

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.