

## ***MINUTES***

Advisory Committee on Model Civil Jury Instructions

March 14, 2011

4:00 p.m.

Present: John L. Young (chair), Dianne Abegglen, Juli Blanch, Francis J. Carney, Marianna Di Paolo, Phillip S. Ferguson, Tracy H. Fowler, L. Rich Humpherys, Timothy M. Shea, Paul M. Simmons, Ryan M. Springer, Peter W. Summerill, Honorable Kate A. Toomey

Excused: Honorable Deno Himonas, David E. West

1. *Premises Liability Instructions.* The committee continued its review of the premises liability instructions:

a. *CV1108. Duty of property seller.* The committee approved the committee note that was added to this instruction since the last meeting.

b. *CV1109. Recovery for injury to ski resort patrons.* The instruction was previously approved, subject to a revision of the committee note. Mr. Simmons asked if the statement in the new committee note that “[t]here may be other risks identified in the case which are or may be ‘an integral part of . . . skiing’” meant that whether other activities are “an integral part of skiing” was a question of fact that the jury had to decide or a preliminary matter for the court to decide as a matter of law. The committee decided that it was probably a question for the court to decide and that the instruction did not need to be changed. The committee approved the committee note as written.

2. *General Instructions.* The committee revisited the general instructions. Mr. Ferguson and Mr. Shea had read through them and tried to take out duplicative language. Mr. Summerill did a frequency analysis of the instructions and noted that the words most commonly used were *you*, *evidence*, *not*, *case*, and *must*. He suggested that the instructions could be revised even more to reduce the use of these words and that they could be rephrased in a positive manner.

Dr. Di Paolo joined the meeting.

a. *CV101A, General admonitions, & CV101B, Further admonition about electronic devices.* Mr. Young thought that CV101A needed a positive introduction. He suggested that the instruction should start with what the jury is supposed to do. Mr. Carney suggested that the instruction tell the jury how important their job is. Mr. Summerill concurred. He said that in a recent focus group, all the participants said they would do their own research, but after they were told why it was important that they not do their own research, all but two changed their minds and said they would follow the instruction. Mr. Carney read a proposed instruction from the American College of Trial Lawyers cautioning

against the use of the internet and use of electronic devices in the courtroom. Mr. Carney will e-mail the ACTL proposed instructions to the committee.

Ms. Blanch joined the meeting.

Ms. Blanch noted that prospective jurors need to be cautioned against use of the internet as well. She had some Google the attorneys and witnesses before filling out juror questionnaires in a recent trial. Mr. Humpherys suggested that they be asked to commit to follow the admonition against use of electronic devices. Mr. Carney noted that the ACTL has jurors sign a statement that they will abide by the court's admonition. He added that the jurors need to be told why it is important that they not use electronic devices in connection with their jury service. Dr. Di Paolo agreed, noting that even college students don't understand why they cannot use term papers and research they find on the internet. Mr. Shea suggested shortening CV101B and combining it with CV101A. Mr. Ferguson thought they should be kept separate because electronic devices need their own emphasis. The committee deferred further discussion of CV101A and CV101B.

**Mr. Shea will work on revising CV101A and CV101B, with the help of Mr. Carney.**

b. *CV102. Role of the judge, jury and lawyers.* Judge Toomey suggested that someone go through all the general instructions and reduce the number of *you's*. Mr. Summerill suggested changing the passive verbs to active voice. Dr. Di Paolo said that whether *you* and the active voice are appropriate in a given case depends on the discourse, that sometimes it is necessary to use them to engage the listener and to keep what you want the listener to focus on at the beginning of the sentence. Mr. Humpherys asked whether it was necessary to say that jurors are officers of the court. Messrs. Carney and Summerill questioned whether that was true. Mr. Humpherys also wondered whether it was necessary to explain the lawyer's role, since the jurors will see what the lawyers do. Messrs. Fowler and Springer thought the important part of the instruction was that the law comes from the judge, not from the lawyers or the jurors' own opinions. Judge Toomey offered to look at the instructions with an eye towards tightening them up but would not be able to get to them this week. Mr. Carney thought the committee should do the first draft and then run them by the judges on the committee. Mr. Shea noted that the last paragraph of CV102 is included in the new juror video. Mr. Young suggested that the committee watch the video at the next meeting. Dr. Di Paolo suggested that the instructions be revised to follow and supplement the video. The committee revised the instruction to read:

You and I and the lawyers all play important roles in the trial.

I supervise the trial and decide all legal questions, such as deciding objections to evidence and deciding the meaning of the law. I will also explain the meaning of the law.

You must follow that law and decide what the facts are. The facts generally relate to who, what, when, where, why, how or how much. The facts must be supported by the evidence.

The lawyers present the evidence and try to persuade you to decide the case in favor of their clients.

Television and movies may not accurately reflect the way real trials should be conducted. Real trials should be conducted with professionalism, courtesy and civility.

The committee approved the instruction as modified.

c. *CV103. Nature of the case.* Judge Toomey suggested striking the first sentence. Dr. Di Paolo thought it was helpful to let the jurors know where they are in the process. Mr. Springer asked whether jurors will understand the term *damages*. The committee revised the instruction to read:

In this case the plaintiff is [name of plaintiff]. The defendant is [name of defendant].

[Name of plaintiff] seeks [describe claim].

[Name of defendant] [denies liability, etc.].

[[Name of defendant] has filed what is known as a [counterclaim/cross-claim/third-party complaint/etc.], seeking [describe claim].]

The committee approved the instruction as revised.

d. *CV104. Order of trial.* Mr. Humpherys suggested deleting the last sentence of subparagraph (2). Mr. Springer thought it was useful to explain the order of proof and reception of evidence. Dr. Di Paolo thought it could be a problem to delete the sentence if the court allowed rebuttal evidence; she pointed

out that *may* is permissive, not mandatory. Mr. Humpherys also suggested deleting the last sentence of subparagraph (5), but Mr. Ferguson thought the jurors need to hear some things more than once. The committee revised the instruction to read:

The trial proceeds as follows:

(1) The lawyers will make opening statements outlining what the case is about and what they think the evidence will show.

(2) [Name of plaintiff] will offer evidence first, followed by [name of defendant]. I may authorize additional evidence.

(3) Throughout the trial and after the evidence has been fully presented, I will instruct you on the law that you must apply. You must follow the law as I explain it to you, even if you do not agree with it.

(4) The lawyers will then summarize and argue the case. They will share with you their views of the evidence, how it relates to the law and how they think you should decide the case.

(5) The final step is for you to go to the jury room and discuss the evidence and the instructions among yourselves until you reach a verdict.

The committee approved the instruction as modified.

e. *CV105. Sequence of instructions not significant.* At Judge Toomey's suggestion, the first two sentences were deleted. (The second sentence was moved to CV104.) The committee approved the instruction as modified.

f. *CV106. Jurors must follow the instructions.* The committee deleted the instruction, on the grounds that it is adequately covered in other instructions. Subsequent instructions will be renumbered accordingly.

g. *CV107. Jurors may not decide based on sympathy, passion and prejudice.* At Mr. Summerill's suggestion, the order of the sentences was reversed. The committee approved the instruction as modified.

h. *CV108. Note-taking.* Mr. Humpherys asked whether the instruction should say that the court will keep the notes. Mr. Shea said that the

practice depends on the judge. Mr. Young thought the committee should recommend that a rule be adopted that requires jurors to leave their notes during breaks and at the end of the trial. Mr. Shea noted that, if it were a rule that jurors leave their notes, then the notes would become a court record and would be presumptively public. Mr. Springer noted that Utah Rule of Civil Procedure 47(n) already covers the jurors' use of notes. The committee revised the instruction to read as follows:

You may take notes during the trial and have those notes with you when you discuss the case. If you take notes, do not over do it, and do not let your note-taking distract you from following the evidence. Your notes are not evidence, and you should use them only as a tool to aid your personal memory. I will secure your notes in the jury room during breaks and have them destroyed at the end of the trial.

The committee deleted the committee note and approved the instruction as modified.

Judge Himonas joined the meeting and asked to be excused. He had just gotten out of trial.

i. *CV110. Rules applicable to recesses.* The committee approved the deletion of this instruction as redundant. Mr. Carney asked whether a jury instruction is needed for the start of recesses. The committee thought not. Judge Toomey noted that she reminds the jurors of the court's admonitions before every recess, as do most other judges.

j. *CV111. All parties equal before the law.* The committee revised the instruction to read:

"Person" means an individual, corporation, organization, or other legal entity.

Judge Toomey thought the second sentence, identifying the parties and the types of entities they are, was necessary. She suggested moving it to CV103, where the court introduces the parties, as an option if one or more of the parties is not an individual. Ms. Blanch thought it was important to keep the instruction a separate instruction if the defendant is a corporation. Mr. Young suggested moving the instruction to CV104 and moving CV111-CV116 to follow CV104. Mr. Simmons thought it was important to keep the definition of *person* because the term is used in other instructions. Judge Toomey suggested starting CV103 with,

“All parties are equal before the law. A party may be . . .” Mr. Shea suggested adding, “In this case the plaintiff is [identify entity]. The defendant is [identify entity]. This should make no difference to you. . . .” Mr. Summerill suggested: “All parties are equal before the law. It should make no difference to you if a party is an individual, a corporation or other legal or business entity” or “It should make no difference to you that the plaintiff is [e.g., an individual] or that the defendant is a [identify entity]. Messrs. Humpherys and Carney noted that the instruction that all parties are equal before the law also applies to more than just whether the party is an individual or a corporation but also applies to such things as height, weight, sex, race, and immigration status. Mr. Shea suggested revising the instruction to read: “All parties are equal before the law. [It makes no difference that the plaintiff is [describe plaintiff] or that the defendant is [describe defendant]. You must decide this case as if it were between individuals.” Mr. Springer suggested deleting CV111 and beefing up the committee note to CV107. Dr. Di Paolo thought that CV111 fit the title of CV107 better. She thought the title of CV111 should be “Definition of *person*.” The title of CV107 was changed to “All persons equal before the law,” and the title of CV111 was changed to “Definition of *person*.” Mr. Springer suggested putting CV111 just before CV107 and questioned whether the instruction was necessary in a case where all the parties are individuals. CV107 was revised to start out, “All parties are equal before the law. You must decide this case based on the facts . . .” The committee deferred further discussion of CV107 and CV111 until the next meeting.

3. *Next Meeting.* The next meeting will be Monday, April 11, 2011, at 4:00 p.m.

The meeting concluded at 6:00 p.m.