Agenda
Policy and Planning Committee

October 16, 2006
4:00 to 6:00 p.m.

Administrative Office of the Courts
Scott M. Matheson Courthouse
450 South State Street
Council Room, Suite N31

Introduction	Tim Shea
Employer and employee rights.	Jathan Janove

Meeting Schedule: Matheson Courthouse, 4:00 to 6:00, Education Room or Judicial Council Room

November 13, 2006
December 11, 2006
January 8, 2007
February 12, 2007
March 12, 2007
April 9, 2007
May 14, 2007
June 11, 2007
July 9, 2007
August 13, 2007
September 10, 2007
October 15, 2007 (3d Monday)
November 19, 2007 (3d Monday)
December 10, 2007

Committee Web Page: http://www.utcourts.gov/committees/muji/
Published Instructions: http://www.utcourts.gov/resources/muji/

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.

Introduction to the Model Utah Jury Instructions, Second Edition.

The Supreme Court has two advisory committees, one for civil instructions and one for criminal instructions, working to draft new and amended instructions to conform to Utah law. The Court will not promulgate the instructions in the same manner as it does the rules of procedure and evidence; rather the Court relies on its committees and their subcommittees, consisting of lawyers of varied interests and expertise, to subject the model instructions to a full and open critical appraisal.

The Utah Supreme Court approves this Second Edition of the Model Utah Jury Instructions (MUJI 2d) for use in jury trials. An accurate statement of the law is critical to instructing the jury, but accuracy is meaningless if the statement is not understood - or is misunderstood - by jurors. MUJI 2d is intended to be an accurate statement of the law using simple structure and, where possible, words of ordinary meaning. Using a model instruction, however, is not a guarantee of legal sufficiency. MUJI 2d is a summary statement of Utah law but is not the final expression of the law. In the context of any particular case, the Supreme Court or Court of Appeals may review a model instruction. The Court encourages the bar and bench to use the model instructions, but the judge retains ultimate responsibility to decide the appropriate instructions to use. (The criminal committee approved the following: "The instructions are being provided at the direction of the Court and with the Court's encouragement to the bar and bench that they be used; nevertheless, the judge retains ultimate responsibility to determine the appropriate instructions to be used. ")

For civil instructions, MUJI 2d eventually will replace the original MUJI published by the Utah State Bar. For criminal instructions, MUJI 2d represents the first published compilation of instructions in Utah.

MUJI 2d will be a continual work in progress, with new and amended instructions being published periodically on the state court web site. Although there is no comment period for jury instructions as there is for rules, we encourage lawyers and judges to share their experience and suggestions with the advisory committees: experience with these model instructions and with instructions that are not yet included here. Judges and lawyers who draft a clearer instruction than is contained in these model instructions should share it with the appropriate committee.

If there is no Utah model instruction, the judge must nevertheless instruct the jury. The judge's task is to further the jurors' understanding of the law and their responsibility though accuracy, clarity and simplicity. To assist in this task, links on this page lead to principles for plain-language drafting and to the pattern instructions of some other jurisdictions.

~~Judges should~~ Depending on the circumstances and at the judge's discretion, the judge may instruct the jurors at times during the trial when the instruction will most help the jurors. Many instructions historically given at the end of the trial ~~should~~ may be given

at the beginning or during the trial so that jurors know what to expect. The fact that an instruction is not organized here among the opening instructions does not mean that it cannot be given at the beginning of the trial. Instructions relevant to a particular part of the trial should be given just before that part. A judge might repeat an instruction during or at the end of the trial to help protect the integrity of the process or to help the jurors understand the case and their responsibilities.

When preparing written instructions, judges and lawyers should include the title of the instruction. This information helps jurors organize their deliberation and decision-making. Judges should provide a copy of the written instructions to each juror. This is permitted under the rules of procedure and is a sound practice because it allows each juror to follow the instructions as they are read and to refer to them during deliberations.

MUJI 2d is drafted without using gender-specific pronouns whenever reasonably possible. However, sometimes the simplest, most direct statement requires using pronouns. The criminal committee uses pronouns of both genders as its protocol. In the trial of criminal cases, often there will not be time to edit the instructions to fit the circumstances of a particular case, and the criminal instructions are drafted so that they might be read without further concern for pronoun gender. The civil committee uses masculine pronouns as its protocol. In the trial of civil cases there often is more time to edit the instructions. Further, in civil cases, the parties are not limited to individual males and females but include also government and business entities and multiple parties. Judges and lawyers should replace masculine with feminine or impersonal pronouns to fit the circumstances of the case at hand. Judges and lawyers also are encouraged in civil cases to use party names instead of "the plaintiff" or "the defendant." In these and other circumstances judges and lawyers should edit the instructions to fit the circumstances of the case.

Model Utah Jury Instructions
Second Edition
Working Draft
October 11, 2006

1911. Breach of employment contract. Just cause.

[Name of plaintiff] claims [his] termination was not for just cause.To establish that a termination was for just cause [name of defendant] must prove that the termination was made for an objective good faith reason supported by facts reasonably believed by [him] to be true.

MUJI 1st References.

References.

Uintah Basin Medical Center v. Hardy, 2005 UT App 92, 110 P.3d 168, 174-75.

Advisory Committee Notes.

Staff Notes.

Status. Changes from: 9/11/2006

1913. Fiduciary duty.

[Name of defendant] claims that [name of plaintiff] breached a fidcuiary duty to [name of defendant]. For [name of defendant] to prevail on a claim of breach of fiducary duty, [he] must prove that [name of plaintiff] violated an extraordinary duty of fidelity, confidentitality, honor, trust and dependability.

If you find that there was an extraordinary relationship between [name of defendant] and [name of plaintiff], then [name of plaintiff] owed [name of defendant] a fiduciary duty. When the relationship which created the fiduciary duty ends, the fiduciary duty ends as well.

MUJI 1st References.

References.

Prince, Yeates & Geldzahler v. Young, 2004 UT 26.
Semenov v. Hill, 982 P.2d 578 (Utah 1999).
Margulies ex rel. Margulies v. Upchurch, 696 P.2d 1195 (Utah 1985).
Microbiological Research Corp. v. Muna, 625 P.2d 690, 695 (Utah 1981).
Renshaw v. Tracy Loan & Trust Co., 87 Utah 364, 49 P2.d 403, 404 (Utah 1935).
C&Y Corp. v. General Biometrics, 896 P.2d 47, 54 (Utah App. 1995).
Envirotech Corporation v. Callahan, 872 P.2d 487 (Utah App. 1994).
Black's Law Dictionary 640 (7th Ed. 1999).

Advisory Committee Notes.

Staff Notes.

Status. Changes from: 9/11/2006

1914. Contract damages.

If you find that [name of defendant] wrongfully [terminated] [breached the contract with] [name of plaintiff], then you may award damages to [name of plaintiff].

You may award damages for the salary and benefits that [name of plaintiff] would have received from [name of defendant] during the period you find the employment was reasonably certain to have continued.

You may also award damages for [list other items of damage] that you find were contemplated by the parties or reasonably foreseeable by the parties at the time the contract was made.

To be entitled to damages, [name of plaintiff] must prove two points:

First, that damages occurred. There must be a reasonable probability, not just speculation, that [name of plaintiff] suffered damages from [name of defendant]'s fault.

Second, the amount of damages. The level of evidence required to prove the <I>amount</I> of damages is not as high as what is required to prove the <I>occurrence</I> of damages. There must still be evidence, not just speculation, that gives a reasonable estimate of the amount of damages, but the law does not require a mathematical certainty.

In other words, if [name 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.

MUJI 1st References.

18.12.

References.

Kraatz v. Heritage Imports, 2003 UT App 201, 48-49, 53-54, 71 P3d. 188, 199-201.
Mahmood v. Ross, 1999 UT 104, 19, 990 P.2d 933, 937.
Berube v. Fashion Centre, Ltd., 771 P.2d 1033 (Utah 1989).
Beck v. Farmers Ins. Exch., 701 P.2d 795, 801 (Utah 1985).
Prince v. Peterson, 538 P.2d 1325, 1328 (Utah 1975).
Erickson v. PI, 73 Cal. App. 3d 850 (1977).
Parker v. Twentieth Century Fox Film Corp., 3 Cal. 3d 176 (1970).

Advisory Committee Notes.

The committee recommends against using the phrases “general” and “consequential” damages. The second paragraph includes the traditional concept of general damages. Loss or diminution of salary and benefits, from common sense and experience, would naturally be expected to result from wrongful termination. If there are other items of damage that meet the test for general contract damages, include them here.

The third paragraph includes the traditional concept of consequential damages: those damages that were contemplated by or were reasonably foreseeable by the parties at the time the contract was made. Include in this paragraph only those items for which there is evidence.

The final paragraphs restate Instuction 2002, Proof of damages.

Staff Notes.

Status. Approved for use: 5/8/2006
Changes from: 9/11/2006

1915. Reserved.

MUJI 1st References.

References.

Advisory Committee Notes.

Staff Notes.

Status. Approved for use:

1916. Reserved.

MUJI 1st References.

References.

Advisory Committee Notes.

Staff Notes.

Status. Approved for use:

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

If you find that [name of defendant] wrongfully [terminated] [breached the contract with] [name of plaintiff], then you may award damages to [name of plaintiff].

You may award damages for the salary and benefits that [name of plaintiff] would have received from [name of defendant] during the period you find the employment was reasonably certain to have continued.

You may also award damages for [other items of damage] that you find were contemplated by the parties or reasonably foreseeable by the parties at the time the contract was made.

You may also award the amount of money that will fairly and adequately compensate [name of plaintiff] for noneconomic damages.

[Give Instruction 2004, Noneconomic damages defined.]
[Give Instruction 2002, Proof of damages.]

MUJI 1st References.

18.11.

References.

Peterson v. Browning 832 P.2d 1280 (Utah 1992).
3 Devitt, Blackmar & Wolf, Federal Jury Practice and Instructions, Section 104.6 (4th Ed. 1987).
Block v. R.H. Macy & Co., 712 F.2d 1241, 1245 (8th Cir., 1983).
E.E.O.C. Policy Guide on Compensatory and Punitive Damages Under 1991 Civil Rights Act (B.N.A., 1992) at II(A)(2), as modified.
Stallworth v. Shuler, 777 F.2d 1431 (11th Cir. 1985).

Advisory Committee Notes.

Staff Notes.

Status. Changes from: 9/11/2006

1918. Duty to mitigate damages.

[Name of defendant] claims that [name of plaintiff] has failed to mitigate damages.

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 comparable employment, deduct the amount earned from any damages awarded. If [name of plaintiff] through reasonable efforts could have found comparable employment, deduct from any damages the amount that [he] could have earned.

[Name of defendant] has the burden of proving that [name of plaintiff] obtained or reasonably could have obtained comparable employment and the amount that [he] could have earned.

MUJI 1st References.

18.13.

References.

Angelos v. First Interstate Bank of Utah, 671 P.2d 772 (Utah 1983).
Pratt v. Board of Education of Uintah County School District, 564 P.2d 294 (Utah 1977).

Advisory Committee Notes.

Staff Notes.

Status. Approved for use: 5/8/2006
Changes from: 9/11/2006

1919. Special damages. Unemployment compensation.

If you decide to award damages for financial losses, such as lost wages, lost benefits, medical expenses, and other out-of-pocket expenses, do not reduce the amount of those damages by the amount that [name of plaintiff] may have received payment from such sources as unemployment insurance, workers' compensation, social security or disability benefits.

MUJI 1st References.

27.3.

References.

Gibbs M. Smith, Inc. v. US Fidelity, & Guaranty Co., 949 P.2d 337, 345 (Utah 1997).
Suniland Corp. v. Radcliffe, 576 P.2d 847, 849 (Utah 1978).
Green v. Denver & Rio Grande Western R. Co., 59 F.3d 1029, 1032 (10th Cir. 1995).
Whatley v. Skaggs Companies, Inc., 707 F.2d 1129, 1138 (10th Cir. 1983).

Advisory Committee Notes.

Staff Notes.

Status. Changes from: 5/8/2006