

MINUTES

Advisory Committee on Model Civil Jury Instructions

February 14, 2005

4:00 p.m.

Present: John L. Young (chair), Honorable William W. Barrett, Jr., Paul M. Belnap, Juli Blanch, Francis J. Carney, Marianna Di Paolo, Phillip S. Ferguson, Tracy H. Fowler, L. Rich Humpherys, Jonathan G. Jemming, Timothy M. Shea, Paul M. Simmons

Excused: Ralph L. Dewsnup, Colin P. King

1. *Minutes.* On motion of Mr. Carney, seconded by Judge Barrett, the committee approved the minutes of the January 10, 2005, meeting.

2. *Draft Instruction on the Role of Attorneys.* Mr. Carney presented a proposed instruction drafted by Rob Clark of the court's advisory committee on professionalism discussing attorneys' ethical duties. Several committee members thought the instruction would create in the minds of jurors an expectation that the attorneys would not act professionally. Dr. Di Paolo asked what jurors would be expected to do with the information and suggested that it left too many possibilities for jurors to come up with impermissible inferences. Judge Barrett recommended limiting the instruction to the second paragraph. Mr. Carney suggested adding the second paragraph to existing instruction 1.102 on the role of the judge, jury and lawyers.

Mr. Shea will add the second paragraph of the proposed instruction to the end of the fourth paragraph of instruction 01.102 so that the committee can see the proposed language in context.

3. *Draft Preliminary and General Instructions.* The committee continued its review of the draft preliminary and general instructions:

a. *01.401. Burden of Proof.* Mr. Humpherys asked how the instruction was to be used and whether it would have to be repeated with the instructions on each element of the parties' claims and defenses. Mr. Ferguson envisioned the instruction as a general instruction on the burden of proof to be given with a general statement of the nature of the case and the parties' claims. It was meant as a roadmap of the parties' claims and defenses and not a complete statement of every element. Mr. Young suggested that the purpose of the instruction be explained in a note. Mr. Fowler suggested that the instruction indicate that the court will instruct the jury more fully on the parties' claims and defenses at the end of the case. Mr. Simmons questioned whether the instruction accurately stated the law, since the preponderance of the evidence is to be determined by all of the evidence, regardless of who may have produced it. Mr. Shea suggested revising the first sentence to read: "When I use the term 'burden of proof,' it means that the party must persuade you by a preponderance of the evidence."

b. *01.402. Preponderance of the Evidence.* The committee discussed the third paragraph of the proposed instruction. Dr. Di Paolo suggested that the second sentence read, "It is how convincing the evidence is and not just how much evidence there is." The committee suggested that this sentence replace both the second and third sentences of the third paragraph. Mr. Ferguson noted that the quantity of evidence may matter; the more evidence there is on a certain point, the more convincing the evidence on that point may be. Mr. Simmons suggested adding the following language from MUJI 2.18: "The preponderance of the evidence is not determined by the number of witnesses, nor the amount of the testimony, but by the convincing character of the testimony." Dr. Di Paolo suggested reversing the order of the last two sentences of the third paragraph.

Mr. Shea will redraft instruction 01.402 in accordance with the committee's suggestions.

c. *01.403. Clear and Convincing Evidence.* Mr. Simmons asked how "no serious or substantial doubt" differed from "beyond a reasonable doubt" and suggested that "highly probable" may be more accurate than "no serious or substantial doubt." Mr. Fowler suggested that the comparison to the criminal standard contained in instruction 01.402 may have to be repeated in instruction 01.403 if "clear and convincing" were the only standard of proof in a case. The committee could not think of a situation where that might be the case. The committee approved the instruction as drafted.

d. *02.105. Standard of Care of Children.* Mr. Jemming explained that Utah does not follow the tri-partite approach of presuming children in certain age categories capable or incapable of negligence. It is not clear, however, whether children below a certain age (such as age 7) are incapable of negligence as a matter of law. The proposed instruction adopts the standard of care under the Restatement, which is that of children of a similar age. The proposed note explains that there is an exception for children engaged in adult activities.

Mr. Belnap was excused.

e. *02.103. Standard of Care of the Physically Disabled.* Mr. Jemming thought that the first sentence of the proposed instruction was misleading, that the standard is not a diminished standard but simply reasonable care under the circumstances, with the actor's disability being one of the circumstances the jury may consider. Dr. Di Paolo noted that having a separate instruction on the standard of care for the physically disabled suggests that the standard is a lesser standard. Mr. Humpherys asked what qualifies as a disability. The committee agreed that mental disabilities are treated differently from physical disabilities and may not excuse a negligent actor even if his negligence was the result of a mental problem. Mr. Carney read a comment from the

Restatement that confirmed the points the committee had made. Mr. Shea noted that the disability must be relevant to the conduct in question. Mr. Young asked whether the jury must make a preliminary finding of disability. He also suggested that the committee note say that there are no Utah cases on point. Ms. Blanch suggested omitting the instruction altogether and allowing the parties to argue whether or not a disabled person was negligent from the general negligence instruction.

Mr. Shea will redraft the instruction as part of the general negligence instruction, using a physical disability as an example of one of the circumstances the jury may consider in determining whether the actor was negligent.

f. *Abnormally Dangerous Activities.* Mr. Carney presented a revised proposed instruction on abnormally dangerous activities. He noted that, under Utah law, there is strict liability for abnormally dangerous activities. Mr. Humpherys asked whether the court or the jury was to apply the factors listed in the instruction to determine whether an activity is abnormally dangerous. Mr. Simmons thought the question was one of law for the court to decide; otherwise, different people could be held to different standards for the same activity, depending on the decision of the particular juries that heard the evidence. Mr. Carney noted that a comment to section 520 of the Restatement (Second) of Torts says that it is a question of law. The committee suggested putting the factors (a through f) in a comment for the court to consider. Dr. Di Paolo noted that “strict liability” needs to be explained to the jury.

Mr. Carney will revise the instruction.

4. *Next Meeting.* The next meeting will be Monday, March 14, 2005, at 4:00 p.m.

The meeting concluded at 5:30 p.m.