

MINUTES

Advisory Committee on Model Civil Jury Instructions

June 8, 2009

4:00 p.m.

Present: John L. Young (chair), Juli Blanch, Phillip S. Ferguson, Tracy H. Fowler, Stephen B. Nebeker, Timothy M. Shea, Paul M. Simmons, and Kent B. Scott (chair of the Construction Contract subcommittee)

Excused: Honorable William W. Barrett, Jr., Francis J. Carney, David E. West

1. *Legal Malpractice Instructions.* Mr. Shea asked what the section should be called--attorney negligence or attorney malpractice. Mr. Simmons suggested "legal malpractice," to make it parallel to the section on medical malpractice and because the section includes theories other than negligence. The committee agreed. The committee then considered the following instructions in this section:

a. *CV402. Elements of claim for attorney's negligence.* The committee had previously approved this instruction. Mr. Shea suggested changing "injury, loss or damage" at the end of the instruction to "harm," to be consistent with other instructions. The committee approved the change.

b. *CV403. Elements of claim for breach of fiduciary duty.* Mr. Ferguson noted that "his" in subparagraph (2)(A) was ambiguous. It was not clear whether it referred to the attorney or the client. Messrs. Young and Simmons suggested adding "to [name of plaintiff]'s detriment" to the end of the subparagraph. Mr. Fowler suggested adding "improper" before "advantage." The committee revised subparagraph (2)(A) to read, "took improper advantage of [his] superior legal knowledge and position." The committee also deleted the last sentence of the committee note as redundant. The committee approved the instruction as revised.

c. *CV407. "Cause" defined.* Mr. Shea noted that he had included the subcommittee's proposal (the first paragraph of CV407) and the instruction on causation from the general negligence instructions (CV209) (the rest of the instruction). Mr. Ferguson thought the subcommittee's proposal was hard to follow. Mr. Simmons noted that CV402, which sets out the elements of the claim, includes "harm," whereas the subcommittee's proposal talks about the loss of a benefit and asked whether the loss of a benefit is the same as "harm." Mr. Young suggested using both. The committee deleted the first two paragraphs of CV407 and added a new introductory paragraph: "[Name of plaintiff] claims that [name of defendant] caused [name of plaintiff] harm by [describe his act or failure to act]."

Ms. Blanch joined the meeting.

The committee approved the instruction as modified.

d. *Damage instructions.* Mr. Shea noted that the legal malpractice instructions do not include instructions on damages. He noted that MUJI 1st included an instruction (7.52) entitled, "Plaintiff Must Prove Damages Resulting from Attorney Negligence," but further noted that the instruction was more of a causation instruction. It said that the plaintiff must prove not only that the defendant attorney was negligent but also that, but for his or her negligence, the plaintiff would have prevailed in the underlying legal action (the so-called "case within a case" requirement). The subcommittee had tried to deal with the concept in its proposed causation instruction ("[Name of plaintiff] must prove that if [name of defendant] had done the act [he] failed to do, or not done the act complained about, [name of plaintiff] would have benefited."). Mr. Fowler asked whether the general instructions on tort damages would apply. Mr. Simmons thought that MUJI 7.52 was necessary. Mr. Young suggested replacing "negligence" with "fault" in the instruction. The committee decided to omit MUJI 7.52 but to add a note to CV407 saying, "In describing the act or failure to act, the instructions should describe the 'case within the case' requirement." Mr. Shea will also add a reference to the damage instructions for tort damages and damages for breach of contract.

e. *Publication.* Mr. Shea asked whether the legal malpractice instructions should be published now or whether he should wait to publish them until the other professional negligence instructions were completed. The committee thought they should be published now.

Mr. Scott joined the meeting.

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

a. *CV2206. Contractor's right to rely on owner-furnished information.* The committee revised subparagraph (4) to read: "The information caused [name of contractor] to incur extra [time/costs]." The instruction was approved as modified.

b. *CV2207, Contractor's duty to inquire or investigate; CV2214, Contractor's damages for defective plans and specifications; and CV2218, Owner's damages for contractor's defective work.* Mr. Scott will re-write CV2207, CV2214, and CV2218, with Mr. Young's input.

c. *CV2215. Contractor's liability for defective work.* Mr. Ferguson asked whether the phrase "the contract requirements" in subparagraph (1) needed to be defined. The phrase was changed to "[describe the contract

requirements].” Mr. Ferguson also thought the instruction was ambiguous because it was not clear whether the owner had to prove either (1) or (2) in addition to (3) or whether he had to either prove (1) or else prove (2) and (3). Mr. Young noted that (1) and (2) will often be present in the same case. At Mr. Shea’s suggestion, the committee bracketed subparagraphs (1) and (2) and deleted “OR.” It also added a note saying that the court should instruct only on those elements ((1) or (2)) for which there is evidence. At Mr. Shea’s suggestion, “the same or” was deleted from subparagraph (2). The committee approved the instruction as modified.

d. *CV2216. Duty to provide access to the worksite.* Mr. Scott will try to find a Utah case to cite as authority for the instruction.

e. *CV2219. Additional time or compensation for extra work.* Ms. Blanch and Mr. Simmons questioned whether the jury can award “time.” Mr. Scott and Mr. Young assured them that it can. The committee approved the instruction.

f. *CV2220. “Waiver” defined.* Mr. Young asked whether the definition of “waiver” for construction contract cases was different from the definition of “waiver” generally. Mr. Shea noted that there is no waiver instruction in the commercial contract instructions. Mr. Nebeker asked whether the requirement in subparagraph (2) meant that the party must have read the contract. Mr. Young asked whether knowledge can be imputed. Mr. Ferguson thought so; if someone signs a contract, he is deemed to know what is in the contract. At Mr. Simmons’s suggestion, “release” was replaced with “give [or giving] up” throughout the instruction. Mr. Young questioned whether jurors would understand the concept of implied intent. Ms. Blanch suggested revising the last paragraph to read, “The intent to give up a right may be determined by considering all relevant circumstances.” The committee left the last paragraph as it was. At Mr. Ferguson’s suggestion, the reference to *Jensen v. IHC Hospitals* was deleted, since it is not a construction contract case. The committee approved the instruction as modified.

g. *CV2221. Wavier of change notice.* Mr. Shea asked whether the phrase “by words or conduct” in the second sentence could be deleted. The committee thought not. Mr. Ferguson asked whether “extra work” needed to be defined. The committee thought that it was adequately defined in CV2217 and did not need to be defined again in CV2221. Mr. Simmons thought the instruction was missing an element, namely, that the owner intended to give up the right to insist on written notice. He thought that an owner could understand that extra work needed to be performed and would require a change to the

contract but could still insist that notice of the change be given in writing. Mr. Scott said that the case law makes it clear that there are just the two elements set out in the instruction. Messrs. Young and Scott explained how changes to a construction contract are made in practice and explained the difference between a change notice and a change order. At Mr. Young's suggestion, the title of the instruction was changed to "Owner's waiver of written change notice from the contractor," and a sentence was added to the beginning of the instruction stating, "The contract requires that change notices be made in writing." The committee approved the instruction as modified.

h. *CV2222, Extra work due to site conditions different from contract terms (Type 1 differing site condition), and CV2223, Extra work due to unusual site conditions unknown to the parties. (Type 2 differing site condition).* At Mr. Ferguson's suggestion, "actual" was added before "site conditions" in the first sentence of CV2222, in subparagraph (3) of that instruction, and in the second sentence of CV2223. At Mr. Simmons's suggestion, the phrase "and the different site conditions added to [name of contractor]'s [time/compensation]" was added to the end of CV2223. The committee approved the instructions as modified.

3. *Next meeting.* The next committee meeting will be August 10, 2009. There will be no committee meeting in July 2009.

The meeting concluded at 6:00 p.m.