractor] from meeting the contract deadline.

Subparagraph (4) (that the contractor did not waive or assume the delay) was deleted, on the grounds that it was an affirmative defense to the claim. The title of the instruction was changed to "Excusable delay not caused by contractor." The committee approved the instruction as revised.

f. *CV2228. Compensable delay; contractor's claim for time and money.* The committee revised the instruction to read:

> [Name of contractor] claims [he] was entitled to additional time and money to perform the work. To succeed on this claim, [name of contractor] must prove that the events causing the delay:
>
> (1) were caused by [name of owner] and not [name of contractor];
>
> (2) were within [name of owner]'s control;
>
> (3) were reasonably foreseeable by [name of owner];
>
> (4) required [name of contractor] to incur additional expenses and take additional time in performing the work.

Former subparagraph (4) (regarding assumption or waiver of the delay) was deleted. Mr. Scott noted that there can be three types of delay: (1) excusable delay, where neither the contractor nor the owner is at fault, in which case the contractor is entitled to additional time; (2) compensable delay, where the owner is at fault but the contractor is not, in which case the contractor is entitled to additional time and money; and (3) inexcusable delay, where the contractor is at fault, in which case the contractor is not entitled to either additional time or additional money. Mr. Humpherys noted that CV2226 imposes less requirements to obtain additional time than CV2228 does and asked which would apply if the contractor just wanted additional money and not additional time. He suggested that CV2228 should deal only with additional money, not additional time, which is covered by CV2226. Dr. Di Paolo, however, thought that they were not mutually exclusive. The contractor, for example, may be entitled to more money under CV2228, but any damage award could be offset by liquidated

damages if the contractor were not also given more time to complete the contract. The committee changed the title of the instruction to "Compensable delay caused by owner." The committee approved the instruction as modified.

e. *CV2227. Inexcusable delay; denying contractor's claim for additional time or money.* At Mr. Scott's suggestion, CV2227 was moved to follow CV2228 on compensable delay. Messrs. Humpherys and West asked whose burden it was to show inexcusable delay, and whether inexcusable delay is just the absence of an excusable or compensable delay. Mr. Humpherys noted that, under CV2228, the burden of proof is on the contractor to prove compensable delay, but under CV2227 the burden of proof is on the owner to prove inexcusable delay and noted the inconsistency. Mr. Scott noted that inexcusable delay may be a direct claim by the owner or an affirmative defense to a contractor's claim for compensable delay. He noted that, in the usual case, the contractor sues the owner for nonpayment, and the owner defends by saying that he didn't pay the contractor because the contractor delayed the project, costing the owner money. In that case, Mr. Shea suggested, the owner only has to show that the contractor has not met his burden of proving an excusable or compensable delay. The committee agreed to delete CV2227.

Mr. Scott will draft a new instruction for an owner's claim for damages caused by a contractor's delay.

g. *CV2234. Termination for cause.* Mr. Young noted that there is no Utah case law on the issue of termination for cause and suggested deleting the instruction. Mr. Carney thought the instruction should be included, with a committee note saying there are no Utah cases on point, but that the instruction represents the majority view from other jurisdictions. Mr. Young thought that the committee was not instructing on matters unless there was Utah law on point. Others pointed out that some of the instructions are rewrites of MUJI 1st instructions, and MUJI 1st did not have Utah authority for every instruction. Mr. Scott noted that CV2234 should not be controversial, that the concept is almost universally recognized. Dr. Di Paolo asked whether "breached the contract" needed to be defined. Mr. Shea noted that CV2101 and CV2102 talk about breaching a contract "by not performing [one's] obligations" under the contract. Others thought that jurors would understand the term. Dr. Di Paolo also thought "cure the breach" in subparagraph (2) would be unclear to jurors. The committee changed subparagraph (2) to read: "(2) gave [name of other party] reasonable time to correct the breach [as required by the contract]." The last phrase was bracketed to show that it is optional, since some contracts may not explicitly deal with time to correct a breach. The committee approved the instruction as modified.

h. *CV2215. Damages for contractor's defective work.* Mr. Young distributed a memorandum and drafts of CV2215 and CV2214 ("Contractor's liability for defective work") that he had drafted. Mr. Young noted that the measure of damages for defective work is generally the reasonable cost of repair but that sometimes repairs are not economically practicable. This concept is subsumed in the phrase "unreasonable economic waste," which is well established in the case law but not well defined and would be confusing to jurors.

Mr. Young will revise CV2215 to add a definition of "unreasonable economic waste," based on the Restatement.

2. *Remaining Construction Contract Instructions.* Mr. Scott encouraged the committee to provide any feedback on the outstanding instructions before the next meeting so that he can present the committee with concise, simplified instructions at the next meeting.

3. *Next Meeting.* The next committee meeting will be Monday, October 13, 2009.

The meeting concluded at 6:05 p.m.

MINUTES

Advisory Committee on Model Civil Jury Instructions

October 13, 2009

4:00 – 6:00 p.m.

Present: Juli Blanch, Marianna Di Paolo, Phillip Ferguson, Rich Humpherys, John Lund, Stephen Nebeker, Timothy Shea, Kent Scott, Peter Summerill, John Young

Excused: Judge William Barrett, Frank Carney, Tracy Fowler, Colin King, Paul Simmons

Mr. Young called the meeting to order.

Mr. Young reported that he and Mr. Shea had met with the Board of District Court Judges to encourage feedback about the model instructions. Board members stated that they were using the new instructions and thought that they were well done. The Board members also stated that, even if there is no Utah law on a matter, that it would be helpful for the committee to draft an instruction based on the law of other states, providing a majority and minority view when appropriate. Other committee members stated that the new instructions seem to be gaining acceptance. Mr. Young thought that Chief Justice Durham's letter to the district court judges had been very helpful.

Mr. Shea reported that, based on his research and the earlier draft provided by Mr. Young, he recommends breaking up the instructions for liability and damages for defective work to cover three concepts: contractor's liability; owner's damages; and avoiding unreasonable economic waste. He reported that the law on the first two is reasonable clear, but that the law on the last is not.

CV2214. Contractor's liability for defective work. The committee decided to omit (2) in light of the recent Davencourt decision. The committee added "did not comply with industry standards" to the bracketed language in (1). The committee approved the instruction.

CV2215. Damages for contractor's defective work. The committee added noncompliance with "industry standards" to the bracketed language. The committee approved the instruction.

CV2216. Avoiding unreasonable economic waste. Mr. Shea reported that Utah law is clear that the contractor bears the burden of proving that the cost to repair or replace defective construction involves unreasonable economic waste. Some states place the burden of disproving that on the owner. Mr. Shea reported that the Stangl case, which establishes the principle, quotes Corbin for the principle that the contractor must prove "affirmatively and convincingly," that the cost to repair or replace involves economic waste. Whether that means the standard or proof is clear and convincing evidence is unstated.

It is also unclear what constitutes unreasonable economic waste, other than it has to be extreme. The committee thought that the concept of the cost to repair or replace

being way out of proportion to the value of the project should be added. The committee decided to add “clearly” out of proportion to (1). The committee approved the instruction.

CV2228. Owner’s claim for damages for delay caused by contractor. Mr. Scott explained that there is no Utah law on damages for delay other than liquidated damages. The committee decided that this instruction should more closely parallel contractor’s claim for damages caused by owner, which is the counterpart to this instruction. The committee edited 2227 to fit the context of the owner’s damages and approved the instruction.

CV2235. Mitigation of damages. The committee decided to copy the commercial contract instruction on mitigation, but to use “without unreasonable risk or burden” rather than “undue” and to separate humiliation since there seems to be no concept that a reasonable amount of humiliation might be acceptable.

CV2236. Impossibility. The committee approved the instruction as drafted.

CV2237. Excessive and unreasonable cost. The committee decided to omit this instruction because it restates the concepts in the “cardinal change” instruction.

CV2238. Frustration of purpose. The committee decided to copy the commercial contract instruction on frustration of purpose. There is no Utah law in the construction context.

CV2239. Estoppel. The committee decided to omit this instruction.

CV2240. Accord and satisfaction. The committee decided to copy the commercial contract instruction on accord and satisfaction.

CV2241. Damages for termination for convenience. Mr. Scott will draft a new instruction.

The meeting was adjourned.

MINUTES

Advisory Committee on Model Civil Jury Instructions
December 14, 2009
4:00 p.m.

Present: John L. Young (chair), Francis J. Carney, Marianna Di Paolo, Phillip S. Ferguson, Tracy H. Fowler, Stephen B. Nebeker, Timothy M. Shea, Paul M. Simmons, Peter W. Summerill, David E. West, and Perrin Love, chair of the eminent domain subcommittee

Excused: Timothy M. Shea (who joined the meeting late)

The committee reviewed the following eminent domain instructions:. Mr. Love noted that the subcommittee tried to walk a fine line between making the instructions understandable and being faithful to the statutes and case law.

1. *CV1601. Condemnation proceedings.* Mr. Fowler asked if "public use" was ever a jury issue. Mr. Love said that it was not. Mr. Carney wondered whether there should be a committee note to that effect, but Mr. Love did not think a note was necessary because it is well known among lawyers practicing in this area. Mr. Summerill asked whether it was different for claims brought directly under the state constitution, which is self-executing. Mr. Love replied that it was not, since there was no constitutional right to a jury on the issue of public use at common law. Mr. Love suggested adding a committee note to explain that the instructions do not cover inverse condemnation and constitutional claims. Mr. Young suggested that the subcommittee decide whether to address the issue in a committee note. Subject to the possible addition of a committee note, the committee approved the instruction.

2. *CV1602. Definition of just compensation.* Mr. Ferguson asked whether "severance damages" was understandable. The committee noted that the term is explained in CV1617. The committee revisited CV1602 in connection with CV1604, as set out below.

3. *CV1603. Burden of proof.* Mr. Love noted that Mr. Shea had taken out the phrase "by a preponderance of the evidence," consistent with the committee's practice. The committee approved the instruction.

4. *CV1604. Verdict to be based on fair market value.* Mr. West thought the second sentence of the instruction was objectionable because it explained what the jury cannot award instead of what it can. Mr. Love noted that the second sentence was the reason for the instruction, since juries often want to award a property owner more than the property's fair market value because the owner does not want to part with the property. He also noted that the instruction was in MUJI 1st, but Mr. Carney pointed out that that is not necessarily sufficient reason to include the instruction in MUJI 2d. Mr. Summerill noted that the last sentence of the instruction stated the same thing only in a positive manner. Mr. Carney raised a philosophical point, namely, when should the

instructions include both a positive statement of the law (*e.g.,* what the jury may consider or award) and the converse (*e.g.,* what the jury cannot consider or award). Mr. Fowler thought that some circumstances arise so frequently that it is appropriate to deal with them in a jury instruction, and that it is not sufficient to say that the attorneys may argue the point. Mr. Ferguson noted that the first sentence invites the second sentence, since a jury may think that putting the owner in as a good a position as if the property had not been taken allows the jury to compensate the owner for the forced nature of the "sale." Mr. Ferguson thought that if the first sentence is given, the second should be given as well.

Dr. Di Paolo joined the meeting.

Mr. Ferguson suggested deleting the first two sentences. Mr. Love thought that, if the second sentence is deleted, the first sentence should be revised to include language that the reviewing committee took out, namely, that the owner should be put in "as good a position moneywise" as if the property had not been taken, "no more or less." Dr. Di Paolo thought that jurors would understand "moneywise" and that, although "no more or less" may not add anything, it does not hurt to be redundant, especially with a lay audience. Mr. Carney noted that the jury could be instructed not to award a whole laundry list of other items. Mr. West thought it was improper to instruct on other items that cannot be awarded. Mr. Young thought that, either evidence of the owner's unwillingness to sell would not be admitted or, if it was, the court would give a limiting instruction anyway. Mr. Love noted that that has not been his experience, because an instruction like CV1604 has always been given. Mr. Young asked if the instruction was necessary given the fact that the jury's award must be limited to damages established by expert testimony, as stated in CV1609. Mr. Carney thought that if the first two sentences of CV1604 were deleted, the instruction would not add anything not already covered by CV1602. Dr. Di Paolo thought that CV1602 and CV1604 did not mean the same thing and thought the instructions could be combined. The committee revised CV1602 to read:

Alternative 1:

In deciding the amount of just compensation, you must put [name of property owner] in as good a position moneywise as if [his] property had not been taken, no more or less.

Just compensation is the fair market value of the property taken on [valuation date].

Your determination of just compensation must be limited to the fair market value of the property taken.

Alternative 2:

In deciding the amount of just compensation, you must put [name of property owner] in as good a position moneywise as if [his] property had not been taken, no more or less.

Just compensation is:

(1) the fair market value of the property taken, and

(2) severance damages, if any, to [name of property owner]'s remaining property caused by the taking.

You should determine these two amounts separately, on [valuation date], and add them together to determine just compensation.

Your determination of just compensation must be limited to the fair market value of the property taken and severance damages to the remaining property, if any.

The committee approved CV1602 as revised.

5. *CV1605. Fair market value.* Dr. Di Paolo asked whether "all of the facts about the property" include the fact that the property has been condemned. Mr. Love said no. He noted that the committee had struggled with the terms "highest probable price" and "prudent and willing." He noted that some subcommittee members thought that "prudent" was not an accurate statement of the law; others thought it was antiquated and was too easily confused with "prudish"; and still others thought that it had to be included. Dr. Di Paolo suggested "reasonable" for "prudent." Mr. Love noted that "prudent" is used in FIRREA regulations and in most appraisals. Messrs. Young and Carney thought that if the jury instruction used a term different from the term in evidence, the jury would be confused. Dr. Di Paolo thought that jurors would understand "prudent." As for "highest probable price," Mr. Carney suggested dropping "highest," but Messrs. Nebeker and Ferguson thought that "probable" alone weakened the concept. Dr. Di Paolo, on the other hand, thought that if the instruction was stated only in terms of the "highest price," the jury might think that, as between competing evaluations, it was required to select the highest appraisal, not necessarily the best appraisal or the one that made the most sense. Mr. Carney noted that he did not find "probable" in any of the cases cited for the instruction. The committee therefore struck "probable" and approved the instruction as modified.

Mr. Shea joined the meeting.

6. *CV1606. Fair market value of easement.* Mr. Ferguson questioned whether "unreasonably interfered" should be defined. The committee thought not. Mr. Summerill asked whether the last paragraph should conclude, "You should consider . . ." Mr. Love thought it was unnecessary. It is included in the second paragraph to highlight the fact that an easement may not deprive an owner of all the uses of his property. Mr. Nebeker raised the issue of temporary easements. Mr. Love said that the subcommittee had decided not to address them because all appraisers value them the same way, as a percentage of the fair market value of the fee estate. The committee approved the instruction as drafted.

7. *CV1607. Highest and best use.* Mr. Love noted that the phrase "merely possible" was included in the *City of Hildale* case. Mr. Shea thought it was redundant and noted that "remote or speculative" is used elsewhere. Mr. Carney thought that "merely" constructions should be avoided. Mr. Shea suggested that the instruction use either "potential" or "possible" but not both. Dr. Di Paolo suggested "unlikely" for "merely possible, remote or speculative." Mr. Love noted that the cases use "remote or speculative." Mr. West would delete the last sentence entirely on the grounds that it just says what the law is not. The committee returned to its earlier discussion on when to give negative instructions. Mr. Young suggested that the general principle should be to instruct on what the law is and not on what it is not. Dr. Di Paolo noted that some situations open up implications. If the implication is likely and improper, then something needs to be done to cancel it out. Mr. Young noted that the last sentence was a little disjointed because it dealt with two different concepts. Mr. Summerill asked why the instruction used the term "reasonably certain" rather than "feasible," as in the *City of Hildale* case. Several committee members thought that the terms were not synonymous. Mr. Love noted that *Hildale* used both terms interchangeably. He noted that "reasonably certain" as used in the case law may be less than "more likely than not." The test is whether it affects fair market value. Mr. Love suggested substituting "reasonably probable" for "reasonably certain." The committee revised the instruction to read:

> You must determine fair market value based on the property's highest and best use. Highest and best use is not necessarily the actual use of the property on [valuation date]. The highest and best use includes any reasonably probable potential use that results in the property's highest value. A potential use is reasonably probable if:
>
> . . .
>
> Highest and best use does not include a use that is remote or speculative.

The committee approved the instruction as revised.

8. *CV1608. Reasonable probability of change in zoning or land use restriction.* Mr. Love noted that CV1608 talks in terms of reasonable probability and suggested making CV1607 consistent. Mr. Carney noted that the medical malpractice instructions took out the phrase "reasonable certainty" on the grounds that "reasonable" and "certainty" were incompatible. The committee replaced "reasonable certainty" with "reasonably probable" in CV1607 and approved CV1608.

9. *CV1609. Verdict based on testimony of witnesses.* Mr. West asked whether the instruction was unique to eminent domain proceedings or whether it should be in the general instructions. Mr. Love said it was unique to eminent domain, where the appraisers' opinions set both a floor and a ceiling on the jury's award. The instruction is not limited to expert testimony, though, because an owner can give his opinion of fair market value. At Dr. Di Paolo's suggestion, the last phrase was revised to read, "within the range of fair market values offered by the witnesses." The committee approved the instruction as revised.

10. *CV1610. Owner testifying.* Dr. Di Paolo asked why owners are singled out for special treatment and why the instruction was not already covered by CV1609. Mr. Love noted that owners are entitled to give their opinions regarding fair market value even though they are not qualified as an appraiser. Mr. Ferguson suggested that the instruction was telling the jury, "The owner can testify, but don't take his opinion too seriously." Mr. Carney thought the instruction was argumentative. Mr. Young suggested combining it with CV1609 and adding "any self-interest" or "the witness's ownership interest in the property" to the list of factors the jury can consider in CV1609. Mr. Ferguson asked whether the concept was already covered by the general instruction on the credibility of witnesses. The subcommittee will consider combining CV1610 with CV1609 and adding a committee note explaining why CV1610 was deleted.

11. *Next Meeting.* The next meeting will be Monday, January 11, 2010, at 4:00 p.m.

The meeting concluded at 6:00 p.m.

MINUTES

Advisory Committee on Model Civil Jury Instructions
January 11, 2010
4:00 p.m.

Present: Hon. William Barrett, Francis J. Carney, Phillip S. Ferguson, Timothy M. Shea, Paul M. Simmons, Peter W. Summerill, David E. West, and Perrin Love, chair of the eminent domain subcommittee

Excused: John L. Young (chair), Juli Blanch, Marianna Di Paolo, Tracy H. Fowler, John R. Lund

Mr. Carney conducted the meeting in the absence of Mr. Young.

1. *Schedule*. Mr. Carney suggested that the committee review vicarious liability and premises liability instructions before doing the accounting malpractice instructions. Mr. Shea noted that Mr. Lund chairs the vicarious liability subcommittee, but he did not know whether a subcommittee has been formed. Mr. Carney will check with Mr. Young.

2. *Feedback*. Mr. Carney noted that the committee is not receiving feedback on the instructions that have been approved. Judge Barrett noted that he recently used the MUJI 2d instructions in trial and noted that the Chief Justice's letter telling courts and counsel to use the instructions has been published in the *Utah Bar Journal*. Mr. Shea noted that there is a "Contact the Committee" link on the MUJI 2d website that allows a person to e-mail Mr. Shea with any comments. Mr. Summerill suggested sending a survey to the judge and attorneys after each civil jury trial and offered to prepare a form for the survey. The committee discussed how to learn when civil jury trials take place. Mr. Shea noted that trials are listed on the court calendars, but they do not always take place as scheduled. Someone suggested using *Rocky Mountain Verdicts & Settlements* as a source for information on jury trials. Mr. West offered to write an article for the *Utah Trial Journal* soliciting feedback.

Mr. Ferguson joined the meeting.

3. *Eminent Domain Instructions*. The committee continued its review of the eminent domain instructions.

a. *CV1609. Owner testifying*. The subcommittee will combine this instruction with CV1608, "Verdict based on testimony of witnesses."

b. *CV1610. Viewing of property*. Mr. Love noted that the instruction was based on MUJI 1st 16.18, which says that a view of the property is not evidence. Mr. Summerill thought the instruction was confusing. He suggested it be revised to read: "You cannot make any determination based on your personal opinion as to the property's value and should only use your viewing of the property to help you understand the testimony." Mr. Love noted that he has

never seen a court allow a view of the property and further noted that the expense makes it prohibitive in most cases. Mr. Shea suggested that the instruction say what a view is and not what it is not. He suggested revising the instruction to read: "You may consider your viewing of the property only to help you evaluate the evidence you have seen and heard in the courtroom to help you gain a better understanding of the testimony." Mr. West questioned whether it was the law that a view of the property is not evidence. Mr. West suggested saying, "Your viewing of the property is not itself evidence *of fair market value,"* adding the italicized phrase. Mr. Carney noted that, according to C.J.S., there is a split of authority on whether a view of the property is evidence or not. He further noted that the cited authority, *Weber Basin Water Conservancy District v. Moore,* 272 P.2d 176 (Utah 1954), involved a bench trial, not a jury trial, so was not controlling. Mr. Simmons suggested omitting the instruction since there is no clear Utah authority for it. Mr. Summerill suggested that, if the parties can convince the court to allow the jury to view the property, then they should draft their own instruction to cover the situation. Mr. Carney asked Mr. Love to tell the subcommittee that the consensus of opinion on the committee was that the instruction should be deleted and to see if the subcommittee will concur. A committee note could be added to the beginning of the eminent domain instructions to explain which MUJI 1st instructions were dropped and why.

c. *CV1611. Project influence.* Mr. Carney questioned the need for the instruction, since the jury should never hear evidence of project influence. Others thought that jurors would speculate on the matter if not instructed otherwise and that the instruction was therefore needed. Mr. Summerill asked what the last sentence of the committee note meant. Mr. Love explained that the jury can take a change in property value into account if the change arises from something outside the scope of the original project. The committee approved the instruction.

d. *CV1612. Value of undeveloped land.* Mr. Love explained the purpose of CV1612, which is to prevent the jury from treating undeveloped land as if it were already subdivided. He asked whether it was okay to cite treatises such as *Nichols on Eminent Domain* in the committee notes. The committee said it was. Mr. Carney suggested updating the references in this and other instructions to include more recent cases, such as *Thorsen v. Johnson,* 745 P.2d 1243 (Utah 1987). Mr. Love will ask the Attorney General's office to update the references. The committee approved the instruction.

e. *CV1613. Value of improved property.* Mr. Love explained the rationale for CV1613, which is that the sum of the parts cannot be greater than the whole; one may make improvements to property for which he may never recoup

the cost. Mr. Shea suggested adding "[diminish]" as an alternative to "enhance" in the last line. Others thought it was unnecessary. Mr. Ferguson thought the first and last sentences were contradictory. Mr. Love noted that the last sentence was included to make sure that the jury did not ignore improvements. Mr. Summerill noted that the *Brown* case cited deals with fixtures, not improvements. Mr. Carney thought that the easiest way to explain the concept was with examples but questioned whether it was proper to use examples in jury instructions. The rest of the committee thought it was. At the suggestion of Judge Barrett and Mr. Ferguson, the last sentence was deleted. The committee approved the instruction as modified.

f. *CV1614. Business injury or loss of profits.* Mr. Summerill questioned the use of "[separate]" in line 4 of alternative 2. Mr. Love noted that business income may affect the value of the property, but it cannot be compensated for as a separate item of damage. The theory is that the business is not being taken but can relocate to another property. The committee deleted the brackets around "[separate]" and approved the instruction as modified.

g. *CV1615. Interest and moving expenses.* Mr. Carney thought that the instructions should track the special verdict form and asked whether the special verdict form asked the jury to find "just compensation" or "fair market value." If the latter, he thought the instruction was unnecessary. Mr. Love, however, thought the instruction was necessary in either event because the jury might think that it can consider interest and moving expenses in arriving at fair market value as well as in arriving at just compensation. Judge Barrett and Mr. Carney suggested deleting the phrase, "In determining just compensation." Mr. Shea suggested revising the instruction to read: "You must not award any amount for interest, moving expenses or costs of these proceedings." Mr. Carney questioned whether the instruction merely told the jury what the law is not. Mr. Summerill thought it told the jury what the law is: the law is that you cannot award damages for these items. He thought instructing the jury on the matter was analogous to instructing the jury on the collateral source rule. Mr. Ferguson thought the instruction was similar to other instructions the committee had approved. The committee approved the instruction as drafted.

h. *CV1616. Severance damages.* Mr. Summerill thought the instruction was confusing because it uses the term "severance damages" before defining it. He suggested deleting "severance" from the first sentence or changing the order of the second and third sentences. Mr. Ferguson questioned whether "severance" was plain English. Mr. Love noted that it was a term of art that has a long history behind it and that it would be defined for the jury. Mr. Ferguson asked what the phrase "as part of the entire property" meant in the second

paragraph. Mr. Carney thought the third paragraph was unnecessary because it singled out severance damages for special treatment; all damages must be reasonably certain and not remote or speculative. Mr. Love noted that other instructions, such as the instruction on "highest and best use," contain similar language. Mr. Shea asked whether "completed" at the end of the second paragraph of the committee note should be changed to "started." Mr. Love thought not, since the idea is that the jury may consider severance damages that may take place during the course of construction, which may not be completed before trial. The committee approved the instruction as drafted.

i. *CV1617. Access.* Mr. Love noted that "reasonable access" in Utah is defined negatively (by what it is not). For that reason, the subcommittee considered using the Arizona model instruction's definition of "reasonable access" but decided against it. Mr. Summerill thought that the last sentence of the committee note was inconsistent with the last sentence of the first paragraph of the instruction. Mr. Love noted that, as a general rule, there is no right of access at a specific point, but a contract, for example, may give such a right. If there were a right to access at a specific point, CV1617 would not be used. In that situation, the court and parties would have to come up with their own instruction. The committee note was meant to explain this concept. Mr. Ferguson suggested that the subcommittee propose two instructions: (1) one for loss of reasonable access, and (2) one for loss of a legally established right of access. The committee approved CV1617 for the first situation. The subcommittee will consider a separate instruction for the second situation.

j. *CV1618. Special benefits.* Mr. Love explained the concept behind CV1618 and gave examples. He noted that the issue rarely comes up. The instruction is an extrapolation from the cited references. The committee approved the instruction.

k. *CV1619. Apportionment of just compensation among multiple interests.* Mr. Love noted that the subcommittee is going to revise CV1620, "Apportionment of just compensation between owner and tenant." The committee deferred discussion of CV1619 until the subcommittee completes that task.

4. *Future Meetings.* Mr. Carney suggested the following agenda for future meetings:

a. Finish the eminent domain instructions.

b. Special verdict forms. (Reach agreement on a general form that can be adapted for each area of law.)

c. Gross negligence instruction (based on *Pearce v. Utah Athletic Foundation,* 2008 UT 13).

d. Revisit the causation instructions in light of *Scott v. HK Contractors,* 2008 UT App 370, with regard to the "substantial factor" issue, an issue raised by Scott DuBois.

e. Premises liability. Mr. Summerill will replace Jeff Eisenberg as chair of the premises liability subcommittee.

f. Vicarious liability.

5. *Next Meeting*. The next meeting will be Monday, February 8, 2010, at 4:00 p.m.

The meeting concluded at 5:45 p.m.

MINUTES

Advisory Committee on Model Civil Jury Instructions
March 8, 2010
4:00 p.m.

Present: Juli Blanch, Francis J. Carney, Marianna Di Paolo, Phillip S. Ferguson, Tracy H. Fowler, Timothy M. Shea, Paul M. Simmons, Peter W. Summerill, David E. West

Excused: Honorable William W. Barrett, Jr., John L. Young (chair)

Mr. Carney conducted the meeting in Mr. Young's absence.

1. *Minutes.* Mr. Summerill noted that he is not replacing Jeff Eisenberg as chair of the premises liability subcommittee, as reported in the minutes of January 11, 2010. The minutes were otherwise approved.

2. *Special Verdict Forms.* Mr. Carney proposed using the special verdict form from the medical malpractice instructions as a template for special verdict forms in other areas. He reported that an issue with special verdict forms arose in a recent case. The defendant objected to the special verdict form's use of the term "fault" for "negligence" because "fault," as defined in CV201, includes both the concept of a wrongful act and causation. So by asking the jury, Was the defendant at fault? and Was the defendant's fault a cause of the plaintiff's injuries? the jury was being asked to determine causation twice. Mr. Ferguson thought the same problem would arise if "negligence" were substituted for "fault" because the elements of a claim for negligence include proximate causation. He suggested asking, Did the defendant breach the standard of care? and Was the defendant's breach of the standard of care a cause of the plaintiff's injuries? Mr. Carney suggested asking, Did the defendant act as a reasonable person under the circumstances? The committee thought these alternatives would be too cumbersome. Mr. Simmons noted that "negligence" is used in two different senses--as a cause of action (with all its elements, including causation) and as shorthand for breach of the duty to use reasonable care. The definition of "negligence" in CV202A does not include causation as part of the definition. Dr. Di Paolo suggested asking, "Was the defendant negligent in . . . ," and specifying the particular act or acts of negligence alleged, such as breaking the motor vehicle code. Mr. Carney suggested replacing "fault" with "negligence." Mr. Simmons noted that "fault" would only be necessary where different forms of "fault" are alleged in the same case (such as strict liability, breach of warranty, and negligence in a products liability case) or where different forms of fault need to be apportioned among the parties. Mr. West suggested, as an alternative, to take the causation element out of the definition of "fault." Mr. Fowler noted that "fault" is defined by statute to include causation. Mr. West then suggested asking just one question--"Was the defendant at fault?"--where the question of causation would be subsumed in the question of fault. Mr. Carney suggested adding a note to the effect that the court should specify the type of fault involved in the case, and that it may take more than one question to ask about different forms of fault. Mr. West did not think it was a

big problem, that juries would not interpret the special verdict form to require them to determine the question of causation twice. Mr. Summerill noted that using the term "fault" in the special verdict form could invite the jury to speculate about whether the defendant was guilty of other forms of fault besides negligence or the specific form alleged in the complaint. Mr. Simmons noted that the instruction defining "fault" says that "the fault alleged in this case is . . ." (with the court specifying the form of fault). Mr. Carney noted that he had successfully resisted attempts by plaintiffs to ask, Was the defendant negligent in any of the following respects alleged by the plaintiff? (followed by a laundry list of ways the plaintiff alleges that the defendant was negligent). Mr. Shea thought there is a problem using "fault" and "negligence" interchangeably in the special verdict form because they are defined differently. Mr. Simmons thought that, if the only form of "fault" involved in the case was negligence, the special verdict form could use "negligence" or "negligent" throughout. Mr. Carney suggested adding a note to the effect that the court does not have to list each allegation of negligence or other fault in the verdict form. Mr. Simmons thought that the issue was covered by the instruction setting forth the parties' contentions. Mr. Carney thought that that instruction, MUJI 1st 3.1, was not included in MUJI 2d. Mr. Summerill noted that CV103 allows the court to describe the parties' contentions. Mr. Carney noted that CV103 is a preliminary instruction, given at the beginning of the case, but Mr. Simmons noted that the court is encouraged to repeat the preliminary instructions as necessary at the end of the case. Mr. Carney noted that CV301B allows the court to set out the plaintiff's specific claims in medical malpractice cases and suggested there should be a similar instruction in the general negligence instructions.

Dr. Di Paolo thought there should be another question between the fault/negligence question (question 1) and the causation question (question 2), namely, Was the plaintiff harmed? She noted that the question, Did the defendant's [fault/negligence] harm the plaintiff? assumes that the plaintiff suffered harm. Mr. Carney suggested saying, Did the defendant's negligence cause any harm to the plaintiff? (adding the word *any)*. Ms. Blanch preferred the phrase "harm, if any." Messrs. Ferguson and Summerill suggested "the harm alleged by the plaintiff." Mr. Shea noted that the phrase "as alleged by the plaintiff" could modify all of the questions, in which case it would be better to place it in the introduction and not in the questions themselves. The committee approved Mr. Carney's suggestion to add "any" to question 2.

Mr. Ferguson suggested cross-referencing the questions on the special verdict form with the jury instructions, for example, "1. Was the defendant negligent? (*See* instructions nos. 10-12.)" Mr. Carney noted the practical problem of getting the right instruction numbers, since the instructions are often being revised and renumbered up to the time that they are read to the jury. Mr. Summerill noted that it would lead to disputes over which instructions to cross-reference in the verdict form. Mr. Carney

noted that it would also be contrary to the instruction that says no one instruction is to be singled out, that no instruction is more important than another, and that the instructions are to be considered together. Mr. West noted that the attorneys will direct the jury's attention to the instructions they think are important in their closing arguments. The committee decided against cross-referencing instructions in the verdict form.

Dr. Di Paolo thought that the first paragraph of the special verdict form was problematic. Rather than saying, "If you . . . cannot determine a preponderance of the evidence," it should read, "If you . . . cannot determine *the issue based on* a preponderance of the evidence." Mr. Shea thought the phrase "so equally" was also problematic. The first paragraph was revised to read:

> Please answer the following questions *in the order they are presented*. If you find that the issue has been proved by a preponderance of the evidence, answer "Yes." If you find that the evidence is equally balanced, or if you find that the greater weight of evidence is against the issue, answer "No."

Mr. Shea suggested using boxes for the jury to check either Yes or No.

At Mr. Shea's suggestion, the phrase, "sign and return the verdict" was changed to "sign the verdict form, and advise the bailiff."

At Mr. Shea's suggestion, the phrase "do you find" was deleted from question 3 (and from question 6 in the comparative fault special verdict form).

The committee considered the proposed special verdict form for comparative fault. Mr. Fowler noted that question 5 uses both "negligence" and "fault" in the same sentence. Question 5 was revised to read: "Assuming the negligence totals 100%, what percentage is attributable to . . . ," and "fault" was replaced with "negligence" throughout the special verdict form.

Mr. West suggested adding the following sentence after the jury apportions fault: "Stop here if the plaintiff's negligence is 50% or more." Messrs. Ferguson and Carney said that they have seen judges require the jury to complete the damage section of the form even if they find the plaintiff 50% or more at fault, to avoid a retrial if the jury's apportionment of damages is reversed on appeal. Mr. West noted that, by the same reasoning, the jury could be required to answer every question on the verdict form, regardless of its answer to any other question. Mr. Summerill suggested adding a note to say that, if the jury's finding of comparative fault may be thrown out on appeal, it may be appropriate to ask the jury to find damages. Mr. West thought that, if the jury is

asked to complete the damage section, it will think it is awarding damages. Other committee members thought that the jury's findings on damages might be skewed if the jury thinks the plaintiff will not receive the amount of damages it finds. Mr. Simmons noted that, if the jury's apportionment of fault is reversed on appeal, any re-trial could be limited to apportionment (if necessary) and damages. Mr. Summerill thought that the sentence "Stop here . . ." should also say, "If you decide that [name of plaintiff]'s fault is 50% or greater, [name of plaintiff] will recover nothing." Other committee members thought that concept was adequately covered in CV211 and that the jury would realize that the plaintiff will recover nothing if they are not asked to complete the damage section of the verdict form.

Mr. Carney noted that the instructions at the end of question 5 were meant to avoid the "net verdict" problem, where the jury awards only the net amount of the plaintiff's damages, after first applying the percentage of the plaintiff's comparative fault. This leads to a double reduction, because the court then applies the jury's finding of comparative fault to the jury's award of damages.

Question 6 was revised to read, "What amount, if any, would fairly compensate [name of plaintiff] for [his] harm?" Mr. Simmons asked whether that would invite the jury to conclude that no amount of money could fairly compensate the plaintiff for his harm and therefore award nothing.

Mr. Carney noted that some defense attorneys object to having multiple lines for damages because they think juries award more if there are multiple lines, but the committee did not see a way to avoid listing past and future economic damages separately and breaking out economic damages into medical expenses, lost wages, and other economic damages, since prejudgment interest is only awarded on past economic damages, and one must know the amount awarded for medical expenses in determining subrogation interests. Mr. West asked about adding loss of earning capacity and loss of household services as other items of damage. Mr. Carney suggested adding a note to say that only those items should be listed for which there is evidence, and there may be other items supported by the evidence that should also be listed. Ms. Blanch asked whether "Noneconomic Damages" should be followed by "(i.e., pain and suffering)." The committee thought not and noted that "noneconomic damages" are defined in CV2004.

Mr. Carney asked Mr. Fowler's subcommittee to propose a special verdict form for a products liability case.

Mr. Summerill suggested that the instructions also include a proposed special verdict form for a wrongful death and survival case in which there are multiple heirs and issues of comparative fault of the decedent and one or more heirs.

Mr. Summerill will draft a proposed special verdict form for a complex wrongful death case.

3. *Feedback*. Dr. Di Paolo noted that the best feedback the committee could receive would come from jurors themselves. She volunteered to write a question or short survey that could be used in interviewing jurors after the trial. Mr. Carney suggested adding a closing jury instruction, to be given after the verdict is returned, thanking the jurors for their time and reminding them that they can now talk to the attorneys if they would like to but that they do not have to talk to anyone about the case. Mr. West suggested that the instruction should also say that the attorneys should honor the jurors' wishes.

Mr. Shea will draft an advisory committee note regarding post-verdict communications with jurors.

4. *CV202B. Gross negligence*. Mr. Carney introduced a proposed instruction on gross negligence, based on recent case law holding that a release does not release the releasee from claims of gross negligence and defining "gross negligence." At Mr. Shea's suggestion, the phrase "that may result" was deleted from the end of the instruction so that it reads, "it is carelessness or recklessness to a degree that shows utter indifference to the consequences." Mr. Summerill suggested replacing "utter" with "complete," but the committee thought that "complete" imposed a higher burden and decided to stay with "utter."

5. *Products Liability Instructions*. Mr. Fowler noted that the product liability instructions probably need to be revised in light of recent cases, including *Egbert v. Nissan,* 2010 UT 8.

6. *Causation Instructions*. Mr. Carney noted that Curt Drake and Scott Dubois of Snell & Wilmer have complained that the MUJI 2d causation instructions omit the "substantial factor" or "substantial role" language of MUJI 3.14 and 6.35. Mr. Carney suggested that they be invited to the next committee meeting to explain their concerns.

7. *Next Meeting*. The next meeting will be Monday, April 12, 2010, at 4:00 p.m.

The meeting concluded at 6:00 p.m.

MINUTES

Advisory Committee on Model Civil Jury Instructions
April 12, 2010
4:00 p.m.

Present: John L. Young (chair), Francis J. Carney, Marianna Di Paolo, Phillip S. Ferguson, Tracy H. Fowler, Timothy M. Shea, Paul M. Simmons, Peter W. Summerill, David E. West.

1. *CV209 & CV309, Causation instructions.* Mr. Carney noted that Curt Drake and Scott DuBois of Snell & Wilmer had asked the committee to revisit CV209 and CV309, the definitions of "cause" in the negligence and medical malpractice instructions. They thought that the instructions should adopt the "substantial factor" test for proximate causation that was alternate B in MUJI 1st (MUJI 3.14). Mr. Carney noted that proximate causation encompasses two elements, actual, or "but for," causation, and legal causation, which he defined in terms of foreseeability. Mr. Carney noted that the "but for" test is problematic in cases of concurrent causation where neither cause alone would have caused the harm, such as where two fires combine to burn down the plaintiff's home. The Restatement (Second) of Torts § 431 says that negligent conduct is a "legal cause" of harm if it "is a substantial factor in bringing about the harm," and "there is no rule of law relieving the actor from liability because of the manner in which his negligence has resulted in the harm." Mr. Carney noted that some Utah cases discuss proximate causation in terms of "substantial factor" or "substantial role," and others use the more traditional definition of "that cause which, in natural and continuous sequence, produces the injury and without which the injury would not have occurred"--"one which sets in operation the factors that accomplish the injury." Cases in the former category include *McCorvey v. Utah Department of Transportation,* 868 P.2d 41 (Utah 1993); *Holmstrom v. C.R. England,* 2000 UT App 239, 8 P.3d 281; *Hall v. Blackham,* 18 Utah 2d 164, 417 P.2d 664 (1966); and *Devine v. Cook,* 3 Utah 2d 134, 279 P.2d 1073 (1955). Cases in the latter category include *Steffensen v. Smith's Management Corp.,* 862 P.2d 1342 (Utah 1993).

Dr. DiPaolo joined the meeting.

Mr. Simmons said that the problem with the "substantial" factor test is that it does not give the jury sufficient guidance and gives the jury too much leeway to decide that a cause in fact was not a proximate cause because the jury doesn't think it was substantial enough. The jury may confuse the concept of "substantial factor" with a preponderance of the evidence and think the cause must have been the main cause of the harm (something more than 50%). He thought the problem with foreseeability as a test for proximate causation is that it is also a test for whether or not a duty exists. The court decides the question of duty as a matter of law, so by allowing the case to go to the jury, the court has already determined that harm to the plaintiff was a foreseeable result of the defendant's conduct. Allowing the jury to revisit the issue of foreseeability can lead to conflicts between the court's determination of foreseeability and the jury's.

Mr. Shea compared CV209 with the California model instructions on proximate causation. The California instructions state as an element of a negligence claim that the defendant's negligence "was a substantial factor in causing" the plaintiff's harm (CACI 400) and then define "substantial factor":

> A substantial factor in causing harm is a factor that a reasonable person would consider to have contributed to the harm. It must be more than a remote or trivial factor. It does not have to be the only cause of the harm.
>
> [Conduct is not a substantial factor in causing harm if the same harm would have occurred without that conduct.]

(CACI 430.) Mr. Simmons thought that "more than a remote or trivial factor" was too vague to help the jury and would eliminate cases where the defendant's fault was a cause in fact of the injury but perhaps not the main cause. He also thought that the last sentence was problematic because it would eliminate cases of concurrent causation, such as the two-fire hypothetical. Mr. Fowler noted that other instructions require the jury to look at matters from the point of view of a reasonable person.

Dr. Di Paolo suggested revising the first subparagraph of CV209 to read, "(1) the person's act or failure to act was a substantial factor in producing the harm directly or set in motion events that produced the harm in a natural and continuous sequence." Mr. Carney thought it made the instruction too complicated. Messrs. Simmons and Summerill thought CV209 was fine the way it was written.

Mr. Simmons thought that the committee had thoroughly discussed the "substantial factor" instruction (MUJI 3.14, alternate B) when it adopted CV209 and did not need to revisit the issue. Mr. Carney noted that there was no unanimity in either the committee or the court decisions defining proximate cause. Mr. Young thought that the full committee needed to be present if it was going to change CV209. He suggested that someone draft an alternative instruction using the "substantial factor" test.

Mr. Carney asked whether the "substantial factor" test incorporated the concept of foreseeability or whether it still needed to be stated separately. He suggested that the committee review comment *a* to section 431 of the Restatement (Second), which defines "substantial factor" to mean that

> the defendant's conduct has such an effect in producing the harm as to lead reasonable men to regard it as a cause, using that word in the popular sense, in which there always lurks the idea of responsibility, rather than in the so-called "philosophic sense," which includes every one of the great number of events without which any happening would not have occurred.

He also recommended that the committee review sections 434, 435, and 461 of the Restatement (Second).

Mr. Fowler also suggested that the committee review *Mitchell v. Gonzalez,* 819 P.2d 872 (Cal. 1991). He thought that a survey would show that the "substantial factor" test is the majority rule among U.S. jurisdictions.

Mr. Summerill noted that *Devine v. Cook* used the "substantial factor" test as a basis for excusing contributory negligence and suggested that the "substantial factor" test may have been imported from contributory negligence law, which no longer exists, leading to confusion. Mr. Summerill also noted, however, that he would rather concede the concept of "substantial factor" and accept Dr. Di Paolo's suggestion rather than fight over which alternative instruction to use in every case.

Mr. Young thought that, whatever the committee decides, there should be an extensive comment identifying and explaining the issues, to help the court and attorneys if the issue goes up on appeal.

The committee deferred further discussion of the issue. Mr. Young asked for memoranda setting out the competing considerations for each proposed definition of cause. Mr. Simmons and Mr. Summerill will draft the memorandum supporting current CV209. Mr. Carney suggested that Messrs. Drake and DuBois be invited to draft the memo supporting a "substantial factor" instruction. Mr. Young asked them to have their memos to Mr. Shea two weeks before the next meeting.

2. *CV299A & B, Special verdict forms.* Mr. Shea noted that he had incorporated changes from the last meeting and added an advisory committee note but was not sure what to put in the note. The third paragraph was meant to avoid a verdict form that lists all of the ways the plaintiff claims the defendant was at fault. Mr. Carney thought that a verdict form that asks, "Was the defendant negligent in any of the following respects?" followed by a laundry list of allegations was inappropriate. Mr. Summerill generally agreed but thought the note should not say so but should allow the court and the parties to decide how much detail to put in the special verdict. The third paragraph of the note was deleted. The first paragraph of the proposed note was also deleted.

Mr. Shea asked if there was any benefit to using "fault" in the instructions and "negligent" in the verdict form. The committee thought not, that the verdict form should track the instructions. Mr. Ferguson thought that the problem was that the law uses "negligence" and "fault" in two different ways, one incorporating the idea of causation and liability, and the other not. Attorneys understand which way the term is being used in context, but juries do not. Mr. Carney asked if we could define "fault"

without including the concept of causation. Mr. Ferguson noted that the statute does not do so, but Mr. Carney did not think the committee was bound to follow the statutory definition. Mr. Summerill noted that the use of "negligence" and "fault" only becomes an issue in cases of comparative fault. Mr. Ferguson suggested changing the order of the instructions so that the definition of "fault" (CV201) went with or was included in the comparative fault instruction (CV211). At Mr. Young's suggestion, the committee decided to make the comparative fault instructions a separate section (section 2900). Mr. Carney noted that this change may require some revisions to the medical malpractice instructions.

Mr. West asked whether, where questions on the special verdict form include subparts, must the same jurors agree on the answer to each subpart. The committee thought not.

Mr. Shea presented his proposed flowchart form of the special verdict form. Mr. Summerilll noted that in a recent trial (*Bustos,* in Second District Court), the jury foreperson tried to make a flowchart on the verdict form because it was so confusing which questions the jury was and was not supposed to answer. Mr. Ferguson thought a flowchart could be used in closing argument. Mr. Summerill suggested that it be used as a demonstrative aid but not necessarily go into the jury room. Dr. Di Paolo asked whether the committee thought the jury should be given both the flowchart and the more traditional verdict form, using the former to help it fill out the latter. Mr. Carney noted that a practical problem with the flowchart is that it would be harder to revise based on events occurring at trial. Mr. Shea said that he had prepared the flowchart in Word and thought it could be easily modified. Dr. Di Paolo noted that if the jury found the flowchart useful, it would use it, but if it did not, it would not.

3. *CV140, Post-verdict jury instruction.* Mr. Shea introduced CV140, which he prepared based on discussions at a previous meeting. The committee thought it was good. Mr. Carney asked if he had looked at different judges' stock instructions on the matter. The committee thought that the instruction could be included as a suggestion, but that judges should be free to use it, adapt it as they see fit, or use their own stock instruction.

4. *CV202A, "Negligence" defined.* Mr. Carney noted that he had a call from the court during a trial asking where the model instruction was that laid out the specific allegations of negligence. He noted that MUJI 2d does not have an instruction similar to MUJI 3.1, setting out the parties' contentions. Mr. Fowler noted that his practice has been to submit contention instructions that were not part of MUJI. Mr. Shea noted that CV103 ("Nature of the case") was meant to fill that purpose. But he proposed adding language to CV202A (taken from CV301B of the medical malpractice instructions) to make the parties' claims explicit. The committee revised the added language to read:

To establish negligence, [name of plaintiff] has the burden of proving that:

(1) [name of defendant] was negligent, and

(2) this negligence was a cause of [name of plaintiff]'s harm.

In this action, [name of plaintiff] alleges that [name of defendant] was negligent in the following respects:

(1)

(2)

(3)

If you find that [name of defendant] was negligent in any of these respects, then you must determine whether that negligence was a cause of [name of plaintiff]'s harm.

[[Name of defendant] has the burden of proving that:

[(1) [name of plaintiff] was negligent, and

[(2) this negligence was a cause of [name of plaintiff]'s harm.

[[Name of defendant] alleges that [name of plaintiff] was negligent in the following respects:

[(1)

[(2)

[(3)

[If you find that [name of plaintiff] was negligent in any of these respects, then you must determine whether that negligence was a cause of [name of plaintiff]'s harm.]

The second part would only be given where the defendant claimed that the plaintiff was also at fault in causing his harm.

Mr. Simmons said that, in one of his firm's recent trials, the court gave the old MUJI 1st instructions rather than repeat the MUJI 2d general instructions at the close of the evidence. Mr. Shea noted that the instructions to MUJI 2d encourage the court to give substantive instructions at the beginning of the case to help the jury understand the evidence and to repeat preliminary instructions at the end of the case. Mr. Summerill noted that CV101-136 are preliminary instructions that ought to be repeated at the end of the case. Mr. Carney noted that CV103 should be read at the beginning of the case and also repeated at the end of the case. But the preliminary instructions as written do not fit well at the end of the case. They need to be revised for use at the end of the case. Mr. Carney suggested breaking the General Instructions (the 100 series of instructions) into two sets--those to be given before the evidence is heard, and those to be given after all the evidence is in. He offered to prepare the two sets.

Mr. Carney asked whether judges are giving preliminary jury instructions, as contemplated by MUJI 2d. Mr. Young suggested adding something to the survey to be given judges asking if they gave preliminary instructions. Dr. Di Paolo noted that it would be useful to also know what instructions they gave. Mr. Shea thought the committee would get fewer responses if we asked the judges to identify the instructions given. Mr. Summerill agreed that the survey needs to be kept simple so that we will get responses. Mr. Carney suggested asking judges to attach a copy of the instructions that were given. Mr. Shea noted that he can get a report of the trials that took place each month and can obtain a copy of the jury instructions given in those cases from the court file. Messrs. Young and Carney asked Mr. Shea to see if he could get them on the agenda for the monthly Third District judges' meeting to discuss the matter with the judges. Dr. Di Paolo thought that the committee should also sample a rural district to get a good demographic representation.

The meeting concluded at 6:05 p.m.

Next Meeting. The next meeting will be Monday, May 10, 2010, at 4:00 p.m.

MINUTES

Advisory Committee on Model Civil Jury Instructions
May 10, 2010
4:00 p.m.

Present: John L. Young (chair), Francis J. Carney, Dr. Marianna Di Paolo, Phillip S. Ferguson, L. Rich Humpherys, Stephen B. Nebeker, Timothy M. Shea, Paul M. Simmons, Peter W. Summerill

Excused: Honorable William W. Barrett, Juli Blanch, Tracy H. Fowler, David E. West

1. *Proximate Cause and Substantial Factor Revisited.* The committee discussed the request of Curt Drake and Scott Dubois to reconsider the causation instruction, CV209, in light of MUJI 1st 3.14. Mr. Dubois did not have time to draft an argument in favor of their position but submitted a section from a brief arguing for use of the MUJI 1st instruction. The argument, however, focused on the use of the term "proximate cause" and not on "substantial factor." The committee thoroughly considered using "proximate cause" at the time it adopted CV209 and rejected the term in favor of "cause," as defined in CV209. As Mr. Carney pointed out, MUJI 2d does not do away with proximate causation as an element of a negligence claim but only does away with the term "proximate" because jurors did not understand it.

Messrs. Simmons and Summerill submitted a memorandum discussing CV209 and explaining why they thought the committee was right in rejecting the "substantial factor" language of MUJI 1st 3.14 when it considered CV209 the first time, in 2005. Their position is that "substantial factor" is confusing in that it implies that, even if the defendant's conduct was a cause in fact of the plaintiff's harm, the defendant cannot be liable unless his conduct meets some threshold level, whereas the committee thought that, under the Liability Reform Act, the extent to which a defendant's conduct contributed to a plaintiff's harm is properly dealt with under the allocation of fault instruction (CV211) and not as a matter of proximate cause.

Messrs. Carney and Simmons discussed the origin of the "substantial factor" definition of proximate cause. Mr. Simmons noted that the definition was originally meant to avoid unjust results where a strict application of a foreseeability or "but for" test would deny liability. He thought that the instruction might be appropriate in a case where there are two or more causes, each of which would have been sufficient alone to cause the plaintiff's harm. Mr. Carney noted that, according to Professor Dobbs, the substantial factor test was meant to get around situations where two causes combine to cause a result that either cause, acting alone, would have caused.

Mr. Carney thought that foreseeability is the *sine qua non* of proximate causation and needs to be included in the jury instruction. Mr. Carney relied in part on *Raab v. Utah Railway Co.,* 2009 UT 61, 221 P.3d 219. Mr. Simmons noted that that case applied federal common law and not Utah law. Mr. Simmons thought that, under *Normandeau v. Hanson Equipment Inc.,* 2009 UT 44, foreseeability is first decided by the court as a

matter of law in determining whether the defendant owed the plaintiff a duty and did not need to be revisited in the context of proximate causation; if the jury decides it again as part of proximate cause, it can lead to inconsistent conclusions by the court and the jury. Mr. Simmons noted that proximate causation is a legal construct that consists of cause in fact and no good reason to relieve the defendant from liability for the harm he in fact caused. The latter part, in his opinion, should be a question of law for the court to decide.

After discussing other matters (see below) to give Mr. Lund a chance to join the meeting, the committee continued its discussion of proximate cause. Mr. Carney suggested that the committee note to CV209 be expanded to explain the varying positions of committee members on foreseeability and to explain why the committee rejected the "substantial factor" test. Mr. Simmons offered to draft a proposed addition to the comment. Mr. Humpherys asked that the comment also cover the situation he raised in an e-mail to the committee, where the defendant's negligence consists in failing to prevent harm.

Mr. Young noted that the Utah appellate courts have used both the "natural and continuous sequence" definition of proximate cause and the "substantial factor" definition and suggested that MUJI 2d contain alternative instructions, as in MUJI 1st. He noted that *Holmstrom v. C.R. England, Inc.,* 2000 UT App 239, 8 P.3d 281, the most recent Utah appellate court decision discussing the "substantial factor" test, should be cited in the references to CV209. Mr. Summerill suggested leaving CV209 as is and letting someone take up on appeal the issue of "substantial factor." Mr. Young noted that the court has had seventeen years to resolve the question raised by the alternative instructions in MUJI 1st and has not done so. Mr. Humpherys thought that if the case law supports alternative instructions, it is the committee's duty to include alternative instructions. Mr. Carney noted that the *Holmstrom* case, relying on the Restatment (Second) of Torts § 431, seems to be at odds with Dobbs, in that it suggests that negligence cannot be a substantial factor in bringing about harm if the harm would have occurred even if the actor had not been negligent. According to Dobbs, that was the very type of situation the "substantial factor" test was meant to address and provide a basis for liability. Mr. Summerill noted that the Utah cases seem to use the "substantial factor" and "natural and continuous sequence" definitions of proximate cause interchangeably. Mr. Shea noted that subparagraph (1) of CV209 could be taken as a definition of "substantial factor." Mr. Ferguson noted that both "proximate cause" and "substantial factor" are confusing, but for different reasons: jurors do not know what "proximate" means, and "substantial" is so broad and vague as to mean anything. None of the committee members were in favor of throwing out CV209, and none were in favor of adding an alternative instruction using a "substantial factor" test for causation. Dr. Di Paolo suggested that the committee note to CV209 be revised so that if someone

searches the instructions for "substantial factor," they will be directed to the committee note and so the issue will not have to come up again.

Mr. Shea will circulate revisions to CV209, and Mr. Simmons will propose additions to the committee note to CV209.

2. *Special Verdict Forms and General Tort Instructions*. Mr. Shea prepared draft special verdict forms for negligence cases involving one defendant with no comparative fault and for cases involving one defendant with comparative fault. The forms can be cut and pasted from the courts website into a Word document. The committee discussed the content of the forms. An attorney (Gary Ferguson) sent an e-mail to the committee chair objecting to the medical malpractice verdict form, which asks, "Did the defendant breach the standard of care?" and suggested that it should ask instead, "Was the defendant at fault?" or "Was the defendant negligent?" He thought asking whether the defendant breached the standard of care was not clear or simple enough for lay jurors to understand easily. Some committee members thought that the same language should be used throughout the tort instructions, but Mr. Young thought that different language could be used for medical malpractice cases. Mr. Carney noted that attorneys in a medical malpractice case before Judge Hilder had objected to asking "Was the defendant at fault?" because "fault" is defined in CV201 to include the element of causation, so the jury is, in effect, asked to determine causation twice. Mr. Simmons noted that that is because the statute defines "fault" as any actionable breach of legal duty "proximately causing or contributing to injury or damages," UTAH CODE ANN. § 78B-5-817(2), and CV201 is taken from the statutory definition. Mr. Ferguson noted that, in one sense, "negligence" also includes proximate causation. He noted that, by using "breach of the standard of care," the medical malpractice verdict form avoids the problem of conflating fault and causation. Mr. Shea noted that we should go through the instructions and identify all those that link fault to causation (such as CV1050). Mr. Carney suggested redefining "fault" in CV201 to eliminate the causation element, so that the second paragraph of that instruction would read, "Fault means any wrongful act or failure to act. The wrongful act or failure to act alleged in this case is [negligence, etc.]." Mr. Simmons noted that the instruction would also have to be revised to say that the jury still needs to find causation. The committee revised the first paragraph of CV201 to include an instruction that, if the jury finds that anyone was at fault, it must then decide whether that person's fault was a cause of the harm.

Mr. Young did not think the current jury instructions were hard for jurors to process. Mr. Carney agreed but noted that we do not want to create appealable issues in the instructions. Mr. Ferguson noted that, if we change the definition of "fault" to eliminate the causation element, someone will appeal the instruction on the grounds that it misstates the law as stated in the statutory definition of "fault." Mr. Humpherys thought that any error would be harmless.

Several committee members thought that the special verdict form should ask, (1) Was the defendant at fault?, and (2) Did the defendant's fault cause the plaintiff's harm?

Mr. Young noted that the committee had agreed at its last meeting to move the comparative fault instruction to the end of the instructions (series 2900), right before the special verdict forms. The committee discussed the placement of the fault, comparative fault, and causation instructions. Since they apply to most, if not all, tort cases, Mr. Shea suggested adding them to the general instructions (the 100 series) or making them a separate section (series 200) and renumbering all the other instructions accordingly. Dr. Di Paolo suggested that, if they are added to the general instructions, they could start as CV150. Mr. Young suggested making them the 1900 series, right before tort damages, and suggested moving CV201, CV209, CV210, CV211, and CV1050 to this new section. Mr. Simmons noted that CV1050 (the products liability comparative fault instruction) may need to stay in the product liability instructions because comparative fault is more limited in a products liability case; it may be limited to product misuse, assumption of risk, and ignoring a warning. Mr. Ferguson thought general instructions on fault and causation were going to go in each section so that one could find all the liability instructions necessary for a given case in one section, but Mr. Young noted that the committee has not always been consistent in doing so. Mr. Simmons noted that the motor vehicle instructions (series 600), for example, do not include any instructions on negligence or causation. Mr. Summerill noted that, whether the general instructions are included in each tort section or in a separate section, they should be separated out for the committee's use, so that the committee can develop a template and be consistent in the language used to explain the same concepts in each tort section.

3. *Other Topics.*

a. *Liability of Design Professionals.* Messrs. Young and Shea noted that the design professionals' liability subcommittee has submitted proposed instructions. Mr. Shea thought they needed a lot of work and offered to meet with the gang of three assigned to review the instructions (Messrs. Carney and Summerill and Ms. Blanch). Mr. Summerill asked how much leeway the gang of three has to revise the instructions. Mr. Young said that it can fix the language of the instructions but should refer substantive legal issues back to the subcommittee.

b. *Condemnation.* Mr. Young reported that Perrin Love should have the remaining condemnation instructions for the committee to review at the next meeting.

c. *Premises Liability*. Mr. Young reported that Jeff Eisenberg's subcommittee is trying to finish the premises liability instructions.

4. *CV202A, "Negligence" defined*. Mr. Shea circulated a proposed revision to CV202A, which includes the parties' contentions regarding how a party was negligent. The committee approved the instruction.

5. *Feedback*. Mr. Shea noted that, so far, the feedback he has received on MUJI 2d has been favorable, but we have to go out and solicit it. Mr. Ferguson noted that he had sent Messrs. Young and Shea five sets of jury instructions from Ruth Shapiro in his office. Mr. Carney reported that he talked to some judges about whether they needed further direction on which instructions to include in the preliminary instructions, at the start of the case, and which ones to include at the end of the case. They did not have any problem distinguishing the preliminary instructions from the final instructions. Mr. Summerill noted, from his recent trial, that the preliminary instructions are very repetitive. Mr. Shea asked whether we should survey judges and attorneys at the end of a case or whether he should copy the instructions used from the court file. The committee thought the latter would be too much work for Mr. Shea and that a survey would be more useful. Dr. Di Paolo noted that the committee needs to decide what it wants to learn from a survey. The committee responded that it wants to learn whether the MUJI 2d instructions are being used and what problems courts and litigants have encountered in using them. The committee suggested additional questions for the survey: Which MUJI 2d instructions were used? Did the court refuse to give any MUJI 2d instruction? If so, why? Which MUJI 1st instructions were used, if any? Did jurors submit questions to the court regarding any instruction? Messrs. Humpherys and Summerill thought it would be useful to get feedback from jurors, but the committee decided against doing so for fear that it would give one side or the other grounds to appeal on the grounds that the jurors did not properly understand or apply a given instruction. Mr. Shea noted that he can pull up a list of trials held each month. Mr. Young suggested that each month we look at the previous month's trials and assign committee members to call the judge or attorneys involved and solicit feedback on the jury instructions. Dr. Di Paolo said that we will have a better idea of what questions to ask after the first time we talk to judges or attorneys about their trials. She also suggested that, if there are a number of trials in a month, we would not have to talk to the attorneys and judge in every case but could take a random, objective sample of the cases.

6. *Next Meeting*. The next meeting is Monday, June 14, 2010, at 4:00 p.m.

The meeting concluded at 6:00 p.m.

MINUTES

Advisory Committee on Model Civil Jury Instructions
June 14, 2010
4:00 p.m.

Present: John L. Young (chair), Honorable William W. Barrett, Jr., Juli Blanch, Francis J. Carney, Marianna Di Paolo, Phillip S. Ferguson, John R. Lund, Stephen B. Nebeker, Timothy M. Shea, Paul M. Simmons, Peter W. Summerill, David E. West

1. *CV201, "Fault" defined; CV209, "Cause" defined.* Mr. Shea revised CV201 and CV209 to remove causation from the definition of "fault," as discussed at the last meeting. Mr. Lund asked how the revised definition complies with the statutory definition of "fault." Messrs. Carney and Shea responded that it complies with the statutory definition, but in two instructions instead of one. At Dr. Di Paolo's suggestion, the second sentence of CV209 was revised to read, "You must also determine whether a person's fault caused the harm." The committee also considered the revised committee note to CV209. Mr. Simmons added a discussion of the foreseeability requirement and an explanation of why the committee rejected the "substantial factor" alternative instruction from MUJI 1st (MUJI 3.14). Mr. Summerill suggested putting the discussion of "substantial factor" before the discussion of "foreseeability," but the committee was satisfied with the note as written. The committee approved CV201 and CV209 as revised.

2. *CV211, Allocation of fault.* Mr. Lund asked what the jury was supposed to allocate if the definition of "fault" does not include causation. Mr. Ferguson noted that the question is whether the Liability Reform Act is a comparative fault statute or a comparative causation statute, a question the Utah Supreme Court has never squarely addressed. Mr. Lund thought the jury was to allocate overall "fault," as defined by the statute, and the statute includes an element of causation in its definition of fault. Mr. Summerill noted that the statute defines "fault" as any actionable breach of legal duty "causing *or contributing* to injury or damages" (Utah Code Ann. § 78B-5-817(2)) (emphasis added). He thought this language was broader than simply causation. Mr. Simmons noted, however, that, if a defendant's fault was not a "cause" of the plaintiff's harm, there could be no liability, and the jury would never reach the allocation question. Mr. Lund thought that "or contributing" may have been included to cover cases of contributory negligence. He thought that, if causation is removed from the jury instruction's definition of "fault," CV211 should tell the jury that it needs to allocate "the fault that caused the harm" and not just "fault." Mr. Lund thought that the instructions should allow a defendant to admit negligence but argue that no fault should be apportioned to him because his fault did not cause the plaintiff's harm. Mr. West thought the third sentence, which read, "Each person's percentage should be based upon how much that person's fault caused the harm," was misleading, because the jury must allocate fault, not causation. He noted that a defendant who may be 90% at fault may have caused only 1% of the damages. He thought that if the defendant's fault is a cause of the plaintiff's harm, the jury can apportion fault to the defendant in accordance with the egregiousness of the defendant's conduct and is not required to allocate fault based

solely on how much the defendant's fault contributed to the harm. Mr. West thought that the allocation should be based on negligence, not on causation. Messrs. Lund and Nebeker noted that it is ultimately a question of who should be responsible for the plaintiff's damages and to what extent. But Mr. Lund thought that the instruction should clearly tell the jury what it is they should base their allocation on. Mr. Ferguson questioned whether the instructions were consistent, since, in CV201, the jury is told that "fault" does not include causation, but in CV211 it is told that "fault" does include causation. After much discussion, the committee revised CV211 to read:

> [Name of party] claims that more than one person's fault was a cause of the harm. If you decide that more than one person is at fault, you must decide each person's percentage of fault that caused the harm. This allocation must total 100%.
>
> You may also decide to allocate a percentage to the plaintiff. [Name of plaintiff]'s total recovery will be reduced by the percentage that you attribute to [him]. If you decide that [name of plaintiff]'s percentage is 50% or greater, [name of plaintiff] will recover nothing.
>
> When you answer the questions on damages, do not reduce the award by [name of plaintiff]'s percentage. I will make that calculation later.

The committee approved the instruction as revised.

3. *CV299B. Special Verdict--One Defendant (Comparative Fault).* Mr. Shea replaced "negligence" with "fault that caused the harm" in the first paragraph of Question 5 and replaced "negligence" with "fault" in other questions as well.

4. *CV1015, Negligence. Definition of "negligence"; and CV1050, Comparative fault.* Mr. Shea noted that the problems the committee had considered with the instructions on "fault" and "comparative fault" in the negligence instructions also apply to the products liability instructions on negligence and comparative negligence, CV1015 and CV1050. Mr. Young suggested sending the revisions to CV201, CV209, and CV211 to the Products Liability Subcommittee to consider whether similar revisions need to be made to the products liability negligence and comparative fault instructions.

5. *Post-trial Surveys.* Mr. Shea noted that he had not yet received the report on civil jury trials for the month of May 2010. Mr. Carney said that he had contacted the attorneys in the jury trials he knew about. Only Rob Jeffs and Eric Schoonveld responded.

6. *CV2012, Noneconomic damages. Loss of consortium.* Based on Rob Jeffs' e-mails to Mr. Carney, the committee considered a proposal to modify CV2012. Mr. Jeffs did not think the current instruction adequately addressed the situation of a housewife who is not able to do her "job" as a housewife or homemaker. The instruction he had proposed in his case said that, to award damages for loss of consortium, the plaintiff must prove that she has suffered

> (1) a significant permanent injury that substantially changes her lifestyle and
>
> (2) one or more of the following:
>
> (a) incapability of performing the types of jobs she performed before the injury; or
>
> (b) inability to provide the companionship, cooperation, affection, aid or sexual relations she provided before the injury.

Mr. Simmons thought the statute is ambiguous. It allows the spouse of an "injured" person to maintain an action for loss of consortium and defines "injured" or "injury" as

> a significant permanent injury to a person that substantially changes that person's lifestyle and includes the following:
>
> (i) a partial or complete paralysis of one or more of the extremities;
>
> (ii) significant disfigurement; or
>
> (iii) incapability of the person of performing the types of jobs the person performed before the injury . . . .

Mr. Simmons thought the phrase "and includes the following" was ambiguous. It could mean "includes but is not limited to the following," that is, that subparagraphs (i) through (iii) are only illustrative of the type of injuries that are sufficiently significant and permanent to give rise to a claim for loss of consortium, or it could mean that one of the types of injury set out in subparagraphs (i) through (iii) must exist for the plaintiff to have a claim for loss of consortium. Dr. Di Paolo thought it meant the latter but acknowledged that the statute could be better drafted. Mr. Simmons said that his firm was researching the issue but did not have an answer yet. The committee saw no reason to change CV2012 at this time but thought that a housewife's inability to do her job as a housewife would be covered under subparagraph (iii) of the statute (subparagraph (2)(c) of the current instruction).

7. *Next Meeting*. There will be no committee meeting in July or August 2010. The next meeting will be Monday, September 13, 2010, at 4:00 p.m.

The meeting concluded at 5:40 p.m.

MINUTES

Advisory Committee on Model Civil Jury Instructions
September 13, 2010
4:00 p.m.

Present: John L. Young (chair), Juli Blanch, Francis J. Carney, Marianna Di Paolo, Phillip S. Ferguson, Tracy H. Fowler, John R. Lund, Stephen B. Nebeker, Timothy M. Shea, Paul M. Simmons, Peter W. Summerill, Diane Abegglen (the new appellate court administrator), and Perrin Love (chair of the Eminent Domain subcommittee)

Excused: Honorable William W. Barrett, Jr., and David E. West

1. *Eminent Domain Instructions*. The committee continued its review of the eminent domain instructions.

a. *CV1609. Verdict based on testimony of witnesses.* This instruction was previously approved but was revised to incorporate former CV1609, Owner testifying. "[[T]estimony]" was deleted from the last sentence. The committee approved the instruction as modified.

b. *CV1610. Viewing of property.* Mr. Young suggested deleting the instruction because judges rarely allow the jury to view the property. Mr. Love noted that it has been allowed in Utah and thought the instruction accurately stated the law. Mr. Young asked whether the subject should be covered in a generic instruction for all property damage cases. Mr. Lund asked whether including the instruction would lead to more requests to view the property. Mr. Love noted that the Attorney General's Office felt strongly about including it. The committee approved the instruction.

Dr. Di Paolo joined the meeting.

c. *CV1605. Fair market value.* The instruction defines "fair market value" in terms of what a "prudent and willing" buyer and seller would agree on. CV2010, the comparable instruction in the tort section, leaves out "prudent and." The committee discussed whether to delete the phrase from CV1605. Messrs. Lund and Love thought the phrase was useful to show that the standard is an objective one and to eliminate the eccentric who would be willing to pay (or would ask for) much more than the property is worth. Dr. Di Paolo thought it was a legal question; she did not know how lay jurors would understand or react to "prudent." Mr. Love noted that FIRREA uses "prudent" in its definition of "fair market value," but the Property Act does not. He also noted that the Attorney General's Office felt strongly about keeping it in the definition. The committee approved CV1605 as written. Mr. Love suggested that other instructions defining "fair market value" be consistent.

d. *CV1616. Severance damages.* Mr. Young suggested that the instruction first set out the parties' claims. Mr. Carney asked whether the instruction presented a jury question or whether it was a matter of the court controlling the evidence that comes in. He also thought the instructions could benefit from examples. Mr. Lund suggested revising the beginning of the instruction to read: "In this case only a portion of the owner's property has been taken. In addition to the fair market value of the property taken, you must determine severance damages to the property that remains." Dr. Di Paolo questioned the use of the term "the taking" and suggested "the condemnation" instead. Ms. Blanch and Mr. Summerill suggested defining "the taking." Dr. Di Paolo suggested "the action on the property which was taken." The committee revised the second sentence of the first paragraph to read: "'Severance damages' means any loss of fair market value to the remaining property caused by the taking and/or by the proposed construction of [describe public improvement] on the property taken." The committee also deleted "as part of the entire property" from the second paragraph. The committee approved the instruction as revised.

e. *CV1617. Reasonable cost of repair or restoration as measure of severance damages.* Mr. Love noted that CV 1616 can be given without CV1617, but CV1617 should not be given without CV1616. Mr. Love also said that the jury needs to know the fair market value of the property to decide severance damages using the cost of repair because repair is only appropriate if the property can be restored to its former value. Dr. Di Paolo thought the instruction was hard to understand. Mr. Ferguson asked whether "as part of the whole" was necessary in the first sentence. Mr. Shea suggested deleting "repair or." Mr. Love noted a distinction between "repair" and "restore": "repair" applies to buildings and structures, whereas "restore" applies to the land. Mr. Lund suggested revising the instruction to say "[repair] [restore]," with the court selecting the word that best applies in the particular case. He also suggested using "[taking] [construction of public improvement]." Ms. Blanch asked what happens if the jury finds that the remaining property can be repaired or restored to its pre-taking fair market value but the cost of doing so is greater than the diminution in fair market value. Mr. Love said that in that case the jury should award severance damages under CV1616. He noted that CV1617 was based on CV2009. He thought the instructions should be consistent. Dr. Di Paolo thought that the last paragraph was confusing in that it says that the measure of damages includes the cost of repair even though the property cannot be fully repaired. Mr. Young suggested separating the instruction into two separate instructions--one where it is possible to repair or restore the property to its pre-taking value, and one where it is not. Mr. Lund noted that it is possible to repair the property without returning it to its fair market value. Mr. Love suggested adding the word "substantially" before "repair or restore," but was not sure if the law would

support the addition. Mr. Young suggested revising the instruction to read, "The measure of damages is the lesser of . . . ." Mr. Summerill suggested providing a flow chart. Mr. Young suggested using the first two paragraphs of CV2009 or simply cross-referencing CV2009 and citing to condemnation cases as authority. Mr. Shea suggested adding, "If you find that the remaining property can be fully repaired or restored, then the damages are the reasonable cost of repair or restoration." Mr. Ferguson suggested saying, "The measure of damages is (1) the fair market value of the property taken, plus (2) severance damages, plus (3) the cost of [repair] [restoration]." Mr. Summerill suggested something along the following lines:

> Please determine the cost of returning the property to fair market value through repair or restoration. If you find that the property cannot be fully returned to fair market value, then determine:
>
> 1. The cost of returning the property as close as possible to fair market value, and
>
> 2. The difference between the fair market value of the property before the taking and after the [repair] [restoration].

Mr. Young asked whether the jury is entitled to know the effect of its determination. Mr. Lund thought the instruction eliminates the idea of severance damages as diminution in fair market value and elevates the cost of repair or restoration ahead of diminution in fair market value. He questioned whether the instruction accurately stated the law. Mr. Love thought the instruction was inconsistent with CV1616 in that it seems to say that severance damage is the cost of repair. Messrs. Lund and Shea suggested saying, "The measure of severance damages is the reasonable cost to [repair] [restore] the remaining property and the difference between the fair market value of the remaining property before the taking and the fair market value after the taking." Mr. Lund suggested adding, "Restoration should substantially restore the value." Mr. Young noted that CV2009 does not say that, and he did not know of any Utah case saying that one is entitled to the cost of restoration to substantially restore the property and the difference in fair market value. He thought the law may be that one is only entitled to severance damages (as determined under CV1616) if one cannot fully restore the property. Mr. Young suggested using the second and third paragraphs of CV2009 and substituting "taking" for "injury." Mr. Lund suggested ending CV1617 after the first paragraph.

The committee decided that it needs more research on what the law is regarding repair or restoration costs as a measure of severance damages.

f. *CV1619. Vested right of access.* Mr. Love noted that Mr. Shea had questioned the necessity of this instruction. The subcommittee split over whether it was necessary but agreed that it accurately stated the law. The committee approved the instruction.

Mr. Love will provide references for the instruction.

g. *CV1621. Apportionment of just compensation among multiple interests.* At Mr. Love's suggestion, the committee deleted "if any" from the second paragraph. It also deleted "as a whole" at the end of the instruction. The committee approved the instruction as modified.

2. *Schedule.*

a. *Premises Liability.* At the next meeting, the committee will consider premises liability instructions. Mr. Summerill volunteered to draft the instructions based on the instructions given in a recent trial he had.

b. *Design Professional Liability.* After premises liability, the committee will consider design professional liability. Craig Mariger chairs the subcommittee for design professional liability. Mr. Young offered to help with the instructions. He will call Mr. Mariger.

c. *Accountant Liability.* The committee has decided against doing a set of accountant liability instructions.

3. *Causation Instructions Revisited.* Mr. Carney noted that he has had second thoughts about including foreseeability as an element of causation, based on an arbitration where the defendant argued that 56 chiropractic visits were not "caused" by the defendant's negligence because they were not reasonably foreseeable. Mr. Carney thought this was a misuse of the causation instruction.

4. *Next Meeting.* The next meeting will be Tuesday, October 12, 2010, at 4:00 p.m. (Monday, October 11, being Columbus Day).

The meeting concluded at 6:00 p.m.

MINUTES

Advisory Committee on Model Civil Jury Instructions
November 8, 2010
4:00 p.m.

Present: John L. Young (chair), Francis J. Carney, Marianna Di Paolo, Phillip S. Ferguson, Tracy H. Fowler, Stephen B. Nebeker, Timothy M. Shea, Paul M. Simmons, Peter W. Summerill, Diane Abegglen, and Justin Matkin (representing the Eminent Domain subcommittee)

Excused: Honorable William W. Barrett, Jr., John R. Lund, and David E. West

1. *Committee Membership*. The committee discussed adding new members to the committee. Judge Barrett has a hard time making the committee meetings because of his law-and-motion calendar on Mondays. The committee thought it could benefit from more judicial input on the committee. Mr. Young noted that Gary Johnson is nearing the end of his term as managing partner of Richards, Brandt, Miller & Nelson and is interested in serving on the committee again. Mr. Summerill suggested that Ryan Springer would also make a good addition to the committee. Mr. Young proposed adding Messrs. Johnson and Springer to the committee. He also asked committee members to come to the next meeting prepared to suggest one or two judges to add to the committee. Ms. Abegglen will check with the Chief Justice to make sure it is not a problem for the committee to add new members.

2. *Eminent Domain Instructions*. The committee continued its review of the eminent domain instructions.

a. *CV1617. Reasonable cost of repair or restoration as measure of severance damages*. Mr. Matkin noted that the subcommittee did not think the cost of repair instruction should be combined with the severance damage instruction. It rewrote CV1617. The new version is meant to replace the version the committee previously considered. It is meant to explain that the cost of cure is not to be added to severance damages but may be a measure of severance damages. The committee thought the word "cure" was problematic. Mr. Macklin noted that the issues that are usually disputed in these cases are (1) the cost of cure, and (2) whether it is feasible to cure the remaining property. Dr. Di Paolo noted that "feasible" connotes "doable," not that it is probable. Mr. Macklin said that awards of the cost of curing the property are often not used to cure the property. The committee revised the instruction to read:

CV1617. Reasonable cost of restoring the property as measure of severance damages.

Severance damages may be reduced or eliminated by restoring the remaining property.

> If you find that restoring the remaining property to its fair market value before the taking will eliminate severance damages, then you must award [name of property owner] the lesser of (1) the reasonable cost to restore the property, or (2) the full amount of severance damages, but not both.
>
> If you find that the remaining property cannot be restored to its fair market value before the taking, then you must award [name of property owner] the lesser of (1) the reasonable cost to partially restore the property to the extent possible, plus the remaining severance damages, or (2) the full amount of severance damages, but not both.
>
> [Name of the party asserting that severance damages should be reduced or eliminated] has the burden to prove that the restoration is feasible and reasonable.

Mr. Summerill asked if the references need to be updated. He suggested adding a reference to Utah Code Ann. § 78B-6-511. The committee note was replaced by a new note approved by the subcommittee. The committee revised the note to eliminate the use of "cure" and "cured":

> This instruction should be given if a party contends that severance damages can be reduced or eliminated by restoring the property to its fair market value before the taking. The Committee is unaware of any Utah law holding that the cost to restore is a proper measure, if the severance damages can be reduced but not eliminated through restoration.

b. *CV1622. Apportionment of just compensation between owner and tenant.* Mr. Macklin explained the rationale for the instruction: "just compensation" is a number that represents the fair market value of the property taken and any severance damages, and any award should not exceed the amount of just compensation. So if the jury finds that a tenant has a favorable lease for which he should be compensated, that amount is deducted from the landlord's recovery. Mr. Shea thought use of the term "bonus value" was confusing. The committee revised the first paragraph to read:

> After you determine the total amount of the just compensation, you must apportion it between [name of property owner] and [name of lessee]. [Name of lessee] is entitled to the difference between: . . .

"[A]nd" was inserted between subparagraphs (1) and (2), and the phrase "date that lease expires or end of term" was used in both subparagraphs. The first sentence of the last paragraph was deleted, and "if any" was deleted from the last bracketed phrase. The phrase "as a whole" was also deleted from the last sentence. Mr. Simmons asked whether the instruction needed to explain how to handle a taking where the lease had an option. The committee thought that would be handled as a fact question and would affect the jury's determination of the end of the lease term. The committee approved the instruction as revised.

3. *Premises Liability Instructions*. The committee noted that the premises liability subcommittee under the chairmanship of Jeffrey Eisenberg had not proposed any instructions. Mr. Summerill volunteered to help with the instructions. He proposed drafts of two instructions (CV1101, "Elements of claim for harm because of property condition," and CV1102, "Duty of property owner"). The instructions assume that the injured person was a business invitee. He noted that we also need instructions defining business visitor or invitee, licensee, and trespasser and instructions dealing with attractive nuisance, permanent vs. temporary conditions, and statutes such as the Inherent Risk of Skiing Act, among other things. He thought the MUJI 1st instruction on open and obvious danger was now subsumed under comparative fault. Mr. Carney noted that he had mediated a premises liability case that recently settled and volunteered to ask the attorneys in that case (Lynn Harris and Ruth Shapiro) for their proposed jury instructions. Mr. Summerill noted that Darren Davis had recently lost a slip-and-fall trial against Snowbird. Mr. Ferguson suggested that Mitch Rice, who represents Wal-Mart, might also be a resource for premises liability instructions. Mr. Shea offered to put the MUJI 1st instructions into plain English. Messrs. Ferguson and Summerill offered to review his draft. The committee deferred further discussion of the premises liability instructions until the next meeting.

The meeting concluded at 5:45 p.m.

Next Meeting. The next meeting will be Monday, December 13, 2010, at 4:00 p.m.

MINUTES

Advisory Committee on Model Civil Jury Instructions

December 13, 2010

4:00 p.m.

Present: John L. Young, Chair, Juli Blanch, Frank Carney, Professor Marianna Di Paolo, Phillip S. Ferguson, Tracy H. Fowler, Stephen B. Nebeker, Ryan Springer, Peter W. Summerill, Timothy M. Shea, Diane Abegglen

Excused: Judge William Barrett, Rich Humpherys, John R. Lund, Paul M. Simmons, David E. West

(1) The minutes of the meeting held on November 8, 2010 were approved.

(2) Mr. Young announced that Judge Deno Himonas, Judge Kate Toomey, and Mr. Ryan Springer were being appointed to the committee. Mr. Gary Johnson is being reappointed to the committee.

(3) CV1101. Duty to invitee. The committee added conduct of activities to discovery of conditions throughout the instruction. The committee decided the factors should be set off with brackets so that only those factors supported by the evidence would be give to the jury. The subcommittee will draft a not about the factors. The instruction was approved as amended.

(4) CV1102. Duty to licensee for an activity on the property. The committee added a reference to defendant's property. The instruction was approved as amended.

(5) CV1103. Duty to licensee for a condition on the property. The committee added a reference to defendant's property. The instruction was approved as amended.

(6) CV1104. General duty to a trespasser. The committee approved the instruction as drafted.

(7) CV1104A Duty to a trespasser for an activity on the property. The committee approved the instruction as drafted.

(8) CV1104B Duty to trespasser for an artificial condition on the property. The committee approved the instruction as drafted.

(9) CV1104C Duty to trespassing child for an attractive nuisance on the property. The committee approved the instruction as drafted.

(10) CV1106. Duty to persons on a public way. The committee changed "consent or acquiescence" to "express or implied consent." The committee changed "would deviate from" to "might leave." The instruction was approved as amended.

MINUTES

Advisory Committee on Model Civil Jury Instructions

January 10, 2011

4:00 p.m.

Present: John L. Young, Chair, Juli Blanch, Judge William Barrett, Frank Carney, Professor Marianna Di Paolo, Phillip S. Ferguson, Tracy H. Fowler, Judge Deno Himonas, Gary Johnson. Ryan Springer, Peter W. Summerill, Judge Kate Toomey, Timothy M. Shea, Diane Abegglen

Excused: Rich Humpherys, John R. Lund, Stephen B. Nebeker, Paul M. Simmons, David E. West

(1) The minutes of the meeting held on December 13, 2010 were approved.

(2) Mr. Young welcomed new members Judge Deno Himonas, Mr. Ryan Springer, and Judge Kate Toomey to the committee. Mr. Young welcomed returning member Mr. Gary Johnson.

(3) Mr. Carney and Mr. Young reported that the Litigation Section of the Bar had offered assistance to the committee.

(4) Mr. Carney asked the judges for their opinions on the instructions that they had used. There were several comments that the general instructions were too repetitive. Mr. Summerill volunteered to review the preliminary and general instructions and offer some suggestions. Judge Toomey reported the attorneys sometimes want to use an instruction from MUJI 1, even though it was omitted deliberately.

Mr. Shea reported that he has been accumulating a list of jury trials every month. The committee decided that Mr. Shea will include the report with the monthly materials and that committee members will be assigned on a rotating basis to contact the judges and lawyers involved for their feedback about the instructions.

(5) 1107. Duty of landlord. The committee changed the “and” connecting paragraphs (a) and (b) to “or.” The committee discussed whether (a) was needed in light of (b). The committee decided there were enough unique elements of each that they were not redundant.

The committee discussed the application of the Fit Premises Act. Mr. Summerill stated that the Fit Premises Act is independent of a claim for negligence. The subcommittee will draft a further committee note for this instruction regarding the Fit Premises Act.

The committee approved the instruction as amended, subject to consideration of the committee note.

(6) CV1108. Duty of property seller. Mr. Summerill reported that the Loveland case, although relevant authority for the instruction, did not expressly adopt Restatement §353. The subcommittee will draft a committee note to that effect. The committee approved the instruction, subject to consideration of the committee note.

(7) CV1109. Recovery for injury to ski resort patrons.

The committee amended the instruction to read:

> [Name of defendant] claims that [he] is not liable for that part of [name of plaintiff]'s harm that was caused by one or more of the risks of skiing. To succeed on this claim, [name of defendant] must prove that [name of plaintiff]'s harm that was caused by [describe applicable conditions in Utah Code Section 78B-4-402(1)(a)-(h)].

The committee discussed whether to use the phrase "was caused by one or more of the inherent risks of skiing." Some preferred including "inherent" because it was part of the statute. Others thought "inherent" too difficult to understand and that the statute would be satisfied as long as the specific example of an inherent risk were drawn from the statutory list. After discussion the committee voted not to include "inherent," with three voting "no."

The subcommittee will draft a further committee note describing the interplay between this instruction and the statute.

The committee approved the instruction as amended, subject to consideration of the committee note.

(8) CV1110. Duty of recreational property owner. To better transition from defendant's and plaintiff's required proof, the committee deleted the sentence "Nevertheless, [name of plaintiff] claims that [name of defendant] is liable for harm because:" and added to the end of the preceding paragraph ", unless [name of plaintiff] proves that: ...." The committee approved the instruction as amended.

(9) There being no further business, the committee adjourned at 5:15.

MINUTES

Advisory Committee on Model Civil Jury Instructions
March 14, 2011
4:00 p.m.

Present: John L. Young (chair), Dianne Abegglen, Juli Blanch, Francis J. Carney, Marianna Di Paolo, Phillip S. Ferguson, Tracy H. Fowler, L. Rich Humpherys, Timothy M. Shea, Paul M. Simmons, Ryan M. Springer, Peter W. Summerill, Honorable Kate A. Toomey

Excused: Honorable Deno Himonas, David E. West

1. *Premises Liability Instructions.* The committee continued its review of the premises liability instructions:

a. *CV1108. Duty of property seller.* The committee approved the committee note that was added to this instruction since the last meeting.

b. *CV1109. Recovery for injury to ski resort patrons.* The instruction was previously approved, subject to a revision of the committee note. Mr. Simmons asked if the statement in the new committee note that "[t]here may be other risks identified in the case which are or may be 'an integral part of . . . skiing" meant that whether other activies are "an integral part of skiing" was a question of fact that the jury had to decide or a preliminary matter for the court to decide as a matter of law. The committee decided that it was probably a question for the court to decide and that the instruction did not need to be changed. The committee approved the committee note as written.

2. *General Instructions.* The committee revisited the general instructions. Mr. Ferguson and Mr. Shea had read through them and tried to take out duplicative language. Mr. Summerill did a frequency analysis of the instructions and noted that the words most commonly used were *you, evidence, not, case,* and *must.* He suggested that the instructions could be revised even more to reduce the use of these words and that they could be rephrased in a positive manner.

Dr. Di Paolo joined the meeting.

a. *CV101A, General admonitions, & CV101B, Further admonition about electronic devices.* Mr. Young thought that CV101A needed a positive introduction. He suggested that the instruction should start with what the jury is supposed to do. Mr. Carney suggested that the instruction tell the jury how important their job is. Mr. Summerill concurred. He said that in a recent focus group, all the participants said they would do their own research, but after they were told why it was important that they not do their own research, all but two changed their minds and said they would follow the instruction. Mr. Carney read a proposed instruction from the American College of Trial Lawyers cautioning

against the use of the internet and use of electronic devices in the courtroom. Mr. Carney will e-mail the ACTL proposed instructions to the committee.

Ms. Blanch joined the meeting.

Ms. Blanch noted that prospective jurors need to be cautioned against use of the internet as well. She had some Google the attorneys and witnesses before filling out juror questionnaires in a recent trial. Mr. Humpherys suggested that they be asked to commit to follow the admonition against use of electronic devices. Mr. Carney noted that the ACTL has jurors sign a statement that they will abide by the court's admonition. He added that the jurors need to be told why it is important that they not use electronic devices in connection with their jury service. Dr. Di Paolo agreed, noting that even college students don't understand why they cannot use term papers and research they find on the internet. Mr. Shea suggested shortening CV101B and combining it with CV101A. Mr. Ferguson thought they should be kept separate because electronic devices need their own emphasis. The committee deferred further discussion of CV101A and CV101B.

Mr. Shea will work on revising CV101A and CV101B, with the help of Mr. Carney.

b. *CV102. Role of the judge, jury and lawyers.* Judge Toomey suggested that someone go through all the general instructions and reduce the number of *you*'s. Mr. Summerill suggested changing the passive verbs to active voice. Dr. Di Paolo said that whether *you* and the active voice are appropriate in a given case depends on the discourse, that sometimes it is necessary to use them to engage the listener and to keep what you want the listener to focus on at the beginning of the sentence. Mr. Humpherys asked whether it was necessary to say that jurors are officers of the court. Messrs. Carney and Summerill questioned whether that was true. Mr. Humpherys also wondered whether it was necessary to explain the lawyer's role, since the jurors will see what the lawyers do. Messrs. Fowler and Springer thought the important part of the instruction was that the law comes from the judge, not from the lawyers or the jurors' own opinions. Judge Toomey offered to look at the instructions with an eye towards tightening them up but would not be able to get to them this week. Mr. Carney thought the committee should do the first draft and then run them by the judges on the committee. Mr. Shea noted that the last paragraph of CV102 is included in the new juror video. Mr. Young suggested that the committee watch the video at the next meeting. Dr. Di Paolo suggested that the instructions be revised to follow and supplement the video. The committee revised the instruction to read:

> You and I and the lawyers all play important roles in the trial.
>
> I supervise the trial and decide all legal questions, such as deciding objections to evidence and deciding the meaning of the law. I will also explain the meaning of the law.
>
> You must follow that law and decide what the facts are. The facts generally relate to who, what, when, where, why, how or how much. The facts must be supported by the evidence.
>
> The lawyers present the evidence and try to persuade you to decide the case in favor of their clients.
>
> Television and movies may not accurately reflect the way real trials should be conducted. Real trials should be conducted with professionalism, courtesy and civility.

The committee approved the instruction as modified.

c. *CV103. Nature of the case.* Judge Toomey suggested striking the first sentence. Dr. Di Paolo thought it was helpful to let the jurors know where they are in the process. Mr. Springer asked whether jurors will understand the term *damages*. The committee revised the instruction to read:

> In this case the plaintiff is [name of plaintiff]. The defendant is [name of defendant].
>
> [Name of plaintiff] seeks [describe claim].
>
> [Name of defendant] [denies liability, etc.].
>
> [[Name of defendant] has filed what is known as a [counterclaim/cross-claim/third-party complaint/etc.], seeking [describe claim].]

The committee approved the instruction as revised.

d. *CV104. Order of trial.* Mr. Humpherys suggested deleting the last sentence of subparagraph (2). Mr. Springer thought it was useful to explain the order of proof and reception of evidence. Dr. Di Paolo thought it could be a problem to delete the sentence if the court allowed rebuttal evidence; she pointed

out that *may* is permissive, not mandatory. Mr. Humpherys also suggested deleting the last sentence of subparagraph (5), but Mr. Ferguson thought the jurors need to hear some things more than once. The committee revised the instruction to read:

> The trial proceeds as follows:
>
> (1) The lawyers will make opening statements outlining what the case is about and what they think the evidence will show.
>
> (2) [Name of plaintiff] will offer evidence first, followed by [name of defendant]. I may authorize additional evidence.
>
> (3) Throughout the trial and after the evidence has been fully presented, I will instruct you on the law that you must apply. You must follow the law as I explain it to you, even if you do not agree with it.
>
> (4) The lawyers will then summarize and argue the case. They will share with you their views of the evidence, how it relates to the law and how they think you should decide the case.
>
> (5) The final step is for you to go to the jury room and discuss the evidence and the instructions among yourselves until you reach a verdict.

The committee approved the instruction as modified.

e. *CV105. Sequence of instructions not significant.* At Judge Toomey's suggestion, the first two sentences were deleted. (The second sentence was moved to CV104.) The committee approved the instruction as modified.

f. *CV106. Jurors must follow the instructions.* The committee deleted the instruction, on the grounds that it is adequately covered in other instructions. Subsequent instructions will be renumbered accordingly.

g. *CV107. Jurors may not decide based on sympathy, passion and prejudice.* At Mr. Summerill's suggestion, the order of the sentences was reversed. The committee approved the instruction as modified.

h. *CV108. Note-taking.* Mr. Humpherys asked whether the instruction should say that the court will keep the notes. Mr. Shea said that the

practice depends on the judge. Mr. Young thought the committee should recommend that a rule be adopted that requires jurors to leave their notes during breaks and at the end of the trial. Mr. Shea noted that, if it were a rule that jurors leave their notes, then the notes would become a court record and would be presumptively public. Mr. Springer noted that Utah Rule of Civil Procedure 47(n) already covers the jurors' use of notes. The committee revised the instruction to read as follows:

> You may take notes during the trial and have those notes with you when you discuss the case. If you take notes, do not over do it, and do not let your note-taking distract you from following the evidence. Your notes are not evidence, and you should use them only as a tool to aid your personal memory. I will secure your notes in the jury room during breaks and have them destroyed at the end of the trial.

The committee deleted the committee note and approved the instruction as modified.

Judge Himonas joined the meeting and asked to be excused. He had just gotten out of trial.

i. *CV110. Rules applicable to recesses.* The committee approved the deletion of this instruction as redundant. Mr. Carney asked whether a jury instruction is needed for the start of recesses. The committee thought not. Judge Toomey noted that she reminds the jurors of the court's admonitions before every recess, as do most other judges.

j. *CV111. All parties equal before the law.* The committee revised the instruction to read:

> "Person" means an individual, corporation, organization, or other legal entity.

Judge Toomey thought the second sentence, identifying the parties and the types of entities they are, was necessary. She suggested moving it to CV103, where the court introduces the parties, as an option if one or more of the parties is not an individual. Ms. Blanch thought it was important to keep the instruction a separate instruction if the defendant is a corporation. Mr. Young suggested moving the instruction to CV104 and moving CV111-CV116 to follow CV104. Mr. Simmons thought it was important to keep the definition of *person* because the term is used in other instructions. Judge Toomey suggested starting CV103 with,

"All parties are equal before the law. A party may be . . ." Mr. Shea suggested adding, "In this case the plaintiff is [identify entity]. The defendant is [identify entity]. This should make no difference to you. . . ." Mr. Summerill suggested: "All parties are equal before the law. It should make no difference to you if a party is an individual, a corporation or other legal or business entity" or "It should make no difference to you that the plaintiff is [e.g., an individual] or that the defendant is a [identify entity]. Messrs. Humpherys and Carney noted that the instruction that all parties are equal before the law also applies to more than just whether the party is an individual or a corporation but also applies to such things as height, weight, sex, race, and immigration status. Mr. Shea suggested revising the instruction to read: "All parties are equal before the law. [It makes no difference that the plaintiff is [describe plaintiff] or that the defendant is [describe defendant]. You must decide this case as if it were between individuals." Mr. Springer suggested deleting CV111 and beefing up the committee note to CV107. Dr. Di Paolo thought that CV111 fit the title of CV107 better. She thought the title of CV111 should be "Definition of *'person.'"* The title of CV107 was changed to "All persons equal before the law," and the title of CV111 was changed to "Definition of *'person.'"* Mr. Springer suggested putting CV111 just before CV107 and questioned whether the instruction was necessary in a case where all the parties are individuals. CV107 was revised to start out, "All parties are equal before the law. You must decide this case based on the facts . . ." The committee deferred further discussion of CV107 and CV111 until the next meeting.

3. *Next Meeting*. The next meeting will be Monday, April 11, 2011, at 4:00 p.m.

The meeting concluded at 6:00 p.m.

MINUTES

Advisory Committee on Model Civil Jury Instructions
April 11, 2011
4:00 p.m.

Present: John L. Young (chair), Honorable William W. Barrett, Jr., Francis J. Carney, Marianna Di Paolo, Phillip S. Ferguson, Gary L. Johnson, Timothy M. Shea, Paul M. Simmons, Ryan M. Springer, Peter W. Summerill, David E. West, Dianne Abegglen, and David A. Cutt

Excused: Juli Blanch, Tracy H. Fowler, Honorable Deno Himonas, L. Rich Humpherys, Honorable Kate A. Toomey

1. *CV1109. Recovery for injury to ski resort patrons.* David A. Cutt joined the meeting to discuss CV1109. Mr. Cutt thought that the instruction was inadequate. He noted that the case law construing the Inherent Risks of Skiing Act recognizes two categories of risks: those skiers expect to encounter, such as steep slopes and weather conditions, and those they would not want or expect to encounter, such as man-made structures on a ski run. The former are inherent risks of skiing for which a ski resort owner or operator cannot be liable, whereas an owner or operator can be liable for the latter if the risk could have been made safer through the exercise of reasonable care. Mr. Cutt noted that the instruction uses the term "risks of skiing," rather than the statutory term "inherent risks of skiing." Mr. Young explained that the committee was trying to simplify instructions by replacing terms of art with terms jurors would understand. Mr. Cutt, who represents injured skiers, said that he had discussed the instructions with Kevin Simon, who represents ski resorts, and the two agreed that more instructions were needed. He offered to work with Mr. Simon to come up with an agreed set of jury instructions. The two have a case going to trial beginning June 6, 2011, so they will need to prepare a set by then in any event. The committee accepted Mr. Cutt's offer and agreed to withdraw CV1109 in the meantime. Mr. Cutt was then excused. Messrs. Ferguson, Shea, and Summerill agreed to serve as the "Gang of Three" to review the proposed instructions that Messrs. Cutt and Simon submit for readability.

2. *"Jury Service in Utah."* Mr. Shea played for the committee the new video "Jury Service in Utah," which is being distributed to courts this week. Mr. Ferguson thought it made some of the general jury instructions superfluous, but Dr. Di Paolo thought that it was helpful to repeat the material in the general jury instructions.

Ms. Abegglen was excused.

3. *CV101, General admonitions.* Mr. Shea presented a new CV101, which he based on the American College of Trial Lawyers' jury instruction that Mr. Carney had circulated following the last meeting. Mr. Shea's proposal would replace both CV101A, "General admonitions," and CV101B, "Further admonition about electronic devices." The committee deleted "or your jury service" from the fourth paragraph, telling the jury that they must not communicate with anyone about the case. The committee also added "about this case" to the next paragraph, following the phrase "must not talk with your

fellow jurors." The committee also replaced the phrase "until I give you the case for deliberation" with "until I send you out to deliberate." Similarly, at Mr. Summerill's suggestion, the last line of the instruction was changed from "until all the evidence is in" to "until I send you to deliberate." Mr. Carney asked whether jurors should be required to sign an affirmation such as the one the ACTL proposed. Mr. Shea thought that if such a change were to occur, it should go through the administrative process. He suggested that, alternatively, a reminder could be posted in the jury room, or the jurors' oath could be modified to accomplish the same result. A number of committee members thought that asking jurors to sign an affirmation was inappropriate and implied that the court and the litigants did not trust them. Judge Berrett noted that, in his experience, jurors as a whole are conscientious and try very hard to do what they are supposed to do. The committee questioned whether it was necessary to say anything about sequestering juries. Some thought it was necessary because jurors will have heard of the practice or seen it on television. The committee changed that part of the instruction to say, "sequester, or isolate, ..." The committee approved the instruction as modified. The instruction will replace CV101A and 101B. Mr. Carney suggested sending the approved instruction to the committee preparing the model criminal instructions for its consideration.

Mr. Springer was excused.

4. *CV111. Definition of "person," and CV107, All persons are equal before the law.* Dr. Di Paolo suggested combining CV111 and CV107. Mr. Shea noted that CV111 applies to other sets of instructions, not just the general or preliminary instructions. Mr. Johnson thought that including both paragraphs of CV107 in the same instruction may suggest to the jury that it should be prejudiced against a corporation. Mr. Young noted that the instruction was meant to minimize that concern and not isolate corporations for special treatment. Mr. Ferguson asked whether taking the second paragraph out of CV107 would cause more problems. Mr. Johnson suggested combining the second paragraph of CV107 with CV111. The committee decided to keep CV111 a separate instruction and to divide CV107 into two instructions. The first paragraph will be its own instruction, titled "Jurors may not decide based on sympathy, passion and prejudice." The second paragraph will be a separate instruction titled "All persons equal before the law." The committee approved the instructions as so modified.

5. *CV112. Multiple parties.* Dr. Di Paolo said that she would leave the instruction as it was, that it did not need to be shortened. At Mr. Carney's suggestion, the committee left "each plaintiff and each defendant" in the second sentence but replaced it with "all parties" in the third sentence. The committee approved the instruction as modified.

6. *CV113, Multiple plaintiffs, and CV114, Multiple defendants.* The committee approved CV113 and CV114 as modified (to delete the phrase "in this action" from each).

7. *CV115. Settling parties.* Dr. Di Paolo suggested revising the instruction to make it clear that parties may settle only part of their dispute. At Mr. Summerill's suggestion, "parties" was replaced with "persons" throughout, since a person may settle before he or she is ever brought into the lawsuit as a party. Mr. Young noted that, by referring to persons who were "at fault," the instruction applies to tort cases but may not apply to commercial, non-tort cases as written. Mr. Simmons questioned whether the jury would have to decide any issues relating to nonparties in a non-tort case. Mr. Ferguson suggested having separate instructions for tort and non-tort cases. Mr. Summerill suggested dealing with the problem in a committee note saying that the instruction may need to be adapted for non-tort cases. Mr. Summerill also suggested leaving the specifics of fault allocation to the jury instruction dealing with allocation of fault. Mr. Ferguson questioned whether the term "settlement agreement" should be included in the instruction, since the agreement itself is rarely if ever given to the jury. The committee revised the second paragraph of the instruction to read:

> There are many reasons why persons settle their dispute. A settlement does not mean that anyone has conceded anything. Although [name of settling person] is not a party, you must still decide whether any of the persons, including [name of settling party], were at fault.
>
> You must not consider the settlement as a reflection of the strengths or weaknesses of any party's positions.

The title of the instruction was changed to "Effect of settlement." The committee approved the instruction as modified.

Mr. Shea will draft a committee note for the instruction.

Mr. West was excused.

8. *CV117. Preponderance of the evidence.* Mr. Johnson suggested leaving in the phrase "I must emphasize to you that" in the second paragraph. He thought the instructions could not emphasis enough the differences between civil cases and criminal cases and noted a recent jury trial in which the jurors were overheard to frame the issue as whether the defendant was "guilty of products liability." The rest of the committee was okay with deleting the quoted language as proposed, but, at Dr. Di Paolo's suggestion, the second paragraph was made the first paragraph of the instruction. The committee approved the instruction as modified.

9. *CV118. Clear and convincing evidence.* The committee approved this instruction as modified.

10. *CV119. Evidence.* Mr. Shea noted that the deletions to CV119 were made because the matters are now covered in new CV101. Dr. Di Paolo thought the term "stipulate" would not be clear to the average juror. Mr. Carney suggested doing away with the term altogether, but Dr. Di Paolo thought it was helpful to include it because the jury will hear the attorneys referring to stipulations. The committee took "stipulations" out of the first paragraph and revised the penultimate paragraph to read, "The lawyers might agree, or stipulate, to a fact . . . ." The committee approved the instruction as modified.

11. *CV120. Direct and circumstantial evidence.* The committee approved the instruction as modified.

12. *CV126. Depositions.* Mr. Summerill questioned whether the phrase "may be received in evidence" is clear to a lay person. The committee thought that it might lead jurors to think that they can take the deposition transcripts with them into the jury room. At Mr. Ferguson's suggestion, the first sentence was deleted from the instruction. The committee approved the instruction as modified.

13. *CV127. Limited purpose evidence.* The committee approved the instruction as modified.

14. *CV131. Spoliation.* Mr. Johnson said that he would like to review *Hills v. UPS,* 2010 UT 39, before considering CV131, so the committee deferred discussion of the instruction until the next meeting.

15. *Approval dates.* Mr. Summerill asked whether the dates on which an instruction was approved and revised could be included in the on-line database. Mr. Shea thought that they could be but said that we could not track all of the changes to an instruction on-line, as some publishers do with statutory revisions. For changes to instructions and the reasons for the changes, one would have to review the committee minutes, but including the date the instruction was approved or revised would make searching the minutes easier.

16. *Special verdicts.* Mr. Summerill circulated before the meeting, by e-mail, drafts of proposed special verdict forms. He noted that the special verdict forms currently included in MUJI 2d do not cover multiple parties and non-parties who may have fault apportioned to them. Mr. Carney noted that they also do not make it clear

that the jury must award general damages if it finds liability in a tort case. The committee deferred further discussion of the special verdict forms until a later meeting.

17. *Next Meeting*. The next meeting will be Monday, May 9, 2011, at 4:00 p.m., in the Education Room.

The meeting concluded at 6:00 p.m.

MINUTES

Advisory Committee on Model Civil Jury Instructions
May 9, 2011
4:00 p.m.

Present: John L. Young (chair), Juli Blanch, Phillip S. Ferguson, Tracy H. Fowler, Honorable Deno Himonas, L. Rich Humpherys, Timothy M. Shea, Paul M. Simmons, Ryan M. Springer, Peter W. Summerill, Honorable Kate A. Toomey

Excused: Honorable William W. Barrett, Jr., Francis J. Carney, Gary L. Johnson, David E. West

1. *General Jury Instructions*. David Cutt has not finished his proposed instructions on ski injury cases, so the committee continued its review proposed changes to the general instructions.

a. *CV129. Statement of opinion*. The sentence "You do not have to believe an opinion, whether or not it comes from an expert witness" was deleted. The committee approved the instruction as modified.

b. *CV130. Charts and summaries*. The committee revised the second sentence to read, "However, the charts or summaries are not evidence." Mr. Summerill thought that the sentence did not accurately state the law and pointed out that summaries can come into evidence under Utah Rule of Evidence 1006. Mr. Young and Judge Toomey suggested deleting the sentence. Judge Himonas thought that the intent of the instruction was to cover demonstrative evidence and suggested just deleting the phrase "and summaries."

Mr. Ferguson joined the meeting.

Mr. Young asked whether the instruction was necessary. Judge Himonas and others thought the jury needed to be instructed on how to consider demonstrative evidence. Mr. Summerill pointed out that "evidence" may be misleading when used with "demonstrative" and suggested calling the instruction "Demonstrative aids." Judge Toomey suggested revising the instruction along the following lines: "Certain charts will be shown to you to help explain the evidence. Unless the charts are received as evidence, you may only consider them to the extent they correctly reflect facts or figures shown by the evidence."

The committee sent the instruction back to the Gang of Three headed up by Mr. Ferguson to propose a new instruction dealing with demonstrative evidence.

c. *CV131. Spoliation*. The committee reserved discussion of CV131 until Mr. Johnson could be present.

Mr. Humpherys joined the meeting.

d. *CV137. Selection of jury foreperson and deliberation.* The committee approved the instruction as modified.

e. *CV139. Agreement on special verdict.* Mr. Shea proposed changing "each question" to "all questions." Mr. Humpherys noted that both were problematic because sometimes the instructions on the special verdict form tell the jury not to answer certain questions. Mr. Simmons pointed out that this could lead to an inconsistent verdict, such as where the jury finds that defendant A was not negligent but then apportions fault between defendant A and defendant B. Mr. Shea revised the first paragraph to read: "I am going to give you a form called the Special Verdict that contains several questions and instructions. You must answer the questions based upon the instructions and the evidence you have seen and heard during this trial." He also changed the first sentence of the last paragraph to read, "As soon as six or more of you agree on the answer to all of the required questions, . . ." The committee approved the instruction as revised.

Mr. Springer joined the meeting.

2. *CV2012. Loss of consortium.* Mr. Young noted that Mr. Carney had asked that the committee revisit CV2012 in light of the Utah Supreme Court's recent decision in *Boyle v. Christensen,* 2011 UT 20. The instruction is no longer accurate to the extent that it requires the plaintiff to prove paralysis, significant disfigurement, or incapacity to perform the types of jobs performed previously. The court in *Boyle* said that this list was not exhaustive. The committee revised the second paragraph of the instruction to read:

> To award damages for loss of consortium, it must be proven that [name of plaintiff] has suffered a significant permanent injury that substantially changes [his] lifestyle. This may include but is not limited to one or more of the following:
>
> [(a) a partial or complete paralysis of one or more of the extremities;]
>
> [(b) significant disfigurement;]
>
> [(c) incapability of performing the types of jobs [he] performed before the injury;]
>
> [(d) other.]

The court should only include the particular injuries at issue in the case. Mr. Ferguson asked whether "one or more of the extremities" was plain English and suggested replacing the phrase with "an arm or leg." The committee discussed what the proper definition of "extremities" was and concluded that it was not authorized to define the statutory term (for example, to say whether a finger or toe qualifies as an "extremity") but should leave it for the court to decide in a particular case. The committee approved the instruction as modified.

3. *Special Verdict Forms.* Mr. Summerill noted that the special verdict forms included in the negligence instructions do not deal with cases of multiple defendants or cases of wrongful death where there are multiple heirs. He presented a proposed verdict form to address these issues. Judge Toomey noted that the introductory paragraph (which Mr. Summerill took from CV299A and 299B) repeats concepts found in the jury instructions. Mr. Humpherys asked whether the introductory paragraph was necessary. Several committee members thought it was useful to repeat specific instructions that will help the jury complete the special verdict form. Mr. Humpherys thought that the part on the preponderance of the evidence unduly emphasized the defense theory. The committee revised that part to read: "If you find that the issue has been proved by a preponderance of the evidence, answer 'Yes'; if not, answer 'No.'" At Mr. Young's suggestion, the next sentence was revised to read: "At least six jurors must agree on the answer to all of the required questions . . . ," consistent with the committee's revision of CV139. Mr. Summerill asked whether the committee agreed with the structure of the instruction (asking the jury first to determine whether each defendant was at fault and then to determine whether the fault of each defendant was a cause of the plaintiff's injuries). Mr. Ferguson noted that the jury has been told to answer each question, but there is no check box for answering question 1 (just for questions 1(a) and 1(b)). Ms. Blanch suggested changing question 1 into headings rather than a separate question (e.g., *"[Name of defendant]")*. She also suggested changing the structure to ask (1) whether defendant A was at fault, (2) whether defendant A's fault was a cause of the plaintiff's harm, (3) whether defendant B was at fault, (4) whether defendant B's fault was a cause of the plaintiff's harm, (5) whether a third party or the plaintiff was at fault, and (6) whether the fault of the third party or plaintiff was a cause of the plaintiff's harm. The committee agreed with her suggestion. The committee noted that the jury should determine the fault of the defendants first, before considering the plaintiff's fault, because that is part of the plaintiff's prima facie case, and if the jury finds that the plaintiff did not make out his or her prima facie case, it does not have to reach the question of the plaintiff's fault, which is in the nature of an affirmative defense. Mr. Simmons asked whether the verdict form should refer to "fault" or to negligence or some other form of fault. Mr. Shea showed that CV201 was revised to eliminate the concept of causation from the definition of "fault," which eliminated the problem of effectively asking the jury to determine causation twice, once as part of the statutory definition of "fault" and again in the causation question.

Mr. Shea will revise the proposed special verdict form in light of the committee's discussion.

4. *Next Meeting*. The next meeting is Monday, June 13, 2011, at 4:00 p.m. The committee will then take July and August off.

The meeting concluded at 4:50 p.m.

MINUTES

Advisory Committee on Model Civil Jury Instructions
June 13, 2011
4:00 p.m.

Present: John L. Young (chair), Diane Abegglen, Honorable William W. Barrett, Jr., Francis J. Carney, Marianna Di Paolo, Phillip S. Ferguson, Tracy H. Fowler, Gary L. Johnson, Timothy M. Shea, Paul M. Simmons, Peter W. Summerill, Honorable Kate A. Toomey, David E. West

Excused: Ryan M. Springer

1. *Committee Membership*. Mr. Young will review the minutes and talk to those members who have missed a number of meetings to see if they would like to be replaced or if they will recommit to their service on the committee.

2. *Vicarious Liability Instructions*. Mr. Young noted that Mr. Lund was given the assignment to come up with instructions on vicarious liability. Messrs. Carney, Johnson, and Simmons volunteered to serve as the "Gang of Three" to review the vicarious liability instructions and have them ready for review at the September 2011 meeting.

3. *Minutes*. Mr. Carney reported that he has put the committee minutes into one searchable .pdf document. He asked whether the document could be put on the Internet. Mr. Shea thought it could be added to the committee's webpage. The minutes are already on the webpage, but they cannot be searched all at once. Dr. Di Paolo suggested also looking at software that would create a word index for the minutes.

4. *General Instructions*. The committee reviewed the last of the revisions to the general instructions:

a. *CV130A, Charts and summaries as evidence; CV130B, Charts and summaries of evidence, and CV130C, Charts and summaries*. Based on the committee's discussion at the last meeting, Mr. Shea prepared three different instructions regarding charts and summaries–one for charts and summaries that are received as evidence under Utah Rule of Evidence 1006 (CV130A); one for charts and summaries of the evidence that are used only as demonstrative exhibits (CV130B), and one where both types of charts and summaries are used at trial (CV130C). Mr. Ferguson questioned the second sentence of CV130B ("You may consider them only if they correctly reflect information shown by the evidence."). He thought the instruction was ambiguous because it suggests that the jury is to determine if the chart or summary correctly reflects information shown by the evidence, when the court must determine that the chart or summary is an accurate depiction of the evidence before it receives it into evidence. Mr. Ferguson noted that, as a practical matter, the court relies on the parties to compare the chart or summary with the evidence and will receive it if there is no objection. If the court determines that it does not accurately reflect

the evidence, it will not receive it, and the jury should not consider it. Mr. Ferguson therefore thought the last sentence of CV130B should be deleted. Mr. Shea asked whether any instruction was necessary. He thought CV130A was tautological ("evidence is treated as evidence"). Dr. Di Paolo noted that, from a juror's perspective, whatever is presented to the jury in open court is considered evidence. Messrs. Summerill and West noted that the difference between CV130A and CV130B is the difference between charts and summaries that can go into the jury room (such as summaries of voluminous medical records) and those that cannot (such as summaries of an expert's testimony or an expert's drawing). Dr. Di Paolo suggested telling the jury that the charts and summaries that they take into the jury room are evidence and that others are not. The committee revised CV130A to read:

> Certain charts and summaries that are received as evidence will be with you in the jury room when you deliberate. You should consider the information contained in them as you would any other evidence.

The committee approved CV130A as revised. The committee then revised CV130B to read:

> Certain charts and summaries will be shown to you to help explain the evidence. However, the charts and summaries are not themselves evidence, and you will not have them in the jury room when you deliberate. You may consider them to the extent that they correctly reflect the evidence.

The committee approved CV130B as revised. The committee decided that CV130C was unnecessary. The court can use CV130A or CV130B or both, depending on what charts and summaries are used in the case.

b. *CV131, Spoliation.* Mr. Johnson noted that CV131 does not offer any guidance as to when the instruction should be used. Under Utah Rule of Civil Procedure 37(g), the sanction for the spoliation of evidence is within the court's discretion, and an adverse inference instruction is just one possibility. Mr. Johnson also noted that the instruction requires that the spoliation be intentional, but the court in *Daynight, LLC v. Mobilight, Inc.,* 2011 UT App 28, said that rule 37(g) does not require "willfulness, bad faith, fault or persistent dilatory tactics" before a court may sanction a party for spoliation. Mr. West asked whether any jury instruction was necessary, given the lack of direction in the case law. The committee thought that a model instruction was appropriate for those cases in which the court concludes that an adverse inference instruction

is the appropriate sanction. Some committee members questioned whether "intentionally" should be omitted from the instruction. Dr. Di Paolo suggested handling the matter in a committee note. Mr. Johnson agreed to draft a proposed committee note. The committee also agreed to add citations to the recent cases on spoliation to the reference section of CV131. Those cases are *Daynight; Hills v. United Parcel Service, Inc.,* 2010 UT 39; and *Kilpatrick v. Bullough Abatement, Inc.,* 2008 UT 82.

c. *CV____, No transcript of testimony.* Mr. Simmons had suggested adding an instruction telling the jury that they would not have a transcript of the trial testimony during their deliberations, so they would need to pay close attention to the evidence presented at trial. The committee revised the second sentence of the instruction to read, "You will not have a transcript or recording of the witnesses' testimony" and approved the instruction as modified. Mr. Shea and Dr. Di Paolo questioned why jurors are not allowed to have a transcript of testimony. Mr. Carney noted that in some jurisdictions, they can have a transcript but noted that other jurisdictions, such as Utah, do not allow it because it would tend to give that evidence more weight, and the other side might then insist that the jury be given a transcript of other evidence more helpful to its case. Mr. Ferguson noted that, to be fair, the jury should receive the entire transcript or nothing.

5. *Verdict Form.* Mr. Shea revised Mr. Summerill's proposed special verdict form for a wrongful death case in light of the committee's discussion at the last meeting. The committee generally liked the format of the form (asking separate questions about fault and causation for each person alleged to have been at fault). At Mr. Simmons's suggestion, the instructions following questions (3) and (4) were changed to say "go to the next set of instructions" rather than "answer the next set of instructions." The heading "Next set of instructions" was highlighted. At Mr. Ferguson's suggestion, "Question" was inserted before the number of each question. Mr. Simmons pointed out that the heading to questions 5 and 6 says "[Name of plaintiff]," but the questions ask about the fault of the decedent. Mr. Johnson pointed out that in a given case the fault of both the plaintiff and the decedent may be relevant. The parties and court can add additional sections for each person alleged to have been at fault. The committee thought that a committee note should be added to that effect, to tell the court and counsel that the form may need to be tailored to fit the circumstances of the case. Mr. Simmons suggested that the phrase "the harm" in questions 9 through 12 be replaced with "[name of decedent]'s death." The committee approved the verdict form up to the damages section.

Mr. Simmons noted that question 13 did not reflect all of the damages recoverable in a wrongful death action. Mr. Summerill noted that the question had been

revised to read, "What amount fairly compensates [name of plaintiff] for the loss of [name of decedent]?" Mr. West noted that there would need to be separate lines for each heir (and for each decedent in a case involving multiple deaths). At Mr. Johnson's suggestion, the committee decided to reverse the order of questions 13 and 14. Mr. Carney noted that the law requires an award of general damages if the jury awards special damages, so the revised order of the instructions makes sense. He further noted that a Utah appellate decision held that a party could waive its right to collect general damages by agreeing to a verdict form that asks the jury what amount "if any" would fairly compensate the plaintiff. Mr. Carney therefore moved to delete the phrase "if any" from all verdict forms. The motion passed without opposition. Mr. Summerill noted that the form could be modified to apply to personal injury cases as well as death cases. He suggested that the damage questions ask the jury to determine the amount of "economic" and "noneconomic" damages. Mr. Shea noted that "economic" and "noneconomic" damages are defined in CV2003 and CV2004. Mr. Simmons pointed out, however, that the instructions on wrongful death damages (CV2013 and CV2014) do not use the terms "economic" and "noneconomic" damages and asked whether those instructions should be revised to define the two types of damages. Mr. Carney noted that in a wrongful death case there may also be a survival claim, which belongs to the estate. He suggested adding another question before the damage questions, asking whether the decedent experienced conscious pain and suffering before he died. Mr. Ferguson suggested phrasing the question, "Did [name of decedent] incur noneconomic damages before [his] death." Some thought that the question was too sterile. Mr. Summerill suggested substituting "harm" for "noneconomic" damages.

Mr. Fowler was excused.

The committee also debated whether survival damages are recoverable where the injured party may be in a coma and may never come out of it before dying. Mr. Ferguson also noted that there is an argument for not allowing the recovery of funeral and burial expenses in a wrongful death case, since they would have been incurred when the decedent died in any event. At the suggestion of Messrs. Carney and Summerill, the committee decided to defer further discussion of the damage section of the verdict form to allow the committee more time to think about it.

6. *Discouraging Use of MUJI 1st.* Mr. Carney noted that attorneys are still requesting MUJI 1st instructions, even those that have been preempted by MUJI 2d and those the Utah Supreme Court has said should not be given. He thought it would be helpful to have a correlation table or comparison chart cross-referencing the MUJI 1st instructions with the MUJI 2d instructions and explaining why some MUJI 1st instructions are not included in MUJI 2d. Judge Toomey and Mr. Summerill noted that Chief Justice Durham has already written a letter, included on the MUJI 2d website, that says MUJI 2d should be used "to the exclusion of other instructions." They

suggested simply adding a sentence that says that if an instruction is not included in MUJI 2d, the omission was intentional. The committee thought a correlation table would still be useful. Mr. Ferguson suggested also cross-referencing JIFU. Mr. Young suggested asking each subcommittee to prepare the table for its section. Mr. Carney said he would do the table for the medical malpractice instructions first, so that the committee could review and approve the format before other subcommittees are asked to do the same for their sections.

7. *Next Meeting*. There will be no committee meeting in July or August 2011. The next meeting will be Monday, September 12, 2011, at 4:00 p.m.

The meeting concluded at 6:00 p.m.

MINUTES

Advisory Committee on Model Civil Jury Instructions
September 12, 2011
4:00 p.m.

Present: Juli Blanch, Francis J. Carney, Marianna Di Paolo, Phillip S. Ferguson, Honorable Deno Himonas, L. Rich Humpherys, Gary L. Johnson, John R. Lund, Timothy M. Shea, Paul M. Simmons, Ryan M. Springer, Peter W. Summerill, Honorable Kate A. Toomey, David E. West. Also present: David A. Cutt

Excused: John L. Young (chair); Honorable William W. Barrett, Jr.; Tracy H. Fowler,

Mr. Shea conducted the meeting in Mr. Young's absence.

1. *CV131. Spoliation.* Mr. Johnson reported that he and Mr. Fowler had reviewed CV131 in light of Utah Rule of Civil Procedure 37(g) and recent case law. Mr. Fowler noted that the instruction implies that it is for the jury to decide whether a party intentionally spoliated evidence and questioned whether that was the law, or whether the court makes that determination as a preliminary matter under Utah Rule of Evidence 104. Mr. Humpherys thought that the issue of spoliation could arise in two ways: (1) as a rule 37(g) sanction, or (2) as a question for the jury. In the latter situation, the jury decides whether there was spoliation, and, if it finds that there was, it can draw the inference stated in the instruction. Mr. Ferguson thought the issue generally arises before trial, in the form of a motion in limine or motion for sanctions. Mr. Springer observed that rule 37(g) is not the exclusive remedy for spoliation. In an appropriate case, there may even be a cause of action for spoliation (although the Utah Supreme Court has yet to recognize such a claim). Mr. Humpherys noted that there was no case law saying that an adverse inference instruction could only be given as a rule 37(g) sanction. Mr. Shea suggested revising CV131 to read: "I have determined that [name of party] intentionally concealed, destroyed, altered, or failed to preserve [describe evidence]. You may assume that the evidence would have been unfavorable to [name of party]." Mr. Lund suggested that the committee note be revised to explain that the law is not clear whether spoliation is a question for the court or the jury. Mr. Johnson offered to draft such a note. Mr. Lund further thought that the issue generally plays out as a question of the sufficiency of the evidence. Mr. Summerill did not think a jury instruction was necessary. He thought that there was not enough direction in the case law and that any instruction would only cause confusion. He thought the issue should be left out of MUJI 2d until it is decided on appeal. He also thought that if there was an instruction it should say that spoliation creates an inference that the evidence would prove what the opponent claims it would prove. Mr. Carney noted that CACI has an instruction similar to CV131. Judge Himonas thought it should be a stock instruction and that in some cases, the question of spoliation should be left to the jury. Mr. Humpherys thought that it should be left to counsel how to argue the inference. He thought the issue could be covered by the instruction on the credibility of witnesses. Mr. Lund noted that CV131 begs the question of what is destruction, concealment, or

alteration of evidence. Mr. Ferguson noted that in his experience courts are reluctant to find that evidence was destroyed in a way that would lead to an adverse inference. Judge Toomey moved to accept the revised instruction, along with a revised note. Mr. Lund and Mr. Humpherys seconded the motion. The motion passed, with Mr. Summerill opposed.

2. *Verdict Form.* The committee continued its review of the proposed special verdict form for wrongful death cases. Mr. Humpherys noted that in personal injury cases, economic damages need to be broken out for several reasons. There may be liens that apply to some economic damages. It is also easier to figure interest on items of economic damages. And it is easier to adjust the verdict on appeal, if necessary, without having to retry the case. Mr. Carney noted that damages in a death case may need to be split between the heirs' damages for the wrongful death and the estate's damages for the decedent's personal injuries before he died (the survival claim). Mr. Johnson noted that the estate may also have claims for contractual damages, such as certain insurance benefits. Mr. Lund noted that, in a wrongful death case, the economic and noneconomic damages need to be broken out for each heir. Mr. Humpherys noted that failing to do so would only cause another lawsuit if the heirs cannot agree how to apportion damages among themselves. Mr. West suggested separating the estate's claim from the heirs' claims and including under the estate's damages past medical expenses, funeral and burial expenses, lost wages, and other economic damages. Mr. Carney suggested that the committee look at special verdicts proposed or used in actual death cases and offered to head up a subcommittee to propose any changes to the verdict form. Committee members should provide Mr. Carney with any verdict forms they have used in wrongful death cases in the past.

3. *Ski Instructions.* Mr. Cutt joined the meeting. Mr. Shea had circulated before the meeting the instructions that were given in Mr. Cutt's recent trial involving a skiing accident. Mr. Shea had edited them for style. He had also proposed combining them into a single instruction. Mr. Cutt liked Mr. Shea's edits but thought that the instructions should not be combined. He thought the term "inherent risks of skiing" should be capitalized to show that it is a term of art. Dr. Di Paolo thought that putting the phrase in quotation marks would have the effect of saying "the so-called inherent risks of skiing," which might denigrate the term. Mr. Lund suggested having someone from the skiing defense bar sign off on the instructions. The committee suggested Kevin Simon or Gordon Strachan of Strachan, Strachan & Simon, Ruth Shapiro of Christensen & Jensen, or Gainer Waldbillig. Mr. Cutt offered to talk to someone in the defense bar and invite them to sign off on the instructions or come to the next committee meeting. The committee agreed to use draft instructions (2) through (5) as edited by Mr. Shea as the starting point. Mr. Lund questioned whether "integral" in instruction (3) would be understandable to jurors. Mr. Cutt noted that it is the statutory language. He said that the cases go even further in defining "inherent risk of skiing." Dr. Di Paolo asked

whether the terms in instruction (3), subparagraph (2) ("hard pack, powder, packed powder, etc.") needed to be defined. Mr. Cutt said that the court should only include in the instruction the subparagraphs of instruction (3) that applied in the particular case. Consequently, Mr. Shea bracketed subparagraphs (1) through (8) of instruction (3). Mr. Lund noted that, if he were defending a ski case, he might want all of the subparagraphs included in the instruction. Mr. Cutt thought that the first paragraph of instruction (3) should say, "Inherent Risks of Skiing means those dangers or conditions which are an integral part of the sport of recreational, competitive, or professional skiing and which may include the following:" Mr. West thought that instruction (2) was not accurate. He noted that the statute has been modified by the case law and that a skier may recover from a ski area operator for injuries resulting from an "inherent risk of skiing" under some circumstances. If a hazard could have been eliminated through the exercise of reasonable care, the ski area operator can still be liable. Mr. West suggested that instruction (2) be revised to read, "Subject to the following instructions, no skier . . ." or something like that. Mr. Cutt noted that the statute has been amended to include snowboarders and others as well as skiers, and the instructions may need to be adapted accordingly in a particular case. The committee deferred further discussion of the instructions until they have been reviewed by the defense bar.

4. *Correlation Table.* Mr. Carney presented a draft correlation table for the medical malpractice instructions, showing the corresponding sections of MUJI 2d for each of the MUJI 1st medical malpractice instructions. Mr. Carney proposed that, where MUJI 1st instructions have been intentionally omitted, the correlation table explain why. Judge Toomey noted that such a table would be very helpful for judges. Mr. Shea noted that he can put correlation tables on the committee's webpage but not on the MUJI 2d website, which he does not control. At the committee's request, Mr. Shea will talk to the courts' webmaster to see if a correlation table can be added to the MUJI 2d website. Mr. Carney offered to prepare a correlation table for the negligence instructions and noted that a similar table will need to be prepared for each of the other sections. Mr. Lund asked whether we should also have correlation tables from MUJI 2d to MUJI 1st. Dr. Di Paolo said it would be easy to change the order of the table to reverse the cross-references. Mr. Shea noted that the instructions will start showing the date each was approved and the date it was amended. Judge Toomey and Mr. Lund thought it would be helpful to have the MUJI 2d instructions in a book. Mr. Shea said that would be up to the legal publishers to decide whether they want to publish them.

5. *Website.* Mr. Summerill noted that it is cumbersome to build a set of jury instructions from the website and that it will only become more cumbersome as new sections are added. He suggested that Mr. Shea also speak to the webmaster about revising the procedure for building a set of jury instructions so that an attorney does not have to go through all of the instructions to pull out the ones he wants.

6. *Punitive Damages.* Mr. Carney noted that MUJI 1st included just one instruction on punitive damages. He proposed two instructions to be given in the first phase of the trial and two instructions to be given in the second phase if the jury decides that punitive damages are warranted. He suggested two approaches to the instructions: (1) using jury instructions actually used in punitive damage cases, or (2) coming up with a new set of instructions, as California did in CACI. He noted that CACI includes definitions of important terms used in the instructions. Mr. Lund expressed concern about having a single approach for punitive damages; he was concerned that it might not adequately deal with all of his affirmative defenses to a punitive damage claim. He also thought that the terms in the punitive damage statute (e.g., "willful and malicious" and "knowing and reckless indifference") needed to be defined for the jury. The committee generally agreed that the instructions should be more detailed, defining statutory terms, although Mr. Humpherys noted that the terms may be hard to define or may not have been defined by the case law yet, and the definitions may end up being circular. Dr. Di Paolo thought that some of the terms, such as malicious, are probably understood by most jurors, unless there is a special legal meaning for the term. Mr. Springer noted that terms used in any affirmative defenses may also need to be defined. Mr. Humpherys noted that proposed CV2029 subparagraph (4) needed to be revised. Under U.S. Supreme Court precedent, the effect of the conduct on the lives of others needs to be limited to others in Utah. Mr. Humpherys also noted that the defendant's poverty can be a consideration under subparagraph (1). Mr. Shea questioned whether the last paragraph of CV2026 was necessary, since the jury will be given the special verdict form. Mr. Humpherys thought that it was important for the jury to know why it is being asked to make a finding on punitive damages. Judge Toomey noted that, by telling the jury that, if it answers "Yes," the amount of punitive damages will be reserved for further consideration at a later time may influence the jury to find against punitive damages, so that they do not have to come back for further proceedings. Mr. Cutt suggested revising the first sentence of that paragraph to read, "In the Special Verdict form you will be asked whether punitive damages should be awarded" and deleting the second sentence of that paragraph. Mr. Lund suggested "assessed" instead of "awarded." Mr. Summerill asked whether the jury should be told that a percentage of any punitive damages awarded above a certain amount goes to the state. The committee decided not to include that in the instruction because there is no appellate case on point. Mr. Humpherys noted that he has seen attorneys ask that the jury be instructed on the presumptive ratio of punitive damages to compensatory damages of 9:1, under the U.S. Supreme Court decision in *Campbell v. State Farm.* The committee decided not to include such an instruction for lack of authority on point. Mr. Humpherys added that he believed it is for the court and not the jury to apply the ratio. At Mr. Shea's suggestion, subsection (2) of proposed CV2026 was revised to read:

> (2) it is proved by clear and convincing evidence that [name of defendant]'s conduct

(a) was willful and malicious, or

(b) was intentionally fraudulent, or

(c) manifested a knowing and reckless indifference toward, and a disregard of, the rights of others.

Mr. Summerill noted that the court explained the last phrase in *Daniels v. Gamma W. Brachytherapy, LLC,* 2009 UT 66, 221 P.3d 256. Mr Summerill also noted that the punitive damages statute speaks of both "acts or omissions" and that the jury instruction should do so as well.

7. *Next Meeting*. The next meeting will be Tuesday, October 11, 2011, at 4:00 p.m.

The meeting concluded at 6:00 p.m.

MINUTES

Advisory Committee on Model Civil Jury Instructions

November 14, 2011

4:00 p.m.

Present: John L. Young (chair); Honorable William W. Barrett, Jr.; Juli Blanch, Francis J. Carney, Marianna Di Paolo, Phillip S. Ferguson, Tracy H. Fowler, John R. Lund, Timothy M. Shea, Ryan M. Springer, Peter W. Summerill, Honorable Kate A. Toomey,. Also present: Kevin Simon

Excused: Honorable Deno Himonas, L. Rich Humpherys, Gary L. Johnson, Paul M. Simmons, David E. West

Assistance/Membership from Litigation Section.

Mr. Young suggested that if a defense attorney were added to the committee, a plaintiff's lawyer also would need to be added. He does not think the committee needs to expand by two members at this time. He asked for the committee's input, and the consensus was not to expand the committee.

Instructions on ski resort injuries.

Mr. Shea summarized the status of the draft instructions. The committee had tentatively approved the draft, but had asked Mr. Cutt to review it with defense counsel. Mr. Cutt is not able to attend the meeting. Mr. Young confirmed that all of the members had received the email from Mr. Gainer Waldbillig. Mr. Simon said that he concurs with Mr. Waldbillig's opinion.

Mr. Simon said that because the statute was amended after Clover v. Snowbird and White v Deseelhorst, the statute should be given the effect of changing the law of those cases, which was to establish two categories of inherent risks of skiing, risks the skier wants to encounter and those the skier does not want to encounter. Mr. Simon said that the amended statute eliminates that distinction. Mr. Summerill asked whether there is anything in the amendment that is contrary to the earlier caselaw. Mr. Simon said there is nothing express in the statute, but the fact that the amendment came after the cases argues for the result. Mr. Simon said that the amendments added categories to the list of inherent risks.

Mr. Ferguson said that we simply do not know the status of the law of Clover v. Snowbird and White v Deseelhorst after the amended statute.

Mr. Young asked whether a statute can eliminate the ordinary standard of care. Mr. Simons said the statute does not do that. If a risk can be eliminated by exercising reasonable care, then there is a duty to do so.

Mr. Summerill suggested including CV 1112 on the two types of risks, but with a note explaining that the status of the law is uncertain after the amended statute. Mr. Simon

said that including the instruction would imply the committee's conclusion that the distinction remains part of Utah law. Mr. Simon suggested being silent on the topic and let MUJI 1 be used. Mr. Shea said that if the committee is uncertain about whether the distinction in types of risks is part of Utah law, they should nevertheless include an instruction that conforms to the statute because we are trying the move away from MUJI 1. Mr. Shea suggested adopting Instructions 1110 and 1111 and writing a committee note that the distinction in risks might survive the statutory amendment because the two do not conflict.

Mr. Carney suggested that Mr. Cutt, Mr. Simon and Mr. Waldbillig write a committee note for the committee to consider at the next meeting. Mr. Simon agreed.

The committee discussed whether the statute was an affirmative defense on which the defendant has the burden of proof. MUJI 1 is silent on the issue as are the two cases. The committee decided to omit Instruction1113 on the burden of proof. The judge will have to decide and can give a burden of proof instruction.

The committee amended CV 1110 to include snowboarders. The committee approved CV 1110 as amended and CV 1111 as drafted. Publication will be delayed until the committee can consider the proposed note.

Verdict form

Mr. Lund suggested removing the instruction that the jurors not deduct an amount due to plaintiff's negligence. Mr. Shea said that the concept is part of the current verdict form for negligence.

Professor Di Paolo suggested amending the introductory paragraph into a more easily read list. The committee agreed.

Mr. Lund suggested adding to the damages section an item for economic damages to the decedent's heir, namely, for loss of support. Mr. Carney said that the heirs would have to be distinguished because support for a 17-year old would be different from support for a 2-year old, and children will be different from a spouse. Mr. Carney said that the instruction on economic damages may need to be amended to include loss of support.

Mr. Shea will add the category of economic damages for an heir to the verdict form, and the committee will consider it at the next meeting.

Punitive damages

The committee amended CV 2026 to bracket each of the three types of conduct giving rise to punitive damages and add a committee note that the jury be instructed only on the types of conduct for which there is evidence. The committee amended CV 2027 to include the definition of "intentionally fraudulent" rather than merely link to the instruction in the committee note.

Several committee members said that the third type of conduct, “a knowing and reckless indifference toward the rights of others,” is a relatively low standard, and that plaintiffs might claim punitive damages in a regular negligence case. The text of the instruction is taken directly from the statute. The definition of those terms is taken from caselaw. **Ms. Blanch said she will research whether there is another definition for these terms.** The committee approved both instructions, pending Ms. Blanch’s research.

Professor Di Paola said that the word “vicarious” probably would be misinterpreted by jurors. The word is used only on the title, so the committee changed the title of CV 2028 to “Liability for the acts of agents.” Mr. Shea amended the instruction to better distinguish between the acts of the defendant’s agent for which the defendant might be liable, and the defendant’s managerial agent, who is acting on the defendant’s behalf. The committee suggested that the instructions could not be approved without Mr. Humpherys being present. The committee also suggested inviting Mr. Paul Belnap to participate.

The meeting ended at 6:00 p.m.

MINUTES

Advisory Committee on Model Civil Jury Instructions

December 12, 2011

4:00 p.m.

Present: John L. Young (chair); Honorable William W. Barrett, Jr.; Francis J. Carney, Marianna Di Paolo, Phillip S. Ferguson, Tracy H. Fowler, L. Rich Humpherys, Timothy M. Shea, Ryan M. Springer

Excused: Juli Blanch, Honorable Deno Himonas, Gary L. Johnson, John R. Lund, Paul M. Simmons, Peter W. Summerill, Honorable Kate A. Toomey, David E. West

Also present: Paul Belnap, David Cutt, Joseph Joyce; Kevin Simon, Stuart Schultz

Instructions on ski resort injuries.

Several committee members had not received the committee note submitted by Gainer Waldbillig. Mr. Cutt had submitted a memorandum, but not a committee note. Mr. Cutt and Mr. Simon remain divided on whether the legislative amendments to the inherent risk of skiing statutes abrogated the law of Clover v. Snowbird and White v Deseelhorst. Mr. Cutt and Mr. Simon agree that CV 1110 and CV 1111 are adequate. They also agree that, since there is no law on whether the inherent risk of skiing is an affirmative defense, CV 1113 on who has the burden of proof is speculative and should be omitted. Mr. Young said that CV 1112, which restates the law of Clover and White, is all that remains at issue. The committee took no action on CV 1112 at the last meeting.

Mr. Simon said that Rothstein v. Snowbird Corp., 2007 UT 96, supports the conclusion that the inherent risk of skiing statutes have completely regulated ski area liability. Mr. Cutt said that Rothstein was a pre-injury release case and not an inherent risk of skiing case. Mr. Cutt and Mr. Simon reported cases in which the trial court judge had and had not included an instruction based on Clover and White.

The committee will again consider the issue at the next meeting.

Punitive damages

Mr. Humpherys suggesting drafting the phase one instructions so that the phrase “punitive damages” is omitted because some parties and judges do not want to influence the jury until there has been a finding of willful or malicious misconduct. Mr. Humpherys said the jury should be advised why they are being asked whether the defendant’s wrongful conduct was malicious.

Mr. Joyce said that there should be no mention of punitive damages until the predicate for them has been established. Mr. Schultz reported Judge Nehring had presided at a trial in which counsel was not permitted to mention punitive damages. Mr. Humpherys is comfortable removing “punitive damages” from the phase one instructions, but is

concerned that jurors may inappropriately punish defendant in the calculation of compensatory damages. Mr. Belnap said it should be up to the judge whether to permit mentioning punitive damages.

Mr. Shea said that the phase one instructions could be re-drafted to omit any references to punitive damages, but there would be less context for the jury. They would ask, in essence, was the conduct willful and malicious, giving definitions for those terms.

The committee discussed ways to present the instructions, including the titles, without the phrase “punitive damages,” yet permit lawyers and judges to easily find them on the MUJI webpage.

Mr. Humpherys said that jurors should not be instructed on the legal limit to the ratio of punitive damages. If the jury award exceeds the maximum ratio, the judge can correct the amount after trial.

The committee discussed the definitions and how they might be given to the jury. Mr. Humpherys suggested simply quoting the statute. Mr. Humpherys said that part of CV 2030 is wrong.

Mr. Belnap, Mr. Humpherys and Mr. Joyce will form a workgroup to develop the punitive damages instructions. They might also invite Rich Mrazik and Karra Porter to join them. They will try to have instructions drafted for the February meeting.

Verdict form

Mr. Carney explained the three options he had described in his email. The committee favored listing the categories of economic damages on the verdict form. The committee approved the form as amended.

The meeting ended at 6:00 p.m.

MINUTES

Advisory Committee on Model Civil Jury Instructions
January 9, 2012
4:00 p.m.

Present: John L. Young (chair), Juli Blanch, Francis J. Carney, Phillip S. Ferguson, Tracy H. Fowler, Hon. Deno Himonas, Gary L. Johnson, Timothy M. Shea, Paul M. Simmons, Ryan M. Springer, Peter W. Summerill, Hon. Kate A. Toomey

Excused: Marianna Di Paolo, John R. Lund, David E. West

1. *Instructions on Ski Resort Injuries.* Mr. Carney moved that the committee approve Mr. Shea's January 3, 2012 memorandum on the effect of the Inherent Risks of Skiing statute on the holdings in *Clover v. Snowbird,* 808 P.2d 1037 (Utah 1991), and *White v. Deseelhorst,* 879 P.2d 13 (Utah 1994), and Mr. Shea's proposals for CV1111, CV1112, and CV1113A and B. Judge Toomey seconded the motion. The motion passed without opposition. Mr. Shea will revise the committee note to CV1113A and CV1113B to say that, if the dispute in a given case is over whether the plaintiff wanted to confront the risk, the defendant will likely have the burden of proof, since it is in the nature of an affirmative defense (assumption of risk), but if the dispute is over whether the defendant could have eliminated the risk through the use of reasonable care, the plaintiff will likely have the burden of proof because it is more in the nature of an element of his cause of action. If both prongs of the test for an inherent risk of skiing are disputed in a given case, each party may have the burden to prove one of the prongs.

2. *CV2013. Wrongful death claim. Adult. Factors for deciding damages.* Mr. Carney noted that the wrongful death verdict form asked the jury to award economic and non-economic damages, but the wrongful death instruction did not clearly define these categories of damages. CV2013 was revised to make it clear what the jury should consider in awarding economic and non-economic damages in a wrongful death case. Mr. Springer noted that the elements of non-economic damages in the instruction did not include some items mentioned in *Oxendine v. Overturf,* 1999 UT 4, 973 P.2d 417, specifically, "pleasure." Mr. Springer noted that one could argue that *Oxendine* leaves open the possibility of recovering hedonic damages under Utah law. He suggested revising the second to the last paragraph of CV2013 to say, "comfort and pleasure." Mr. Fowler opposed trying to make the list of factors the jury may consider exhaustive, since, he noted, a plaintiff's attorney could use the instruction to argue that the jury must award a different sum for each item listed. Judge Himonas asked whether the list was meant to be exclusive. If not, he suggested it say that non-economic damages include damages "for the loss of such things as . . ." Mr. Simmons noted that *Oxendine* also allowed the jury to consider the loss of "counsel and advice" and suggested that that language be added to the instruction as well. Judge Himonas questioned whether there was any difference between "counsel" and "advice." Some committee members thought there was. The committee revised the second-to-last paragraph to read:

> You may calculate non-economic damages for the loss of such things as love, companionship, society, comfort, pleasure, advice, care, protection and affection which [name of plaintiff] has sustained and will sustain in the future.

The committee approved the instruction with this modification, with Mr. Johnson opposed.

3. *Verdict Forms.* Mr. Shea announced that the personal injury and wrongful death verdict forms (CV299) are available on the website as Word files so that attorneys and courts can adapt them more easily to make them case-specific.

4. *CV2019. Aggravation of dormant pre-existing condition.* In light of the Utah Court of Appeals' discussion of CV2019 in *Harris v. ShopKo Stores, Inc.,* 2011 UT App 329, and its approval in that case of the instruction given in *Ortiz v. Geneva Rock Products, Inc.,* 939 P.2d 1213, 1219 n.5 (Utah Ct. App. 1997), Mr. Shea proposed replacing CV2019 with the following:

> If a latent condition does not cause pain, but that condition plus the injury brings on pain by aggravating the latent condition, then it is the injury, not the latent condition, that causes the pain.

At Judge Himonas's suggestion, "latent" was replaced with "pre-existing." At Mr. Simmons's suggestion, "causes" was replaced with "is a cause of." The committee approved the instruction as modified. Mr. Ferguson noted that the defendant in *Harris* has petitioned for a writ of certiorari. He also noted that the issues in such cases will often be whether or not a condition was asymptomatic and at what point the condition must have been asymptomatic.

5. *Vicarious Liability Instructions.* The committee started its review of the vicarious liability instructions.

a. *CV2801. Corporation acts through its agents.* Judge Himonas suggested replacing "corporation" with "business entity" in the title. Mr. Springer suggested "principal," and Mr. Fowler suggested "organization." The committee chose to go with "organization." At Mr. Summerill's suggestion, "[name of defendant]" in the second line was changed to "[name of party]," consistent with the first line. At the suggestion of Messrs. Ferguson and Shea, "while performing" was deleted from the second line. The committee approved the instruction as modified.

Ms. Blanch joined the meeting.

b. *CV2802. Liability of principal for authorized acts or acts within the scope of authority; and CV2804. Scope of actual authority.* The committee questioned whether both CV2802 and CV2804 were necessary. CV2802 was meant as a general statement of the basis for vicarious liability and was meant to replace MUJI 25.2, whereas CV2804 was meant to define actual authority (both express and implied) and was meant to replace MUJI 25.4. The committee agreed, however, that the distinction was not apparent from the instructions and that they could be combined into one instruction. Mr. Ferguson suggested saying that a principal can be liable for the act of an agent under three circumstances: (1) where the principal authorized the act; (2) where the agent was acting within the scope of his duties, authority, or employment; or (3) where the agent's act was necessary or incidental to carrying out his assigned duties. Mr. Shea suggested adding to CV2802 a definition of "scope of duties or authority," and inserting subparagraphs (1) and (2) from CV2804 as the definition. At Ms. Blanch's suggestion, the committee combined the instructions to read:

> *CV2802. Actual authority.*
> [Name of plaintiff] claims that [name of principal] is liable for [describe act or omission] by [name of officer/employee/agent]. To succeed on this claim, [name of plaintiff] must prove that:
> (1) [name of principal] granted [name of officer/employee/agent] the authority to [describe actual authority]; or
> (2) [name of officer/employee/agent]'s conduct was necessary, usual, proper or incidental to the conduct that [name of principal] actually authorized.

Judge Himonas questioned whether conduct can give rise to vicarious liability if it is "incidental" to the authority but not necessary, usual, and proper. Mr. Simmons thought that it could, that if the agent has discretion as to the manner of carrying out his actual authority, the principal can be liable if the agent chooses a manner that is not "necessary" or "usual" but is nevertheless incidental to his authority and proper. *Zions First National Bank v. Clark Clinic Corp.,* 762 P.2d 1090, 1094 (Utah 1988), defines "implied authority" to include "authority to do those acts which are incidental to, *or* are necessary, usual, and proper to accomplish or perform, the main authority expressly delegated to the agent." (Emphasis added and footnote omitted.) The committee approved the instruction as rewritten.

c. *CV2805. Approval of conduct.* This instruction is meant to cover the concept of ratification. Mr. Shea suggested deleting "expressly or impliedly."

Judge Himonas suggested replacing the phrase with "directly or indirectly." Judge Toomey pointed out that the second paragraph makes it clear that approval can be implied from conduct or even silence, so the committee deleted the phrase "expressly or impliedly" from the first paragraph and approved the instruction as modified.

d. *CV2806. Scope of duties.* Judge Himonas questioned whether the instruction was necessary. He saw a possible conflict between it and CV2802. Mr. Simmons noted that CV2806 was a specific application of the general principles stated in CV2802 applicable to employment cases and should be titled "Scope of employment" rather than "Scope of duties." He thought that both instructions would not be given in the same case but that the more specific instruction would be given in employment cases. At Mr. Young's suggestion, the committee deferred further consideration of CV2806 to allow the vicarious liability subcommittee to revisit the issue.

6. *Present Value Tables.* Mr. Carney asked why the committee did not include a present value table for calculating the present value of future damages, as some jurisdictions do. The table would show the value of $1 at different times (e.g., 1 year from the time of trial up to 20 or 30 years after the time of trial) using different discount rates, obviating the need for expert economic testimony in some cases. Ms. Blanch thought that expert testimony would always be required to establish the discount rate. Messrs. Summerill and Springer thought that the court could take judicial notice of inflation rates from government-published statistics. Judge Himonas thought that a table is a good idea, especially if the parties stipulate to the discount rate, but asked what happens when there is a dispute about what rate the jury should use. He noted that the defense often just attacks the plaintiff's economist, without providing a discount rate of its own. Mr. Carney noted that the instructions tell the jurors that they are not required to accept even expert testimony. Ms. Blanch thought that if the jury is given a table, it may select a discount rate that has no basis in the evidence. For example, the parties' experts may disagree about whether the discount rate is 4% or 6%, and the jury could then apply a 20% discount rate. Mr. Young suggested asking the jury on the verdict form to determine the plaintiff's total economic damages and the applicable discount rate and then letting the court reduce the economic damages to present value. Mr. Carney will provide examples of what other jurisdictions have done for the next meeting.

7. *Next Meeting.* The next meeting will be Monday, February 13, 2012, at 4:00 p.m.

The meeting concluded at 5:50 p.m.

MINUTES

Advisory Committee on Model Civil Jury Instructions

February 13, 2012

4:00 p.m.

Present: Juli Blanch, Frank Carney, Professor Marianna Di Paolo, Phillip S. Ferguson, Tracy H. Fowler, Judge Deno Himonas, Ryan M. Springer, Peter W. Summerill, Judge Kate Toomey, David E. West, Timothy M. Shea

Excused: John L. Young, Chair, Judge William W. Barrett, L. Rich Humpherys, Gary L. Johnson, John R. Lund, Paul M. Simmons,

Mr. Carney chaired the meeting in Mr. Young's absence.

CV 2803. Apparent authority. Mr. West said that the instruction should include a statement that nothing the purported agent says can bind the principal. The plaintiff has a duty to inquire about the agent's authority independent of the agent's representations. Judge Himonas said that the first paragraph is sufficient because it focuses exclusively on the principal's conduct.

Mr. Ferguson said that the references cited includes the requirement that the plaintiff rely on the agent's apparent authority, but that there is nothing in the instruction to that effect. Mr. Shea included "and [name of plaintiff] relied on that authority" at the end of paragraph (3). The committee discussed the draft further but decided to wait until Mr. Lund, who provided the original draft, could attend.

CV2805. Scope of employment. Mr. Carney said that although scope of authority and scope of employment are similar concepts in the law of agency and vicarious liability, the courts have developed more detailed tests for the latter and limited them to traditional employment relationships.

Prof. Di Paola observed that the phrase "scope of employment" is used in several of the subsequent instructions, but that it is used only on the title of this instruction. The committee decided to rework the instruction into a definition of "scope of employment." In the introductory paragraph the last sentence was redrafted: To succeed on this claim, [name of plaintiff] must prove that [name of employee]'s conduct "was within the scope of employment. 'Scope of employment' means that the conduct: …."

The committee discussed the last phrase of paragraph (1) "…in other words, [he] was doing [name of employers]'s work rather than being wholly involved in a personal matter." Prof. Di Paola thought that "completely" would be better understood that "wholly." Mr. Springer said that the case from which the case comes uses "entirely." He suggested that the "in other words" clause, as written in the case, appeared to summarize all three of the requirements for something to be within the scope of employment.

Mr. Shea said that the concept of being wholly involved in a personal matter is contrary to the later instructions, which include several qualifiers. After discussion, the committee deleted the phrase, but decided to wait until Mr. Simmons, who provided the original draft, could attend.

CV 2806. Deviation from scope of employment. The committee approved the instruction as drafted.

CV 2807. Scope of employment; travel to and from work. Several members suggested that the instruction should be presented as an exception to the general rule that the employer is not liable for the employee's conduct while the employee is commuting. Mr. Shea added to the beginning of the introductory paragraph "Usually, traveling to and from work is not within the scope of employment. [Name of plaintiff] claims that…."

The committee added references and a committee note directing lawyers and judges to Ahlstrom v. Salt Lake City Corp., 2003 UT 4, 73 P.3d 315 for examples of the several circumstances that are exceptions to the "coming and going" rule. The committee discussed the rule further, but decided to wait until Mr. Simmons, who provided the original draft, could attend.

The meeting ended at 6:00 p.m.

MINUTES

Advisory Committee on Model Civil Jury Instructions
March 12, 2012
4:00 p.m.

Present: John L. Young (chair), Dianne Abegglen, Honorable William W. Barrett, Jr., Juli Blanch, Francis J. Carney, Marianna Di Paolo, Phillip S. Ferguson, L. Rich Humpherys, Timothy M. Shea, Paul M. Simmons

Excused: Tracy H. Fowler, John R. Lund, Honorable Kate A. Toomey, David E. West

1. *Vicarious Liability Instructions.* The committee continued its review of the vicarious liability instructions:

a. *CV2805. "Scope of employment" defined.* At the last meeting, the committee had tentatively approved CV2805 as revised, subject to the approval of Mr. Simmons (who had drafted the instruction). Mr. Simmons said he approved of the changes, and the committee approved the instruction.

b. *CV2803. Apparent authority.* The committee had deferred further discussion of CV2803 to allow the subcommittee and Mr. Lund (who drafted the instruction) to look more into the issue of whether reliance was an element of apparent authority. The subcommittee (including Mr. Lund) concluded that it was not, although reliance may be relevant to the issue of causation. The committee approved the instruction.

Dr. Di Paolo and Mr. Humpherys joined the meeting.

c. *CV2807. Scope of employment; travel to and from work.* The committee had deferred approval of CV2807 until Mr. Simmons (who drafted the instruction) could be present. Mr. Simmons said that he approved of the committee's changes, and the committee approved the instruction.

d. *CV2808. Scope of employment; dual purpose.* Some committee members questioned how CV2808 fit with CV2807. Mr. Young said that CV2808 was a limitation on CV2807. Mr. Humpherys questioned whether the phrase "over the same route" was necessary. Although the language comes from the case law, the committee thought that it was not a legal requirement, that whether or not someone was acting within the scope of his employment should not depend on whether the employee decided to go, for example, south on Main Street and then east on 400 South or east on South Temple and then south on State Street to arrive at the courthouse. At Dr. Di Paolo's suggestion, "over the same route" was replaced with "to the same destination." The committee approved the instruction as revised.

e. *CV2809. Scope of employment; intentional act.* Dr. Di Paolo questioned whether subsection (2) ("occurred during [his] work hours") was

necessary. The committee thought that it was for intentional torts. Mr. Humpherys questioned whether subsection (3) ("occurred within the boundaries of employment") was appropriate and raised the question of the "boundaries of employment" for a delivery person, someone sent on an errand for the employer, or a salesman, whose territory could include, for example, the entire western United States. Mr. Carney checked the Restatement and Am. Jur. 2d for the legal standard. Based on those authorities, the committee replaced subsections (2) and (3) with a new (2): "occurred substantially within the authorized time and space limits of [his] employment." The committee also rewrote subsection (4) (now subsection (3)) to read: "was at least party motivated to serve [name of employer]'s interest." Mr. Carney thought the last paragraph would provoke controversy. Mr. Shea suggested changing the phrase "served a personal interest" to "served only a personal interest." Dr. Di Paolo suggested deleting the paragraph altogether. The committee revised the last paragraph to read: "However, if [name of employee]'s conduct was unprovoked, highly unusual, and outrageous, then [name of employee]'s conduct was not within the scope of employment." Dr. Di Paolo asked whether all three modifiers ("unprovoked," "highly unusual," and "outrageous") were required. The committee thought that the instruction should follow the case law, which appears to require all three. The committee approved the instruction as revised.

f. *CV2810. Joint venture defined.* Mr. Carney noted that the distinction between a partnership and joint venture is slight. A joint venture is usually created for a single project. Joint ventures were included in the old partnership act, but the new act takes joint ventures out of the definition of partnership. Mr. Carney thought that the liability principles were still the same for both. Mr. Humpherys questioned whether the jury would understand the phrases "community of interest" and "joint proprietary interest." Dr. Di Paulo thought that "performing" was an odd choice of verb in the phrase "performing a common purpose." Judge Barrett suggested substituting "goal" for "purpose." Mr. Young questioned whether subsection (3) was necessary and noted that in construction contracts, a third party usually owns the subject matter (the real property and improvements). Ms. Blanch asked whether there was a distinction between "shared" and "mutual." Some committee members thought that "mutual" implied an equal sharing, whereas "shared" implied that the parties' interest may not be equal. Mr. Simmons thought that "mutual" implied that either joint venturer can exercise the right of control, whereas "shared" implies that it must be exercised jointly. Messrs. Ferguson and Young concurred. The committee was not sure what the law was on mutual or shared control. At the suggestion of Messrs. Shea and Humpherys, the instruction was revised to read:

> A joint venture is a relationship voluntarily agreed to by two or more people in which the parties combine their property, money, skill, labor or knowledge and share--
>
> (1) an interest in a common goal;
> (2) an ownership interest in [describe the subject matter];
> (3) a right to control;
> (4) the profits; and
> (5) any losses, unless there is an agreement to the contrary.

The committee approved the instruction as modified.

Ms. Blanch was excused.

g. *CV2811. Liability of [partnership/joint venture] for acts of [partner/joint venture].* Mr. Humpherys asked whether "authority" in subsection (2) needed to be modified. He suggested putting "express or implied" in front of it. At Mr. Ferguson's suggestion, the committee revised subsection (2) to read, "[name of partner/joint venturer] acted under the [actual/apparent] authority of the [partnership/joint venture]," since "actual" encompasses both express and implied authority. Those present approved the instruction as revised, subject to one more vote for approval.

h. *Old CV2812. Liability of partnership for misapplication of property or money.* Mr. Shea noted that the subcommittee had deleted old CV2812 because it could not envision a case where it would be needed. Those present approved of the deletion.

i. *New CV2812. Liability of parents or legal guardians for property damage caused by a minor.* The committee questioned the need to list specific modes of transportation in subparagraph (2). Mr. Carney noted that the cause of action was statutory, and the instruction tracks the statute. The statute specifically names "railway car[s]" and "caboose[s]," for example, but not motorcycles. Therefore, the committee did not think that it could simply say "vehicle." Mr. Ferguson suggested adding a committee note to highlight the problem. Mr. Simmons suggested also noting in the committee note that the parents' liability is limited to $2,000. He did not think, however, that the statutory limit needed to be included in the instruction; it would be up to the court to apply the limit if the jury awarded more than $2,000. The committee approved the instruction, subject to obtaining one more vote for approval.

j. *CV2814. Liability of one signing minor's application for a learner permit or provisional license.* Mr. Young suggested making this instruction CV2812B and the preceding instruction CV2812A. He also questioned whether the instruction should include the statutory amounts for liability insurance. He thought that was a legal question for the court to determine. The committee questioned whether the instruction was needed at all. Mr. Carney reported that he had asked the plaintiffs' bar if anyone had used the prior instruction (MUJI 25.21). No one reported having used it at trial, although some people said that they had relied on it for settlement demands. Mr. Ferguson thought that whether the defendant signed a minor's application may be a fact question for the jury to decide, but the committee agreed that the instruction was not necessary.

k. *CV2813. Liability of an owner who gives a minor permission to drive his vehicle.* The committee agreed that this instruction presents a question for the jury (namely, whether the defendant "knowingly permitted" or "furnished" a vehicle for a minor's use. Mr. Humpherys asked what the difference was between subsections (1) and (2). Under subsection (2), the defendant does not have to be the owner of the vehicle. Mr. Carney suggested adding "or" between the two subsections. Dr. Di Paolo noted that a second distinction is that, under (2), the vehicle need not be driving on a "highway" and questioned whether the instruction should define "highway." Mr. Humpherys asked whether the statute would apply if, as a result of the minor's operation of a vehicle on a highway, an injury occurred off the highway. The committee thought that the statute would still apply, as long as the negligence related to driving the vehicle on the highway. At Mr. Ferguson's suggestion, the title was changed from "Liability of an owner . . ." to "Liability of a person . . . ," since, under subsection (2), the person need not be the owner. The committee deferred further discussion of the vicarious liability instructions.

2. *CV1005. Industry standard.* Mr. Simmons had asked that the committee revisit CV1005, which, he said, was not supported by either Utah law or the authorities cited for it. The committee asked him to bring the matter to the attention of Mr. Fowler, the chair of the products liability subcommittee, so that the subcommittee can consider the issue first.

3. *Insurance Instructions.* Mr. Humpherys noted that the Utah Supreme Court recently heard oral argument on the question of when the "fairly debatable" defense in insurance bad faith actions presents a jury question. The committee will begin consideration of the insurance instructions at the May 2012 meeting.

4. *Next Meeting.* The next meeting will be Monday, April 9, 2012, at 4:00 p.m.

The meeting concluded at 6:00 p.m.

MINUTES

Advisory Committee on Model Civil Jury Instructions
May 14, 2012
4:00 p.m.

Present: John L. Young (chair), Dianne Abegglen, Juli Blanch, Honorable William W. Barrett, Jr., Francis J. Carney, Phillip S. Ferguson, Tracy H. Fowler, Gary L. Johnson, John R. Lund, Timothy M. Shea, Paul M. Simmons, Ryan M. Springer, Peter W. Summerill, Honorable Kate A. Toomey, David E. West

Vicarious Liability Instructions. The committee continued its review of the vicarious liability instructions:

1. *CV2810. Joint venture defined.* Mr. Ferguson pointed out that the numbered subparagraphs start with (2). Mr. Shea will fix them so that they start with (1).

2. *CV2811. Liability of [partnership/joint venture] for acts of [partner/joint venturer].* The committee approved the instruction.

3. *CV2812. Liability of parents or legal guardians for property damage caused by a minor.* Mr. West noted that the two numbered subparagraphs at the end of the instruction need to be separated by "and" or "or." Since either condition is sufficient, Mr. Shea added "or" to the end of subparagraph (1). Mr. West also thought that subparagraph (1) was vague and did not give the jury much guidance; he questioned whether it was an accurate statement of the law. The committee reviewed the statutory language. It debated adding the language from section 78A-6-1113(5) until someone pointed out that subsection (5) says that "A court may waive part or all of the liability for damages" if certain conditions are met. The committee thought that this language meant that the question of whether the conditions were met was for the court, not the jury, to decide. On Mr. Lund's motion (Judge Toomey 2d), the committee approved the instruction as proposed, with the addition of the word "or" at the end of subparagraph (1).

4. *CV2813. Liability of a person who gives a minor permission to drive his vehicle.* On Mr. Ferguson's motion (Judge Toomey 2d), the committee approved CV2813.

5. *CV2814. Independent contractor defined.* Mr. Johnson noted that the Vicarious Liability Subcommittee had not had a chance to review the instructions dealing with vicarious liability for the acts of an independent contractor. Since the intent of CV2814 is to help the jury decide whether a given actor was an independent contractor or an employee, Mr. Shea suggested giving two instructions--one defining "employee," and one defining "independent contractor"–along with an instruction telling the jury that the defendant can be vicariously liable if the actor was an employee but not if he or she was an independent contractor, unless certain exceptions to the

general rule apply. Mr. Johnson noted that there is not an instruction defining "employee," just instructions defining scope of employment (CV2805-09). Mr. Ferguson suggested using the following language from *Utah Home Fire Insurance Company v. Manning,* 1999 UT 77, ¶ 11, 985 P.2d 243:

> [A]n employee is one who is hired and paid a salary, a wage, or at a fixed rate, to perform the employer's work as directed by the employer and who is subject to a comparatively high degree of control in performing those duties. In contrast, an independent contractor is one who is engaged to do some particular project or piece of work, usually for a set total sum, who may do the job in his [or her] own way, subject to only minimal restriction or controls and is responsible only for its satisfactory completion.

Judge Toomey suggested that the two definitions be separate instructions. Mr. West thought that CV2814 was too vague. It lists some factors for the jury to consider but does not tell jurors how to weigh them, that they are not exclusive, or that no one factor is dispositive. He suggested prefacing the list with "Among the factors you may consider are the following:" Mr. Summerill noted that the factors were taken from workers' compensation cases, not from tort cases. He agreed with Mr. West that the jury should be told that no one factor is dispositive. Mr. Springer offered as authority for that position *Gourdin ex rel. Close v. Sharon's Cultural Education Recreational Association (SCERA),* 845 P.2d 242 (Utah 1992). Mr. Shea added the sentence, "You may consider the following factors, no one of which is controlling, and weigh them as you think appropriate." Mr. Young suggested bracketing the factors, so that the court would only give those for which there is evidence. Mr. Lund and Ms. Blanch questioned the sentence "An independent contractor is responsible only for the job's satisfactory completion," and noted that a jury could think from this sentence that the only way an independent contractor could be liable is for the unsatisfactory completion of the work. Ms. Blanch suggested deleting the word "only," and Judge Toomey suggested deleting the sentence altogether.

Mr. Johnson will rewrite CV2814 in light of the committee's discussion.

6. *CV2815. Liability of employer for acts of independent contractor.* Mr. Young questioned the use of the phrase "employer of an independent contractor." He noted that a jury may infer from the phrase that an independent contractor was an "employee." The committee deleted "of employer" from the title of the instruction and replaced references to the "employer" of an independent contractor with "[name of defendant]." It also replaced references to "independent contractor" or "contractor" with "[name of contractor]." Ms. Blanch suggested deleting "or participated in" from the third line. She thought that it would allow the jury to find an employer liable merely for

having provided some tools, for example. Mr. Ferguson suggested that whether the level of participation rose to the level of control, making the employer liable, was a question for the jury. Mr. Summerill thought that whether an employer's participation could make him liable depends on whether the employer participated in the injury causing act. Ms. Blanch thought that that would not be vicarious liability but that the employer would then be liable for its own negligence. Mr. Summerill noted that the "participation" standard comes from *Begaye v. Big D Construction Corp.,* 2008 UT 4, 178 P.3d 343, which in turn relied on *Thompson v. Jess,* 1999 UT 22, 979 P.2d 322, and thought it should not be abandoned. At the suggestion of Messrs. Lund and Johnson, the committee added "actively" before "participated in." Mr. Summerill noted that the last sentence of the first paragraph is stated in the negative and thought the committee had agreed to stay away from instructions of the type that "X is not enough." At Mr. Shea's suggestion, the sentence "The employer must exert sufficient control over the independent contractor such that the contractor could not carry out the injury-causing aspect of the work in his or her own way" was moved to the second sentence of the first paragraph, and the last sentence of the instruction was deleted as tautological. Mr. Lund thought that the instruction should tell the jury that it needs to find a causal relation between what the defendant/employer did and what the contractor did. Mr. Young suggested separating the concepts of active participation and control. Ms. Blanch thought that the two concepts are equivalent and should not be separated. At Mr. Johnson's suggestion, the committee agreed to revisit the instruction at the next meeting, after reviewing Mr. Shea's latest draft.

7. *CV2816. Liability of employer for physical harm caused by independent contractor when non-delegable duty is present.* Mr. Johnson noted that he was not sure how CV2816 differs from MUJI 1st 25.11. Mr Shea wondered what the jury was supposed to do with the instruction, since the court will have already determined whether or not a duty exists, and the only question for the jury is to determine whether any duty was breached. Mr. Ferguson agreed that the instruction does not say what the jury is supposed to decide. Mr. Lund thought the instruction was explanatory, that it explained to the jury why there was an exception in the particular case to the general rule that the employer of an independent contractor is not liable for the fault of the contractor, much like other instructions explain to the jury the effect of its finding of comparative fault. Mr. Summerill noted that Judge Hadfield had given an instruction on non-delegable duty in a trial Mr. Summerill had. He will try to find the instruction and give it to Mr. Johnson to consider in revising CV2816. The committee deferred further discussion of the instruction.

8. *CV2817. Liability of employer for physical harm caused by independent contractor if work is inherently dangerous.* Mr. Johnson noted that the authority for the instruction is *Thompson v. Jess.* Ms. Blanch thought that the instruction could be improved by giving an example, such as the use of explosives. Mr. Lund thought the

instruction could give more guidance on what is considered "a special danger." Mr. Ferguson thought the instruction, like CV2816, did not clearly say what the jury was supposed to decide. He and Mr. Carney asked whether the existence of a special or inherent danger was a question for the court or the jury. Mr. Young suggested adding an introductory instruction explaining the claims of the parties, for example: "[Name of defendant 1] claims that [name of defendant 2] was an independent contractor and that [name of defendant 1] is therefore not liable for [name of defendant 2]'s fault. [Name of plaintiff] claims that [name of defendant 1] can be liable for [name of defendant 2]'s fault because [describe the reason, e.g., retained control, non-delegable duty, inherently dangerous work]." Mr. Lund thought that whether the retained control doctrine applies is probably a question of fact, whether a case involves a nondelegable duty is probably a question of law, and whether a case involves inherently dangerous work is probably somewhere in between. Mr. Young suggested further research on the issue of whether an activity is "inherently dangerous" is a question of law or fact. If there is no clear answer under Utah law, he suggested providing alternative instructions (instruction A if the court decides it is a question of law, in which case the court would instruct the jury, "I have determined that [describe the activity] was inherently dangerous," or instruction B if the court decides it is a question of fact).

9. *CV2818. Vicarious punitive damages liability.* Mr. Ferguson questioned whether this instruction should go with the vicarious liability instructions or whether it should go with the punitive damage instructions. The committee thought it should probably go with the vicarious liability instructions. In the interest of time, the committee deferred further discussion of the instruction and of CV1005 for a later meeting.

Next Meeting. The next meeting is Monday, June 11, 2012, at 4:00 p.m. The committee will then take July and August off.

The meeting concluded at 5:55 p.m.

MINUTES

Advisory Committee on Model Civil Jury Instructions
June 11, 2012
4:00 p.m.

Present: Diane Abegglen, Juli Blanch, Francis J. Carney, Marianna Di Paolo, Phillip S. Ferguson, Timothy M. Shea, Paul M. Simmons, Peter W. Summerill, Honorable Kate A. Toomey, David E. West

Excused: John L. Young, Tracy H. Fowler, Ryan M. Springer

Messrs. Carney and Shea directed the meeting in Mr. Young's absence.

1. *Committee Membership.* Mr. Shea noted that Judge Himonas has resigned from the committee because of his other commitments. Mr. Carney suggested that Judge Ryan Harris be invited to take his place. Judge Toomey moved to adopt the recommendation without a quorum. The motion passed without opposition. Judge Toomey and Mr. Carney will invite Judge Harris to join the committee. Judge Toomey also suggested inviting Judge Todd Shaughnessy. Other suggestions for committee members from the bench were Judge Keith Kelly and Judge Andrew Stone. Judge Shaughnessy is already on the Rules advisory committee (as is Judge Toomey), and Judge Kelly is on the Evidence advisory committee. Judge Toomey and Ms. Blanch volunteered to invite Judge Stone to join the committee. Judge Toomey asked committee members to come to the next meeting prepared to propose names of attorneys who could be added to the committee, particularly those with expertise in the remaining substantive areas to be covered by the instructions.

2. *Minutes.* Mr. Carney moved to adopt the minutes of the May 14, 2012 meeting. Judge Toomey seconded the motion. The minutes were approved.

3. *Vicarious Liability Instructions.* The committee continued its review of the vicarious liability instructions:

a. *CV2814. Independent contractor defined.* Judge Toomey thought the instruction was a correct statement of the law. Mr. West thought that the instruction did not adequately tell the jury what an independent contractor is. Dr. Di Paolo and Mr. Humpherys agreed. They thought the "right of control" was not adequately explained, that a jury could think that if the employer had the right to hire or fire the actor, then he had the right to control the actor's work, and the actor was therefore an employee. Judge Toomey suggested dropping "and control" from the second paragraph and deleting subparagraph (2). Mr. Humpherys noted that an employee has to fill out a form W-4, and the employer is required to withhold taxes for the employee. Mr. West suggested adding language similar to MUJI 1st 25.9, that the most important factor is whether the employer retained the right to control the manner and means of doing the work. Judge Toomey noted that the second paragraph covered that concept. Dr. Di Paolo suggested changing the order of the sentences in the second paragraph.

Mr. Humpherys noted that the term "agent" was not used after the first sentence. Messrs. Carney and Summerill suggested dropping "agent" and explaining the change in a committee note. Mr. Shea asked whether the instruction needed to juxtapose "employee" with "independent contractor," that is, whether it should just define an independent contractor and not confuse the question by trying to distinguish an "employee." Dr. Di Paolo thought the distinction was useful. After further discussion, the committee revised CV2814 to read:

> [Name of defendant] claims that [name of actor] was an independent contractor.
>
> An independent contractor is one who has the right to control the manner and means of accomplishing the work, in his or her own way, subject only to minimal direction, and is responsible only for completing the job satisfactorily.
>
> To decide whether [name of actor] was an independent contractor, you must decide whether [name of defendant] had the right to control the manner and means of accomplishing the work. If you decide that [name of defendant] did, then [name of actor] is not an independent contractor. If you decide that [name of defendant] did not, then [name of actor] is an independent contractor.
>
> You may consider the following factors and weigh them as you think proper:
>
> (1) agreements between the parties about who had the right of direction or control;
> (2) the right to hire and fire;
> (3) the method of payment; and
> (4) who furnished the equipment.

On Judge Toomey's motion (Mr. Summerill 2d), the committee approved the instruction as revised.

b. *CV2815. Liability for independent contractor.* On Judge Toomey's motion (Mr. Summerill 2d), the committee approved CV2815.

c. *CV2815A. Principal controls manner and means of work.* CV2815A is meant to state the law governing the retained control doctrine. At Mr. Carney's suggestion, the title was changed to "Principal retains control over the injury causing aspect of the work." Judge Toomey suggested, "actively

participated in the injury-causing aspect of the work." Mr. Carney noted that in the case of *Gonzalez v. Russell Sorensen Construction,* 2012 UT App 154, the court held that a general contractor who asserted control over the property could be liable under the retained control doctrine. Mr. Shea suggested breaking the instruction up into two parts: (1) actively participated, or (2) exerted control. Judge Toomey asked whether "actively participated" was a form of vicarious liability, or whether it was properly considered liability for one's own negligence. Mr. Carney noted that if "active participation" is removed from the instruction, then the reason needs to be explained in a committee note. Mr. Summerill agreed. Mr. Humpherys suggested adding a note that says that active participation can be the basis for either direct or vicarious liability. Dr. Di Paolo suggested substituting "the part of the work that caused the injury" for "the injury-causing aspect of the work." The committee revised CV2815A to read:

> . . . [name of defendant] is liable for physical harm caused by [name of actor]'s negligence if [name of defendant] exerted so much control over the manner and means of the part of the work that caused the injury that [name of actor] could not carry out that work in [his] own way.

On Judge Toomey's motion (Mr. Summerill 2d), the committee approved the revised instruction.

d. *CV2815B. Principal prohibited from delegating duty.* CV2815B is meant to state the law governing nondelegable duties. Mr. Summerill thought the title was wrong, that it should be "Principal liable for nondelegable duty" or "Employer of an independent contractor is not relieved of liability for delegation of a duty negligently performed." He noted that he had a nondelegable duty instruction in a recent trial, but he could not find it. He suggested striking *Yazd v. Woodside Home Corp.* from the references and adding *Bowen v. Riverton City,* 656 P.2d 454 (Utah 1982); *Price v. Smith's Food & Drug Centers,* 2011 UT App 66, 252 P.3d 365; and *Johnson v. DOT,* 2004 UT App 284, 98 P.3d 773, as references. Mr. Summerill further noted that the doctrine does not prohibit delegation of a duty; it just adds a potentially liable party (the principal). In other words, the principal may remain liable despite having delegated the duty. Mr. Ferguson asked what the jury was supposed to decide, since the question of duty is for the court to decide. In other words, is an instruction even necessary? Messrs. Carney and Humpherys and Judge Toomey did not think so. They thought the instruction was just informational. With that in mind, the committee revised the instruction to read:

> . . . [name of defendant] is liable for physical harm caused by [name of actor's] negligence because I have determined that a [law or contract] imposes liability even though [name of defendant] delegated the duty to perform the part of the work that caused the injury.

At Mr. Ferguson's suggestion, the committee decided to hold the instruction for Mr. Johnson's review.

e. *CV2815C. Inherently dangerous work.* Mr. Carney asked whether it is ever a jury decision to decide whether particular work is "inherently dangerous." Mr. Ferguson thought it almost always is. Dr. Di Paolo asked whether the actor has to be told that the work is inherently dangerous. The committee thought not, but the employer must know or have reason to know of the special danger. Mr. Humpherys asked what the issue was for the jury to decide and whether the instruction needs to define "special danger." Mr. Shea suggested adding, "You must decide whether the work involved a special danger and whether the defendant knew or had reason to know that the special danger was inherent in or normal to the work." Mr. West noted that the committee needs to know whether the special danger doctrine (also called the peculiar risk doctrine) presents a jury question or not. If not, Mr. Shea suggested revising the instruction similar to CV2815B, to read:

> . . . [name of defendant] is liable for [name of actor's] negligence because I have determined that the work involved a special danger that [name of defendant] knew or had reason to know was inherent in or normal to the work.

Mr. Shea suggested having the subcommittee answer the question of whether the doctrine presents a question for the jury. Mr. Carney suggested comparing CV2815C with CACI 3708.

4. *Next Meeting.* There will be no committee meeting in July or August 2012. The next meeting will be Monday, September 10, 2012, at 4:00 p.m. Mr. Humpherys noted that the punitive damage subcommittee is waiting for the Utah Supreme Court to decide a recent punitive damage case before it finishes its work.

The meeting concluded at 6:00 p.m.

MINUTES

Advisory Committee on Model Civil Jury Instructions
September 10, 2012
4:00 p.m.

Present: John L. Young (chair), Diane Abegglen, Francis J. Carney, Marianna Di Paolo, Phillip S. Ferguson, Honorable Ryan Harris, John R. Lund, Timothy M. Shea, Paul M. Simmons, Peter W. Summerill, David E. West

Excused: Tracy H. Fowler

Mr. Young welcomed Judge Harris to the committee and noted that Judge Andrew Stone has also been added to the committee.

1. *Vicarious Liability Instructions.* The committee continued its review of the vicarious liability instructions:

a. *CV2814. Independent contractor defined.* Mr. Shea noted that the subcommittee added a new subparagraph: "(4) who was actually directing the work." On Mr. Lund's motion (Messrs. Carney and Summerill 2d), the committee approved the instruction as amended.

b. *CV2815. Liability for independent contractor.* Mr. Shea noted that the approach taken in CV2815 follows that taken in the trespass instructions: the court should give CV2815 followed by CV2815A, B, and/or C, as the claims and evidence require.

c. *CV2815B. Principal may remain liable despite delegating duty.* The committee approved CV2815B.

d. *CV2815C. Inherently dangerous work.* Mr. West questioned the definition of "special danger" in the last paragraph. He noted that it could apply to just about any activity. It was taken from CACI 3708. Mr. Lund suggested leaving the term undefined, since there is no Utah case defining the term. He and other committee members thought that the instructions should state what Utah law is rather than advocating or suggesting what the law should be. At Mr. Young's suggestion, the third paragraph of CV2815C was removed. Mr. Carney questioned whether any instruction should be given. He thought that it did not fit cleanly into negligence law.

Dr. Di Paolo joined the meeting.

Mr. Lund suggested leaving the instruction in, since *Thompson v. Jess,* 1999 UT 22, 979 P.2d 322, at least implies that Utah recognizes the doctrine, and clarify in the committee note the holding of *Thompson*. Mr. Shea revised the committee note to say: "The committee has no guidance on the definition of a special danger from the Utah Supreme Court, although the Supreme Court has recognized the

> principle. This provision has no application when the injured person is an employee of the independent contractor undertaking the allegedly dangerous work [citing *Thompson v. Jess].*" The committee approved the instruction as modified.

2. *CV1005. Industry standard.* The committee deferred discussion of CV1005 until Mr. Fowler could be present.

3. *CV2016. Survival claim.* Mr. Shea noted that the Utah survival statute, Utah Code Ann. § 78B-3-107, was amended in 2009 to provide that, if an injured person dies from an unrelated cause before judgment or settlement, his or her personal representatives or heirs may still recover special damages and general damages "not to exceed $100,000, which resulted from the injury caused by the wrongdoer and which occurred prior to death of the injured party from the unrelated cause," unless the death occurred more than six months after the incident and the claimant did not give written notice of intent to hold the wrongdoer responsible or the claim was not the subject of ongoing negotiations. Before the amendment, the plaintiff in such a case could not recover general (noneconomic) damages, and CV2016 so provides. The committee discussed whether the jury should be instructed on the $100,000 limit or on the notice provisions of the statute and concluded that those were matters for the court to consider and apply and did not present jury questions in the typical case. Mr. Simmons asked whether the jury needed to be instructed to find whether or not the death was related to the wrongdoing giving rise to the action. Judge Harris thought the question for the jury was whether the death was caused by the defendant's fault. Messrs. Lund and Ferguson thought that that question was adequately presented in the wrongful death instructions and that CV2016 did not serve any purpose. Mr. Lund moved to delete CV2016 and keep CV2015. Dr. Di Paolo suggested revising CV2015 to cover cases where the death was caused by the tortious conduct and where it was unrelated. The committee considered various proposals and finally settled on the following language for CV2015:

> If you decide that [name of defendant]'s fault was a cause of [name of decedent]'s harm, you must award economic and noneconomic damages for the period of time that [name of decedent] lived after the injuries, regardless of whether the death was caused by [name of defendant]'s fault.

Mr. Carney questioned whether the verb should be "must," "should," or "may." Mr. Lund suggested that the instruction use the same verb as other damages instructions. Dr. Di Paolo thought that if the jury has to award damages if it finds causation, then "must" is the proper verb. On Mr. Lund's motion (Mr. Simmons 2d), the committee approved the revised instruction.

4. *Liquidated Damages*. Mr. Ferguson noted that the Utah Supreme Court had recently issued an opinion addressing liquidated damages (*Commercial Real Estate Investment, L.C. v. Comcast of Utah II, Inc.,* 2012 UT 49). He noted that the instructions do not include a liquidated damages instruction and questioned whether one should be added. Mr. West thought it should go in the Commercial Contracts section. Mr. Ferguson thought that the case did not change the law of substantive unconscionability or mitigation of damages. Judge Harris noted that the holding of the case is that liquidated damages are not subject to heightened scrutiny. Mr. Lund asked what the jury would have to decide in a liquidated damage case. Mr. Ferguson thought that the questions for the jury would be whether a liquidated damage provision was unenforceable for one of the typical contract defenses, such as mistake, procedural or substantive unconscionability, or fraud. Mr. Lund questioned whether these were fact questions for the jury or legal questions for the court. Mr. Ferguson thought that in some cases, such as where there was a question of the parties' intent, they could present fact questions. At Mr. Young's suggestion, the committee decided to have the contract subcommittee, headed by Bruce Badger, look at the issue and recommend a jury instruction if they think one is appropriate.

5. *Next Meeting*. The next meeting will be Tuesday, October 9, 2012, at 4:00 p.m.

The meeting concluded at 5:40 p.m.

MINUTES
Advisory Committee on Model Civil Jury Instructions
October 9, 2012
4:00 p.m.

Present: John L. Young (chair), Diane Abegglen, Marianna Di Paolo, Phillip S. Ferguson, Honorable Ryan M. Harris, Gary L. Johnson, Timothy M. Shea, Paul M. Simmons, Honorable Andrew H. Stone. Also present: Craig R. Mariger, chair of the Design Professional subcommittee (by phone) and Craig C. Coburn, of the Design Professional subcommittee

Excused: Francis J. Carney, Ryan M. Springer, Peter W. Summerill, David E. West

1. *New Member:* Mr. Young introduced Judge Stone as the newest member of the committee. He also welcomed Messrs. Mariger and Coburn to the meeting.

2. *Professional Liability: Design Professionals*. The committee discussed the draft instructions for cases against design professionals.

a. *CV501. Standard of care for design professionals*. Mr. Coburn thought that the edits to the first paragraph by the gang of three were acceptable. The committee discussed whether the Uniform Building Code establishes the standard of care and concluded that it did not necessarily. Mr. Young observed that the building code is a moving target in Utah, since it can be amended by counties and cities. Mr. Mariger noted that the clearest case of design professional negligence involves a code violation and that most cases involve experts arguing over what the code requires. But the committee agreed not to make a code violation a requirement for breach of the standard of care.

Mr. Young asked whether the instruction should say "A licensed [design professional] . . . ," since design professionals must be licensed in Utah. Mr. Mariger noted that home designers do not have to be licensed for certain activities.

At least one member of the subcommittee thought that the locality requirement was meant to make plaintiffs hire local experts, but Mr. Mariger noted that some standards for some design services, such as geotechnical engineering services, may vary greatly from, say, Texas to Utah. He further noted that the instruction says that if there is evidence that the standard varies with the locality, then the jury should apply the standard for the locality at issue. Mr. Young asked whether it was for the judge or the jury to decide whether the standard varied with the locality. Mr. Mariger thought it was for the jury, based on the expert testimony the judge allows into evidence. Mr. Simmons questioned whether the sentence "The standard of care may change over time and may be different in different localities" was necessary. Dr. Di Paolo thought it was helpful. At Mr. Ferguson's suggestion, the committee decided to leave in the sentences about the locality rule but to bracket them, since it is not an issue in every case. Mr. Shea will add a note to the committee note about the reason for

the brackets. Mr. Shea suggested changing "localities" to "places." Dr. Di Paolo thought that "localities" implies a political unit. Mr. Mariger thought the standard varied by geography or region and not by the particular local governmental unit. He suggested using "geographic location" if the committee thought "localities" was not clear enough. Dr. Di Paolo did not think juries would misunderstand the term. At Mr. Shea's suggestion, the committee deleted "at issue in this matter" from the last sentence of the first paragraph and changed "community" to "locality."

Mr. Simmons thought the second paragraph was similar to the "mere fact of an accident" instructions that the Utah Supreme Court has held to be improper. Mr. Coburn noted that the language was taken from *SME Industries, Inc. v. Thompson, Ventulett, Stainback & Associates, Inc.,* 2001 UT 54, 28 P.3d 669. Mr. Simmons said that his objection was not that the instruction did not accurately state the law but that the court has said that juries should be instructed on what the law requires, not on what it does not require. Mr. Mariger said he would defer to the committee, but he thought lay people think that professionals have to be perfect. Mr. Coburn noted that *SME* says that the law does not require a "perfect plan or outcome" and that a design professional does not warrant results. The committee noted that similar instructions have not been included in the negligence or medical malpractice instructions. Judge Harris thought the design professional context was different and was inclined to leave the paragraph in. Messrs. Young and Ferguson agreed, noting that in medical malpractice there are not plans, blueprints, and change orders that can solve or create problems. The committee voted to include the language, with Judge Stone and Mr. Simmons opposing the motion. Mr. Ferguson questioned the use of "inherent" and suggested, "There is always the possibility of error in the professional services of [the design profession] . . . ." Mr. Young thought "always" goes further than "inherent." Mr. Mariger said that the case law says "inescapable possibility of error." The committee agreed that this language was worse. Judge Stone thought the language could be read as giving the design professional a pass. He noted that a single error in 1000 pages of plans can violate the standard of care, depending on the error. Messrs. Mariger and Coburn agreed. The committee debated whether to say "the law does not require . . ." or "the standard of care does not require . . . ." Dr. Di Paolo favored "the law"; Judge Harris and Mr. Shea favored "the standard of care," since that is the subject of the instruction and the term being defined. Mr. Shea suggested adding to the end of the first paragraph, "The standard of care does not require a perfect plan or satisfactory result," and deleting the rest of the second paragraph. Judge Harris suggested adding the word "necessarily" ("The standard of care does not necessarily require . . ."). Messrs. Mariger and Coburn disagreed. They thought the addition of "necessarily" was not supported by case law and that a satisfactory result was a matter of contract, not part of the standard of care. Dr. Di Paolo

suggested: "The law does not require perfect plans or a satisfactory result but rather requires compliance with the standard of care." Judges Harris and Stone and Mr. Simmons thought this language was acceptable.

At Mr. Shea's suggestion, the committee replaced "injury" with "harm" and "the cause" with "a cause" throughout the instruction and agreed to remove the quotations from the References section, just citing the cases.

Dr. Di Paolo asked whether the third paragraph of the instruction was redundant. Messrs. Mariger and Coburn thought it was necessary to show that the plaintiff has the burden of proving the standard of care. Judge Stone asked why the plaintiff's specific theories were listed. Mr. Shea and Judge Harris noted that the same format is used in the medical malpractice and negligence instructions. Mr. Shea questioned whether the sentence "[Name of defendant] is an [specify type of design professional]" was necessary. Judge Harris and Mr. Young thought so, especially if the instruction is read at the beginning of trial.

The committee approved the instruction as modified.

b. *CV502. More than one recognized practice.* Mr. Young asked whether there was a Utah case that supported the instruction. Judge Harris thought that it contradicted CV501. Mr. Coburn noted that the intent was to say that professionals can disagree about a practice without it necessarily violating the standard of care. Dr. Di Paolo thought the instruction was confusing. She was troubled by the phrase, "if the practice . . . turns out to be the wrong choice . . . ." Judge Stone thought the instruction implied that one can violate the standard of care as long as he or she used his or her best judgment, even if that judgment was poor. Mr. Johnson moved to delete the instruction; Judge Harris 2d. The committee voted to eliminate the instruction.

c. *CV503. Standard of care of a specialist.* Mr. Young asked whether there are specialists among design professionals and whether the instruction is supported by Utah law. Mr. Mariger thought it was similar to medical malpractice, where there are board-certified specialists. He thought that if design professionals hold themselves out as specialists, they should be held to a higher standard of care. He gave as an example a geotechnical engineer who says he is an expert in shoring and bracing design. Merely being a geotechnical engineer is not enough to impose a higher standard of care on the defendant, but when the defendant holds himself or herself out as a specialist within his or her field, then he or she should be held to a higher standard of care. But Mr. Mariger recognized that there could be a problem with insurers denying coverage because the professional is agreeing to a standard of care that is greater than the contract requires. Mr. Ferguson thought the instruction should be included unless there was contrary case law. Mr. Johnson 2d. Judge Harris asked if other states have adopted such an instruction. Judge Stone thought it followed from the medical

malpractice cases but expressed concern that it could encourage ultrafine distinctions among experts. Mr. Coburn suggested a distinction between claimed specialties and recognized specialties. Mr. Mariger thought the better analogy was to attorneys, who are generally not board certified but hold themselves out as specialists in various fields. He thought that it was the act of holding oneself out as a specialist that created the higher standard of care. At Judge Stone's suggestion, the committee agreed to delete the last paragraph of the instruction, leaving it to the trial judge to qualify an expert on the standard of care. Whether an expert's testimony is admissible will be decided in a rule 702 hearing. Mr. Young suggested that the subcommittee try to find additional authority for the instruction, but the instruction was otherwise approved as modified.

3. *Next Meeting*. The next meeting will be Tuesday, November 12, at 4:00 p.m.

The meeting concluded at 6:00 p.m.

MINUTES
Advisory Committee on Model Civil Jury Instructions
November 13, 2012
4:00 p.m.

Present: John L. Young (chair), Diane Abegglen, Francis J. Carney, Marianna Di Paolo, Honorable Ryan M. Harris, Gary L. Johnson, Timothy M. Shea, Paul M. Simmons, Ryan M. Springer, Honorable Andrew H. Stone. Also present: Craig R. Mariger, Chair of the Design Professional subcommittee

The committee continued its review of the Professional Liability: Design Professionals instructions:

1. *CV504A. Evidence of standard of care where expert is required.* Mr. Mariger noted that there were no substantive changes from the MUJI 1st instruction. He also noted that a Utah Court of Appeals case held that an expert is not needed in a landscape design case. Judge Stone suggested replacing "must" with "may." Mr. Johnson thought "must" was appropriate because the jury has to choose between the opinions of competing experts. Mr. Simmons questioned whether the jury has to choose between the opinion of one expert and that of another or whether they can pick and choose which parts of the various expert opinions to apply. Judge Stone saw no problem with telling the jury what factors to consider but thought the instruction should not dictate how the jury considers the factors. Mr. Carney suggested making the instruction consistent with CV129 on opinion testimony and CV326 on the medical malpractice standard of care. He also compared the instruction to MUJI 2.14. Mr. Mariger said he was okay with omitting the last two paragraphs if they were adequately covered by other instructions but thought the concepts needed to be covered. Dr. Di Paolo thought it was important that the jury understand why it had to rely on expert testimony. Mr. Young noted that CV136, on conflicting testimony of experts, adequately covered the third paragraph of CV504A, and Mr. Mariger agreed. At Mr. Shea's suggestion, the committee decided to add the sentence "If you find that an expert witness has relied on a fact that has not been proved, or has been disproved, you must consider that in determining the value of the expert witness's opinion" to CV136. The committee agreed, but changed "must" to "may." Mr. Young suggested revising the first sentence of CV136 to say "you must compare" (as opposed to "you may compare"). Dr. Di Paolo was concerned with omitting the second and third paragraphs from CV504A; she thought the jury needed specific language in CV504A because it has to use an expert's standard of care. She suggested putting CV136 into the body of CV504B. Mr. Springer and Judge Harris thought that including the concepts in a general instruction was more efficient. The committee decided to add a committee note saying to give CV136 after CV504B and not to use CV129 in this situation. The committee revised CV504A to read: "Due to the advanced learning and skill involved in [architecture] [landscape architecture] [engineering]]land surveying], I have determined that you must rely on expert testimony to decide whether [name of defendant] complied with the standard of care. You must use only the standard of care established through evidence presented in this trial by expert witnesses and through other evidence admitted for the purpose of defining the standard of care. You may not use a standard based on your own experience

or any other standard of your own." When asked what "other evidence" might apply, Messrs. Carney and Johnson noted that there may be literature, admitted under the learned treatise exception to the hearsay rule. The committee approved the instruction as revised.

2. *CV504B. Evidence of standard of care where expert is not required.* Mr. Johnson questioned whether the instruction was necessary. He thought the issue would be decided before trial, by a motion in limine. Mr. Young questioned whether the instruction was covered by CV129, "Statement of opinion." Mr. Mariger thought not. He thought the subject needed to be covered, but that it could be done in a general instruction. Judge Harris asked whether we needed an instruction for cases where one side has an expert and the other side does not. Mr. Young thought the second sentence in effect told the jury that it could ignore the expert testimony. Mr. Simmons suggested deleting the second sentence. Mr. Young suggested deleting the first sentence. Mr. Mariger thought that CV504B would rarely be given, since expert testimony is required in most cases. He suggested replacing it with a general instruction to the effect that "I have determined that expert testimony is not needed to establish the standard of care. You may consider expert testimony, but you are not bound to use it." Mr. Shea thought that the instruction did not need to be limited to standard of care. Mr. Young suggested putting the last two sentences of the first paragraph in CV129, "Statement of opinion." Judge Stone noted that CV129 covers all opinion testimony, not just expert testimony. He suggested bracketing the second paragraph of CV129, to be used only in cases where expert testimony is not required. Mr. Shea noted that a committee note to CV326 and CV504A will say not to give CV129 in cases where expert testimony is required. Judge Stone noted that there may be two types of expert opinions in the same case–expert opinions where expert opinions are required, and others where they are not. The instructions may have to be adapted to explain to the jury how to consider each type of expert opinion involved in the case. Mr. Springer suggested explaining that in the committee note to CV129. The committee agree to delete CV504B.

3. *CV505. Damages. Entitlement to damages.* Judge Harris thought the instruction was adequately covered by the general damage instructions. Mr. Carney suggested adding a hyperlink to the general instructions (CV2001-CV2004).

4. *CV505A. Damages. Measure of property damages.* Mr. Young suggested comparing CV505A to CV2231 (damages for contractor's defective work) and CV2232 (avoiding unreasonable economic waste). Mr. Mariger noted that the instruction is based on the Restatement (Second) of Contracts, which says you get the repair measure of damages unless it is disproportionate. Utah has only adopted the first Restatement of Contracts, which says you can recover the greater of the repair measure or loss of property value. *See Stangl v. Todd,* 554 P.2d 1316 (Utah 1976). (*Stangl* was decided before the second Restatment was adopted.) At Mr. Young's suggestion, Mr. Mariger

agreed to compare CV505A and CV506 with CV2231 and CV2232 for the next meeting. Mr. Springer thought that CV2231 was less cumbersome than CV505A. Mr. Young thought that they should be the same. Mr. Mariger asked whether the committee wanted to follow the Restatement (Second) approach, anticipating a change in Utah law. The committee has generally tried to follow the law as it is rather than anticipate what Utah appellate courts might do, but reserved further discussion of the issue and of CV505A until the next meeting.

5. *CV506. Betterment or value added.* Mr. Mariger noted that there is no Utah case directly on point. He explained that betterment arises when an error is caught before there is any activity in the field. In construction law, the matter is handled by change orders. Mr. Young asked whether the committee should omit the instruction because there is no Utah law on point or give its best guess as to how the Utah Supreme Court would decide the issue. Mr. Mariger noted that a similar instruction was in MUJI 1st, and an instruction will be given whether it is in MUJI 2d or not. Judge Harris said he would prefer to have Utah case law to back up the instruction. Mr. Carney thought it was okay to include the instruction as long as the committee note included a caveat that it may not accurately state Utah law. Mr. Springer did not think the instruction was terribly controversial. Mr. Mariger noted that MUJI 1st did not include the plaintiff's response to a betterment defense, namely, that the plaintiff would not have done the project had he known what it would have cost to do it right. Mr. Young did not think examples were necessary. Dr. Di Paolo thought that the first three sentences of the instruction were not easy to understand, but agreed that the examples were long. Judge Harris noted that it is the attorney's job to provide examples in closing argument. He agreed that the instruction was not clear. Dr. Di Paolo suggested revising the instruction along the lines of: "Start with $x (the amount it would have cost). [Explain how you get to $x.] Then reduce it by $y." Mr. Young thought that MUJI 7.41 was clearer. Mr. Mariger offered to rewrite the instruction with Dr. Di Paolo's suggestion in mind.

6. *CV507, Transition instruction; CV508, Breach of warranty essential elements; and CV509, Creation of a warranty.* Mr. Mariger suggested adding a reference to *Groen v. Tri-O-Inc.,* 667 P.2d 598 (Utah 1983). Mr. Young suggested combining CV507 and CV509. Mr. Shea suggested following CV1023, "Breach of Warranty. Definition of 'Warranty.'" Mr. Young asked whether the definitions of warranty differ in design professional cases and under the Uniform Commercial Code. He thought the instruction should start with a clear definition of warranty. Mr. Mariger noted that the cases say that a warranty is an assurance of a fact. The most common warranty is that a product is free of defects. He thought there were better cases to cite as references. The committee revised the second sentence of CV509 to read, "A warranty is an assurance or promise of a certain fact or condition regarding the work of [name of defendant]." Mr. Young suggested moving this sentence to the second sentence of

CV507. Mr. Shea suggested renaming CV507 "Creation of a warranty" and revising it to read:

> [Name of plaintiff] claims that [name of defendant] is responsible for damages for breach of warranty. You must decide whether [name of defendant] made a warranty of the [work/service] to [name of plaintiff]. A warranty is an assurance or promise of a certain fact or condition regarding the work of [name of defendant].

Dr. Di Paolo and Judge Harris suggested making the last sentence of Mr. Shea's proposal a separate jury instruction or making it a part of CV508. The committee approved CV507 as modified by Mr. Shea.

The meeting concluded at 6:00 p.m.

Next Meeting. The next meeting will be Monday, December 10, 2012, at 4:00 p.m.

MINUTES

Advisory Committee on Model Civil Jury Instructions
December 10, 2012
4:00 p.m.

Present: John L. Young (chair), Diane Abegglen, Juli Blanch, Francis J. Carney, Marianna Di Paolo, Tracy H. Fowler, Honorable Ryan M. Harris, Gary L. Johnson, Timothy M. Shea, Paul M. Simmons, Honorable Andrew H. Stone, Peter W. Summerill. Also present: Craig R. Mariger, Chair of the Design Professional subcommittee

Excused: Phillip S. Ferguson, Ryan M. Springer, and David E. West

The committee continued its review of the Professional Liability: Design Professionals instructions:

1. *CV504. Damages.* Mr. Shea verified that the committee had decided to delete CV504 and add links to other damage instructions. The committee noted that most design professional claims will be contract claims, not tort claims. Mr. Shea will add references to the contract damage instructions.

Dr. Di Paolo joined the meeting.

2. *CV505. Damages. Measure of property damages.* Mr. Young compared CV505 with CV2231, the instruction on damages for a contractor's defective work. The latter says that the measure of damages is the cost of repair unless that would result in unreasonable economic waste. CV505 says the measure of damages is (1) the cost of repair (unless unreasonably wasteful) or (2) lost value. Mr. Young thought the two instructions should be the same. Mr. Young will send CV2231 back to John Lund and Kent Scott to consider adding the property's lost value as an alternative in CV2231.

Mr. Young noted that CV2231 uses the phrase "unreasonable economic waste," whereas CV505 uses "unreasonably wasteful." He thought the two instructions should use the same terms. Ms. Blanch thought "unreasonably wasteful" was preferable. Mr. Mariger noted that the term was chosen because it was thought to be plainer English. Mr. Shea will change the language in CV2231 to "unreasonably wasteful." Mr. Summerill asked whether the term was defined. The committee noted that CV2232 provides an explanation. Mr. Mariger thought that CV2232 may have been based on real property cases, whereas Utah law follows the first Restatement of Contracts in design professional cases, in which case CV2232 should not be used. Mr. Young thought that CV2232 was based on a comment to the first Restatement. If that is the case, Messrs. Young and Mariger thought similar language could be included in CV505. Mr. Summerill thought that the jury needed some guidance on determining whether the cost of repair would be unreasonably wasteful. Mr. Mariger noted that it is a matter of looking at the disparity between the cost of repair and the value of the repaired property and deciding whether that disparity is reasonable, which is a question for the jury to determine based on the evidence and their judgment and experience.

At Ms. Blanch's suggestion, the phrase "If repair is not possible or if [name of defendant] proves that the costs of repair would be unreasonably wasteful," was deleted from the second paragraph as repetitive. It was suggested that the phrase "that the costs of repair of the property are sufficiently more than the loss in the value of the property caused by the breach of the standard of care" be deleted from the preceding sentence, but Mr. Mariger thought that language should stay.

At Mr. Young's suggestion, the term "give" was changed to "award," to make the instruction consistent with CV2231.

3. *CV506. Betterment or value added.* Mr. Summerill asked whether betterment was the flip side of economic waste and asked how the issue would be addressed on a special verdict form. Mr. Mariger noted that betterment only applies to a repair measure of damages. Mr. Young thought there would need to be a finding of fact on the special verdict form. Mr. Shea suggested making two instructions–505A for the repair measure of damages, which could also include betterment, and 505B for loss of property value. Mr. Mariger thought it was better to keep the betterment instruction separate, since it will not apply in every case and has not been unambiguously adopted in Utah. Mr. Young asked Mr. Mariger to have his subcommittee draft a comment saying that it is unclear whether the doctrine has been adopted in Utah. Mr. Mariger noted that, although there are no cases expressly adopting the doctrine in Utah, there are no cases rejecting it either, and there are a lot of cases saying that the plaintiff should not be placed in a better position by a breach of contract than he would have been in if the contract had been performed. Mr. Mariger had no doubt that the instruction correctly stated the law in Utah. He said the cases focus not on whether the doctrine exists but whether it applies in a given case, that is, on whether the plaintiff was bettered under the facts of the case. Judge Harris thought that the current committee note was unnecessary. Mr. Shea asked how much of the parenthetical information should be included in the references section.

The committee revised the instruction to read:

> The damages you award to [name of plaintiff] cannot place [him] in a better position than the position that [he] would have been in had [name of defendant] not breached the standard of care.
>
> To prevent [name of plaintiff] from being placed in a better position, you must reduce from the damages any additional amount of money that [name of plaintiff] would have paid in designing and constructing the [facility name] if [name of defendant] had provided services that met the standard of care. You must make this reduction only if [name of defendant] proves that [name of plaintiff] would have completed the [facility name] at the additional cost for construction if the services had met the standard of care. . . .

4. *CV507. Creation of a warranty*. Dr. Di Paolo thought the instruction should define warranty before telling the jury what it has to decide (namely, whether there was a warranty and whether it was breached). Mr. Mariger could not think of a warranty "made by the actions of" the defendant in this context. He noted that a warranty claim differs from a negligence claim but that, under *SME Industries, Inc. v. Thompson, Ventulett, Stainback & Associates, Inc.,* 2001 UT 54, 28 P.3d 669, there is no implied warranty other than that the work complies with the standard of care. Specifically, there is no implied warranty of fitness for a particular purpose in design professional cases. Dr. Di Paolo was not clear on the distinction and asked whether we even need to instruct on an implied warranty claim. Mr. Mariger thought so, since implied warranty claims are very common. Mr. Young noted that AIA contracts disclaim any implied warranties. But Mr. Mariger thought that the implied warranty recognized in *SME* cannot be disclaimed. The committee decided to move the second sentence of the instruction to the end of the instruction and to delete the words "operation of" from the phrase "by operation of law" in the definition of implied warranty. It also decided to add the *SME* and *Groen v. Tri-O-Inc.* cases to the references and delete the reference to BAJI.

5. *CV508. Breach of warranty essential elements*. The committee revised the instruction to read:

> [Name of plaintiff] must prove the following elements to prove breach of warranty:
>
> (1) [Name of defendant] made a warranty that [describe the warranty];
>
> (2) [Name of defendant] reasonably expected that [name of plaintiff] would rely on the warranty, and [name of plaintiff] in fact reasonably relied on the warranty;
>
> (3) The [work/services] of [name of defendant] [was/were] not as promised;
>
> (4) [Name of plaintiff] was injured and incurred damages as a consequence of the breach of warranty by [name of defendant]; and
>
> (5) It was reasonably foreseeable at the time the warranty was made that [name of plaintiff] would be harmed if the [work/services] [was/were] not done as promised in the warranty.

> [To establish breach of an express warranty, [name of plaintiff] does not also have to prove that [name of defendant] was negligent.]

Mr. Shea asked whether the fourth element could be stated "[Name of defendant]'s breach of warranty was a cause of [or "caused"] [name of plaintiff]'s harm." Mr. Mariger noted that in warranty and contract actions, the breach must be "the cause" of the plaintiff's harm; the plaintiff can only recover for the harm caused by the breach of warranty (or contract). The committee questioned whether comparative fault would apply in a breach of implied warranty case under *SME,* since the implied warranty in effect applies a negligence standard.

The committee bracketed the last paragraph at Judge Harris's suggestion because the sentence only applies to express warranty claims; under *SME,* the plaintiff does have to prove that the defendant was negligent for breach of an implied warranty in a design professional case. Dr. Di Paolo and Judge Stone expressed concerns with the last paragraph. Messrs. Young and Mariger suggested alternative instructions, for breach of express warranty and breach of implied warranty. Judge Stone thought the instruction could be adapted based on how the warranty claim was defined. He also suggested using "breached the standard of care" for "negligent." The committee decided to add a comment saying to give the bracketed paragraph only where the claim is not one for breach of the standard of care, that is, where it is a claim for breach of express warranty. The instruction was approved as revised.

6. *CV509. Implied warranties. Accuracy and fitness for purpose.* Judge Stone questioned the use of "impliedly warrant or guarantee" and suggested substituting "promised" in its place. Dr. Di Paolo suggested "does not imply a warranty or guarantee." Mr. Mariger suggested "makes an implied warranty to the contracting party," noting that there are no implied warranties to third parties in design professional cases. The committee revised the instruction to read:

> The [name of defendant] made an implied warranty to [name of plaintiff] that the services would not fall below the standard of care, but [he] did not make an implied warranty to [name of plaintiff] that [his] services would be performed without error or defects or that [his] services would be suitable for the purpose intended by [name of plaintiff]. The [architect] [engineer] [land surveyor] does warrant that [his] services will not fall below the ordinary skill and care exercised by others engaged in the same profession in the same locality.

Ms. Blanch was excused.

Mr. Mariger suggested adding a committee note to the effect that the instruction does not apply if the plaintiff was not the contracting party. Mr. Mariger and Judge

Stone also thought the note should say that the instruction should be used in conjunction with CV501, "Standard of care for design professionals." The reference to MUJI 7.39 should be changed.

7. *CV510. Implied warranties. Compliance with building code.* Mr. Mariger noted that there is no law in Utah to support this instruction. He said that the AIA contract does not expressly waive an implied warranty of compliance with building codes. The *Allen Steel* case said that the implied warranty had to be expressly disclaimed, but the opinion was withdrawn because the case settled. Mr. Mariger offered to bring a copy of the opinion to the next meeting and added that some jurisdictions hold otherwise. Mr. Carney asked if there was a difference between a warranty and a guaranty. Mr. Mariger did not think so. Judge Harris asked when the issue became a jury question. Mr. Mariger thought it was not clear what is and is not a jury question. Mr. Young thought that it would be up to the jury to decide whether the defendant complied with the building code. Mr. Summerill suggested letting the attorneys argue the issue rather than instruct on it. Mr. Mariger did not think that a jury instruction was necessary but said that it was very important to the plaintiffs' bar. The matter was deferred till the next meeting.

The meeting concluded at 6:00 p.m.

Next Meeting. The next meeting, scheduled for January 14, 2013, was canceled. The next meeting will be Monday, February 11, 2013, at 4:00 p.m.

MINUTES
Advisory Committee on Model Civil Jury Instructions
March 11, 2013
4:00 p.m.

Present: John L. Young (chair), Dianne Abegglen, Juli Blanch, Francis J. Carney, Marianna Di Paolo, Phillip S. Ferguson, Honorable Ryan M. Harris, L. Rich Humpherys, Gary L. Johnson, John R. Lund, Timothy M. Shea, Paul M. Simmons, Peter W. Summerill

Excused: Tracy H. Fowler, Honorable Andrew H. Stone, David E. West

1. *Design Professional Instructions*. Mr. Young reported that he and Mr. Shea received some proposed committee notes and proposed changes to the design professional instructions today from Craig Mariger, the chair of the Design Professional subcommittee. The committee will review the proposals at its May 2013 meeting because Mr. Mariger cannot attend the April meeting.

2. *Insurance Litigation Instructions*. The committee reviewed the first of the insurance litigation instructions. Mr. Humpherys noted that the instructions will be divided into the following categories: (1) breach of contract; (2) claim for benefits; and (3) bad faith (i.e., breach of the implied covenant of good faith and fair dealing). Each category may be further divided into first-party and third-party claims (first-party claims being claims between the insured and insurer, and third-party claims being claims arising out of a third party's claim against the insured). Mr. Humpherys suggested that there was a distinction between a claim for benefits and a breach-of-contract claim. Some committee members (such as Ms. Blanch and Messrs. Young, Johnson, and Simmons) did not see the distinction and thought both fell within the rubric of breach of contract. Mr. Humpherys, however, did not think there could be a breach of contract until there had been a determination of what the insurer was legally obligated to pay. Mr. Humpherys used the example of an insurance policy that provides that the insurer does not have to pay property damage until 30 days after the value of the damage has been determined through arbitration. If the plaintiff files an action for payment of property damage sooner than 30 days after an arbitration, arguably there has been no breach of contract. Some committee members questioned whether the plaintiff could even bring a claim in that situation. They thought it would be subject to dismissal as not ripe. Mr. Humpherys asked whether a dispute over the value of a claim is a breach of the contract. Mr. Young suggested it may be more akin to an action for declaratory relief. Mr. Humpherys asked whether it should have its own set of instructions. He noted that under *Mahan,* for a breach-of-contract claim there must be an express provision of the contract that has not been adhered to. Mr. Humpherys thought that consequential damages would be available for a breach of contract but not for a mere claim for benefits and that attorney fees would be available for bad faith but not for a mere breach of contract. The committee did not reach any consensus on these issues. Some, such as Mr. Carney, thought it would depend on the specific language of the contract and what it says about what the insurer has to pay and when.

Mr. Humpherys asked Mr. Lund if he would serve on the insurance instruction subcommittee, and Mr. Lund agreed. Mr. Humpherys noted that he also intended to ask Paul Belnap, Stuart Schultz, Alan Bradshaw, and David Olsen to serve on the subcommittee.

Judge Harris and Dr. Di Paolo joined the meeting.

a. *CV2401. Breach of contract–General description of claims and defenses*. At Mr. Young's suggestion, the committee reversed the order of CV2401 and CV2402. Mr. Ferguson questioned whether "policy contract" was necessary throughout the instructions. The committee felt that it was important to state up front that an insurance policy is a contract, before setting out the parties' claims and defenses, but that after that the instructions could use "policy" or "contract" without having to say every time that the policy is a contract or that the contract is the policy. Mr. Humpherys thought that lay jurors would think there was a distinction between an insurance policy and a contract. Mr. Johnson noted that there are two lines of cases in Utah law, one emphasizing the contractual nature of insurance policies and one emphasizing their differences from other contract (such as their adhesive nature). He preferred to have the option of using either term ("contract" or "policy") depending on the facts of the case and suggested putting both terms in brackets. For example, if the policy was negotiated at arm's length, "contract" might be more appropriate than "policy." Dr. Di Paolo thought "policy" would be more understandable to lay jurors. The committee was fairly evenly split on whether to use "policy" or "contract," with Dr. Di Paolo and Messrs. Young, Carney, Simmons, and Summerill preferring "policy," and Ms. Blanch and Messrs. Ferguson, Johnson, and Lund preferring "contract." Mr. Carney suggested adding a committee note saying that if the policy was negotiated to use "contract" instead of "policy." Judge Harris said that his default would probably be "policy," but that if it was not an adhesion contract, he would allow "contract."

Mr. Shea thought the first two sentences of CV2401 said the same thing. The committee combined the sentences to read: "[Name of plaintiff] claims that [name of defendant] breached the insurance policy and claims to have been damaged by the breach of the policy provisions as follows: [Define claimed losses.]" The second paragraph was revised to read: "[Name of defendant] claims that [describe defenses]."

Mr. Lund asked whether the instruction should be given at the beginning of the trial.

The committee renumbered CV2401 CV2402 and renamed it "General description of claims and defenses." Mr. Humpherys noted that he did not care if "Breach of contract" was in the title of each instruction but thought that there

should be a heading clearly delineating the breach of contract–first-party instructions from other insurance instructions.

b. *CV2402. Breach of contract–General relationship*. Mr. Shea suggested deleting the part that reads, "and, therefore, the relationship between [name of plaintiff] and [name of defendant] is contractual. The insurance policy simply . . ." The committee felt, however, that it would be helpful to the jury to tell them that the relationship is contractual. Mr. Lund asked whether the second sentence should be revised to include the duty to defend as well as the duty to pay covered claims. Mr. Humpherys thought third-party claims should be treated separately, since they give rise to tort duties, not just contractual duties. Mr. Ferguson asked if the duty to defend ever goes to the jury, since the question of duty is for the court to decide. Ms. Blanch thought that the instruction should also say that the insured has obligations. The committee revised the last sentence of the instruction to read: "The insurance policy obligates both [name of plaintiff] and [name of defendant] to comply with the terms of the contract."

The committee discussed using "insured" and "insurer" to avoid terms like "policy holder" and "insurance company" but decided against doing so, since they can be confusing to lay jurors, and the distinction between the two terms can be easily missed when jurors are listening to the instructions.

The committee renumbered the instruction CV2401 and renamed it "An insurance policy is a contract." The committee note referring the reader to the general contract instructions remained with the instruction.

c. *CV2403. Breach of contract–Coverage provision*. Mr. Humpherys explained the problem the subcommittee faced: The case law says that contract interpretation is a question of law, for the court to decide. But it also says that you use the ordinary and customary meanings of words unless the words have a special meaning. Mr. Humpherys thought the instructions should give the provision at issue and then define the terms; otherwise, the jury would be left to give the contract its own interpretation. Mr. Ferguson agreed, stating that we should not have the jury telling the parties what their contract means. Dr. Di Paolo asked how you decide which words to define. The committee thought that it depended on the relevance of the terms to the case and whether or not their definitions were disputed. Mr. Young asked why the court should tell the jury to use the ordinary and customary meaning of terms if the jury is not to construe the contract. Mr. Lund also expressed concerns about the court instructing the jury on contract construction, other than simply defining ambiguous terms. Mr. Lund suggested that if a contract term is ambiguous, the judge should define it, but if it is not, the judge should not say anything about construing the policy. Judge Harris thought that if a contract term was ambiguous and dispositive, the case wouldn't be going to the jury at all. Dr. Di Paolo noted that the issue may not be

one of ambiguity but of the policy using legal language, e.g., a term of art, that the judge may have to define for the jury. The committee agreed that the instruction should define any relevant technical language. Also, if the court has ruled on what contract language means, it should instruct the jury on that. The committee revised the first part of the instruction to read:

> [Name of plaintiff] claims that [name of defendant] breached the following provisions in the policy: [Quote applicable policy language.]
>
> When deciding this case, you must use the following definitions: [Include specific judicial interpretations about the language of the policy.]

Judge Harris noted that the judicial interpretations should be limited to the court's interpretations in the case, such as on a prior motion for summary judgment or motion in limine, and not all judicial interpretations of the same or similar language. Judge Harris thought that the intent was that, if the trial judge had already determined that language in the policy had an unambiguous meaning, there should be an instruction giving the jury that specific interpretation. Mr. Humpherys thought that there did not need to be a prior decision on the meaning, but the court could decide the meaning as part of the jury instructions.

Messrs. Lund and Simmons questioned whether the last part of the instruction ("You will be asked to decide whether . . .") should explain which party has the burden of proof on the issues. Mr. Simmons thought that might depend on whether a particular issue was an affirmative defense or a condition precedent to coverage under the contract. Mr. Johnson agreed that who has the burden of proof can be confusing if the case involves exclusions and exemptions from or exceptions to the exclusions. Mr. Humpherys asked if there was a general instruction that whoever is trying to prove a fact has the burden of proving it. Mr. Lund thought that the burden of proof was generally part of each instruction on what the jury must decide. Some committee members thought that the last part of CV2403 should be its own instruction and cover the burden of proof.

Mr. Humpherys will take the instruction back to the subcommittee to revise in light of the committee's discussion.

3. *Next Meeting*. The next meeting will be Monday, April 9, 2012, at 4:00 p.m.

The meeting concluded at 6:00 p.m.

MINUTES
Advisory Committee on Model Civil Jury Instructions
April 8, 2013
4:00 p.m.

Present: Dianne Abegglen, Francis J. Carney, Marianna Di Paolo, Phillip S. Ferguson, Honorable Ryan M. Harris, L. Rich Humpherys, Timothy M. Shea, Paul M. Simmons, Ryan M. Springer, Honorable Andrew H. Stone

Excused: John L. Young (chair), Tracy H. Fowler, Gary L. Johnson, David E. West

Mr. Shea conducted the meeting in Mr. Young's absence. The committee continued its review of the Insurance Litigation instructions:

1. *CV2401, Insurance policy is a contract, and CV2402, General description of claims and defenses*. Mr. Ferguson moved that the committee approve CV2401 and CV2402 as modified at the last meeting and as reflected in the meeting materials. Mr. Carney seconded the motion. The motion passed without opposition.

2. *CV2403, Coverage provision*. Mr. Humpherys repeated his suggestion made at the last meeting that not all claims for benefits are necessarily breach-of-contract claims and illustrated his position with sample policy provisions. For example, where an auto policy says that the insurer will pay uninsured motorist (UM) or underinsured motorist (UIM) benefits that the insured is "legally entitled to recover" from an uninsured or underinsured driver, has the insurer breached the contract by not paying benefits where there has not yet been any finding that the insured is "legally entitled" to recover anything? Similarly, if a homeowner's policy says that the insurer will pay a loss within 60 days after the value of the loss is established by an appraisal or some other means and the value has not yet been established, has the insurer breached the contract by not paying the loss? Mr. Humpherys did not think so and suggested that there should be a third category of insurance claims, in addition to claims for breach of an express contract and breach of the implied covenant of good faith and fair dealing, namely, a request for a judicial declaration of what is owing under the policy. Mr. Simmons questioned whether that would be a jury claim. Mr. Humpherys drew a distinction between a denial of coverage and a disagreement over the amount due under a policy and thought that, under the latter, the insured would not be able to recover consequential damages. Judge Harris and Mr. Simmons thought that a dispute over the amount due can be characterized as a claim for breach of contract. Judge Harris noted that damages are part of a breach-of-contract claim and that many breach-of-contract claims, not just in the insurance context but also in other areas of the law such as vendor-purchaser cases, are framed as breach-of-contract actions. If the trier of fact determines that the plaintiff was entitled to $x under the contract and the defendant did not offer or pay him $x, then there has been a breach of contract. What is owing under the contract is a preliminary question that the trier of fact must determine in deciding a breach-of-contract case. Judge Harris suggested trying to draw a distinction between the two may be splitting hairs. Mr. Ferguson asked, where the insured is claiming he is

entitled to $1,000,000, and the insurer claims he is only entitled to $500,000, if the court or jury decides he is entitled to $750,000, was the insurer in breach? Judge Harris and Mr. Simmons thought so, if the insurer did not offer to pay the $750,000. Mr. Simmons thought that, until the Utah appellate courts recognize the distinction, the committee should stick to recognized causes of action (i.e., breach of express contract, and breach of the implied covenant of good faith and fair dealing). Mr. Shea asked whether the issue could be adequately covered by CV2402, setting out the parties' positions. Mr. Carney suggested explaining the issue in a committee note. He asked how the jury instructions would differ in a case where the only dispute was over the value of the insured's loss. Mr. Humpherys noted that the damages recoverable would be different. Mr. Simmons asked whether the plaintiff would be entitled to recover damages if there was no breach of either the insurance contract or the implied covenant of good faith and fair dealing. Mr. Carney thought a claim for benefits would be similar to an eminent domain case, where the issue is the value of the property taken. Mr. Humpherys will propose a new instruction to cover this third category of insurance claims.

3. *CV2403. Coverage provision.* Mr. Shea noted that the instruction has been revised to only instruct on contract interpretation if the jury is required to apply a special meaning to a term of the contract, not if it is simply to give the words of the contract their ordinary and customary meanings. Mr. Carney questioned whether the last part of the instruction ("You will be asked to decide whether . . .") was necessary since the jury will be told the parties' claims and defenses in CV2402. Judge Stone and Mr. Carney suggested breaking CV2403 into two instructions–one on contract interpretation, and one on the elements of a breach-of-express-contract claim. Messrs. Ferguson, Shea, and Simmons suggested that the latter instruction should start, "To succeed on this claim, [name of plaintiff] has the burden of proving . . ." Mr. Humpherys noted that subparagraphs (1)-(3) in CV2403 were just meant as examples; he was inclined to leave them out. Mr. Ferguson suggested cross-referencing the instruction on the elements for breach of contract from the commercial contract instructions (CV2107) and instructing the court and attorneys to list the elements in dispute. Mr. Simmons asked whether it was part of the plaintiff's prima facie case to prove that he complied with everything the policy required him to do or was excused from complying, or whether it was up to the defendant to raise an affirmative defense of noncompliance. Mr. Shea suggested adding a committee note saying that what the plaintiff has to prove depends on the issues in dispute. Judge Stone agreed that the parties' claims and defenses should limit the issues for the jury to decide. The committee did not want the jury going through the entire policy and deciding the case on an issue that was not addressed by the parties. Judge Harris and Mr. Ferguson thought that, as a practical matter, whether the plaintiff had met any conditions precedent in the policy will generally be decided by pretrial motions. Mr. Humpherys

thought that there needs to be more guidance from the courts on who has the burden of proof.

4. *CV2404. Exclusion provision.* Mr. Simmons noted that CV2404 had the language that was deleted in CV2403 about using the ordinary and customary meaning of words. The committee agreed that CV2403 and CV2404 should be handled the same. The third paragraph of CV2404 was revised to read, "[When deciding this case, you must use the following definitions: . . .]" At Judge Harris's suggestion, the last paragraph was deleted. Mr. Shea questioned whether the alternatives "arose out of/was caused by/resulted from" were all necessary. Mr. Simmons asked whether the appropriate phrase depended on the language of the policy. Judge Stone suggested revising the fourth paragraph to read, "To succeed, [name of defendant] has the burden of proving that [name of plaintiff]'s loss fell within the exclusion." Dr. Di Paolo questioned whether "loss" was the right word. She noted that the plaintiff may simply be claiming that he did not get as much money as he wanted. The committee suggested "claim" or "benefit" as alternatives. Messrs. Humpherys and Ferguson noted that the applicability of any exclusion is generally decided by the court on summary judgment. At Mr. Stone's suggestion, the paragraph was revised to read: "To succeed, [name of defendant] has to prove that the exclusion applies to [name of plaintiff]'s claim." The instruction was approved as modified.

5. *CV2405. Proof of loss.* Mr. Humpherys noted that this instruction only applies where a breach of contract is claimed; it does not apply in cases where the jury is just determining the value of a claim or loss. Mr. Ferguson suggested adding a statement to that effect in a committee note. Dr. Di Paolo questioned the use of the term "substantial compliance." She thought it would be unfamiliar and confusing to lay jurors. She suggested using "largely" or "mostly" for "substantial." The committee recognized that "substantial compliance" was a term of art in the law and was not easily defined. It felt that using a different term could invite a reversal. Mr. Ferguson noted that "substantial compliance" is a familiar concept in construction law. Mr. Shea suggested defining "substantial compliance" by its purpose and revising the first paragraph to say: ". . . A proof-of-loss is a summary of the facts and circumstances giving rise to the covered loss. It must be sufficient to give [name of defendant] an adequate opportunity to investigate, to prevent fraud, and to form an estimate of its rights and obligations under the policy." Mr. Humpherys thought the first two paragraphs should be left as is. At Judge Harris's suggestion, the second sentence of the second paragraph was revised to read, "The law does not require that the proof-of-loss be notarized or that [name of plaintiff] strictly comply with the proof-of-loss provisions in the policy." Judge Harris suggested contrasting substantial compliance with strict compliance. The last sentence of the second paragraph was revised to read, "Only substantial compliance–not strict compliance–is required." At Judge Harris's suggestion, the third paragraph was deleted, since it does not tell the jury anything new

(such as who has the burden of proof on the issue of proof of loss). The committee approved the instruction as modified.

6. *Next Meeting*. The next meeting will be Monday, May 13, at 4:00 p.m.

The meeting concluded at 6:00 p.m.

MINUTES
Advisory Committee on Model Civil Jury Instructions
May 13, 2013
4:00 p.m.

Present: John L. Young (chair), Dianne Abegglen, Juli Blanch, Francis J. Carney, Marianna Di Paolo, Phillip S. Ferguson, Tracy H. Fowler, Honorable Ryan M. Harris, L. Rich Humpherys, Gary L. Johnson, Timothy M. Shea, Paul M. Simmons, Honorable Andrew H. Stone

Excused: Ryan M. Springer, David E. West

The committee continued its review of the Insurance Litigation instructions:

1. *CV2403, Coverage provision*. Mr. Shea proposed a change in the title (to "Breach of policy provision") and rewrote the instruction and committee note. The committee approved Mr. Shea's changes.

2. *CV2404. Elements of the claim*. Mr. Shea rewrote this instruction as well. The committee approved his changes.

Craig Mariger (chair of the Design Professional subcommittee) joined the meeting but was excused because the committee was not prepared to discuss the latest draft of the Design Professional instructions.

Ms. Blanch joined the meeting.

3. *CV2405. Value of loss*. Messrs. Humpherys and Johnson agreed that the offer is irrelevant. The committee revised the instruction to read: "[Name of plaintiff] claims that [name of defendant] has not paid for [describe [name of plaintiff]'s loss]. To succeed on this claim, plaintiff has the burden to prove the value of [his] loss." The committee approved the instruction as modified.

4. *CV2406. Exclusion from coverage*. CV2406 was previously approved. Mr. Humpherys thought that the instruction needs a comment. He said that exclusions are typically decided by the court. The instruction would only apply if there is an unambiguous exclusion, and the issue is whether the facts fall within the exclusion. If the exclusion is ambiguous, the ambiguity is resolved in favor of the insured. Examples of such factual disputes are whether a person is a member of the insured's household, whether an event was expected or intended by the insured, whether someone had the insured's permission to use his automobile, and whether the insured's actions were intentional. Mr. Ferguson suggested adding, "You must decide [explain the fact question]." Mr. Johnson suggested adding, "[Name of plaintiff] has the burden of proving an exception to the exclusion." He noted that there is a shifting burden of proof: it is the insured's burden to prove that a claim comes under a coverage provision; it is the insurer's burden to prove that an exclusion applies; and it is the insured's burden to

prove an exception to the exclusion. Mr. Young suggested a separate jury instruction for exceptions to an exclusion. Mr. Humpherys suggested handling the matter by a committee note, which could say that if there is an exception to an exclusion, CV2406 can be adapted to show who has the burden of proving the exception. Mr. Johnson offered to propose a committee note. The instruction was otherwise approved.

5. *CV2407. Proof of loss.* CV2407 was previously approved. Mr. Shea noted that the instruction does not say who has the burden of proof or what the jury is supposed to do with the information. He suggested adding, "You must decide whether the proof of loss here was adequate." Mr. Humpherys thought that the issue was an affirmative defense, but Mr. Johnson suggested that it was a condition precedent. He noted that the fact questions for the jury to resolve are (1) the timeliness of the proof of loss, (2) its adequacy, and (3) whether the insurer was prejudiced by any untimeliness or inadequacy. He suggested adding a reference to the statute (Utah Code Ann. § 31A-21-312) and governing regulation (Utah Admin. Code 590-190-3(10)). He thought that the burden of proof should be on the insured to show that he or she gave proof of loss, but the burden of proof is on the insurer to show that it was prejudiced. Mr. Humpherys suggested changing the title to "Defense of inadequate proof of loss" and to begin the instruction with "To determine whether there was a breach of contract, you must decide whether [name of plaintiff] gave sufficient proof of loss to enable [name of defendant] to investigate," etc. He thought that if the plaintiff was not making a claim for benefits, then breach of contract is not at issue, and the instruction would be irrelevant. Dr. Di Paolo suggested changing the second sentence of the instruction to read, "A proof of loss is a summary of the facts and circumstances that gave rise [not "giving rise"] to the covered loss." She also questioned the use of the terms "substantial compliance" (which Judge Harris explained means "close enough") and "prejudiced." Mr. Shea suggested revising the instruction to read:

> [Name of defendant] claims that it did not breach the insurance policy because [name of plaintiff] did not submit an adequate proof of loss. [Name of defendant] has the burden of proving that the proof of loss was not adequate to allow it to investigate, to prevent fraud, and to form an estimate of its rights and obligations under the policy. The law does not require that the proof of loss be notarized or that [name of plaintiff] strictly comply with the proof-of-loss provisions in the policy. Only substantial compliance–not strict compliance–is required.
>
> You must decide whether the proof of loss was adequate. If you find that the proof of loss was not adequate, you must decide whether [name of defendant] was prejudiced.

Mr. Shea also suggested that there be a question on the special verdict form that asks, "Was the proof of loss adequate?" Mr. Humpherys suggested dealing with prejudice in a separate instruction. He noted that if the proof of loss is adequate, there is no breach of contract, but if there is prejudice, there is no coverage. Mr. Johnson liked the idea of two instructions and volunteered to propose a separate instruction. The committee deferred further discussion of CV2407 until Mr. Johnson can propose a new instruction.

6. *CV2408. Unspecified time of performance.* Mr. Johnson asked when the instruction would apply if there is not a bad-faith claim. Mr. Humpherys suggested a cross-reference to the corresponding commercial contract instruction (CV2109). Dr. Di Paolo said she liked the original structure of the instruction. Mr. Humpherys asked whether the instruction merged the implied duty of good faith and the implied duty to pay within a reasonable time. Mr. Shea suggested using "date" for "time" throughout the instruction. The committee approved the instruction as modified.

7. *CV2409. Recovery of consequential damages.* Ms. Blanch questioned the use of "generally" in the second paragraph. Mr. Humpherys noted that one does not have to foresee the special damage. Mr. Ferguson noted that the standard is "reasonably foreseeable," not actually foreseen. He and Mr. Humpherys asked whether consequential damages (those "naturally flowing" from the breach) present a jury question or a question of law for the court. They also suggested adding a reference to *Beck v. Farmers Insurance Exchange,* 701 P.2d 795 (Utah 1985). Judge Harris suggested keeping the first paragraph and then referring back to the commercial contract instructions on general and consequential damages (CV2135 and CV2136, respectively). Messrs. Humpherys and Johnson suggested adding a committee note to say that the instruction sets out recoverable damages "unless otherwise modified by statute," such as in the case of personal-injury-protection (PIP) benefits. Mr. Simmons asked whether general damages in a breach-of-insurance-contract case are simply the unpaid benefits owing. Mr. Humpherys thought they were broader and included all damages naturally flowing from the breach. The committee adopted Judge Harris's suggestion and approved the instruction as revised.

8. *Bad-faith subcommittee.* The committee discussed potential members of the insurance bad faith subcommittee, including Mr. Humpherys, Mr. Lund, Alan Bradshaw, and Paul Belnap or Stuart Schultz from Strong and Hanni.

9. *Next meeting:* The next meeting will be June 10, 2013, at 4:00 p.m. There will be no committee meetings in July and August.

The meeting concluded at 5:30 p.m.

MINUTES

Advisory Committee on Model Civil Jury Instructions
June 10, 2013
4:00 p.m.

Present: Dianne Abegglen, Francis J. Carney, Marianna Di Paolo, Phillip S. Ferguson, Tracy H. Fowler, L. Rich Humpherys, Gary L. Johnson, Timothy M. Shea, Paul M. Simmons, Ryan M. Springer, Honorable Andrew H. Stone

Excused: John L. Young (chair), Juli Blanch, John R. Lund, Peter W. Summerill, David E. West

Mr. Shea conducted the meeting in Mr. Young's absence. The committee continued its review of the Insurance Litigation instructions:

1. *CV2406, Exclusion from coverage.* The instruction was previously approved. Mr. Johnson added a committee note. Mr. Humpherys questioned whether citations to cases from other jurisdictions should be included. The committee decided that they were not necessary and deleted them. The comment was approved as modified.

Mr. Springer joined the meeting.

2. *CV2407, Proof of loss.* Messrs. Shea and Simmons questioned the necessity of the third paragraph. Messers. Humpherys, Ferguson, and Johnson explained why the second and third paragraphs were both necessary: an inadequate or untimely proof of loss can give rise to two defenses: (1) that the plaintiff breached the contract, meaning that there is no coverage, or (2) that the defendant did not breach the contract because the plaintiff failed to comply with a condition precedent, meaning that the defendant was excused from timely performing its obligations.

Dr. Di Paolo joined the meeting.

Mr. Simmons proposed adding to the end of the second paragraph the phrase "and that its further performance was therefore excused." Dr. Di Paulo thought the phrase "performance was excused" would be unclear to a lay juror. Mr. Shea suggested "it did not have to pay for the loss." Dr. Di Paolo suggested "it was not required to pay for the loss sooner." The committee revised the second and third paragraphs to read:

> [[Name of defendant] claims that [name of plaintiff] is not covered because [name of plaintiff] breached the terms of the insurance contract by not giving [adequate/timely] proof of loss.]

> [[Name of defendant] claims that it was not required to pay for the loss sooner because [name of plaintiff] did not submit [adequate/timely] proof of loss.]

Mr. Shea questioned whether paragraph 4 was necessary. Mr. Humpherys thought it was because attorneys may want to quote the policy language on proof of loss, but the policy requirements may be unenforceable under Utah's proof-of-loss statute and the cases construing it. At Mr. Shea's suggestion the first two sentences of subparagraph (1) were moved to the end of the first paragraph.

Mr. Ferguson questioned the use of "preclude" in subparagraph (2), and Mr. Shea thought that "the claim" was ambiguous, since it could refer to a claim for coverage or one of the claims in the case. Mr. Shea suggested revising subparagraph (2) to read: "If it was not reasonably possible to give proof of loss within the time required by the policy, there is still coverage for the claim unless [name of defendant] can prove that it was prejudiced by [name of plaintiff]'s failure to give proof of loss." Mr. Humpherys explained that prejudice is not an issue if it was not reasonably possible to give proof of loss in the time required by the policy. The committee decided to break subparagraph (2) into two parts:

> (2) If it was not reasonably possible to give the proof within the time required by the policy, the failure to give proof of loss within the required time is not a valid reason to deny the claim.
>
> (3) The failure to give [adequate/timely] proof of loss is not a valid reason to deny the claim unless [name of defendant] proves that it was prejudiced by [name of plaintiff]'s failure to give timely proof of loss.

Dr. Di Paolo suggested using "harmed" for "prejudiced," but Mr. Johnson explained that "prejudiced" was a term of art that would be explained in another instruction.

At Mr. Humpherys's suggestion, subparagraphs (2), (3), (4), and (5) were bracketed, since all may not apply in a given case.

Judge Stone joined the meeting.

Some committee members questioned whether the last paragraph was necessary. Mr. Simmons pointed out that it explains who has the burden of proof. At Mr. Ferguson's suggestion, the paragraph was revised to read:

> You must decide whether the proof of loss was [adequate/timely]. [Name of defendant] has the burden to prove that the proof of loss was not [adequate/timely].

At Mr. Simmons's suggestion, the paragraph was moved to the fourth paragraph of the instruction.

Dr. Di Paolo suggested breaking up the instruction into two instructions. Mr. Humpherys said his preference was to leave them as one because they would need to be given together.

Judge Stone suggested making the paragraph about the policy having to conform to Utah law a separate instruction. Mr. Humpherys thought that was a good idea, since the concept arises in other contexts as well. He, Mr. Johnson, and Mr. Ferguson will draft a proposed instruction that says that the terms of an insurance policy must conform to Utah law.

The committee broke CV2407 into two instructions–the first defining proof of loss and stating the parties' claims, and the second setting out the specific law that applies to proofs of loss. Mr. Shea asked where the committee note and references should go–with the first instruction or the second. Mr. Humpherys noted that the committee note needs to be revised. The only reference the first instruction needs is to *Zions First National Bank v. National American Title Insurance Co.*, 749 P.2d 651, 655-56 (Utah 1988). All three references should be included with the second instruction. The instruction was approved as modified.

3. *CV2410. Notice of loss.* Because the notice-of-loss instruction tracked the proof-of-loss instruction, the committee agreed to defer discussion of CV2410 until Mr. Shea has had an opportunity to revise CV2410 to conform with the revisions to CV2407. Dr. Di Paolo asked what the difference between a proof of loss and a notice of loss is. Mr. Humpherys explained that the notice of loss is notice to the insurer of the fact of a loss, and proof of loss is evidence of the amount claimed. Dr. Di Paolo suggested explaining the difference in the instructions and putting the two instructions next to each other. Mr. Shea noted that the organization of the instructions needs to be revised but can wait until a subset of the insurance instructions is complete.

4. *CV2408 [now renumbered 2409]. Unspecified time of performance.* The instruction was previously approved. The committee agreed to delete the links to the commercial contract instructions and approved the committee note to read, "This instruction applies only if the policy or the law does not provide when the performance at issue must be done." The committee approved the note as modified.

5. *CV2409 [now renumbered 2410]. Recovery of damages.* The instruction was previously approved. The committee added a citation to *Beck v. Farmers Insurance Exchange*, 701 P.2d 795 (Utah 1985), and changed "statute" to "law" in the committee note and approved the instruction as revised.

6. *CV2411. "Prejudice" defined.* Mr. Shea presented a new instruction he had recently received from Mr. Johnson defining "prejudice." Mr. Humpherys thought that the instruction needed more work and suggested deferring discussion of it until the next meeting. He noted that the definition of "prejudice" may depend on the context and the facts of the case, such as whether the policy is a liability policy or a life insurance policy, if the issue is lack of notice or failure to obtain approval to settle, etc. The committee also deferred discussion of the remaining instructions (CV2411, Coverage by estoppel, and CV2412, Insurable interest) until the next meeting.

7. *Next meeting:* The next meeting will be September 9, 2013, at 4:00 p.m. There will be no committee meetings in July and August.

The meeting concluded at 5:45 p.m.

MINUTES

Advisory Committee on Model Civil Jury Instructions
September 9, 2013
4:00 p.m.

Present: John L. Young (chair), Alison Adams-Perlac, Juli Blanch, Marianna Di Paolo, Phillip S. Ferguson, Honorable Ryan M. Harris, L. Rich Humpherys, Gary L. Johnson, Timothy M. Shea, Paul M. Simmons, Ryan M. Springer, Honorable Andrew H. Stone

1. *Alison Adams-Perlac.* Mr. Young welcomed Ms. Adams-Perlac to the committee. She is a new staff attorney with the Administrative Office of the courts who will be taking Mr. Shea's place. The committee thanked Mr. Shea for all of his good work over the years.

2. *CV2018, Aggravation of symptomatic pre-existing conditions, and CV2019, Aggravation of dormant pre-existing condition.* CV2018 and CV2019 were based in part on the Utah Court of Appeals' decision in *Harris v. ShopKo Stores, Inc.*, 2011 UT App 329, the reasoning of which was recently rejected by the Utah Supreme Court. *See Harris v. ShopKo Stores, Inc.*, 2013 UT 34. Messrs. Johnson and Summerill revised these instructions accordingly. The committee approved the changes, which eliminate CV2019, and will add a citation to the Utah Supreme Court's decision in the references to CV2018.

3. *Insurance Litigation Instructions.* The committee continued its review of the Insurance Litigation instructions. Mr. Humpherys noted that he would like to separate the instructions by category, such as first-party claims, third-party claims, bad faith, etc. Mr. Humpherys was under the impression that the instructions were added to the courts' website as they were approved. Mr. Shea noted that they are on the committee's page on the courts' website but are not added to MUJI 2d instructions until the whole section is completed, although, he added, if the Insurance Litigation instructions were put into categories, a particular category could be added when it was completed.

a. *CV2408. Insurance policy must conform to Utah law.* Mr. Shea recommended making subparagraph (3) a separate instruction. It requires a definition of "prejudice," which is contained in CV2411. Mr. Young noted that the subcommittee has also proposed a new instruction on prejudice from delay in providing notice of a claim. Messrs. Humpherys and Johnson noted that proof of loss and notice of claim are separate and are governed by separate instructions. Mr. Humpherys added that less is required for notice of loss than for proof of loss. Mr. Young noted that the notice-of-loss instructions should come before the proof-of-loss instructions. Mr. Johnson suggested comparing CV2408 with CV2410, Notice of loss. Mr. Ferguson and Mr. Shea suggested deleting the opening clause of CV2408 ("As it relates to a proof of loss, the law that applies is:"). Judge Harris thought that the instruction did not match the title. Mr.

Young suggested changing the title to "Adequate compliance for proof of loss." Dr. Di Paolo thought that strict and substantial compliance were concepts not easily understandable to lay people and suggested deleting the last sentence of subparagraph (1). Mr. Simmons asked whether substantial compliance was a question of law or fact. Messrs. Humpherys and Ferguson thought it was a fact question. Mr. Ferguson asked whether it is a term of art. Mr. Shea suggested starting the instruction with, "A proof of loss is adequate if it is (1) timely, and (2) substantially complies with the proof-of-loss provisions of the policy." Dr. Di Paolo asked whether we could use a term other than "substantial" and suggested "adequate." Mr. Shea suggested saying that proof of loss is adequate if what was not done was not important or was minor or if it put the company on notice of the loss. Mr. Humpherys asked whether the standard was an objective one, i.e., would a reasonable insurer have known of the claim from the proof of loss. Mr. Humpherys noted that the issue can arise in two ways: (1) the insurer claims that it is relieved of liability under the policy because it did not get notice or proof of loss, or (2) the insurer claims that the insured breached the contract because he or she did not give adequate notice or proof of loss. Mr. Shea suggested that he and Ms. Adams-Perlac put CV2407 and CV2410 into the same format and then create two additional instructions, on adequacy and prejudice. Dr. Di Paolo noted that the prejudice instructions use "material" in a way that creates an ambiguity for a layperson, who could understand it to mean "touchable," and suggested changing "material" to "important." Mr. Shea noted that the construction contract instructions use "important" for "material." Dr. Di Paolo also suggested including in the instruction a definition of "strict compliance" and "substantial compliance." Mr. Humpherys thought they were already defined in CV2407, which states the purpose of the proof-of-loss requirement. Judge Harris thought that we needed to use the terms the courts have used ("strict" and "substantial" compliance) and that the best we could do to explain them would be to give examples. The committee suggested common issues that come up, such as whether the proof has to be notarized or whether it has to be on the insurer's form. But Judge Harris also thought that by listing specific examples, we may be implying that those are the only requirements that don't have to be strictly complied with. Ms. Blanch noted that strict compliance means 100% compliance. What is substantial compliance is not clear; is 80% enough? 85%? Mr. Young thought that "substantial" compliance was whatever was sufficient compliance in the jurors' minds. Mr. Humpherys thought that compliance was "substantial" if the purpose of the notice- or proof-of-loss requirements was fulfilled. Dr. Di Paolo thought the instruction needed to say that. The committee turned its attention to CV2407.

Judge Stone joined the meeting.

b. *CV2407. Proof-of-loss.* The committee revised the instruction to read:

> The insurance company must be given adequate proof of loss. A proof of loss is a summary of the facts and circumstances that gave rise to the covered loss. The law does not require strict compliance with policy provisions related to submission of the proof of loss as long as it is adequate. A proof of loss is adequate if it gives [the insurance company] a sufficient opportunity to investigate, to prevent fraud, and to form an estimate of its rights and obligations under the policy.
>
> [[Name of insurance company] claims that [name of policyholder] is not covered because the insurance company did not receive [adequate/timely] proof of loss.]
>
> [[Name of insurance company] claims that it was not required to pay for the loss sooner because it did not receive a[n] [adequate/timely] proof of loss.]
>
> [If it was not reasonably possible to give the proof of loss within the required time, the failure to give proof of loss within the time required by the policy is not a valid reason to deny the claim.]
>
> You must decide whether the proof of loss was [adequate/timely]. [Name of insurance company] has the burden to prove that the proof of loss was not [adequate/timely].

The terms "policy holder" and "insurance company" were substituted for "plaintiff" and "defendant," respectively, because the plaintiff is not always the policy holder. The insurance company may bring the action for a declaratory judgment that there is no coverage because a timely or adequate proof of loss was not given, for example. Also, the passive voice was used because the proof of loss does not have to come from the policy holder; it can come from an insurance agent, the third-party claimant, a claims administrator, etc. The committee approved CV2407 as revised.

c. *CV2408 revisited.* The committee returned to its consideration of CV2408. Subparagraphs (1) and (2) have now been incorporated into CV2407 and are no longer necessary. Subparagraph (3) on prejudice will be incorporated into a separate instruction on prejudice. Mr. Young suggested adding a new subparagraph for "Other," allowing the parties to address any other issues that might arise regarding proof of loss. Mr. Simmons asked who has the burden of

proof on each of the issues covered by subparagraphs (2), (4), and (5). Judge Harris thought that subparagraph (5) implied that direct delivery or first-class mail to the insurer are the only ways the proof of loss can be delivered. Ms. Blanch thought "given directly" implied hand delivery. Mr. Humpherys asked whether e-mail would be sufficient. He noted that the instruction was based on Utah Administrative Code R590-190-3 and suggested adding "or by other reliable means of communication." Judges Harris and Stone questioned the need for the instructing on subparagraphs (4) and (5) at all. Judge Stone noted that if the regulation covers those situations, the court can decide the question as a matter of law. The rest of CV2408 was therefore deleted. The references to CV2408 will be moved to CV2407.

d. *CV2408. Unspecified time of performance.* [Note: There were two instructions numbered CV2408 in the materials. This is the second of the two.] This instruction was previously approved, but the committee agreed to substitute "time" for "date" in the instruction, and the committee approved the instruction again as modified.

e. *CV2410, Notice of loss, and CV2411, "Prejudice" defined.* Mr. Shea and Ms. Adams-Perlac will revise CV2410 and CV2411 in light of the committee's revisions of CV2407 and CV2408.

f. *CV2412. Coverage by estoppel.* Messrs. Ferguson and Johnson noted that they disagree with the decision in *Youngblood v. Auto-Owners Insurance Co.*, 2007 UT 28, 158 P.3d 1088, on which CV2412 is based, but agreed that the instruction accurately states the law as stated in *Youngblood*. Mr. Ferguson questioned the use of "material" mispresentation. Mr. Young suggested replacing "material" with "important." Dr. Di Paolo thought that "significant" might be better in this context. At Mr. Humpherys's suggestion, the second sentence was revised to read, "[Name of plaintiff] therefore claims that [he/she/it] is entitled to modify the policy to conform to what was represented by [name of defendant]'s agent." Mr. Shea asked if there was a distinction between "coverage," "benefits," and "protection." The committee thought that "coverage" and "protection" were not both necessary in the instruction. The committee approved the instruction as modified.

g. *CV2413, Insurable interest.* Mr. Johnson suggested using the statutory definition of "insurable interest," noting that it can apply to people as well as to property. Mr. Humpherys will redo the instruction.

h. *CV24__, Compliance with Utah law.* Mr. Ferguson questioned whether the terms "construe" and "ambiguous" were plain English. He also asked whether the instruction covered a question of law rather than fact. Mr.

Humpherys noted that at can be a breach of contract if an adjuster does not construe a policy according to Utah law but added that the instruction is probably more applicable to bad-faith cases, not breach-of-contract cases. He will put the instruction in the bad-faith instructions.

i. *CV__, Recovery of consequential damages.* Mr. Humpherys noted that recovery of consequential damages in insurance cases is different enough from recovery of consequential damages in other commercial contract cases that it should be covered by a separate instruction and not merely refer to CV2136, the commercial contract instruction.

4. *Next meeting.* The next meeting will be on Tuesday, October 15, 2013, at 4:00 p.m.

The meeting concluded at 6:00 p.m.

MINUTES

Advisory Committee on Model Civil Jury Instructions
October 15, 2013
4:00 p.m.

Present: John L. Young (chair), Alison Adams-Perlac, Honorable Ryan M. Harris, L. Rich Humpherys, Gary L. Johnson, Paul M. Simmons, Ryan M. Springer, Honorable Andrew H. Stone, Peter W. Summerill, David E. West, Craig R. Mariger (chair of the Professional Liability: Design Professionals subcommittee)

Excused: Francis J. Carney, Marianna Di Paolo, Phillip S. Ferguson

1. *Pro Se Litigants.* Mr. Young noted that Judge Toomey had asked the committee, on behalf of the Board of District Court Judges, to consider drafting a model jury instruction concerning pro se litigants (that they have the right to represent themselves, that they are equal in the eyes of the law to those parties represented by counsel, and that the court neither favors nor disfavors them). Mr. Young organized a subcommittee to draft such an instruction. The subcommittee is Mr. Young, Judge Harris, and Mr. Johnson.

2. *Design Professional Instructions.* The committee continued its review of the Design Professional Instructions. Mr. Mariger distributed a red-lined copy of the revised instructions and explained the changes.

a. *CV501. Standard of care for design professionals.* The first paragraph was revised to make it consistent with the other instructions, listing the different types of design professionals in brackets. "[A]nd the amount of the harm" was added to the last paragraph. At Mr. Humpherys's suggestion, it was revised to read, "and, if so, the amount of the harm." Several committee members questioned the bracketed paragraph on changes in the standard of care. Mr. West, for example, thought the court should just instruct on the standard of care. Mr. Mariger said that the standard of care is generally a question of fact for the jury to decide based on expert testimony. At Mr. Simmons's suggestion, the committee deleted the first two lines of the second paragraph so that it now reads:

> The "applicable standard of care" is the standard of care existing at the time of [name of defendant]'s services and in the same or similar locality as where [name of defendant]'s services were performed.

The committee approved the instruction as revised.

Mr. Springer joined the meeting.

b. *CV502. Standard of care of a specialist.* Mr. Mariger explained that he was asked to find a case to support CV502. He could not find a Utah case specific to design professionals. The closest he could find was *Steiner Corp. v. Johnson & Higgins,* a federal district court case involving an actuary. The cases hold that the act of holding oneself out to the public as a specialist is what triggers the higher standard of care. The design professional is not liable simply because he or she does not possess the skill and knowledge of a specialist but is only liable if he or she does not adhere to the standard of care of a specialist. The committee approved the instruction as revised.

c. *CV503. Evidence of standard of care where expert is required.* Mr. Shea had proposed a committee note saying to give instruction CV129 on lay opinion testimony if no expert is required. Mr. Mariger explained that, if the court determines that the applicable standard of care is within the knowledge of lay persons, the jury can generally decide the question itself, without either expert or lay opinion testimony. So the reference to CV129 was deleted. The committee approved the instruction as modified.

d. *CV504. Damages.* Mr. Mariger noted that most of the cases involving design professionals are contract cases, involving contract damages, because the economic loss rule bars tort damages unless there is a personal injury involved or damage to other property. The committee and Mr. Mariger questioned whether there should be an instruction number (CV504) for what is just a committee note. At Mr. Mariger's suggestion, CV504 was deleted, and the committee note was added to CV505. The rest of the instructions will be renumbered accordingly.

e. *CV505. Measure of damages. Defective improvements.* Mr. Mariger was asked to compare CV505 with CV2232 (avoiding unreasonable economic waste in commercial contracts). CV2232 is a modification of the rule stated in the Restatement (Second) of Contracts, which has not been adopted in Utah. It does not accurately state the law. Mr. Mariger traced the development of the law on this issue. Originally, the law was that the measure of damages was expectation damages, i.e., the cost to repair the property to its prior condition. This is the position taken in the Restatement (First) of Contracts and followed by the Utah Supreme Court in three cases–*Rex T. Fuhriman, Inc. v. Jarrell,* 445 P.2d 136 (Utah 1968); *Stangl v. Todd,* 554 P.2d 1316 (Utah 1976); and *Winsness v. M.J. Conoco Distributors,* 593 P.2d 1303 (Utah 1979). Judge Cardozo held in a 1921 New York case that a repair that cost more than the corresponding increase in market value could be considered economic waste. So some courts got away from the first Restatement rule and awarded either the repair cost or the loss of market value, whichever was lower. Some awarded the repair cost unless the repair required a substantial alteration of the structure. In the second

Restatement, the drafters returned to the principle that the plaintiff is entitled to the benefit of his or her bargain, so the presumptive measure of damages was the loss in the value of the property *to the plaintiff* as a result of the defective construction. It is only if the plaintiff cannot prove the loss in the value of the property to the plaintiff with sufficient certainty that the plaintiff recovers the diminution in the market value of the property or the reasonable costs of repair "if the costs are not clearly disproportionate to the probable loss in value to him." The second Restatement rule has not been followed by many courts, including Utah's. Economic waste is assumed if it would require a "substantial modification" to put the property back in its former state.

Mr. Mariger stated that CV2232 does not accurately state Utah law. CV505 has been brought into line with Utah law as stated in the *Winsness* line of cases. The committee thought CV505 was cumbersome and redundant. Mr. Humpherys suggested deleting "to be constructed" in the second line. Mr. West suggested deleting "receipt of" in the fourth line. Mr. Humpherys asked whether "unreasonably wasteful" is a fact question or a legal question. Mr. Mariger thought it was factual but noted that the *Fuhriman* case reviewed the issue de novo. Mr. Young asked whether it is waste if the cost of repair exceeds the increase in market value by $1. Mr. Mariger said that the standard is "unreasonably wasteful," so $1 is probably not enough; it must be significant. Mr. Humpherys questioned what "sufficiently larger" meant. Mr. Johnson noted that it is a two-step process: first, the jury calculates the difference between the cost of repair and the increase in fair market value; second, the jury must make a value judgment as to whether the repair would be "unreasonably wasteful." Mr. Mariger noted that the concept is whether a reasonable person would make the repair. Mr. Young asked whether "fair market value" needs to be defined. The committee noted that it is defined in CV2010 and CV2605. The committee revised the instruction to read:

> If [name of defendant]'s breach of the standard of care has caused a defective improvement, the amount of money that will reasonably compensate [name of plaintiff] for the injury resulting from the defective improvements will be either (1) a "repair" measure of damages or (2) a "loss in market value" measure of damages.
>
> "Repair" Measure of Damages: If repairing the improvements is possible and would not be unreasonably wasteful, you must award [name of plaintiff] the reasonable cost to repair the improvements to the condition they would have been in if [name of defendant] had not breached the standard of care. This is called the "repair" measure of damages.

> "Loss in Market Value" Measure of Damages: If repairing the improvements is not possible, or if [name of defendant] proves that the cost to repair the improvements is unreasonably wasteful, then you cannot award [name of plaintiff] the "repair" measure of damages. You must instead award [name of plaintiff] damages equal to the difference between the fair market value that the improvements would have had if [name of defendant] had not breached the standard of care and the fair market value of the improvements received by [name of plaintiff] following [name of defendant]'s breach of the standard of care. This is called the "loss in market value" measure of damages.
>
> The repair is unreasonably wasteful if the cost of repair is sufficiently more than the loss in fair market value of the improvements caused by the breach of the standard of care, so that a reasonable person would not make the repair under the circumstances. If you find that a repair is unreasonably wasteful, then you should award to [name of plaintiff] the "loss in market value" measure of damages.

The committee approved the instruction as revised.

Mr. Summerill was excused.

f. *CV506. Betterment or value added.* The committee corrected a typographical error on line 2 and approved the instruction.

g. *CV507. Creation of a warranty.* Mr. Mariger noted that he had added references. The committee approved the instruction.

h. *CV508. Breach of warranty essential elements.* and *CV509. Implied warranties. Accuracy and fitness for purpose.* Mr. Mariger noted that he added to the committee notes to CV508 and CV509 a definition of an "*SME*-type warranty." The committee approved the instruction.

The committee thanked Mr. Mariger for all his and his subcommittee's good work on the design professional instructions. Mr. Mariger was then excused.

3. *CV324. Use of alternative treatment methods.* Mr. Springer noted that the Utah Supreme Court's opinion in *Turner v. University of Utah Hospitals & Clinics,* 2013 UT 52, calls into question the continued use of CV324. The court in *Turner* did not expressly disapprove of the instruction, nor did it give any guidance as to what a proper instruction should say. The holding in *Turner* was that it was error to give the

instruction because the case did not involve "alternative treatment methods." But there is no Utah case law to support the instruction. Mr. Springer reviewed the apparent genesis of the instruction. The MUJI 1st instruction was based on instructions from Georgia and Wisconsin, but added the provision that "it is not medical malpractice for a provider to select one of the approved methods, even if it later turns out to be a wrong selection." This provision is inconsistent with Utah tort law. The Georgia and Wisconsin instructions were in the context of informed consent. The Utah informed consent statute does not talk about alternative methods of treatment. Mr. Simmons asked why it is not sufficient to simply instruct on what the standard of care is, and not on what medical malpractice is not. Mr. Humpherys thought the instruction would only apply where the plaintiff was claiming that the defendant chose the wrong method. Messrs. West and Johnson thought that the court in *Turner* acknowledged the principle contained in the instruction and merely found that there was no evidence to support giving the instruction in that case. Judge Harris noted that the instruction would only apply if one expert was saying that there were equally viable alternative treatment methods and another expert disagreed. Judge Harris thought that, if there is a disagreement among the experts as to what the standard of care required, the choice of the standard of care should be left to the jury. The instruction short-circuits the jury's analysis by in effect telling the jury that it is not medical malpractice to select one method over another, even if a reasonable provider would not have chosen that method under the circumstances. Mr. Springer proposed deleting the instruction. Mr. Young thought that the committee should hear from the medical malpractice subcommittee on the issue before making a final decision. Mr. Springer agreed to get the subcommittee's input for the next meeting. In the meantime, Messrs. Young and Humpherys suggested saying on the MUJI 2d website that the instruction is "under review."

4. *Insurance Litigation Instructions.* The committee continued its review of the Insurance Litigation instructions.

a. *CV2407. Notice of loss.* Mr. Humpherys noted that a notice of loss and proof of loss are not the same thing. Adequacy is more of an issue with proof of loss than it is with notice of loss. The committee bracketed the first three paragraphs. Judge Stone noted that the statute (Utah Code Ann. § 31A-21-312) only requires that the notice give "particulars sufficient to identify the policy." Some committee members thought the notice should also identify the nature of the loss or indicate that the claimant is making a claim under the policy. Mr. Humpherys noted that sometimes the claimant is not the insured and may not be able to correctly identify the policy, such as where a pedestrian is making a claim for personal injury protection (PIP) coverage under an auto policy, or where a permissive user was operating a covered auto. Mr. West asked whether the insurer must show prejudice if it was reasonably possible for the claimant to give notice within the required time and simply failed to do so, for no good reason. The fourth paragraph suggests not. Judge Stone suggested that the insurer must

show that it was prejudiced by the lack of notice or untimely notice in every case, citing § 31A-21-312(2). Mr. Humpherys thought that there might be an administrative rule that addressed the issue. The committee suggested dropping the introductory clause of the fourth paragraph ("If it was not reasonably possible to give the notice of loss within the required time"). Mr. Humpherys offered to research the issue further.

5. *Next meeting.* The next meeting will be on Tuesday, November 12, 2013, at 4:00 p.m.

The meeting concluded at 6:00 p.m.

MINUTES

Advisory Committee on Model Civil Jury Instructions
November 12, 2013
4:00 p.m.

Present: John L. Young (chair), Alison Adams-Perlac, Juli Blanch, Francis J. Carney, Tracy H. Fowler, Honorable Ryan M. Harris, L. Rich Humpherys, Gary L. Johnson, Paul M. Simmons, Honorable Andrew H. Stone

Excused: Marianna Di Paolo

1. *CV2231. Damages for contractor's defective work.* Mr. Young noted that when the committee approved CV505, "Measure of Damages. Defective Improvements" at its last meeting, it became apparent that CV2231, "Damages for contractor's defective work," was not accurate. Mr. Young therefore revised CV2231 and 2232 to bring them in line with CV505. Kent Scott, the chair of the Construction Contract Instructions subcommittee, has approved the change. Mr. Humpherys thought the "'Loss in Market Value' Measure of Damages" paragraph was cumbersome. Mr. Young noted that "standard of care" does not apply in construction contract cases; the standard is the contract. The committee revised that paragraph to read:

> "Loss in Market Value" Measure of Damages: If repairing the improvements is not possible, or if [name of defendant] proves that the cost to repair the improvements is unreasonably wasteful, then you cannot award [name of plaintiff] the "repair" measure of damages. You must instead award [name of plaintiff] damages equal to the difference between the fair market value that the improvements would have had absent [name of defendant]'s breach and the fair market value of the improvements as received. This is called the "loss in market value" measure of damages.

The committee approved the instruction as revised.

2. *Proposed Pro-Se Instructions.* At Judge Toomey's suggestion, Mr. Johnson, Judge Toomey, and Judge Harris drafted some instructions to be used when one of the parties is pro se. They based them in part on instructions from the Eastern District of California.

a. *CV99. Introducing pro se litigant to the jury.* Mr. Humpherys thought that, if the instructions are to refer to "pro se" litigants, they should define "pro se." The committee thought it would be better to use the term "self-represented" and avoid the Latin phrase. At Mr. Humpherys's suggestion, the committee added the following sentence to the beginning of the instruction: "In this case, [name of plaintiff/defendant] is representing [himself/herself]." The committee also changed "the trier of fact" to "you" in the next paragraph. The committee approved the instruction as revised.

b. *CV101A. General admonitions. (Pro-se version.)* The committee deleted the phrase "proceeding 'pro se,' which means he/she is" from the sixth paragraph and approved the instruction as modified.

c. *CV102A. Role of the judge, jury, parties and lawyers. (Pro-se version.)* At Mr. Ferguson's suggestion, "prejudicial" in the fifth paragraph was changed to "prejudiced." The committee discussed what obligation a judge has to assist a pro-se litigant in order to ensure a fair trial. Judges Harris and Stone noted that the Supreme Court recognized such a duty in *Turner v. Rogers*, 564 U.S. —, 131 S. Ct. 2507 (2011), in a civil contempt case where there was the potential for incarceration. At the suggestion of Judge Stone and Mr. Fowler, the committee added a committee note to the effect that it is unclear to what extent a judge must help a pro-se litigant to insure that the process is fair, citing *Turner v. Rogers*. The committee approved the instruction as revised.

d. *CV119A. Evidence. (Pro-se version.)* Mr. Ferguson did not think that the instruction clearly explained when a pro-se litigant is testifying as a witness. Mr. Young suggested that the court advise the jury whenever the pro-se litigant is testifying as a witness. The committee instead revised the instruction to read, "However, pro se [plaintiff's][defendant's] statements made under oath on the witness stand are evidence." The committee also deleted the preceding sentence ("If the facts as you remember them differ from the way they have stated them, your memory of them controls.") on the grounds that it is not limited to pro-se litigants but applies generally and should be covered in other instructions. The committee approved the instruction as modified.

3. *CV324. Use of alternative treatment methods.* Some committee members thought that whether the instruction would be appropriate would depend on whether the plaintiff was claiming that the defendant was negligent in his or her choice of treatment methods or that he or she was negligent in performing the method chosen. Judge Harris noted that he did not know when a court would ever give the instruction if there is conflicting expert testimony on whether there are acceptable alternative treatment methods. Mr. Humpherys thought that, unless the instruction is supported by Utah law, it should be withdrawn. In Mr. Springer's absence, the committee deferred further discussion of CV324. Mr. Carney noted, however, that he did not think the Medical Malpractice Instructions subcommittee (comprised of Kurt Frankenburg, Brian Miller, Jack Ray, Ryan Springer, Pete Summerill, and Bobby Wright) would agree on what to do with CV324 in light of *Turner v. University of Utah Hospitals and Clinics*, 2013 UT 52. Mr. Carney will ask both sides to present their best arguments on the issue in writing by January 15.

4. *Insurance Litigation Instructions.* The committee continued its review of the Insurance Litigation instructions:

a. *CV2407. Notice of loss.* Mr. Humpherys noted that he had revisited CV2407 in light of the discussion at the last meeting, and the statute and regulation had not been very helpful. He noted that the first part of the fourth paragraph ("If it was not reasonably possible to give the notice of loss within the required time") was deleted because it was not supported by the statute or case law. The committee approved the instruction as revised.

b. *New notice instruction.* Mr. Humpherys thought that there should be a new notice instruction explaining to whom notice may be given, based on a regulation that says one can give notice to an agent of the insured and former section 31A-23-305 of the Utah Code (now section 31A-23a-405(2)), which now reads:

> There is a rebuttable presumption that every insurer is bound by any act of its appointed licensee performed in this state that is within the scope of the appointed licensee's actual (express or implied) or apparent authority, until the insurer has canceled the appointed licensee's appointment and has made reasonable efforts to recover from the appointed licensee its policy forms and other indicia of agency. . . .

Judge Stone asked whether "agent" (or "licensee") is a defined term. Mr. Johnson noted that the Insurance Code used to include definitions for "agent" and "broker," but the revised code refers to them as "producers." But the revision did not change all statutory references to "agent." Mr. Humpherys thought that the statute was referring to agents in the legal sense and not necessarily an insurance "agent." Mr. Johnson thought it would be a fact question as to whether one was acting as an agent for the insurer, the insured, or both (a dual agent).

c. *CV2409. When insurer claims prejudice from delay in notice or proof.* Mr. Humpherys thought use of the word "lengthy" was problematic. At Judge Stone's suggestion, the phrase "was so lengthy it" was deleted from the second line. Mr. Humpherys also thought the phrase "material change in its ability" was problematic. He noted that there could be a material change, but the insurer could still be able to perform an adequate investigation. Mr. Ferguson asked whether the standard was that the insurer could not complete its investigation. Mr. Humpherys thought not. Mr. Young noted that the committee had used "important" for "material" in other contexts, but the committee thought "important" would not work here. Mr. Fowler suggested "significant," and Judge Stone suggested "meaningful." Mr. Humpherys thought there needed to be some showing of harm to the insurance company because it could not perform its full investigation, such as not being able to find a witness whose testimony would

have changed the outcome. Mr. Ferguson noted that delay only becomes an issue if the notice is given after the time specified in the policy. Mr. Ferguson asked whether "is prejudicial" could be understood to imply some racial prejudice. Judge Stone suggested "detriment" for "prejudice." Mr. Simmons wondered whether lay jurors would understand "detriment" any better than "prejudice." The committee considered synonyms to "detriment," including "impairment," "harm," and "disadvantage." Mr. Young questioned whether we need "actual" if we use "detriment." Mr. Simmons questioned how much detriment is required. For example, if the insurer is precluded from performing an investigation that would meet the gold standard for investigations but is not precluded from obtaining enough information to adjust the claim, is that sufficient to bar the insured's claim? The committee thought that it should be a reasonableness standard. The committee revised the first paragraph of the instruction to read:

> [Insurer] claims that [insured's] delay in providing [notice][proof] of [describe claim or loss] caused actual detriment to insurer. An insurer suffers detriment if it is unable to reasonably investigate, or defend, or resolve a claim because of the delay.

Similarly, in the last paragraph the phrase "was prejudiced by" was replaced with "suffered detriment because of."

The committee revised the first part of the third paragraph to read, "In determining if [insurer] suffered actual detriment, you may consider the extent to which late notice interfered with the [insurer's] ability to reasonably: . . ." Mr. Humpherys questioned the use of "interfered with," noting that it implies some positive action, whereas the failure to provide timely notice is an omission. Ms. Adams-Perlac suggested "prevented," but the committee thought that created too high a standard. Ms. Blanch suggested "affected," but the committee thought that created too low a standard. The committee decided to stay with "interfered with."

Ms. Blanch suggested combining paragraphs (1) and (2) (examining the scene and interviewing witnesses) and adding a catch-all "or otherwise conduct its investigation."

Mr. Humpherys questioned whether the instruction should list factors at all for the jury to consider in determining if the insurer suffered sufficient detriment. He thought that the instruction should just state what the law is, and factors to consider are factual matters that the attorneys can argue but are not part of the legal standard. Mr. Johnson wanted to list the factors so that he and the jury could tell what evidence he needed to prove his case. Mr. Young suggested bracketing all of the factors and just giving those that applied in the particular

case. Mr. Humpherys thought that listing factors for the jury to consider either unduly limits the jury's consideration of all the facts and circumstances of the case or unduly focuses the jury on certain facts. Mr. Simmons suggested moving the factors to a committee note, as was done in CV207, "Abnormally dangerous activity." Ms. Blanch noted that other instructions, such as CV2013, "Wrongful death claim. Adult. Factors for deciding damages," list factors. Mr. Humpherys thought the wrongful death instruction was distinguishable because the law limits the damages recoverable in a wrongful death action to only those categories of damages listed in the instruction. Mr. Carney suggested leaving the factors in the instruction and letting Mr. Humpherys draft a committee note explaining why he thinks it is inappropriate to include them in an instruction. Mr. Young suggested tying the factors to the insurer's claims, so that the jury would be told that (1) the insurer claims that it suffered detriment because of a, b, and c; (2) therefore, you must decide if the insurer suffered detriment because of a, b, or c. Ms. Adams-Perlac offered to put the instruction in that form.

5. *Next meeting.* The next meeting will be on Monday, December 8, 2013, at 4:00 p.m.

The meeting concluded at 6:00 p.m.

MINUTES

Advisory Committee on Model Civil Jury Instructions
December 9, 2013
4:00 p.m.

Present: John L. Young (chair), Alison A. Adams-Perlac, Juli Blanch, Francis J. Carney, Marianna Di Paolo, Phillip S. Ferguson, Honorable Ryan M. Harris, L. Rich Humpherys, Paul M. Simmons, Ryan M. Springer

Absent: Tracy H. Fowler, Gary L. Johnson, John R. Lund, Honorable Andrew H. Stone, Peter W. Summerill, David E. West

1. *Instructions for Cases Involving Pro-se Litigants.* Mr. Ferguson reported that he did not think it was possible to lay down a set of rules for juries to follow in cases involving pro-se litigants. He noted that the cases say that pro-se litigants will be held to the same standard of knowledge and practice as qualified members of the bar; "[n]evertheless," they should be "accorded every consideration that may reasonably be indulged." *See, e.g.*, *State v. Winfield*, 2006 UT 4, ¶ 19, 128 P.3d 1171 (citations omitted). Courts must decide what constitutes reasonable indulgence based on the facts of each case. Mr. Young suggested that a committee note be added to CV99 that explains that and references the cases that state the standard (*State v. Winfield; Allen v. Friel*, 2008 UT 56, 194 P.3d 903; and *Nelson v. Jacobsen*, 669 P.2d 1207 (Utah 1983)). Ms. Adams-Perlac volunteered to draft the committee note.

2. *Insurance Litigation Instructions.* The committee continued its review of the Insurance Litigation instructions:

a. *CV2408. To whom notice must be given.* Mr. Humpherys noted that the instruction was taken from the statute, Utah Code Ann. § 31A-21-312(1)(a) & (4). Mr. Young raised the question of electronic notice, such as by e-mail. Mr. Humpherys thought that it could come under the rubric "written notice" but noted that there was no Utah law on the issue.

Ms. Blanch and Mr. Carney joined the meeting.

Mr. Humpherys suggested adding a comment referring users to the instructions on agency. He noted that the regulation, R590-190-7(2), says that notice of claim or loss may be given to "any appointed agent, authorized adjuster, or other authorized claim representative" unless the insurer "clearly directs otherwise," as provided in the regulation. He did not think, however, that the regulation could limit the people who could receive notice under the statute. Mr. Young thought that a committee note would not be necessary in light of the regulation. The committee decided to add a reference to R590-190-7(2) instead of a cross-reference to the agency instructions but not define in the instruction the "Specific Disclosure" required by the regulation. Mr. Ferguson asked whether the insurer's agent for service of process would be considered an "appointed agent" for notice

purposes. Mr. Humpherys did not know the answer but thought one could argue so. Ms. Adams-Perlac offered to look for cases interpreting the statute. At Mr. Simmons's and Dr. Di Paolo's suggestion, the phrase "or mail by depositing a first class postage prepaid envelope addressed to [insurer] with the notice inside" was replaced with "or by first-class mail to the [insurer]." The committee approved the instruction as revised.

b. *CV2409a. To whom proof of loss must be given.* Mr. Humpherys noted that the instruction was the same as CV2408 except that "proof of loss" replaced "notice of loss." The instruction was revised to correspond to the revised CV2408. Mr. Humpherys noted that the regulation governing notice of loss (R590-190-7) does not apply to proofs of loss, which are governed by R590-190-3(10). A citation to the latter regulation was added to the references, and the instruction was approved as modified.

c. *CV2410. When insurer claims prejudice from delay in notice or proof.* Ms. Adams-Perlac noted that she had revised the instruction in light of the discussion at the last meeting. Mr. Young did not think the list of ways an insurer could be prejudiced needed to be included twice. Mr. Ferguson noted that, in the last paragraph, "[insured]" and "[insurer]" needed to be switched. Mr. Humpherys questioned the phrase "both at the outset and as new information came in during the investigation" in subparagraph (2). The committee deleted the phrase. He also questioned whether subparagraph (3) ("Direct and control the actual trial with attorneys of its choosing") was an accurate statement of the law. He noted that an insurer is not prejudiced if the insurer's chosen counsel provides appropriate representation. He said the problem occurs when trial counsel does not protect the insurer's interest. Mr. Ferguson suggested deleting the phrase "with attorneys of its choosing." Ms. Blanch asked whether the committee was trying to be too precise in enumerating ways the insurer may be prejudiced by late notice. Dr. Di Paolo quested the use of the phrase "actual detriment" and asked what "actual" added. She noted that, if we use the term "actual detriment," jurors will assume it means something different from "detriment" and will try to figure out the difference. Mr. Simmons suggested that courts use the phrase "actual detriment" to distinguish it from "theoretical detriment" but thought that juries did not need to be concerned with the distinction. The committee decided to delete "actual." Mr. Young suggested that we include a committee note explaining that the cases (including *State Farm Mut. Auto. Ins. Co. v. Green,* 2003 UT 48, 89 P.3d 97) talk about "actual prejudice," but the committee decided to use a different term that would be more understandable to lay people, without intending any difference in meaning. Ms. Adams-Perlac questioned whether "detriment" was sufficiently plain English and suggested using "harm" instead. Dr. Di Paolo agreed that "detriment" does not mean much to lay people and is vague. After considering alternatives (including

"loss"), the committee decided to use "harm" throughout. The committee questioned the use of "interfered" as well and considered alternatives, such as "obstructed," "inhibited," and "prevented." Mr. Humpherys noted that it is not enough that the late notice interfered with the insurer's ability to investigate, defend, or resolve a claim; the insurer must be harmed *because of* the interference. The committee decided to use "obstructed." Mr. Young questioned whether the last paragraph was necessary. Mr. Humpherys thought it was because it explains who has the burden of proof. The committee also discussed the order of the sentences within the instruction and revised the instruction to read:

> **CV 2410. When insurer claims prejudice (harm) from delay in notice or proof**
>
> [Insurer] claims that [insured]'s delay in providing [notice/proof] of [describe claim or loss] harmed [insurer] by obstructing [insurer's] ability to reasonably [investigate/defend/resolve] the claim.
>
> The failure to give [adequate/timely] [notice/proof] of loss is a valid reason to deny the claim if [insurer] proves that it was harmed because of [insured]'s failure to give [adequate/timely] [notice/proof] of loss.
>
> You must determine whether the evidence shows [insurer] was harmed due to [insured]'s delay.

The committee approved the instruction as revised.

d. *CV2414. Must have an insurable interest.* Mr. Humpherys noted that he still needs to draft CV2414a, "What is an insurable interest." He noted that it will be complicated because it differs with each type of insurance. He noted a Utah case that involved a partnership that took out life insurance on its two partners. After the partnership was dissolved, one of the partners died. The other partner claimed the life-insurance proceeds, as did the deceased partner's family. The court sided with the family, on the grounds that the surviving partner did not have an insurable interest in the life of his former partner at the time of his death. The case has been heavily criticized because the partner had an insurable interest in his partner's life when the policy was purchased, and the partnership paid the premiums on the policy. Mr. Simmons asked whether CV2414 should explain when the insurable interest must exist. Mr. Young thought it could vary depending on the type of insurance and would be covered in CV2414a. At Judge Harris's suggestion, the titles of CV2414 and CV2414a were

changed to “Insurable interest required” and “Insurable interest defined,” respectively. At Mr. Ferguson’s suggestion, the phrase “Under the law” was deleted from the beginning of the instruction. At Mr. Young’s suggestion, the phrase “You will be asked to decide” was replaced with “You must decide” in the last sentence. The committee approved CV2414 as modified.

Mr. Humpherys asked to be excused because he had another commitment. The committee decided to defer further discussion of the instructions until he can be present.

3. *Next meeting.* The next meeting will be on Monday, January 13, 2014, at 4:00 p.m.

The meeting concluded at 5:30 p.m.

MINUTES

Advisory Committee on Model Civil Jury Instructions
January 13, 2014
4:00 p.m.

Present: John L. Young (chair), Alison A. Adams-Perlac, Juli Blanch, Francis J. Carney, Marianna Di Paolo, Phillip S. Ferguson, Tracy H. Fowler, L. Rich Humpherys, Paul M. Simmons, Peter W. Summerill

Absent: Honorable Ryan M. Harris, Gary L. Johnson, John R. Lund, Ryan M. Springer, Honorable Andrew H. Stone, David E. West

1. *Instructions for Cases Involving Pro-se Litigants.* The committee approved the committee note to CV099 that Ms. Adams-Perlac drafted.

2. *Insurance Litigation Instructions.* The committee continued its review of the Insurance Litigation instructions:

a. *CV2415. Compliance with Utah law.* Mr. Humpherys noted that this instruction relates more to bad-faith claims than to breach-of-contract claims. The committee agreed, noting that the issue would not go to the jury in a breach-of-contract case, since the court would construe the contract as a matter of law. Mr. Humpherys thought an instruction might be needed to keep the jury from construing the policy anyway, since the policy is typically admitted into evidence. Mr. Young and Ms. Blanch thought that the problem could be handled by redacting any policy provision that the court has held is contrary to Utah law.

Dr. Di Paolo joined the meeting.

Ms. Blanch thought that a single stock instruction would not be able to cover all the different circumstances and noted that the court and the parties will need to decide the best way to keep the jury from considering policy language it should not consider based on the circumstances of the particular case. Mr. Young asked if there needed to be a committee note addressing the problem. Mr. Humpherys thought it was already covered in CV2403. The committee decided to omit CV2415 from the breach-of-contract instructions and reconsider it as part of the bad-faith instructions.

b. *CV2416. Recovery of consequential damages.* Mr. Humpherys noted that consequential damages can include damages for emotional distress if emotional distress was reasonably foreseeable from a breach of the contract and not excluded by the contract. The Utah Supreme Court rejected the argument that consequential damages are only available for bad faith in *Machan v. UNUM Life Insurance Company*, 2005 UT 37, 116 P.3d 342. Mr. Ferguson noted that consequential damages in a breach-of-contract case do not include attorney's fees. He asked whether CV2416 tracked the instruction on consequential

damages in commercial contract cases. The committee compared the two instructions (CV2416 and CV2136) and concluded they were substantially the same. Mr. Young noted, however, that CV2136 referred to "the parties' contemplation," whereas CV2416 referred to the defendant's contemplation. Mr. Simmons noted that the result would probably be the same, since the plaintiff will always claim that he contemplated the damages he is seeking, but the committee revised CV2416 to refer to the "parties" rather than the "defendant." Mr. Ferguson asked what "generally foreseen" meant. Mr. Humpherys checked the case law and changed "generally" to "reasonably." At Mr. Young's suggestion, the phrase "at the time the policy was issued" was moved to the end of the second paragraph, and the last phrase in that paragraph was deleted. At Mr. Fowler's suggestion, "follows" was changed to "naturally flows." So the second and third paragraphs now read:

> Consequential damages are those damages caused by [name of defendant]'s breach that the parties could have reasonably foreseen at the time the policy was issued.
>
> A loss is foreseeable if it naturally flows from the breach in the ordinary course of events. A loss is also foreseeable if it is the result of special circumstances, beyond the ordinary course of events, that the parties knew of or had reason to know of.

The parenthetical quotations from *Black v. Allstate Ins. Co.* in the References section were deleted. The committee approved the instruction as modified.

c. *CV2417. Claim regarding insurable interest.* The committee thought that most questions of insurable interest would be decided by the court as a matter of law. But the statute does not cover every situation, and the statutory language at times makes the question a fact question, e.g., Utah Code Ann. § 31A-21-104(1)(c) (defining insurable interest in property or liability to require a "*substantial* economic interest" in the nonoccurrence of an event) (emphasis added). Mr. Summerill asked who had the burden of proving that the plaintiff did or did not have an insurable interest. Mr. Humpherys thought it was an affirmative defense and that the insurer would have the burden. Mr. Young noted that generally the party making a claim or raising a defense has the burden of proving his claim or defense. Mr. Summerill suggested adding a sentence at the end of the instruction: "To prevail on this claim, [name of defendant] must prove that [name of claimant] did not have an insurable interest at the time of the loss." Mr. Carney, however, found some authority for the proposition that the plaintiff has the burden of proving an insurable interest in at least some cases. The committee decided not to address the burden of proof in the instruction

absent a clear expression of Utah law on the issue but to note the question in a committee note. Ms. Adams-Perlac volunteered to research the issue.

Ms. Blanch was excused.

Dr. Di Paolo raised the question of when the insurable interest must exist–at the time the policy is taken out or at the time a claim is made. From the statutory language ("An insurer may not knowingly provide insurance to a person who does not have or expect to have an insurable interest in the subject of the insurance," Utah Code Ann. § 31A-21-104(2)(a)), Mr. Humpherys thought it was when the policy was bought. Mr. Carney found an article in the *Utah Bar Journal* (Mark W. Dykes, *Parduhn Me: The Utah Supreme Court and the Insurable Interest Requirement*, 19 UTAH B. J. 38 (July/Aug. 2006)) supporting this position in the context of a life insurance policy. Mr. Ferguson asked what happens if the plaintiff has no insurable interest at the time of the loss. Mr. Young suggested adding a committee note that would refer attorneys to the statute for determining when an insurable interest must exist. Ms. Adams-Perlac added a note to that effect. The committee revised the last paragraph of the instruction to read:

> [Name of insurance company] claims that [name of claimant] did not have an insurable interest in [describe–item of property/person's life/liability for an event, etc.]. Unless [name of claimant] had an insurable interest, the insurance is not valid, and [name of insurance company] is not required to pay benefits.

The committee approved the instruction as modified, subject to Ms. Adams-Perlac's research on the burden of proof.

d. *CV2418. Insurable interest in property or liability*. Mr. Humpherys noted that the instruction followed the statutory language, but the statutory language was not easily understandable to lay people. At the suggestion of Mr. Young and Dr. Di Paolo, the phrase "nonoccurrence of the" was deleted. Mr. Young suggested saying that an insurable interest means an interest "in the insurance policy for the purpose of insuring against the occurrence of an event." Dr. Di Paolo and Mr. Humpherys thought the interest wasn't in the policy but in the property or event insured against. Mr. Young suggested adding an introductory section saying that insurance is bought to insure against the occurrence of an event. The committee thought that an introduction was not necessary, that other instructions adequately covered the concept and that jurors would understand the purpose of insurance at least by the time this instruction is given. The instruction was revised to read:

> An insurable interest means any lawful and substantial economic interest in the [property/event] that is insured.

The committee approved the instruction as modified.

e. *CV2419. Life insurance–insurable interest.* Some of the committee questioned whether "love and affection" was always required in the case of a close family relative. Mr. Simmons suggested moving the phrase "if it is a person closely related by blood or by law" to the end of the first paragraph, since, as the instruction is written, it applies to both subsections (1) and (2). Dr. Di Paolo suggested starting the instruction, "For [name of plaintiff] to have an insurable interest in [name of person] . . ." Mr. Humpherys noted, however, that it is not simply a matter of listing the elements of an insurable interest. He explained that the list in CV2419 and the statute it is based on (Utah Code Ann. § 31A-21-104(3)) is not exhaustive but only covers the most common situations that might present a jury question. Mr. Humpherys thought that subsection (2) was a general statement of the law (i.e., that the person making the claim for insurance benefits must have "a lawful and substantial interest in having the life, health, or bodily safety of the person insured continue"). If the people are closely related, the substantial interest may be that engendered by love and affection rather than an economic interest (as in the case of business partners or an ex-spouse). The committee thought the phrase "engendered by love and affection" was not sufficiently plain English and suggested alternatives ("comes from," "is rooted in," "generated by"). The committee revised the instruction to read:

> For [name of plaintiff] to have an insurable interest in the [life/health/safety] of [name of person], [he/she] must have a lawful and substantial interest in the continued [life/health/bodily safety] of [name of person]. If [name of person] is closely related by blood or law to [name of plaintiff], then the substantial interest may be that generated by love and affection.

The committee approved the instruction as modified.

f. *CV2420. Representation, warranty and estoppel.* In answer to a question from Mr. Ferguson, Mr. Humpherys noted that *Youngblood v. Auto-Owners Insurance Company,* 2007 UT 28, also applied to representations, warranties, and estoppel. Mr. Humpherys noted a caveat–the representation must not be one as to a future occurrence. The committee questioned whether certain terms in the instruction would be clear to lay jurors, viz., "warranty," "representation," "negotiation of an insurance policy." Mr. Young suggested revising the instruction to read:

> A statement made by any person representing [name of insurer] in buying an insurance policy that affects the insurance company's obligations under the policy is unenforceable unless it is stated in the policy or in a written application signed by the applicant.

Dr. Di Paolo suggested using "explanation" for "statement." Mr. Humpherys suggested adding a committee note referring the reader to the instructions on agency if there is any question about the agent's authority. Mr. Humpherys thought that the instruction needed more work and suggested that it be put over to the next meeting.

3. *Next meeting*. The next meeting will be on Monday, February 10, 2014, at 4:00 p.m.

The meeting concluded at 6:00 p.m.

MINUTES

Advisory Committee on Model Civil Jury Instructions
February 10, 2014
4:00 p.m.

Present: Alison Adams-Perlac, Juli Blanch, Francis J. Carney, Marianna Di Paolo, Phillip S. Ferguson, Tracy H. Fowler, Honorable Ryan M. Harris, L. Rich Humpherys, Gary L. Johnson, Paul M. Simmons, Ryan M. Springer, Honorable Andrew H. Stone, Peter W. Summerill. Also present: Kurt M. Frankenburg, Sean C. Miller

Excused: John L. Young (chair), John R. Lund, David E. West

Mr. Carney presided in Mr. Young's absence.

1. *Minutes.* Mr. Johnson said he had a problem with the minutes regarding CV2417, "Claim regarding insurable interest." He thought the burden of proof should be on the insured to prove an insurable interest. But he was not aware of any Utah law on point. Ms. Adams-Perlac noted that she had researched the issue and found one case involving a property loss that suggested that the plaintiff had the burden of proof. Mr. Simmons pointed out that CV2417 did not specify who had the burden of proof. Mr. Johnson withdrew his objection and moved that the minutes be approved. Messrs. Springer and Summerill 2d. The committee approved the minutes.

2. *CV324. Use of alternative treatment methods.* Mr. Carney noted that he had asked the plaintiffs' and defense medical malpractice bars to present their positions on whether the committee should delete or amend CV324 in light of the decision in *Turner v. University of Utah Hospitals & Clinics,* 2013 UT 52. Mr. Carney noted that he and Elliott Williams had drafted the instruction and that it was a compromise. He thought it was less defense oriented than MUJI 1st 6.29. Mr. Carney introduced Messrs. Frankenburg and Miller, whom he had invited to present the defense position. Mr. Frankenburg did not think that *Turner* changed anything because it did not involve alternative methods of treatment. He thought the instruction was still appropriate in cases where it applied; otherwise, the supreme court would have said not to use it anymore. He did not think that the instruction needed to say anything about informed consent; he thought that adding issues of informed consent to the instruction would conflate the issues and confuse juries. He acknowledged that the language in the instruction that "it is not medical malpractice for a provider to select one of the approved methods, even if it later turns out to be a wrong selection" could be misleading, but he thought the instruction was supported by *Walkenhorst v. Kesler,* 92 Utah 312, 67 P.2d 654 (1937). Mr. Miller thought *Butler v. Naylor,* 1999 UT 85, 987 P.2d 41, provided additional support. He thought that if there was a problem with the way the instruction was worded, the jury should consider it in conjunction with CV301B, "Standard of care defined," etc. He noted that the method used needs to comply with the standard of care, but if there are acceptable alternative methods, it is not negligence to choose one over another. He suggested revising the instruction to say "it is not per se negligence" to choose one alternative over another. He thought that *Turner* was not the

problem, that the problem was that jurors need to understand that the treatment chosen still must comply with the standard of care.

Dr. Di Paolo joined the meeting.

Mr. Carney thought that there was a place for the instruction but that it was overused. He noted that doing something and doing nothing are not "alternative methods of treatment."

Mr. Springer presented the plaintiffs' position. He thought there was no support in Utah law for the instruction. He distinguished *Walkenhorst* on the grounds that it involved a physician testifying against a chiropractor, not a choice between alternative treatment methods in the same field or specialty. He said that he had not found a similar instruction in other jurisdictions.

Judge Harris joined the meeting.

Mr. Springer said that the Utah Supreme Court did not reject the instruction in *Turner* because it did not apply on the facts of *Turner,* and the court is not in the business of giving advisory opinions. Mr. Carney pointed out, however, that the court had said not to use other instructions in other cases, such as the unavoidable accident instruction and "the mere fact of an accident" instruction. Mr. Springer thought that the mere fact that a doctor made a choice between alternative methods of treatment should not immunize him from liability. On the other hand, Mr. Frankenburg thought that the plaintiff should not win just by showing that he was not told about an alternative method of treatment. Mr. Springer thought the instruction presupposes that informed consent was given. Mr. Carney thought that the defense should have the burden of proof to show that a substantial body of doctors uses the method, but that informed consent was not needed on every alternative method. Mr. Springer and Mr. Frankenburg agreed that it may be difficult to define "method of treatment." Mr. Springer suggested a distinction between methods of treatment and techniques, but Mr. Frankenburg doubted that such a distinction exists in the case law or medical literature. Dr. Di Paolo asked whether, if we have an instruction on alternative methods of treatment, we need another instruction on alternative techniques.

Ms. Blanch joined the meeting.

Mr. Summerill thought that the instruction tried to avoid a negligence-based analysis. He thought that medical malpractice trials come down to a battle of the experts. He thought the instruction in effect told the jury that it did not have to weigh the experts' opinions in this situation and does away with the reasonableness standard for negligence. He thought the instruction increased the plaintiff's burden.

Mr. Carney asked why the instruction was needed at all. Mr. Miller thought it was necessary because juries are confused by evidence of different methods of treatment. Messrs. Springer and Simmons thought the concept was adequately covered by the standard-of-care instructions. Mr. Simmons thought that medical malpractice cases come down to competing expert opinions on what the standard of care is, whether it was breached, or both. In some cases, the disagreement will be over the doctor's choice of a method of treatment, and in other cases it will be over the doctor's application of his chosen method of treatment, but the jury can consider both under the general standard-of-care instructions. Mr. Johnson was not comfortable with the language "it is not medical malpractice." He said he did not like any jury instruction that tells the jury how to decide the case. He suggested saying that the selection of one method over another is not "in and of itself" negligence. *See Peffer v. Cleveland Clinic Found.*, 894 N.E.2d 1273, 1280 (Ohio Ct. App. 2008). Ms. Blanch suggested an analogy to products liability cases, in which the jury is told that it may consider compliance with governmental standards in deciding whether a product is defective.

Judge Harris said he was having a hard time thinking of a scenario where he would give CV324. He thought the general standard-of-care instruction would adequately cover the issue and that giving a separate instruction on it would be confusing. Before a court could give CV324, both experts would have to agree that the treatment method the defendant chose was "approved by a respectable portion of the medical community." Judge Stone agreed that CV324 was not appropriate but thought that the way "standard of care" is defined in CV301B may not reach alternative methods of treatment. It suggests a single standard of care, whereas alternative methods of treatment suggests that there may be more than one standard of care. He pointed out that doctors may be reasonable doctors but use different methods of treatment. He thought that a jury instruction would be necessary in appropriate cases. Mr. Carney asked whether the issue could be handled by a committee note.

Mr. Summerill thought that there is just one standard of care: A healthcare provider is required to use reasonable care, that is, the care that a reasonable provider would use under similar circumstances. He thought the problem with CV324 is that it does away with reasonableness as the standard. Judge Stone pointed out that CV301B does not mention reasonableness either. Ms. Blanch suggested that the committee beef up CV301B. Mr. Summerill suggested adopting her suggestion and adding that the fact that there is no particular method of treatment that is used by all providers is one factor the jury may consider in determining whether the defendant acted reasonably. Mr. Humpherys said that the problems with listing factors are that (1) it is hard to know what factors to list and which ones to leave out and (2) spelling out factors can become unbalanced and argumentative. Mr. Summerill thought that CV301B in effect already lists factors by listing the parties' contentions. Mr. Frankenburg suggested adding to CV301B a sentence that says, "There can be more than one method of treatment that comes within the standard of care." Mr. Miller thought that additional language needed

to be added to address the hindsight test, that is, that the doctor should not be held liable just because his choice of method later turns out to be wrong. He also noted that the standard of care may change over time, but the committee pointed out that a provider is only required to use the standard of care applicable at the time he or she acted.

Mr. Humpherys said that it is not enough to show that two methods are both reasonable. The plaintiff must also show that the defendant's method was not reasonable. If the plaintiff cannot produce expert testimony to that effect, the case never gets to the jury. A jury question only arises when an expert says that the defendant's conduct was unreasonable.

Judge Stone suggested adding to CV326, "Expert testimony required," the following: "It is your job to decide based on the expert testimony what the standard of care is. You must resolve the dispute between the experts." He suggested adapting CV326 to include the general instruction on conflicting testimony of experts (CV136) and noted that CV326 is inconsistent with CV129 ("Statement of opinion"). Mr. Springer pointed out that the committee note to CV326 says that CV129 is not to be given when CV326 is used.

Mr. Carney took a straw vote. Five committee members (Judge Harris and Messrs. Humpherys, Simmons, Springer, and Summerill) were in favor of deleting CV324. Ms. Blanch and Messrs. Fowler, Ferguson, and Johnson were in favor of amending CV324 and possibly CV301B and CV326 to fix the problems with CV324. Mr. Summerill thought that if the committee kept CV324 it would be creating an instruction where there is no clear Utah law on point. Mr. Johnson suggested having the medical malpractice instruction subcommittee revise CV301B and CV326 to incorporate the protections of CV324. Mr. Ferguson volunteered to work with Ms. Blanch and Mr. Springer to try to propose something for the next meeting. Ms. Adams-Perlac will also serve on the subcommittee.

Messrs. Frankenburg and Miller were excused. They will be invited back to the next meeting. Mr. Springer was also excused.

3. *Insurance Litigation Instructions.* The committee continued its review of the insurance litigation instructions.

a. *CV2412. Recovery of damages.* Mr. Humpherys noted that he had added a new last paragraph, based on *Castillo v. Atlanta Casualty Co.*, 939 P.2d 1204 (Utah Ct. App. 1997), and added a reference to *Castillo.* He also suggested adding "consequential" before damages in the first paragraph. The committee deleted the link to CV2136 and moved the link to CV2135 to a committee note. Mr. Humpherys noted that there is a problem using the term "expectation

damages" in insurance cases because it suggests a version of the "reasonable expectations" doctrine, which the Utah Supreme Court has rejected.

b. *CV2416, Recovery of consequential damages.* Mr. Humpherys noted that his instruction is in addition to CV2412. He thought the last paragraph should be omitted. He was uncomfortable with the phrase "reasonable expectations" for the reason stated above. The committee decided to add the third paragraph of CV2416 to the end of CV2412 and to delete the rest of CV2416. **CV2412 was approved as modified.**

c. *CV2413, Coverage by estoppel, and CV2420, Representation, warranty, and estoppel.* The committee had previously approved CV2413. Mr. Johnson said he was uncomfortable with the instruction and asked how it was different from CV2420. Mr. Humpherys said that CV2420 was his effort to restate the holding in *Youngblood v. Auto-Owners Ins. Co.*, 2007 UT 28, 158 P.3d 1088. At Mr. Humpherys's suggestion, the committee replaced CV2413 with CV2420. Dr. Di Paolo suggested deleting "[material]" from subparagraph b. She noted that "material" has not been used to mean "important" in everyday speech for 200 years. Mr. Humpherys noted that it is the term the case law uses, and he had included it only to prompt a discussion of better synonyms. The committee decided to go with "important," as it had in other instructions. A committee note can be added to explain the use of "important," as was done with CV1801. The second paragraph of the committee note was deleted. It was included only to show the committee the source of the instruction.

d. *CV2421, Estoppel–reasonable reliance.* Mr. Humpherys noted that CV2421 should accompany CV2420. Dr. Di Paolo suggested using the language from CV2420(d) in the first paragraph to tie the two instructions together. The paragraph was revised to read: "When determining whether a reasonable person would rely on the agent's statement, you may consider the following:" Mr. Humpherys noted that CV2420 is supposed to state the standard for the agent's statement (an objective standard), and CV2421 is supposed to state the standard for the insured's reasonable reliance (a combination of objective and subjective standards), but he agreed that the relationship between the two was not clear. He noted that subparagraphs (a) and (b) of CV2421 are subjective, but subparagraphs (c) and (d) are objective. Judge Harris was concerned with the implication that subparagraphs (a) through (e) were an exhaustive list of factors for the jury to consider. Mr. Humpherys noted that they were the factors the Utah Supreme Court listed. Judge Harris suggested revising the instruction to say "you may consider all relevant factors, including the following."

e. *CV2414a, Insurable interest defined.* Mr. Humpherys agreed to draft a new instruction for CV2414a.

4. *Schedule.* Mr. Humpherys said that he thought the insurance instructions could take another year or two to complete. Judge Harris noted that Judge Lawrence and other judges had requested new punitive damage instructions. The committee decided to do punitive damage instructions next and to continue its work on insurance instructions until after the punitive damage instructions are completed.

5. *Committee Membership.* Mr. Humpherys suggested that Paul Belnap be invited to rejoin the committee. Ms. Adams-Perlac will extend an invitation to him.

6. *Next Meeting.* The next meeting will be Monday, March 10, 2014, at 4:00 p.m.

The meeting concluded at 6:00 p.m.

MINUTES

Advisory Committee on Model Civil Jury Instructions
March 10, 2014
4:00 p.m.

Present: John L. Young (chair), Alison Adams-Perlac, Juli Blanch, Francis J. Carney, Marianna Di Paolo, Phillip S. Ferguson, Honorable Ryan M. Harris, L. Rich Humpherys, Gary L. Johnson, Paul M. Simmons, Peter W. Summerill. Also present: Jack Ray

Excused: Tracy H. Fowler, John R. Lund, Ryan M. Springer, Honorable Andrew H. Stone

1. *CV301B. "Standard of care" defined. "Medical malpractice" defined. Elements of claim for medical malpractice.* Mr. Carney reviewed the prior discussions and history of CV301B and CV324. Mr. Ferguson reported that his subcommittee (Mr. Ferguson, Ms. Blanch, and Ms. Adams-Perlac; Mr. Springer was not there) decided to move CV326 into CV301B and added the following language: "The expert witnesses may disagree as to what the standard of care is and what it requires. If so, it will be your responsibility to determine the credibility of the experts and to resolve the dispute." Mr. Carney noted that a party cannot argue "alternative treatment methods" under CV324 just because the experts may disagree on what the standard of care is. Mr. Ferguson noted that the subcommittee did not use CV136 ("conflicting testimony of experts") as a reference. It also did not use CV129 ("statement of opinions"), which allows the jury to ignore expert opinions, because jurors cannot ignore all expert testimony on the standard of care in a medical malpractice or other professional liability case. Mr. Summerill noted that the phrase "skill ordinarily used by other qualified [providers/doctors]" in the first paragraph was problematic. Mr. Ray added that the legal standard is an objective, reasonableness standard and that the level of skill "ordinarily used" by other providers may not meet this objective standard. He proposed the following language, based on *Schaerrer v. Stewart's Plaza Pharmacy, Inc.*, 2003 UT 43, ¶ 35, 79 P.3d 922: "the reasonable degree of skill, care, and knowledge that would be exercised by a reasonably prudent [provider] in the same situation." Mr. Carney agreed with Mr. Ray and raised another issue, namely, whether the locality rule was still alive. The court held that it did not apply to "specialists" in *Jenkins v. Parrish*, 627 P.2d 533 (Utah 1981), but alluded to the rule in a later case. The committee agreed that it is seldom argued any more.

Ms. Blanch and Dr. Di Paolo joined the meeting.

Mr. Carney asked whether the instructions should refer to "medical negligence" or "medical malpractice." Messrs. Ray and Summerill noted that they have had potential clients say, in explaining their claim, that they did not know if the defendant's conduct was malpractice or just negligence, as if they were different. Dr. Di Paolo said that "malpractice" sounds much worse than "negligence." Mr. Young suggested adding a committee note recommending that the court clarify that medical negligence and medical malpractice are the same thing. Mr. Ray thought that "medical negligence" is

appropriate, since the standard is a negligence standard. Mr. Ferguson noted that we don't say that a negligent driver is guilty of vehicular malpractice. Mr. Humpherys asked whether "malpractice" should be purged from all the jury instructions. Mr. Summerill noted that CV302 refers to "nursing negligence," whereas CV301B refers to "medical malpractice." Mr. Carney noted that CV302 on the nursing standard of care should be revised to track any changes to CV301. Judge Harris thought that the instruction should tell the jury that the terms mean the same thing. Mr. Humpherys was concerned that using "malpractice" at all will taint "medical negligence." Mr. Carney noted that the verdict form just refers to "fault." Dr. Di Paolo suggested using both terms ("malpractice" and "negligence") every time one is used. Mr. Young suggested a separate introductory instruction to dispose of the issue at the beginning. Dr. Di Paolo suggested asking on the verdict form, "Did [name of defendant] violate the standard of care?" It was noted that "fault" encompasses both breach of the standard of care and causation, yet the verdict form asks both whether the defendant was at fault and whether the defendant's fault was a cause of the plaintiff's harm. Mr. Simmons suggested revising CV301B to read:

CV301B Elements of a medical negligence claim

To establish [his] [her] claim, [name of plaintiff] has the burden of proving two things:

1. That [name of defendant] breached the standard of care, and

2. That the breach was a cause of [name of plaintiff]'s harm.

Then a separate instruction (CV301C) could define "standard of care":

CV301C "Standard of care" defined.

A [health care provider/doctor] is required to use that degree of learning, care, and skill used by reasonably prudent [providers/doctors] in good standing practicing in the same [specialty/field] under the same or similar circumstances. This is known as the "standard of care." The failure to follow the standard of care is a form of fault known as either medical negligence or medical malpractice. The terms mean the same thing.

To establish a breach of the standard of care, [name of plaintiff] has the burden of proving–

1. What the standard of care is, and

2. That [name of defendant] failed to follow the standard of care.

> The standard of care is established through expert witnesses and other evidence. You may not use a standard based on your own experience or any other standard of your own. It is your duty to decide, based on the evidence, what the standard of care is. The expert witnesses may disagree as to what the standard of care is and what it requires. If so, it will be your responsibility to determine the credibility of the experts and to resolve the dispute.

Judge Harris noted that *Schaerrer* says that a health-care professional is required to "possess and exercise" the requisite care and asked if the instruction loses anything by saying simply "use." The committee thought not. They thought that as long as a defendant used the requisite care in the particular case, he would not liable even though he otherwise may not possess all the care exercised by reasonably prudent providers. Mr. Simmons asked what other "evidence" could establish the standard of care besides expert testimony, since even learned treatises or medical journals must come in through an expert. Mr. Ferguson pointed out that the standard can also be established by judicial notice or stipulation. The committee also noted that res ipsa loquitur can apply in a medical malpractice case. Mr. Summerill suggested adding to the committee note that a plaintiff does not have to establish the standard of care in a res ipsa loquitur case. Mr. Ray noted that the part of CV301B that listed the plaintiff's allegations raises questions, such as, must the plaintiff prove that the defendant failed to follow the standard of care in all respects listed? Must the jury agree on the same items? What if, for example, three jurors think the defendant breached the standard of care with respect to issue (1), two thought he did with respect to issue (2), and three thought he did with respect to issue (3)? All eight jurors agree that the defendant breached the standard of care, but there is no majority that agrees on any specific breach. The committee decided to delete the paragraph, since it raises more questions than it answers. The last paragraph of old CV301B was moved to the beginning of CV309, "Cause" defined, and the phrase "in any of these respects" was deleted from it. The committee approved CV301B, CV301C, and CV309 as revised.

2. *CV324. Use of alternative treatment methods.* Mr. Carney raised two questions regarding an alternative treatment instruction: (1) is it ever appropriate? and (2) if so, what form should it take? Mr. Ferguson's subcommittee proposed a revised CV324 that treated it as an affirmative defense. Mr. Ray thought the instruction created a legal doctrine that does not exist in Utah. He thought the committee was trying to salvage something that should not exist. Mr. Summerill thought it was argument and should not be presented as a court-sanctioned theory. Ms. Blanch thought it was not the committee's job to invalidate instructions that have not been invalidated by the Utah Supreme Court. Other committee members thought it was not the committee's job to perpetuate instructions that were not based on Utah law. Ms. Adams-Perlac said the committee's job is to get rid of bad instructions. Mr. Young noted that if there is no Utah law supporting an instruction, we should not be using it. Mr. Summerill noted that

CV301A says that the committee considered instructions on certain claims (such as loss of chance) but did not include them because there is no clear appellate authority on whether those claims exist in Utah. Mr. Carney thought that part of the committee's job is to help judges and attorneys and provide guidance where Utah law may not be clear. Mr. Simmons said he had an analytical problem with CV324 as revised. He thought that it invited inconsistent verdicts, because, before the jury could reach the question of alternative treatment methods as an affirmative defense, it first had to find that the defendant breached the standard of care, for example, by his choice of treatment methods or his application of the method under the circumstances of the case. If it decided that the defendant breached the standard of care but then decided that the defendant was not liable because he used a method that was "approved by a respectable portion of the medical community," that would mean that a negligent defendant could escape liability. The instruction in effect gives the defendant a "Get Out of Jail Free" card. Dr. Di Paolo thought that the concept was already covered in the standard-of-care instructions and thought that a committee note could be added to CV301B or 301C to explain the absence of the instruction. Mr. Carney noted that no one from the medical malpractice defense bar was at the meeting and said he was not comfortable proceeding in their absence. Ms. Adams-Perlac said that she had not sent them a notice of the meeting. Mr. Carney notified them the day of the meeting, but that may not have been sufficient time. Mr. Young suggested tabling the discussion. Mr. Humpherys thought that any decision should be based on a sound foundation, whether anyone was present to represent a particular side or not, and asked if anyone was advocating that there is Utah law to support CV324. He also suggested asking the defense bar to draft a comment on their position if the committee decides to eliminate CV324. Judge Harris suggested leaving CV324 in but using the strike-out feature on it. Further discussion was deferred until the next meeting.

3. *Committee Membership*. David E. West has resigned from the committee.

4. *Next Meeting*. The next meeting will be Monday, April 14, 2014, at 4:00 p.m.

The meeting concluded at 6:00 p.m.

MINUTES

Advisory Committee on Model Civil Jury Instructions
April 14, 2014
4:00 p.m.

Present: Alison Adams-Perlac, Francis J. Carney, 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. Also present: Christopher W. Droubay, John Ray, and Terence L. Rooney

Excused: John L. Young (chair), Juli Blanch, John R. Lund, Ryan M. Springer

Ms. Adams-Perlac conducted the meeting in Mr. Young's absence.

This was Mr. Carney's last meeting. The committee thanked Mr. Carney for his eleven years of service, and Ms. Adams-Perlac presented him with a certificate. She also provided a cake to honor the occasion.

1. *CV324. Use of alternative treatment methods.* Ms. Adams-Perlac and Mr. Carney summarized the history and prior discussions on CV324. The committee had discussed amending it, dispensing with it altogether, leaving it in but with the text struck out, and posting the two sides' position statements in the committee note. Mr. Carney asked whether we should have an instruction where, as here, there is no clear Utah law on point. He noted that in MUJI 1st the committee included alternative instructions when the law was not clear, but this committee has tried to avoid alternative instructions, although the committee made an exception for the instructions on the burden of proof under the Inherent Risks of Skiing Act (CV1113A-1113C).

Dr. Di Paolo, Judge Stone, and Mr. Humpherys joined the meeting.

Mr. Carney noted that the instruction is overused, being requested in nearly every case. He also noted that there are about 26 or 27 states that have a similar instruction, including California. Mr. Rooney read the California and Washington instructions. Mr. Droubay noted that the Washington instruction was revised to meet criticisms similar to criticisms of CV324. Mr. Ray thought the instruction was duplicative and argumentative and not necessary because the law was already adequately covered in the instructions on the standard of care (CV301B and CV302). Mr. Rooney agreed that the instruction is overused but thought it was appropriate where there is a real dispute as to what the standard of care is, such as in some cancer cases, where the physician may have a choice between radiation, chemotherapy, or another treatment. Mr. Summerill thought such a dispute should be resolved by the court under evidence rule 702. He noted that the proposed revision to CV324 uses rule 702 language. Mr. Rooney noted that there is not always a single way to do something, and if there are two or more ways, a doctor should be able to use the one he thinks best. He agreed that the situation does not come up routinely in every case and that the defendant should not win just because he picked one of two accepted methods; he can still be liable if his choice was the wrong one under the

circumstances or if he was negligent in performing the method of treatment. Mr. Ray said the problem with CV324 is that it tells the jury that the defendant is not negligent as long as there is more than one accepted method of treatment. Mr. Carney suggested revising CV324 but putting in a note that it was "not approved by the committee" and letting the issue come up on appeal. Mr. Summerill thought that if the committee included any instruction, it will have the appearance of approval, regardless of what any committee note says. Ms. Adams-Perlac did not think the instruction was supported by the law and thought it should be eliminated. If people are going to use an instruction on the issue, she thought they should have a better version. Judge Stone said that at a minimum we should get rid of the current CV324, which everyone agrees is bad. He suggested a simple instruction saying that there may be more than one standard of care. Mr. Rooney re-read the Washington instruction, WPI 105.08, which says: "A physician is not liable for selecting one of two or more alternative *[courses of treatment][diagnoses],* if, in arriving at the judgment to *[follow the particular course of treatment] [make the particular diagnosis],* the physician exercised reasonable care and skill within the standard of care the physician was obliged to follow." Mr. Summerill said that the problem with the Washington instruction is that it says that the physician is "not liable." He suggested including links to other states' instructions if attorneys need guidance in proposing their own instruction. Dr. Di Paolo pointed out that linking to other states' instructions is problematic because they do not have any basis in Utah law. Mr. Droubay thought that if the committee eliminated the instruction, the defense will be faced with motions in limine saying that they cannot argue that the defendant made a reasonable choice among acceptable alternatives. He thought that one should be able to argue that there is more than one method of treatment that may meet the standard of care. Mr. Carney thought that the model instructions should provide guidance in case the court or attorneys want to use an instruction on the issue. He favored including an instruction with a cautionary note, saying that the committee was not in agreement. Mr. Fowler agreed. He thought that the committee's job was to place the current instructions in plain English, and a form of CV324 was part of the original MUJI instructions. Dr. Di Paolo also thought that if attorneys are going to be creating jury instructions on issues not covered in the model instructions, it would be helpful to give them some guidance. Messrs. Summerill and Simmons thought that would be opening a Pandora's box because it would open the door for instructions on any number of issues for which there is no clear Utah law on point.

Mr. Carney moved to include a cleaned-up version of CV324 in the instructions, say that the committee was sharply divided on the appropriateness of the instruction, say that it should only be used when there really are alternative methods of treatment that are accepted in the medical community, and add position statements supporting and opposing the instruction. Mr. Johnson seconded the motion. The motion carried (Judge Stone, Dr. Di Paolo, and Messrs. Carney, Ferguson, Fowler, Humpherys, and Johnson voting in favor, and Messrs. Simmons and Summerill opposed). Mr. Rooney

thought that the committee note should send the message that attorneys use the instruction at their own risk.

Ms. Adams-Perlac asked if there were any concerns about the language in the proposed revision to CV324 circulated before the last committee meeting. Dr. Di Paolo said the phrase "respectable portion" was problematic. She thought that most people would interpret it to mean more than half. She suggested saying "a method generally approved" but noted that that raised the issue of what percentage of the medical community must approve a method before it is "generally approved." Mr. Ray pointed out that "respectable portion" could also mean a portion of the medical community that was respectable, regardless of its size (such as a few Dr. Welbys). Mr. Ferguson quoted *Walkenhorst v. Kesler*, 67 P.2d 654 (Utah 1937), which says "at least a respectable portion." Mr. Rooney quoted the New Jersey instruction (5.50G), which says that "alternative diagnosis/treatment choices must be in accordance with accepted standard medical practice." Mr. Summerill noted that a "respectable portion" of the medical community could be negligent and referenced Learned Hand's decision in the tug-boat case, *In re Eastern Transportation Co. (the T.J. Hooper)*, 60 F.2d 737 (2d Cir. 1932) ("A whole calling may have unduly lagged in the adoption of new and available devices. . . . There are precautions so imperative that even their universal disregard will not excuse their omission.").

Judge Harris joined the meeting.

Judge Stone thought that a new term (e.g., "generally accepted" or "accepted standard medical practice") was not necessary, given the standard-of-care instruction. He also did not think that the matter was an affirmative defense. Judge Harris agreed. Judge Stone thought that the instruction should tell the jury that the standard of care may include more than one method of diagnosis or treatment. Mr. Simmons suggested doing away with CV324 and simply adding a bracketed sentence to the standard-of-care instructions (CV301B and CV302) saying that there may be more than one method of diagnosis or treatment that complies with the standard of care. Mr. Summerill thought this would be problematic because it would be adding language to an instruction that has already been approved and would eliminate CV324, which would raise more questions. Mr. Ray also preferred to keep the instructions separate; he thought that the alternative treatment language would be used in every case if it were part of the standard-of-care instruction. Judge Stone thought that the instruction should sync well with the standard-of-care instructions. Mr. Carney suggested something along the lines of CACI 506: A doctor "is not necessarily negligent just because [he/she] chooses one medically accepted method of treatment or diagnosis and it turns out that another medically accepted method would have been a better choice."

Mr. Humpherys proposed including the current CV324 but with the language struck out with a note that the committee does not approve the instruction, based on

Turner v. University of Utah Hospitals & Clinics, 2013 UT 52, 310 P.3d 1212, that the committee was divided on other ways to approach the issue, and setting forth the plaintiffs' and defense positions on the issue. Mr. Humpherys thought this would show that the MUJI 1st instruction should not be used, that some version of the instruction may be valid, but that the committee could not agree on what version that might be. Judge Stone and Mr. Summerill seconded the motion. Mr. Carney said he would still want to include language that the trial court can work from. Mr. Summerill thought that doing so would make whatever language was suggested appear to have the courts' imprimatur. He thought it would be better to simply let the parties advocate their positions before the trial court. Judge Harris said he was mystified as to when he would ever give CV324. Judge Stone said that because the proposed revised CV324 refers to "*the* standard of care," it implies that there is only one way to do it. He thought the legal principle is that "the standard of care" can include more than one way of doing something. The jury will have to decide which expert to believe, the one who says that there is only one way to skin the cat, or the one who says there are two or more ways.

The committee thought that we needed new proposed language for both the instruction and the committee note before anything could be finally approved. Mr. Carney thought the language should include other things, such as that it is the defendant's burden of proof to show that there is more than one acceptable alternative. Mr. Ferguson thought that the burden of proof is on the plaintiff to show that there is only one acceptable method that meets the standard of care. Ms. Adams-Perlac offered to draft new language. The committee will vote again on the new language.

Messrs. Droubay, Ray, and Rooney were excused.

2. *Term Limits.* Ms. Adams-Perlac noted that the recent resignations of Messrs. Young and Carney (Mr. Young's to take effect after the May 2014 meeting) raised the issue of whether there should be term limits on serving on the committee. She noted that there are currently term limits for the court's advisory committees on rules. A person may serve two four-year terms, with exceptions for judges, staff attorneys, the chair, and institutional members (such as Dr. Di Paolo). The policy and planning committee will consider whether to apply term limits to the jury instruction committees at its next meeting. Ms. Adams-Perlac noted that this committee has been serving since 2003, and some members are getting burned out. Judge Harris thought that the committee needed institutional knowledge. He thought that terms should be staggered so that we do not lose a Mr. Young and a Mr. Carney at the same time. Mr. Carney noted that we have tried to keep the committee evenly balanced between attorneys who represent primarily plaintiffs and those who represent primarily defendants, but committee members do not represent a particular constituency but are supposed to do what is best for the development of the law and legal process. Ms. Adams-Perlac explained the process for adding new members to a committee: When there is a vacancy on a committee, notice goes out to the bar, and attorneys may apply to

fill the vacancy. The staff and committee chair make recommendations to the Supreme Court. The committee generally thought that term limits were a good idea.

3. *Time*. Mr. Carney expressed his view that the committee has lost its way. He noted that the first edition of MUJI took only a year to complete, and we have been working for eleven years with no end in sight. He thought at this point we should only be meeting irregularly when necessary to consider modifications to the rules based on new developments in the law. He thought that the committee needed to triage and set priorities. He noted that every jury trial has instructions, and they are done on time, in much less time than the committee has taken. Judge Harris noted that Judge Lawrence has drafted his own instructions on punitive damages (the next topic the committee is set to discuss) and has shared them with him and Judge Stone. Ms. Adams-Perlac said that she was writing an article for the Bar Journal encouraging people to submit their proposed jury instructions for the committee's consideration. Mr. Carney noted that he and Mr. Young had asked for feedback in the past and had not received much. Ms. Adams-Perlac offered to reach out to judges and ask them to send the committee the actual instructions that they use.

The committee discussed the work of the subcommittees. Dr. Di Paolo noted that people get discouraged when their work is not reviewed for years. She suggested setting timelines and putting a limit on the amount of time spent discussing each instruction. Judge Stone suggested having no more than two meetings on any instruction. Mr. Summerill noted that part of the problem is that committee members do not come to the meetings prepared to discuss the instructions and have to spend a large amount of the meeting time reading the instructions. He thought the best procedure was to have one person on a subcommittee be in charge of drafting the instructions for that area of the law, present them to the subcommittee for revision, and the full committee would just review the final product for minor revisions. Mr. Humpherys suggested making the committee smaller. Mr. Summerill liked the idea and thought that a smaller committee could bring in specialists ad hoc for help in certain areas. Mr. Humpherys also suggested doing the instructions like they would be done at a trial: Each side would argue its position, and the judges on the committee would decide what the instruction should be. Dr. Di Paolo also noted that the instructions should be field tested on lay people so that the committee could have research on how the instructions are actually being understood.

4. *Next Meeting*. The next meeting will be Monday, May 12, 2014, at 4:00 p.m.

The meeting concluded at 6:00 p.m.

MINUTES

Advisory Committee on Model Civil Jury Instructions
May 12, 2014
4:00 p.m.

Present: John L. Young (outgoing chair), Alison Adams-Perlac, Juli Blanch, Phillip S. Ferguson, Honorable Ryan M. Harris, L. Rich Humpherys, Gary L. Johnson, Paul M. Simmons, Honorable Andrew H. Stone, Peter W. Summerill

Excused: Marianna Di Paolo, Tracy H. Fowler, John R. Lund, Ryan M. Springer

1. *Committee Status.* Mr. Young reported that the Utah Supreme Court has scheduled a meeting with him, the chair of the Criminal Instructions committee, and the staff attorneys for May 28 to discuss ways in which the drafting and approval process can be accelerated. Mr. Young solicited suggestions from the committee. He suggested using the Litigation Section as a source for volunteers. Ms. Adams-Perlac thought that the process should involve more new attorneys, who are eager to work, on subcommittees if not on the committee itself. Ms. Blanch thought it would be a good idea to involve younger attorneys, who have not begun to specialize and are not biased toward one side or another at this point in their practices. Ms. Adams-Perlac also reported that Judge Lindberg is writing an article for the *Utah Bar Journal* on MUJI 2d. Mr. Humpherys thought that the committee had spent a lot of time discussing jury instructions "on the edges" and suggested spending less time on such instructions and on plain English review and focus on core instructions. He also thought that the committee might move more quickly if it had fewer members, but other members thought that the committee benefited from the perspectives and collective wisdom of all its members. Ms. Adams-Perlac suggested limiting the number of instructions to consider at any meeting. She noted that committee members often do not review the full packet for a meeting because they don't think the committee will cover all of the instructions in the packet. She thought the preparation would be better if the meetings were limited to discussing a few instructions and that the meetings would be successful if the committee could approve 3-5 new instructions at each meeting. She noted that the committee had spent four meetings on a single instruction (CV324). Mr. Ferguson thought that the subcommittees had not been as robust lately and that the committee ends up doing the subcommittees' work. Mr. Young agreed and noted that we need to get subcommittees going in other areas. He also noted that the Gang-of-Three approach had worked to speed things up. Mr. Humpherys noted that the problem is getting attorneys to do the work when they have busy practices. He suggested soliciting volunteers from the Bar. Mr. Young explained the procedure for getting appointed to an advisory committee. Mr. Humpherys noted that he would like to see the insurance and punitive damage instructions through, whether he remains on the committee or is involved as a member of the subcommittees or an adviser.

2. *Mr. Young.* This was Mr. Young's last meeting. Ms. Adams-Perlac presented him with a certificate from the Supreme Court and a plaque, acknowledging

and thanking him for his eleven years of service as chair of the committee, and the committee gave him an ovation. Mr. Young was then excused. Ms. Adams-Perlac directed the rest of the meeting.

3. *CV324. Use of alternative treatment methods.* Ms. Adams-Perlac drafted a new version of CV324 but noted that, after further consideration, she thinks the instruction should be deleted in its entirety. Mr. Ferguson suggested at least leaving in the committee note to alert practitioners to the issue, but he thought we should not include the plaintiffs' and defense position statements. He thought we needed to say that the question is controversial and has not been decided yet. Mr. Humpherys moved to leave in the instruction number and title and committee note but delete the rest of the instruction and let the law develop. Mr. Ferguson seconded the motion. Judge Harris suggested leaving in the first sentence of the committee note ("The committee discussed this instruction at length and agreed that the previous version of the instruction was not supported by Utah law."). Judge Stone suggested adding, "Alternative treatment methods are adequately covered by other instructions." He did not want to preclude the argument altogether by deleting the instruction. Mr. Humpherys suggested adding, "Previous versions were neither supported nor contradicted by Utah law." Judge Harris noted that the real problem with the instruction was that it was not supported by the law and suggested saying, "Previous versions of the instruction were not adequately supported by Utah law," and citing to *Turner v. University of Utah Hospitals & Clinics,* 2013 UT 53. Judge Stone asked whether the jury should be instructed that there is mor than one way to skin a cat (i.e., comply with the standard of care) or leave it for the experts to argue. Mr. Ferguson said that in his experience, the instruction is never needed but thought that the issue was whether to have a separate instruction or to roll it into the standard-of-care instructions. Ms. Blanch thought that the absence of an instruction could cause a judge to preclude expert testimony that the standard of care may include more than one acceptable method of treatment. Judge Stone thought it was a fact question as to whether the standard of care included more than one method of treatment. His concern was that the standard-of-care instructions refer to "*the* standard of care," suggesting that there is only one way to do something. Judge Harris suggested saying in the comment, "Whether there are multiple ways of complying with the standard of care should be determined based on the facts and circumstances of the case." Judge Stone suggested adding, "The court should determine whether it is appropriate to instruct on alternative treatment methods." Mr. Humpherys thought that the committee should provide a suggested instruction in case the court determines it is appropriate. Judge Harris asked whether it should be a separate jury instruction or be included in the committee note. Mr. Humpherys revised his motion to include the first sentence of the revised instruction ("The standard of care may include more than one acceptable method of treatment.") and drop the second sentence on the burden of proof, which the committee agreed goes beyond current Utah law. Mr. Johnson seconded the revised motion, which passed without opposition.

4. *CV302. "Standard of care" for nurses defined.* Ms. Adams-Perlac reported that she had rewritten CV302 to track CV301C. Judge Stone moved that the committee adopt the revision. Mr. Summerill seconded the motion, which passed without opposition.

5. *Punitive Damage Instructions.* Mr. Humpherys noted that there are not clearly defined lines as to the role of the jury, the trial court, and the appellate courts in determining the amount of punitive damages. Consequently, there are unresolved issues, including the following: (a) Should the jury be told about the presumptive ratios for upholding an award of punitive damages? (b) Should the jury be told that half of any punitive damage award above $50,000 goes to the state? (c) Can the jury consider criminal penalties for the same conduct in determining the amount of punitive damages? He suggested raising these issues in a committee note.

a. *CV2026. Purpose of punitive damages.* Mr. Johnson questioned the use of the term "wrongdoer" in the first sentence. The committee thought it was appropriate since the instruction was intended to be given in the second phase of the trial, after the jury had made a finding of the defendant's liability for punitive damages. At Mr. Ferguson's suggestion, "some" was deleted from the first sentence. Mr. Summerill and others questioned whether the phrase "to serve as a deterrent to others" would be easily understood by lay jurors. The committee discussed alternatives and replaced the phrase with "to discourage others from similar conduct." Judge Stone and Mr. Ferguson asked whether there should be a general introductory instruction alerting the jury that it is moving into a new phase of the trial. Mr. Summerill noted that he had some he had used in the past. He also thought the sentence "They are not intended to compensate the plaintiff" was problematic, because it could cause the jury to award less punitive damages because they may think they are enriching the plaintiff, not knowing that half of any award over $50,000 goes to the state. On the other hand, telling the jury that half of any award over $50,000 will go to the state runs the risk that the jury will increase its award of punitive damages in order to help the state rather than to punish the defendant or deter future misconduct. Judge Harris suggested that the parties can make a motion on that issue on a case-by-case basis. Mr. Humpherys moved to approve the instruction as revised. Mr. Simmons seconded the motion, which passed without opposition. Mr. Humpherys offered to draft a committee note to go with CV2026.

c. *CV2027. Requirements for punitive damages.* Some committee members thought that the statutory terms ("willful and malicious," "intentionally fraudulent," and "conduct that manifested a knowing and reckless indifference toward and a disregard of the rights of others") needed to be explained or put in plainer English, but other committee members thought that the committee could not do much with the statutory language. Judge Harris suggested that it was for

the jury to decide what they mean in a particular case. The committee thought that the instruction should be given in the first phase of the trial, before the jury is asked to decide whether the defendant is liable for punitive damages. Mr. Humpherys agreed to rework the instruction.

The committee discussed whether the phrase "punitive damages" should be used in the first phase of the trial, before the jury has made a finding that the defendant's conduct meets the standard for punitive damages. Judges Harris and Stone favored telling the jury why they are being asked to make a finding on the egregiousness of the defendant's conduct, on the grounds that jurors generally make better decisions when they understand why they are being asked to do things.

Committee members volunteered to provide jury instructions on punitive damages from other trials they have been involved in.

c. *CV2028. Amount of punitive damages.* Mr. Johnson questioned whether a lay jury would understand what "reasonable and proportionate to the harm" meant. He suggested changing it to "must bear a reasonable relationship to the amount of actual injury," citing *Cooper Industries v. Leatherman Tool Group*, 532 U.S. 424, 448-49 (2001). Mr. Humpherys said that the idea the instruction is meant to convey is that punitive damages are not like winning the lottery, that there are legal limits on the amount of punitive damages the jury can award. But he would stop short of telling the jury the presumptive ratios. Judge Stone thought that we should not assume that there will be a bifurcated trial in every case. The statute says that evidence of the defendant's wealth or financial condition can only come into evidence after there has been a finding of liability for punitive damages, Utah Code Ann. § 78B-8-201(2), but if wealth is not an element but only one factor the jury can consider, the parties may decide to forego evidence of wealth, in which case the jury could consider liability for and the amount of punitive damages in the same phase. Mr. Humpherys thought there was a Utah appellate opinion that suggested that there can be no punitive damage award in the absence of evidence of the defendant's wealth. Mr. Humpherys offered to find the case for the next meeting. Judge Stone noted that other punishments in the law do not necessarily depend on the defendant's wealth. For example, the fine for jaywalking is the same whether the defendant is penniless or Bill Gates. Ms. Blanch thought the amount should be enough that the defendant feels some pain but not so much as to bankrupt the defendant. Mr. Humpherys noted another issue: The Supreme Court has said that the jury may not consider others' conduct, yet the purpose of punitive damages is to deter not only the defendant but also others from engaging in the same or similar conduct in the future. Mr. Summerill thought the Supreme Court's proscription was limited to the defendant's conduct in other states. Judge Stone questioned the

use of the term "randomly." Ms. Adams-Perlac noted that she had changed it from "arbitrarily." Judge Stone thought jurors understand what "arbitrarily" means. He thought there were risks from deviating too much from Supreme Court language in this area where there are constitutional limits on the amount of punitive damages. Mr. Summerill thought that the phrase "The amount of punitive damages may not be arbitrarily selected" was unnecessary because the jury is told that the amount must be sufficient to fulfill the dual purpose of punitive damages (to punish and deter). He thought the instruction should start by telling the jury what punitive damages should be, not what they should not be. Judge Harris suggested revising the instruction to read:

> [If you decide] [Now that you've decided] to award punitive damages, you must determine the amount. Punitive damages should be the amount necessary to fulfill the two purposes of punitive damages--to punish past misconduct and to discourage future misconduct. The amount must be reasonable and in proportion to the harm to the plaintiff.

Mr. Simmons questioned the phrase "the amount necessary," on the grounds that it implies there is only one proper amount, but Judge Harris thought there was, and it was what the jury decides it is. The committee approved the instruction as revised.

6. *Next meeting.* The next meeting will be Monday, June 9, 2014, at 4:00 p.m.

The meeting concluded at 6:00 p.m.

MINUTES

Advisory Committee on Model Civil Jury Instructions
June 9, 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

Excused: John R. Lund, Ryan M. Springer, Honorable Andrew H. Stone, Peter W. Summerill

Ms. Blanch presided.

1. *Minutes.* Mr. Humpherys moved to approve the minutes of the May 12, 2014 meeting. Mr. Johnson 2d. The motion passed without opposition.

2. *Supreme Court Update.* Ms. Adams-Perlac reported on the meeting that she, John Young, and Judge Denise Lindberg had with the Utah Supreme Court. The court suggested that the committee be moved under the umbrella of the bar. Ms. Adams-Perlac's sense was that the court was concerned that it is perceived as being too closely tied to MUJI 2d, even though the instructions are not approved by the court. Judge Lindberg, Mr. Young, and Ms. Adams-Perlac spoke against the idea and suggested ways to revitalize the jury instruction committees, such as term limits and involving younger members of the bar. The court took the matter under advisement. Ms. Adams-Perlac said that she has been working on an article for the *Utah Bar Journal* encouraging suggestions for jury instructions and encouraging members to apply for the committee. She will probably wait for a new chair to be appointed before submitting it to the bar journal.

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

a. *CV2026. Punitive damages–introduction.* Mr. Humpherys noted that he had removed the definition of "malicious conduct" from the instruction because the term was not defined in the Utah cases. Mr. Ferguson suggested saying in a committee note that the term has not been defined by Utah appellate courts. The definition of "knowing and reckless indifference" was taken from *Behrens v. Raleigh Hills Hospital,* 675 P.2d 1179, 1187 (Utah 1983). Mr. Humpherys asked to what extent the issue of punitive damages is governed by the statute (Utah Code Ann. § 78B-8-201) and to what extent it is governed by the common law (including pre-statute common law). (*Behrens* predated the statute, and its definition was not defining the statutory standard but was taken from a Wyoming case.) There is also an issue as to how much, if any, of *Crookston v. Fire Insurance Exchange,* 817 P.2d 789 (Utah 1991), survives the more recent U.S. Supreme Court punitive-damage decisions. Mr. Simmons suggested listing the predicates for punitive damages separately and in brackets, e.g.: "[¶] [willful

and malicious] [¶] [intentionally fraudulent] [¶] manifested a knowing and reckless indifference toward, and a disregard of [name of plaintiff]'s rights]." Because of the way the elements are listed in the statute, the committee chose to leave "willful and malicious" and "intentionally fraudulent" together, but bracketed, to show that one or both may not apply in a given case. The committee thought that the third option ("knowing and reckless indifference") is pleaded in almost every case seeking punitive damages. Mr. Simmons also questioned whether "[name of plaintiff]'s rights" should be replaced with the statutory language ("the rights of others"). Mr. Humpherys noted that the Supreme Court has held that due process forbids a state from using punitive damages to punish a defendant for injury that it inflicts on a nonparty, *see Philip Morris, USA v. Williams*, 549 U.S. 346, 353 (2007) (cited with approval in *Westgate Resorts, Ltd. v. Consumer Prot. Grp., LLC*, 2012 UT 55, ¶ 10, 285 P.3d 1219, meaning that the effect of the defendant's conduct on others is not a proper consideration. Mr. Simmons noted the apparent inconsistency in this holding and the principal that the amount of punitive damages should be sufficient to deter similar misconduct in the future. Judge Harris noted that plaintiffs generally do not like the last sentence of the instruction because they think that juries will be reluctant to award punitive damages if they think it will mean more work for them. Some committee members thought it was in keeping with the philosophy of telling jurors the consequences of their actions. Dr. Di Paolo suggested making the language more neutral, e.g., "I will then give you further instructions." Judge Harris thought it was a matter to be handled by the special verdict form. Mr. Humpherys agreed that it was not a legal matter; he did not object to striking it. Dr. Di Paolo and Mr. Ferguson suggested striking the entire last paragraph. Mr. Johnson noted that there may not be a special verdict form. Ms. Adams-Perlac suggested putting the last sentence of the last paragraph in brackets and letting the attorneys argue their positions as to whether or not it should be given to the jury. Dr. Di Paolo asked whether "ordinary care" in the preceding paragraph needed to be defined. For example, the instruction could say "an extreme departure from ordinary care, that is, the care a reasonable person would provide . . . ." Mr. Ferguson suggested inserting the definition of "ordinary care" from the negligence instructions. He also asked whether "intentionally fraudulent" was redundant and whether "intentionally" could be deleted. He thought it suggested a higher standard than merely proving fraud by clear and convincing evidence. Judge Harris thought that the committee should not deviate from the statutory language. Mr. Humpherys suggested adding the following language from *Behrens:* "Punitive damages are not awarded for mere inadvertence, mistake, errors of judgment and the like, which constitute ordinary negligence." Mr. Simmons thought that the committee should not deviate from its policy of not defining things by what they are not. Mr. Johnson added that, if the evidence showed that the defendant made a mere mistake or error of judgment, the matter would generally be dealt with by a motion before the case

ever goes to the jury. Dr. Di Paolo had a problem with the phrase "mere inadvertence," which she did not think lay jurors would understand. Ms. Adams-Perlac thought that "inadvertence" and "mistake" were roughly synonymous. Judge Harris thought that the language from *Behrens* should be a separate paragraph. Mr. Humpherys thought it should also be bracketed because it would not apply in every case. For example, it would not apply in an assault, fraud, or defamation case. The committee approved the instruction as modified.

b. *CV2027. Punitive damages discretionary.* Some committee members thought the instruction was largely duplicative of CV2026. Judge Harris said whether it was necessary may depend on how the special verdict form is worded. In a trial he had where the plaintiffs were seeking punitive damages, the jury was asked, "Is the plaintiff entitled to punitive damages?" Judge Harris did not think any more was needed, since CV2026 tells the jury when a plaintiff is entitled to punitive damages. Mr. Humpherys thought the question on the special verdict form should be, "Was the defendant's conduct willful and malicious," etc.? He noted that just because the jury finds that the defendant's conduct justifies an award of punitive damages does not mean that the jury will want to award punitive damages. He thought that, unless the court asks the jury if the defendant's conduct meets one of the standards for punitive damages, the jury could award punitive damages for other reasons, for example, because the jurors did not like the defendant or thought he lied on the witness stand. The committee decided to delete CV2027 and to add the following language to the end of CV2029: "Whether or not to award a specific amount or any amount of punitive damages is left entirely up to you."

c. *CV2028. Purpose of punitive damages.* At Judge Harris's suggestion, the committee decided to delete CV2028 as a separate instruction and to add it to the end of the first paragraph of CV2026. The committee approved this revision to CV2026.

d. *CV2029. Amount of punitive damages.* Mr. Humpherys suggested deleting the first sentence of CV2029, but Judge Harris disagreed. At Mr. Ferguson's suggestion, "[If you]" was deleted from the beginning of the sentence, since the instruction will only be given after the jury decides to award punitive damages (unless the punitive damage phase is not bifurcated from the liability phase of the trial and all punitive damage instructions are given together). Judge Harris suggested deleting the phrase "but should not be arbitrarily selected," but Mr. Johnson disagreed. He thought it was required by due process. Mr. Humpherys asked how a lay juror would understand the sentence "The amount must be . . . in proportion to the [name of plaintiff]'s harm." Dr. Di Paolo thought that jurors would understand that to mean that they have to weigh the harm and make any award of punitive damages roughly balance. The committee thought

that would be error since an award of punitive damages can be much less than a compensatory award or, presumptively, up to nine times the compensatory award. Ms. Blanch questioned whether the jury should be told anything about proportionality or whether proportionality is simply a matter for the court to deal with in post-trial motions. Mr. Humpherys suggested changing the sentence to read, "The amount must be reasonable and bear some relationship to [name of plaintiff]'s harm." He also suggested adding a committee note regarding the court's role in determining proportionality. The committee approved the instruction as revised, subject to approval of the wording of the committee note.

Judge Harris was excused.

e. *CV2030. Punitive damages.* The committee changed the beginning of the instruction to read, "In determining punitive damages, you may not award . . . ," and changed "[forum state]" to "[Utah]." Because there was no longer a quorum, however, the committee deferred a vote on approving the instruction as modified.

4. *Next meeting.* Barring any action by the Utah Supreme Court in the interim, the next meeting will be Monday, September 8, 2014, at 4:00 p.m. There will be no committee meetings in July and August.

The meeting concluded at 5:50 p.m.