

## ***MINUTES***

Advisory Committee on Model Civil Jury Instructions

June 13, 2011

4:00 p.m.

Present: John L. Young (chair), Diane Abegglen, Honorable William W. Barrett, Jr., Francis J. Carney, Marianna Di Paolo, Phillip S. Ferguson, Tracy H. Fowler, Gary L. Johnson, Timothy M. Shea, Paul M. Simmons, Peter W. Summerill, Honorable Kate A. Toomey, David E. West

Excused: Ryan M. Springer

1. *Committee Membership.* Mr. Young will review the minutes and talk to those members who have missed a number of meetings to see if they would like to be replaced or if they will recommit to their service on the committee.
2. *Vicarious Liability Instructions.* Mr. Young noted that Mr. Lund was given the assignment to come up with instructions on vicarious liability. Messrs. Carney, Johnson, and Simmons volunteered to serve as the “Gang of Three” to review the vicarious liability instructions and have them ready for review at the September 2011 meeting.
3. *Minutes.* Mr. Carney reported that he has put the committee minutes into one searchable .pdf document. He asked whether the document could be put on the Internet. Mr. Shea thought it could be added to the committee’s webpage. The minutes are already on the webpage, but they cannot be searched all at once. Dr. Di Paolo suggested also looking at software that would create a word index for the minutes.
4. *General Instructions.* The committee reviewed the last of the revisions to the general instructions:
  - a. *CV130A, Charts and summaries as evidence; CV130B, Charts and summaries of evidence, and CV130C, Charts and summaries.* Based on the committee’s discussion at the last meeting, Mr. Shea prepared three different instructions regarding charts and summaries—one for charts and summaries that are received as evidence under Utah Rule of Evidence 1006 (CV130A); one for charts and summaries of the evidence that are used only as demonstrative exhibits (CV130B), and one where both types of charts and summaries are used at trial (CV130C). Mr. Ferguson questioned the second sentence of CV130B (“You may consider them only if they correctly reflect information shown by the evidence.”). He thought the instruction was ambiguous because it suggests that the jury is to determine if the chart or summary correctly reflects information shown by the evidence, when the court must determine that the chart or summary is an accurate depiction of the evidence before it receives it into evidence. Mr. Ferguson noted that, as a practical matter, the court relies on the parties to compare the chart or summary with the evidence and will receive it if there is no objection. If the court determines that it does not accurately reflect

the evidence, it will not receive it, and the jury should not consider it. Mr. Ferguson therefore thought the last sentence of CV130B should be deleted. Mr. Shea asked whether any instruction was necessary. He thought CV130A was tautological (“evidence is treated as evidence”). Dr. Di Paolo noted that, from a juror’s perspective, whatever is presented to the jury in open court is considered evidence. Messrs. Summerill and West noted that the difference between CV130A and CV130B is the difference between charts and summaries that can go into the jury room (such as summaries of voluminous medical records) and those that cannot (such as summaries of an expert’s testimony or an expert’s drawing). Dr. Di Paolo suggested telling the jury that the charts and summaries that they take into the jury room are evidence and that others are not. The committee revised CV130A to read:

Certain charts and summaries that are received as evidence will be with you in the jury room when you deliberate. You should consider the information contained in them as you would any other evidence.

The committee approved CV130A as revised. The committee then revised CV130B to read:

Certain charts and summaries will be shown to you to help explain the evidence. However, the charts and summaries are not themselves evidence, and you will not have them in the jury room when you deliberate. You may consider them to the extent that they correctly reflect the evidence.

The committee approved CV130B as revised. The committee decided that CV130C was unnecessary. The court can use CV130A or CV130B or both, depending on what charts and summaries are used in the case.

b. *CV131, Spoliation.* Mr. Johnson noted that CV131 does not offer any guidance as to when the instruction should be used. Under Utah Rule of Civil Procedure 37(g), the sanction for the spoliation of evidence is within the court’s discretion, and an adverse inference instruction is just one possibility. Mr. Johnson also noted that the instruction requires that the spoliation be intentional, but the court in *Daynight, LLC v. Mobilight, Inc.*, 2011 UT App 28, said that rule 37(g) does not require “willfulness, bad faith, fault or persistent dilatory tactics” before a court may sanction a party for spoliation. Mr. West asked whether any jury instruction was necessary, given the lack of direction in the case law. The committee thought that a model instruction was appropriate for those cases in which the court concludes that an adverse inference instruction

is the appropriate sanction. Some committee members questioned whether “intentionally” should be omitted from the instruction. Dr. Di Paolo suggested handling the matter in a committee note. Mr. Johnson agreed to draft a proposed committee note. The committee also agreed to add citations to the recent cases on spoliation to the reference section of CV131. Those cases are *Daynight; Hills v. United Parcel Service, Inc.*, 2010 UT 39; and *Kilpatrick v. Bullough Abatement, Inc.*, 2008 UT 82.

c. *CV\_\_\_, No transcript of testimony.* Mr. Simmons had suggested adding an instruction telling the jury that they would not have a transcript of the trial testimony during their deliberations, so they would need to pay close attention to the evidence presented at trial. The committee revised the second sentence of the instruction to read, “You will not have a transcript or recording of the witnesses’ testimony” and approved the instruction as modified. Mr. Shea and Dr. Di Paolo questioned why jurors are not allowed to have a transcript of testimony. Mr. Carney noted that in some jurisdictions, they can have a transcript but noted that other jurisdictions, such as Utah, do not allow it because it would tend to give that evidence more weight, and the other side might then insist that the jury be given a transcript of other evidence more helpful to its case. Mr. Ferguson noted that, to be fair, the jury should receive the entire transcript or nothing.

5. *Verdict Form.* Mr. Shea revised Mr. Summerill’s proposed special verdict form for a wrongful death case in light of the committee’s discussion at the last meeting. The committee generally liked the format of the form (asking separate questions about fault and causation for each person alleged to have been at fault). At Mr. Simmons’s suggestion, the instructions following questions (3) and (4) were changed to say “go to the next set of instructions” rather than “answer the next set of instructions.” The heading “Next set of instructions” was highlighted. At Mr. Ferguson’s suggestion, “Question” was inserted before the number of each question. Mr. Simmons pointed out that the heading to questions 5 and 6 says “[Name of plaintiff],” but the questions ask about the fault of the decedent. Mr. Johnson pointed out that in a given case the fault of both the plaintiff and the decedent may be relevant. The parties and court can add additional sections for each person alleged to have been at fault. The committee thought that a committee note should be added to that effect, to tell the court and counsel that the form may need to be tailored to fit the circumstances of the case. Mr. Simmons suggested that the phrase “the harm” in questions 9 through 12 be replaced with “[name of decedent]’s death.” The committee approved the verdict form up to the damages section.

Mr. Simmons noted that question 13 did not reflect all of the damages recoverable in a wrongful death action. Mr. Summerill noted that the question had been

revised to read, “What amount fairly compensates [name of plaintiff] for the loss of [name of decedent]?” Mr. West noted that there would need to be separate lines for each heir (and for each decedent in a case involving multiple deaths). At Mr. Johnson’s suggestion, the committee decided to reverse the order of questions 13 and 14. Mr. Carney noted that the law requires an award of general damages if the jury awards special damages, so the revised order of the instructions makes sense. He further noted that a Utah appellate decision held that a party could waive its right to collect general damages by agreeing to a verdict form that asks the jury what amount “if any” would fairly compensate the plaintiff. Mr. Carney therefore moved to delete the phrase “if any” from all verdict forms. The motion passed without opposition. Mr. Summerill noted that the form could be modified to apply to personal injury cases as well as death cases. He suggested that the damage questions ask the jury to determine the amount of “economic” and “noneconomic” damages. Mr. Shea noted that “economic” and “noneconomic” damages are defined in CV2003 and CV2004. Mr. Simmons pointed out, however, that the instructions on wrongful death damages (CV2013 and CV2014) do not use the terms “economic” and “noneconomic” damages and asked whether those instructions should be revised to define the two types of damages. Mr. Carney noted that in a wrongful death case there may also be a survival claim, which belongs to the estate. He suggested adding another question before the damage questions, asking whether the decedent experienced conscious pain and suffering before he died. Mr. Ferguson suggested phrasing the question, “Did [name of decedent] incur noneconomic damages before [his] death.” Some thought that the question was too sterile. Mr. Summerill suggested substituting “harm” for “noneconomic” damages.

Mr. Fowler was excused.

The committee also debated whether survival damages are recoverable where the injured party may be in a coma and may never come out of it before dying. Mr. Ferguson also noted that there is an argument for not allowing the recovery of funeral and burial expenses in a wrongful death case, since they would have been incurred when the decedent died in any event. At the suggestion of Messrs. Carney and Summerill, the committee decided to defer further discussion of the damage section of the verdict form to allow the committee more time to think about it.

6. *Discouraging Use of MUJI 1st.* Mr. Carney noted that attorneys are still requesting MUJI 1st instructions, even those that have been preempted by MUJI 2d and those the Utah Supreme Court has said should not be given. He thought it would be helpful to have a correlation table or comparison chart cross-referencing the MUJI 1st instructions with the MUJI 2d instructions and explaining why some MUJI 1st instructions are not included in MUJI 2d. Judge Toomey and Mr. Summerill noted that Chief Justice Durham has already written a letter, included on the MUJI 2d website, that says MUJI 2d should be used “to the exclusion of other instructions.” They

suggested simply adding a sentence that says that if an instruction is not included in MUJI 2d, the omission was intentional. The committee thought a correlation table would still be useful. Mr. Ferguson suggested also cross-referencing JIFU. Mr. Young suggested asking each subcommittee to prepare the table for its section. Mr. Carney said he would do the table for the medical malpractice instructions first, so that the committee could review and approve the format before other subcommittees are asked to do the same for their sections.

7. *Next Meeting.* There will be no committee meeting in July or August 2011. The next meeting will be Monday, September 12, 2011, at 4:00 p.m.

The meeting concluded at 6:00 p.m.