MINUTES

Advisory Committee on Model Civil Jury Instructions
November 8, 2004
4:00 p.m.

Present: Francis J. Carney (acting chair), Timothy M. Shea, Honorable William W. Barrett, Jr., Paul M. Belnap, Juli Blanch, Ralph L. Dewsnup, Marianna Di Paolo, Phillip S. Ferguson, L. Rich Humpherys, Colin P. King, Stephen B. Nebeker, Paul M. Simmons, Jonathan G. Jemming

Excused: John L. Young (chair)

1. *Minutes.* On motion of Ms. Blanch, seconded by Judge Barrett, the committee approved the minutes of the October 18, 2004, meeting.

2. *Draft Preliminary and General Instructions.* The committee continued its review of the draft instructions prepared by Mr. Ferguson's subcommittee:

a. *2.24. Settling Defendants in Multi-party Cases.* Mr. Dewsnup questioned whether the terms of a settlement (as opposed to the fact of settlement) must be disclosed and whether the Liability Reform Act superseded *Slusher v. Ospital.* Mr. Ferguson noted that in practice he has always received copies of settlement agreements in multi-party cases when he has asked for them and that, even though *Slusher* was decided under pre-Liability Reform Act law, it recognized, in footnote 13, that "[i]f anything, concerns regarding secret settlement agreements apply more strongly under" the Liability Reform Act than under prior law. Some committee members thought that the terms of the settlement agreement should be disclosed to the judge and that it should be left to the judge's discretion whether to tell the jury about the terms. Mr. Dewsnup questioned whether the parties can disclose the terms of the agreement even to the judge if the settlement is confidential. Mr. Humpherys and Mr. King felt that the terms of a true *Mary Carter* agreement may need to be disclosed. After further discussion, the instruction was amended to read as follows:

02.24. Settling parties in multi-party cases.

Some of the parties have reached a settlement agreement in this matter.

There are many reasons why parties settle during the course of a lawsuit. Settlement does not mean that any party has conceded anything. You must still decide which party or parties, including [the settling parties], were at fault and how much fault each party should bear. In deciding how much fault should be allocated to each party you must not consider the settlement agreement as a reflection of the strengths or weaknesses of any party's position.

> You may consider the settlement in deciding how believable a witness is.

The Advisory Committee Note was revised to read: "The Court and the parties must decide whether the fact of settlement and to what extent the terms of the settlement will be revealed to the jury in accordance with the principles set forth in *Slusher v. Ospital,* 777 P.2d 437 (Utah 1989)." The committee decided not to quote or paraphrase the *Slusher* factors in the note. The committee also decided not to include the comment from former MUJI 2.24, on the grounds that it addresses evidentiary issues rather than jury instruction issues. Finally, the committee decided to include references to *Child v. Gonda,* 972 P.2d 425 (Utah 1998), as well as to *Slusher* and Utah Rule of Evidence 408.

b. *Other Preliminary Instructions.* The committee deferred consideration of the instructions on burden of proof, preponderance of the evidence and clear and convincing evidence until the next meeting, to allow Mr. Ferguson's subcommittee to complete its work on these instructions.

3. *Proposed Introductory Statement.* Mr. Shea introduced a proposed introduction to the new instructions, which prompted a discussion of the following issues:

a. *Name.* The committee discussed what the instructions should be called. Suggestions included Model Utah Jury Instructions Second (MUJI 2d), MUJI Revised (MUJIR) and Utah Civil Jury Instructions.

b. *Approval.* Mr. Shea raised the issue of what Supreme Court approval of the new instructions will mean. The Court will want to be free to review the instructions as they arise in cases that come up for review, particularly where there has not been any Utah law on point. Mr. Shea suggested that the introduction could be worded more strongly if it came from the Court and not the committee.

c. *Release of Instructions.* Mr. King questioned whether the instructions should be released piecemeal. Doing so may raise problems where the new instructions use different terms from those used in MUJI. Mr. Shea suggesting adding a passage to the introduction to discuss the transition from the old instructions to the new. He also recommended adding a table showing where the former instructions are treated in the new instructions. The committee agreed to delete references to MUJI from the references in the new instructions and handle cross-references between the old and new instructions through the table.

d. *Public Comment.* A majority of the committee thought that the instructions should be released for public comment, even though public comment is not required and the comment period may further delay release of the instructions.

e. *Timing of Instructions.* At the committee's suggestion, Mr. Shea will revise the introduction to discuss when the instructions should be given during the course of a trial and refer to Utah Rule of Civil Procedure 47.

Ms. Blanch was excused.

4. *Negligence Instructions.* The committee revisited some of the negligence instructions it had previously approved.

a. *3.01. Verdict Form.* Mr. Dewsnup questioned whether the jury should be instructed in terms of the verdict form or in terms of the elements of the parties' claims and defenses, with special verdict forms included in their own section. The committee discussed when the jury should be given the special verdict form. After further discussion, the committee tentatively approved reading the special verdict form before the instructions on the substantive law of the parties' claims and defenses. Mr. Shea suggested that the instruction should be put in the general instructions, since it is not unique to negligence cases. It was also suggested that 3.01 could be used in place of 2.27.

b. *3.02. "Negligence" defined.* Dr. Di Paolo suggested calling the instruction *Definition of "Negligence."* The committee noted that ordinary people are not always careful and agreed to replace "an ordinary, careful person" with "a reasonably careful person" every time it appears in the instruction. The last line was revised to read: "You must decide whether the [defendant/plaintiff] was negligent by comparing his conduct with that of a reasonably careful person in similar situations." The committee approved the instruction as revised.

c. *3.03. Standard of Care for the Physically Disabled.* The committee debated whether instruction 3.03 accurately states the law. Some committee members thought that it should not be limited to physical disabilities.

Mr. Jemming will determine whether Utah has adopted sections 283 and 283B of the Restatement (Second) of Torts.

Mr. Dewnsup will propose a revised instruction 3.03.

5. *Next Meeting.* The next meeting will be Monday, December 13, 2004, at 4:00 p.m.

The meeting concluded at 6:00 p.m.