

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

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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.