MINUTES
Advisory Committee on Model Civil Jury Instructions
May 21, 2007
4:00 p.m.

Present: Juli Blanch, Francis J. Carney, Marianna Di Paolo, Phillip S. Ferguson, Tracy H. Fowler, L. Rich Humpherys, Colin P. King, Timothy M. Shea, Paul M. Simmons, and John L. Young (chair). Also present: Kamie F. Brown and John A. Anderson

1. *Committee Members*. Mr. Young noted that the committee will be losing two of its members--Paul M. Belnap and Ralph L. Dewsnup--who will be leaving to preside over missions for the Church of Jesus Christ of Latter-day Saints. Mr. Young asked committee members to come to the next meeting with suggestions for attorneys who could replace Messrs. Belnap and Dewsnup on the committee. The new members do not necessarily have to have the same specialties as Messrs. Belnap and Dewsnup and do not necessarily have to take over their subcommittee assignments as well.

2. *Summer Schedule*. The committee agreed to cancel the meetings scheduled for July 9 and August 13, 2007. The June 11 meeting will be held as planned. The next meeting after that will be September 10, 2007.

3. *Products Liability Instructions*. Mr. Fowler introduced Mr. Anderson, who serves on the products liability subcommittee. The committee continued its review of the products liability instructions. Mr. Fowler and Ms. Brown distributed proposed revisions to instructions 1006 through 1010:

a. *1006. Strict liability. Duty to warn.* Mr. Fowler and Ms. Brown thought that a preliminary instruction was necessary so that the jury could first determine whether a warning was even necessary under the facts of the case, before determining whether any warning was adequate. Mr. Ferguson and Mr. Simmons questioned whether the jury should be instructed on the "duty to warn," since the question of duty is a question of law for the court to decide. Mr. Fowler thought that it was a mixed question of law and fact and that the jury may need to find the underlying facts giving rise to a duty to warn. Mr. Young asked whether the instruction was appropriate only where the defendant had failed to provide a warning, since, if the defendant provided a warning, he may have implicitly acknowledged that he had a duty to warn. Mr. Young suggested adding a committee note saying that the instruction should not be given if a warning was in fact given.

Mr. Fowler will draft a proposed committee note saying that the court should consider whether the parties' claims and the facts of the case require the instruction.

Mr. Carney asked what the difference was between a danger "from the product" and one "from its foreseeable use." The committee thought that "foreseeable use" was sufficient to cover all dangers for which a warning is required.

Mr. Shea will review other instructions to see that they are worded consistently.

At Dr. Di Paolo's suggestion, as modified by the committee, the instruction was revised to read:

> . . . You must first decide if [name of defendant] was required to provide a warning.
>
> a. [Name of defendant] was required to warn about a danger from the [product]'s foreseeable use of which [he] knew or reasonably should have known and that a reasonable user would not expect.
>
> b. [Name of defendant] was not required to warn about a danger from the foreseeable use of the [product] that is generally known and recognized.

Mr. Carney asked whether the phrase "generally known and recognized" was necessary. The committee thought it was. Mr. Carney then suggested shortening the phrase to "generally known." Dr. Di Paolo thought that this was a case where redundancy was not bad and that saving two words may not make the instruction more understandable to jurors. Mr. Humpherys asked whether there was a difference between the concepts of foreseeability and expectation in subparagraph a. The committee thought there was and that the terms were used appropriately in subparagraph a ("foreseeable" for the defendant and "expect" for the user).

b. *1007. Strict liability. Elements of claim for failure to adequately warn.* Mr. Fowler noted that new instruction 1007 was the same as the former instruction 1006 except for the first sentence, which is now covered by the first sentence of new 1006. The committee approved the instruction.

c. *1008. Strict liability. Definition of "adequate warning."* Mr. Fowler and Ms. Brown added a sentence to the end of the instruction that reads: "The overall adequacy of the warning given must be judged in light of the ordinary knowledge common to members of the community who use the product." Dr. Di Paolo thought that this sentence should precede the elements of

an adequate warning. Mr. Humpherys expressed concern that it gave the jury an out to find a warning inadequate that met all of the elements of an adequate warning. Mr. Young questioned whether the last sentence contradicted the statute (Utah Code Ann. § 78-15-6(2)), which makes the user's subjective knowledge relevant. Ms. Brown pointed out that the statute defines "unreasonably dangerous," whereas this instruction is meant only to explain how the jury is to judge the adequacy of a warning. Mr. Anderson thought that the instruction on the adequacy of a warning should also incorporate the user's knowledge. Mr. Simmons disagreed. He pointed out that, under the statute and the Tenth Circuit's interpretation of the statute, the user's subjective knowledge goes only to whether a product was unreasonably dangerous, which is covered in another instruction (1005). It is not a hurdle that the plaintiff should have to jump over twice. Mr. Anderson conceded that he did not have any authority for his position. Mr. Humpherys thought that the user's knowledge is best handled as part of the causation analysis. Mr. Young noted that the user's knowledge is also covered in the instruction on the sophisticated user defense (1049), which he thought would be given in every case where the effect of the user's knowledge was an issue. Mr. Humpherys agreed. Mr. Anderson pointed out that it is the plaintiff's burden to show that a warning was not adequate, and the sophisticated user defense is an affirmative defense on which the defendant has the burden of proof. Dr. Di Paolo noted that the last sentence of 1008 was inconsistent with a sophisticated user defense. Mr. Ferguson noted that the test for the adequacy of a warning cannot be a subjective test, or no warning could be found adequate.

Mr. Anderson will propose a comment stating his view that it may be appropriate to instruct on the user's subjective knowledge of the product's dangers in a particular case.

Mr. Humpherys pointed out that the instruction could be misread as requiring the defendant to prove that a warning was adequate, not as requiring the plaintiff to prove that a warning was inadequate. After further discussion the instruction was revised to read:

> A [product] with an adequate warning is defective.
>
> A warning is inadequate if, in light of the ordinary knowledge common to members of the community who use the product, it:
>
> (1) was not designed to reasonably catch the user's attention;
>
> (2) was not understandable to foreseeable users;

(3) did not fairly indicate the danger from the [product]'s foreseeable use; or

(4) was not sufficiently conspicuous to match the magnitude of the danger.

Mr. Fowler noted that he and Ms. Brown had also added a new paragraph to the end of the advisory committee note.

d. *1009. Strict liability. Failure to warn: Heeding presumption (presumption in favor of plaintiff).* Mr. Fowler noted that the instruction tells the jurors that in the right circumstances they can presume that an instruction would have been read and heeded. Mr. Carney asked whether there was a general instruction on presumptions. (There is not.) Mr. Shea asked whether the instruction should indicate that it is only to be used where there is no evidence going to the issue of whether the plaintiff would have read and heeded a warning. Mr. Fowler thought the committee note covered that. Mr. King noted that the presumption gives plaintiffs a disincentive to put on relevant but weak evidence as to whether the plaintiff read and heeded warnings. Mr. Humpherys asked if the presumption would apply where there was conflicting evidence. Mr. Fowler and Ms. Brown noted that the effect of the presumption is to substitute for evidence, and if there is any evidence, then there is no presumption. Mr. Humpherys asked whether a plaintiff could still rely on the presumption if he chose not to put on evidence in his case-in-chief but rebutted the defendant's contrary evidence. Mr. King thought that the first paragraph of the note was confusing. At Mr. Simmons's suggestion, the phrase "In that case," was added to the beginning of the second sentence of that paragraph.

Mr. Shea will revise the note to try to eliminate the phrase, "Some members of the subcommittee do not believe . . ."

Mr. Simmons asked whether the jury is instructed on the effect of a presumption (that is, what it means to say, "You can presume . . ."). Mr. Fowler and Ms. Brown thought it may be impractical to do so since the effect of a presumption may vary. Mr. Shea asked whether we needed a separate instruction on the learned intermediary doctrine (discussed in the second paragraph of the note). The committee noted that there is little Utah law on the subject. Mr. Simmons asked whether, where no warning is given to a learned intermediary, there should be a presumption that the learned intermediary would have read the warning and passed it on to his patient, particularly where the learned intermediary may not

be available to testify. Mr. King thought that direct advertising of prescription drugs to consumers has undermined the learned intermediary doctrine.

e. *1010. Strict liability. Failure to warn: Presumption that warning will be read and followed (presumption in favor of defendant).* The phrase "you are instructed that" was deleted from the first sentence, and a typographical error (*it* for *if)* was corrected in the second sentence. Messrs. King and Simmons thought that *adequate* should be added before *warning*. They thought no presumption should arise if the warning was not likely to have been seen and understood (for example, because it was too small, in the wrong place, or in the wrong language). Mr. Fowler and Ms. Brown thought that if the warning was adequate, there would be no need for the presumption because there would be no liability. But the adequacy of the warning will generally be a question of fact for the jury to decide. They noted that the instruction tracks the language of comment *j* to Restatement (Second) of Torts § 402A. Messrs. Humpherys, King, and Simmons thought the instruction could confuse the jury. For example, Mr. Humpherys noted, a literal reading of the instruction would allow the jury to presume that a warning would be read and followed even though the warning was so general as to be useless (e.g., "Don't do anything dumb."). Mr. Humpherys also questioned whether a comment should be added similar to the comment to 1009 that the instruction should not be given if there is any evidence going to the issue. Mr. King asked in what circumstances the instruction would be given. He thought that once the plaintiff introduces evidence of the inadequacy of any warning, the jury should not be instructed on any "reading" presumption. Mr. Anderson agreed that it would apply in only limited circumstances, but he thought it would apply where, for example, a manufacturer warns about X and Y but not about Z, and the accident could have been prevented if the plaintiff had read and heeded the warning about X and Y. Mr. Young suggested that the instruction needs an extensive committee note. He thought there was a significant question as to whether it should even be included in the products liability instructions. Mr. Ferguson suggested combining instructions 1009 and 1010. Dr. Di Paolo agreed that the instructions were confusing. She thought that jurors would not understand the relationship between instruction 1008 and 1010 and would argue over which one should govern. The committee reserved further discussion on instruction 1010 for a later meeting.

4. *Next Meeting*. The next meeting will be Monday, June 11, 2007, at 4:00 p.m.

The meeting concluded at 6:15 p.m.