MINUTES

Advisory Committee on Model Civil Jury Instructions
December 14, 2009
4:00 p.m.

Present: John L. Young (chair), Francis J. Carney, Marianna Di Paolo, Phillip S. Ferguson, Tracy H. Fowler, Stephen B. Nebeker, Timothy M. Shea, Paul M. Simmons, Peter W. Summerill, David E. West, and Perrin Love, chair of the eminent domain subcommittee

Excused: Timothy M. Shea (who joined the meeting late)

The committee reviewed the following eminent domain instructions:. Mr. Love noted that the subcommittee tried to walk a fine line between making the instructions understandable and being faithful to the statutes and case law.

1. *CV1601. Condemnation proceedings.* Mr. Fowler asked if "public use" was ever a jury issue. Mr. Love said that it was not. Mr. Carney wondered whether there should be a committee note to that effect, but Mr. Love did not think a note was necessary because it is well known among lawyers practicing in this area. Mr. Summerill asked whether it was different for claims brought directly under the state constitution, which is self-executing. Mr. Love replied that it was not, since there was no constitutional right to a jury on the issue of public use at common law. Mr. Love suggested adding a committee note to explain that the instructions do not cover inverse condemnation and constitutional claims. Mr. Young suggested that the subcommittee decide whether to address the issue in a committee note. Subject to the possible addition of a committee note, the committee approved the instruction.

2. *CV1602. Definition of just compensation.* Mr. Ferguson asked whether "severance damages" was understandable. The committee noted that the term is explained in CV1617. The committee revisited CV1602 in connection with CV1604, as set out below.

3. *CV1603. Burden of proof.* Mr. Love noted that Mr. Shea had taken out the phrase "by a preponderance of the evidence," consistent with the committee's practice. The committee approved the instruction.

4. *CV1604. Verdict to be based on fair market value.* Mr. West thought the second sentence of the instruction was objectionable because it explained what the jury cannot award instead of what it can. Mr. Love noted that the second sentence was the reason for the instruction, since juries often want to award a property owner more than the property's fair market value because the owner does not want to part with the property. He also noted that the instruction was in MUJI 1st, but Mr. Carney pointed out that that is not necessarily sufficient reason to include the instruction in MUJI 2d. Mr. Summerill noted that the last sentence of the instruction stated the same thing only in a positive manner. Mr. Carney raised a philosophical point, namely, when should the

instructions include both a positive statement of the law (*e.g.,* what the jury may consider or award) and the converse (*e.g.,* what the jury cannot consider or award). Mr. Fowler thought that some circumstances arise so frequently that it is appropriate to deal with them in a jury instruction, and that it is not sufficient to say that the attorneys may argue the point. Mr. Ferguson noted that the first sentence invites the second sentence, since a jury may think that putting the owner in as a good a position as if the property had not been taken allows the jury to compensate the owner for the forced nature of the "sale." Mr. Ferguson thought that if the first sentence is given, the second should be given as well.

Dr. Di Paolo joined the meeting.

Mr. Ferguson suggested deleting the first two sentences. Mr. Love thought that, if the second sentence is deleted, the first sentence should be revised to include language that the reviewing committee took out, namely, that the owner should be put in "as good a position moneywise" as if the property had not been taken, "no more or less." Dr. Di Paolo thought that jurors would understand "moneywise" and that, although "no more or less" may not add anything, it does not hurt to be redundant, especially with a lay audience. Mr. Carney noted that the jury could be instructed not to award a whole laundry list of other items. Mr. West thought it was improper to instruct on other items that cannot be awarded. Mr. Young thought that, either evidence of the owner's unwillingness to sell would not be admitted or, if it was, the court would give a limiting instruction anyway. Mr. Love noted that that has not been his experience, because an instruction like CV1604 has always been given. Mr. Young asked if the instruction was necessary given the fact that the jury's award must be limited to damages established by expert testimony, as stated in CV1609. Mr. Carney thought that if the first two sentences of CV1604 were deleted, the instruction would not add anything not already covered by CV1602. Dr. Di Paolo thought that CV1602 and CV1604 did not mean the same thing and thought the instructions could be combined. The committee revised CV1602 to read:

> Alternative 1:
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> In deciding the amount of just compensation, you must put [name of property owner] in as good a position moneywise as if [his] property had not been taken, no more or less.
>
> Just compensation is the fair market value of the property taken on [valuation date].
>
> Your determination of just compensation must be limited to the fair market value of the property taken.

Alternative 2:

In deciding the amount of just compensation, you must put [name of property owner] in as good a position moneywise as if [his] property had not been taken, no more or less.

Just compensation is:

(1) the fair market value of the property taken, and

(2) severance damages, if any, to [name of property owner]'s remaining property caused by the taking.

You should determine these two amounts separately, on [valuation date], and add them together to determine just compensation.

Your determination of just compensation must be limited to the fair market value of the property taken and severance damages to the remaining property, if any.

The committee approved CV1602 as revised.

5. *CV1605. Fair market value.* Dr. Di Paolo asked whether "all of the facts about the property" include the fact that the property has been condemned. Mr. Love said no. He noted that the committee had struggled with the terms "highest probable price" and "prudent and willing." He noted that some subcommittee members thought that "prudent" was not an accurate statement of the law; others thought it was antiquated and was too easily confused with "prudish"; and still others thought that it had to be included. Dr. Di Paolo suggested "reasonable" for "prudent." Mr. Love noted that "prudent" is used in FIRREA regulations and in most appraisals. Messrs. Young and Carney thought that if the jury instruction used a term different from the term in evidence, the jury would be confused. Dr. Di Paolo thought that jurors would understand "prudent." As for "highest probable price," Mr. Carney suggested dropping "highest," but Messrs. Nebeker and Ferguson thought that "probable" alone weakened the concept. Dr. Di Paolo, on the other hand, thought that if the instruction was stated only in terms of the "highest price," the jury might think that, as between competing evaluations, it was required to select the highest appraisal, not necessarily the best appraisal or the one that made the most sense. Mr. Carney noted that he did not find "probable" in any of the cases cited for the instruction. The committee therefore struck "probable" and approved the instruction as modified.

Mr. Shea joined the meeting.

6. *CV1606. Fair market value of easement.* Mr. Ferguson questioned whether "unreasonably interfered" should be defined. The committee thought not. Mr. Summerill asked whether the last paragraph should conclude, "You should consider . . ." Mr. Love thought it was unnecessary. It is included in the second paragraph to highlight the fact that an easement may not deprive an owner of all the uses of his property. Mr. Nebeker raised the issue of temporary easements. Mr. Love said that the subcommittee had decided not to address them because all appraisers value them the same way, as a percentage of the fair market value of the fee estate. The committee approved the instruction as drafted.

7. *CV1607. Highest and best use.* Mr. Love noted that the phrase "merely possible" was included in the *City of Hildale* case. Mr. Shea thought it was redundant and noted that "remote or speculative" is used elsewhere. Mr. Carney thought that "merely" constructions should be avoided. Mr. Shea suggested that the instruction use either "potential" or "possible" but not both. Dr. Di Paolo suggested "unlikely" for "merely possible, remote or speculative." Mr. Love noted that the cases use "remote or speculative." Mr. West would delete the last sentence entirely on the grounds that it just says what the law is not. The committee returned to its earlier discussion on when to give negative instructions. Mr. Young suggested that the general principle should be to instruct on what the law is and not on what it is not. Dr. Di Paolo noted that some situations open up implications. If the implication is likely and improper, then something needs to be done to cancel it out. Mr. Young noted that the last sentence was a little disjointed because it dealt with two different concepts. Mr. Summerill asked why the instruction used the term "reasonably certain" rather than "feasible," as in the *City of Hildale* case. Several committee members thought that the terms were not synonymous. Mr. Love noted that *Hildale* used both terms interchangeably. He noted that "reasonably certain" as used in the case law may be less than "more likely than not." The test is whether it affects fair market value. Mr. Love suggested substituting "reasonably probable" for "reasonably certain." The committee revised the instruction to read:

> You must determine fair market value based on the property's highest and best use. Highest and best use is not necessarily the actual use of the property on [valuation date]. The highest and best use includes any reasonably probable potential use that results in the property's highest value. A potential use is reasonably probable if:
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> . . .
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> Highest and best use does not include a use that is remote or speculative.

The committee approved the instruction as revised.

8. *CV1608. Reasonable probability of change in zoning or land use restriction.* Mr. Love noted that CV1608 talks in terms of reasonable probability and suggested making CV1607 consistent. Mr. Carney noted that the medical malpractice instructions took out the phrase "reasonable certainty" on the grounds that "reasonable" and "certainty" were incompatible. The committee replaced "reasonable certainty" with "reasonably probable" in CV1607 and approved CV1608.

9. *CV1609. Verdict based on testimony of witnesses.* Mr. West asked whether the instruction was unique to eminent domain proceedings or whether it should be in the general instructions. Mr. Love said it was unique to eminent domain, where the appraisers' opinions set both a floor and a ceiling on the jury's award. The instruction is not limited to expert testimony, though, because an owner can give his opinion of fair market value. At Dr. Di Paolo's suggestion, the last phrase was revised to read, "within the range of fair market values offered by the witnesses." The committee approved the instruction as revised.

10. *CV1610. Owner testifying.* Dr. Di Paolo asked why owners are singled out for special treatment and why the instruction was not already covered by CV1609. Mr. Love noted that owners are entitled to give their opinions regarding fair market value even though they are not qualified as an appraiser. Mr. Ferguson suggested that the instruction was telling the jury, "The owner can testify, but don't take his opinion too seriously." Mr. Carney thought the instruction was argumentative. Mr. Young suggested combining it with CV1609 and adding "any self-interest" or "the witness's ownership interest in the property" to the list of factors the jury can consider in CV1609. Mr. Ferguson asked whether the concept was already covered by the general instruction on the credibility of witnesses. The subcommittee will consider combining CV1610 with CV1609 and adding a committee note explaining why CV1610 was deleted.

11. *Next Meeting.* The next meeting will be Monday, January 11, 2010, at 4:00 p.m.

The meeting concluded at 6:00 p.m.