

## ***MINUTES***

Advisory Committee on Model Civil Jury Instructions

February 9, 2009

4:00 p.m.

Present: John L. Young (chair), Juli Blanch, Francis J. Carney, Marianna Di Paolo, Phillip S. Ferguson, Tracy H. Fowler, John R. Lund, Timothy M. Shea, Paul M. Simmons, and David E. West. Also present: Kent B. Scott, chair of the construction contract subcommittee

1. *New Member.* The committee welcomed John R. Lund, who is taking the place of Gary Johnson on the committee.

2. *Construction Contract Instructions.* The committee continued its review of the construction contract instructions.

a. *General instruction.* Mr. Carney thought the section on construction contracts needed a general instruction. Messrs. Scott and Shea noted that the commercial contract instructions contain general instructions on the issues in a breach of contract case and the elements of a breach of contract claim (CV2101 and CV2102). Mr. Carney suggested that a committee note be added to the construction contract section referring users to CV2101 and CV2102 for general instructions.

b. *CV2207. Contractor's right to withdraw bid.* Mr. Shea noted that he had changed "intentional" in subparagraph (2) to "unintentional." Mr. Lund asked whether "mathematical" would be more easily understood than "arithmetical." The committee approved the instruction as modified.

c. *CV2208. Mutual mistake.* Mr. Young thought the instruction belonged in the contract instructions, not the construction contract instructions. Mr. Scott noted that the instruction was similar to the commercial contract instruction (CV2129) but cited construction contract authorities. Some committee members thought the instructions would be more user friendly if both the commercial contract instructions and the construction contract instructions contained an instruction on mutual mistake. Mr. Lund noted, however, that if the instructions used different language, one may think that the law is different depending on the type of contract involved. Mr. Young suggested using the language of CV2129 for CV2208 but keeping the construction contract references. The committee approved his suggestion.

d. *CV2209. Unilateral mistake.* At Mr. Young's suggestion and on motion of Mr. Ferguson, the committee substituted the language of CV2130 for CV2209, but kept the references to construction contract cases.

e. *CV2210. "Material mistake" defined.* Mr. Young noted that the commercial contract instructions cover "material breach" but not "material mistake." The committee debated whether to use the term "material" or "important." Mr. Scott noted that the public bidding statute uses "material." Since the instructions on unilateral and mutual mistake now use the term "important," the committee thought that CV2210 was unnecessary and deleted the instruction, although some committee members questioned whether the instructions should define "important mistake."

Dr. Di Paolo joined the meeting.

f. *CV2211. Promissory estoppel.* The committee noted that CV2211 is similar to CV2114, but there is a difference in subparagraph (3). Mr. Scott reported that he had talked to Bruce Badger, the chair of the commercial contract subcommittee, and Mr. Badger agreed that CV2211 should be used for CV2114. The committee struck "by a preponderance of the evidence" from the first paragraph, in keeping with its practice of not restating the standard of proof in each instruction. At Mr. Ferguson's suggestion, "material" in subparagraph (1) was changed to "important." Mr. Lund questioned whether "induce" in subparagraph (3) was plain English. The committee discussed alternatives, such as "lead to," "cause the party to act or not act," "make," "prompt," "persuade," and "influence." Mr. Simmons suggested rephrasing subparagraph (3) to say that the party making the promise "expected that [name of party] would act or not act based on the promise." Mr. Lund and Dr. Di Paolo thought that shifted the focus of the instruction. The committee rewrote subparagraph (3) to read: "[name of other party] knew or should have expected that [his] promise would lead [name of party] to act or not act." The committee approved the instruction as revised.

g. *CV2212. Owner's duty not to interfere with construction.* At Mr. Ferguson's suggestion, "or delays" was deleted from subsection (3), on the grounds that the result of delays is damages. Mr. Young questioned whether "damages" should be "additional costs." Other committee members noted that there may be other damages besides "additional costs," such as consequential and incidental damages, and one can have damages without additional costs. The committee left "damages" in subsection (3) and approved the instruction as otherwise modified.

h. *CV2213. Implied warranty of fitness of plans and specifications.* Mr. Young noted that there is a recent Utah case on point that refers to the implied warranty as one of the "accuracy," not "fitness," of the plans and specifications. He noted that the case allowed the contractor to recover damages for additional costs incurred. Mr. Scott thought that the damages could best be

covered in a separate damage instruction. Mr. Shea questioned the use of “deficiencies” in the instruction. The committee changed “deficiencies” to “defects” and added at the end of the instruction “and may recover damages caused by defects in the plans and specifications.” Mr. Young suggested that the subcommittee revise the instruction to explain the damages that are recoverable for a breach of the implied warranty. Mr. Shea noted that the instruction does not use the term “warranty” and suggested the title be revised to “Defective plans and specifications.” The instruction was approved, subject to the subcommittee adding a section on damages.

i. *CV2214. Duty to provide for suitable working conditions.* The committee deleted “[he] is entitled to” from the first line. At Mr. Young’s suggestion, it added “at the construction site” to the end of the first sentence and the end of subparagraph (1). and struck “by a preponderance of the evidence” from the second sentence. Mr. West questioned whether the owner is responsible for the site; he thought that responsibility belonged to the contractor. Mr. Scott noted that the owner must provide safe working conditions and give the contractor access to the site, but also noted that the subcommittee could not find any Utah authority for the instruction. Mr. Lund thought that responsibility for the site would be a matter of contract. Mr. Young thought that if the contract was silent, the owner had a duty. The committee ultimately decided to withdraw the instruction since there is no Utah law on point.

j. *CV2215. Duty to provide access to the worksite.* Mr. Young thought there was a Utah case on point (the *City of Fillmore* case). Mr. Scott offered to check for Utah authority for the instruction. Mr. West thought that the cases generally involve a general contractor (not an owner) failing to provide access to the worksite. At Mr. Lund’s suggestion, the first sentence was revised to read: “[Name of contractor] claims [he] had additional costs because [name of owner] failed to provide access to the worksite.” Mr. West suggested that a committee note be added to say that the instruction can be modified to cover subcontractor-contractor claims. Mr. Shea suggested that it be covered in a general note for the entire section. Mr. Lund asked whether the duty to provide access included an element of reasonableness. Mr. Young suggested saying “suitable access.” Mr. Scott noted that the cases just refer to “access.” Dr. Di Paolo thought that suitability is subsumed in the term “access.” Mr. Simmons asked whether subparagraph (3) (which says that the owner had responsibility for lack of access) was a question of fact for the jury to decide or a question of law for the court to decide. Subparagraph (3) was deleted and replaced with “(3) [he] had additional costs.” The instruction was approved as modified.

Mr. Fowler was excused.

k. *CV2216. Claim for extra work.* Messrs. Lund and Ferguson questioned the use of “[time/compensation]” in the first line. Mr. Ferguson noted that the jury cannot award “time.” Mr. Scott noted that the intent was that the court and attorneys would adapt the instruction to the facts of the case. Some contracts may provide that there are no damages for delay, for example. The committee substituted “cost” for “compensation.” The phrase “by a preponderance of the evidence” was deleted from the third line. At Mr. Young’s suggestion, subparagraph (3) was changed to “[name of owner] knew or should have known that the work required additional [time/cost].” Dr. Di Paolo asked whether the owner must have known that the work would require additional time or cost at the time he directed the contractor to perform the additional work. Mr. Scott noted that the owner must have known (or should have known) before the work was completed but not necessarily when he ordered the additional work. Mr. Scott suggested that the jury be left to work out the timing issue, based on what is fair under the circumstances of the particular case. The committee approved the instruction as modified.

3. *Procedure.* Noting that the “perfect is the enemy of the good,” Mr. Carney suggested a procedure for approving the instructions more quickly. He suggested that each set of instructions be approved by a smaller group than the whole committee. Mr. Young suggested that two groups of 3 or 4 members approve each set of instructions. The committee approved Messrs. Young, Scott, and Lund as the group to approve the construction contract instructions. Mr. Carney volunteered to take Mr. Johnson’s place on the professional liability instruction subcommittee. Mr. Carney noted that, because the jury instruction revisions are ongoing, if there are mistakes in the instructions, they can be fixed later. Mr. Carney noted that we need feedback on the jury instructions to identify problem areas and tell where they need to be revised or fine-tuned. Dr. Di Paolo suggested that the court require all jury instructions actually given at trial to be posted somewhere. Mr. Shea noted that the committee’s webpage can also be used as a blog page.

4. *Next Meeting.* The next meeting will be Monday, March 9, 2009, at 4:00 p.m.

The meeting concluded at 6:00 p.m.