

## *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.