

## ***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.

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The meeting concluded at 6:00 p.m.