MINUTES
Advisory Committee on Model Civil Jury Instructions
September 12, 2011
4:00 p.m.

Present: Juli Blanch, Francis J. Carney, Marianna Di Paolo, Phillip S. Ferguson, Honorable Deno Himonas, L. Rich Humpherys, Gary L. Johnson, John R. Lund, Timothy M. Shea, Paul M. Simmons, Ryan M. Springer, Peter W. Summerill, Honorable Kate A. Toomey, David E. West. Also present: David A. Cutt

Excused: John L. Young (chair); Honorable William W. Barrett, Jr.; Tracy H. Fowler,

Mr. Shea conducted the meeting in Mr. Young's absence.

1. *CV131. Spoliation.* Mr. Johnson reported that he and Mr. Fowler had reviewed CV131 in light of Utah Rule of Civil Procedure 37(g) and recent case law. Mr. Fowler noted that the instruction implies that it is for the jury to decide whether a party intentionally spoliated evidence and questioned whether that was the law, or whether the court makes that determination as a preliminary matter under Utah Rule of Evidence 104. Mr. Humpherys thought that the issue of spoliation could arise in two ways: (1) as a rule 37(g) sanction, or (2) as a question for the jury. In the latter situation, the jury decides whether there was spoliation, and, if it finds that there was, it can draw the inference stated in the instruction. Mr. Ferguson thought the issue generally arises before trial, in the form of a motion in limine or motion for sanctions. Mr. Springer observed that rule 37(g) is not the exclusive remedy for spoliation. In an appropriate case, there may even be a cause of action for spoliation (although the Utah Supreme Court has yet to recognize such a claim). Mr. Humpherys noted that there was no case law saying that an adverse inference instruction could only be given as a rule 37(g) sanction. Mr. Shea suggested revising CV131 to read: "I have determined that [name of party] intentionally concealed, destroyed, altered, or failed to preserve [describe evidence]. You may assume that the evidence would have been unfavorable to [name of party]." Mr. Lund suggested that the committee note be revised to explain that the law is not clear whether spoliation is a question for the court or the jury. Mr. Johnson offered to draft such a note. Mr. Lund further thought that the issue generally plays out as a question of the sufficiency of the evidence. Mr. Summerill did not think a jury instruction was necessary. He thought that there was not enough direction in the case law and that any instruction would only cause confusion. He thought the issue should be left out of MUJI 2d until it is decided on appeal. He also thought that if there was an instruction it should say that spoliation creates an inference that the evidence would prove what the opponent claims it would prove. Mr. Carney noted that CACI has an instruction similar to CV131. Judge Himonas thought it should be a stock instruction and that in some cases, the question of spoliation should be left to the jury. Mr. Humpherys thought that it should be left to counsel how to argue the inference. He thought the issue could be covered by the instruction on the credibility of witnesses. Mr. Lund noted that CV131 begs the question of what is destruction, concealment, or

alteration of evidence. Mr. Ferguson noted that in his experience courts are reluctant to find that evidence was destroyed in a way that would lead to an adverse inference. Judge Toomey moved to accept the revised instruction, along with a revised note. Mr. Lund and Mr. Humpherys seconded the motion. The motion passed, with Mr. Summerill opposed.

2. *Verdict Form*. The committee continued its review of the proposed special verdict form for wrongful death cases. Mr. Humpherys noted that in personal injury cases, economic damages need to be broken out for several reasons. There may be liens that apply to some economic damages. It is also easier to figure interest on items of economic damages. And it is easier to adjust the verdict on appeal, if necessary, without having to retry the case. Mr. Carney noted that damages in a death case may need to be split between the heirs' damages for the wrongful death and the estate's damages for the decedent's personal injuries before he died (the survival claim). Mr. Johnson noted that the estate may also have claims for contractual damages, such as certain insurance benefits. Mr. Lund noted that, in a wrongful death case, the economic and noneconomic damages need to be broken out for each heir. Mr. Humpherys noted that failing to do so would only cause another lawsuit if the heirs cannot agree how to apportion damages among themselves. Mr. West suggested separating the estate's claim from the heirs' claims and including under the estate's damages past medical expenses, funeral and burial expenses, lost wages, and other economic damages. Mr. Carney suggested that the committee look at special verdicts proposed or used in actual death cases and offered to head up a subcommittee to propose any changes to the verdict form. Committee members should provide Mr. Carney with any verdict forms they have used in wrongful death cases in the past.

3. *Ski Instructions*. Mr. Cutt joined the meeting. Mr. Shea had circulated before the meeting the instructions that were given in Mr. Cutt's recent trial involving a skiing accident. Mr. Shea had edited them for style. He had also proposed combining them into a single instruction. Mr. Cutt liked Mr. Shea's edits but thought that the instructions should not be combined. He thought the term "inherent risks of skiing" should be capitalized to show that it is a term of art. Dr. Di Paolo thought that putting the phrase in quotation marks would have the effect of saying "the so-called inherent risks of skiing," which might denigrate the term. Mr. Lund suggested having someone from the skiing defense bar sign off on the instructions. The committee suggested Kevin Simon or Gordon Strachan of Strachan, Strachan & Simon, Ruth Shapiro of Christensen & Jensen, or Gainer Waldbillig. Mr. Cutt offered to talk to someone in the defense bar and invite them to sign off on the instructions or come to the next committee meeting. The committee agreed to use draft instructions (2) through (5) as edited by Mr. Shea as the starting point. Mr. Lund questioned whether "integral" in instruction (3) would be understandable to jurors. Mr. Cutt noted that it is the statutory language. He said that the cases go even further in defining "inherent risk of skiing." Dr. Di Paolo asked

whether the terms in instruction (3), subparagraph (2) ("hard pack, powder, packed powder, etc.") needed to be defined. Mr. Cutt said that the court should only include in the instruction the subparagraphs of instruction (3) that applied in the particular case. Consequently, Mr. Shea bracketed subparagraphs (1) through (8) of instruction (3). Mr. Lund noted that, if he were defending a ski case, he might want all of the subparagraphs included in the instruction. Mr. Cutt thought that the first paragraph of instruction (3) should say, "Inherent Risks of Skiing means those dangers or conditions which are an integral part of the sport of recreational, competitive, or professional skiing and which may include the following:" Mr. West thought that instruction (2) was not accurate. He noted that the statute has been modified by the case law and that a skier may recover from a ski area operator for injuries resulting from an "inherent risk of skiing" under some circumstances. If a hazard could have been eliminated through the exercise of reasonable care, the ski area operator can still be liable. Mr. West suggested that instruction (2) be revised to read, "Subject to the following instructions, no skier . . ." or something like that. Mr. Cutt noted that the statute has been amended to include snowboarders and others as well as skiers, and the instructions may need to be adapted accordingly in a particular case. The committee deferred further discussion of the instructions until they have been reviewed by the defense bar.

4. *Correlation Table*. Mr. Carney presented a draft correlation table for the medical malpractice instructions, showing the corresponding sections of MUJI 2d for each of the MUJI 1st medical malpractice instructions. Mr. Carney proposed that, where MUJI 1st instructions have been intentionally omitted, the correlation table explain why. Judge Toomey noted that such a table would be very helpful for judges. Mr. Shea noted that he can put correlation tables on the committee's webpage but not on the MUJI 2d website, which he does not control. At the committee's request, Mr. Shea will talk to the courts' webmaster to see if a correlation table can be added to the MUJI 2d website. Mr. Carney offered to prepare a correlation table for the negligence instructions and noted that a similar table will need to be prepared for each of the other sections. Mr. Lund asked whether we should also have correlation tables from MUJI 2d to MUJI 1st. Dr. Di Paolo said it would be easy to change the order of the table to reverse the cross-references. Mr. Shea noted that the instructions will start showing the date each was approved and the date it was amended. Judge Toomey and Mr. Lund thought it would be helpful to have the MUJI 2d instructions in a book. Mr. Shea said that would be up to the legal publishers to decide whether they want to publish them.

5. *Website*. Mr. Summerill noted that it is cumbersome to build a set of jury instructions from the website and that it will only become more cumbersome as new sections are added. He suggested that Mr. Shea also speak to the webmaster about revising the procedure for building a set of jury instructions so that an attorney does not have to go through all of the instructions to pull out the ones he wants.

6. *Punitive Damages*. Mr. Carney noted that MUJI 1st included just one instruction on punitive damages. He proposed two instructions to be given in the first phase of the trial and two instructions to be given in the second phase if the jury decides that punitive damages are warranted. He suggested two approaches to the instructions: (1) using jury instructions actually used in punitive damage cases, or (2) coming up with a new set of instructions, as California did in CACI. He noted that CACI includes definitions of important terms used in the instructions. Mr. Lund expressed concern about having a single approach for punitive damages; he was concerned that it might not adequately deal with all of his affirmative defenses to a punitive damage claim. He also thought that the terms in the punitive damage statute (e.g., "willful and malicious" and "knowing and reckless indifference") needed to be defined for the jury. The committee generally agreed that the instructions should be more detailed, defining statutory terms, although Mr. Humpherys noted that the terms may be hard to define or may not have been defined by the case law yet, and the definitions may end up being circular. Dr. Di Paolo thought that some of the terms, such as malicious, are probably understood by most jurors, unless there is a special legal meaning for the term. Mr. Springer noted that terms used in any affirmative defenses may also need to be defined. Mr. Humpherys noted that proposed CV2029 subparagraph (4) needed to be revised. Under U.S. Supreme Court precedent, the effect of the conduct on the lives of others needs to be limited to others in Utah. Mr. Humpherys also noted that the defendant's poverty can be a consideration under subparagraph (1). Mr. Shea questioned whether the last paragraph of CV2026 was necessary, since the jury will be given the special verdict form. Mr. Humpherys thought that it was important for the jury to know why it is being asked to make a finding on punitive damages. Judge Toomey noted that, by telling the jury that, if it answers "Yes," the amount of punitive damages will be reserved for further consideration at a later time may influence the jury to find against punitive damages, so that they do not have to come back for further proceedings. Mr. Cutt suggested revising the first sentence of that paragraph to read, "In the Special Verdict form you will be asked whether punitive damages should be awarded" and deleting the second sentence of that paragraph. Mr. Lund suggested "assessed" instead of "awarded." Mr. Summerill asked whether the jury should be told that a percentage of any punitive damages awarded above a certain amount goes to the state. The committee decided not to include that in the instruction because there is no appellate case on point. Mr. Humpherys noted that he has seen attorneys ask that the jury be instructed on the presumptive ratio of punitive damages to compensatory damages of 9:1, under the U.S. Supreme Court decision in *Campbell v. State Farm*. The committee decided not to include such an instruction for lack of authority on point. Mr. Humpherys added that he believed it is for the court and not the jury to apply the ratio. At Mr. Shea's suggestion, subsection (2) of proposed CV2026 was revised to read:

> (2) it is proved by clear and convincing evidence that [name of defendant]'s conduct

(a) was willful and malicious, or

(b) was intentionally fraudulent, or

(c) manifested a knowing and reckless indifference toward, and a disregard of, the rights of others.

Mr. Summerill noted that the court explained the last phrase in *Daniels v. Gamma W. Brachytherapy, LLC,* 2009 UT 66, 221 P.3d 256. Mr Summerill also noted that the punitive damages statute speaks of both "acts or omissions" and that the jury instruction should do so as well.

7. *Next Meeting*. The next meeting will be Tuesday, October 11, 2011, at 4:00 p.m.

The meeting concluded at 6:00 p.m.