MINUTES

Advisory Committee on Model Civil Jury Instructions
January 11, 2016
4:00 p.m.

Present: Juli Blanch (chair), Marianna Di Paolo, Joel Ferre, Tracy H. Fowler, Honorable Ryan M. Harris, Gary L. Johnson, Paul M. Simmons, Nancy Sylvester, Christopher M. Von Maack. Also present: David C. Reymann, from the Defamation subcommittee

Excused: Patricia C. Kuendig, Honorable Andrew H. Stone, Peter W. Summerill

1. *Minutes.* On motion of Mr. Fowler, seconded by Mr. Von Maack, the minutes of the November 9, 2015 meeting were approved.

2. *Schedule.* Ms. Blanch noted that most of the subcommittees were fully staffed and on schedule. She indicated that Matthew Barneck, the chair of the Wills/Probate subcommittee was not sure that jury instructions were necessary for that subject. He was going to talk to other practitioners to see if they thought model jury instructions were needed. Judge Harris noted that the probate code provides for jury trials in some cases.

3. *Defamation Instructions.* The committee continued its review of the defamation instructions.

a. *CV1607. Definition: Defamatory*. Mr. Reymann explained that, even though the committee approved this instruction at the last meeting, he revised it in light of recent research on the question of the relative roles of the judge and jury because the approved instruction was too broad. The question of whether a statement has "defamatory meaning" is a question of law for the court to decide. The court determines whether a statement can bear the meaning the plaintiff claims it has and, if so, whether that meaning is defamatory. The only question for the jury is whether the recipient understood the statement in its defamatory sense. Mr. Simmons asked whether the instruction should only be given where a statement is ambiguous, that is, capable of two or more meanings, one of which is defamatory. Mr. Reymann explained that it should be given in every case because defamatory meaning is an element of the tort. Mr. Simmons suggested deleting the last three sentences of the last paragraph and simply say, "You must decide whether the recipient understood the statement to be defamatory." In the alternative, he suggested deleting the second sentence and revising the third. He thought that jurors would not understand what they are supposed to do with the statement, "In some cases, the defamatory meaning of a statement is the only reasonable interpretation of that statement." Other committee members thought the language was helpful.

Dr. Di Paolo joined the meeting.

At Judge Harris's suggestion, the third sentence was moved to the beginning of the paragraph. The committee revised the paragraph to read:

> Some statements may convey more than one meaning. For example, a statement may have one meaning that is defamatory and another that is not. To support a defamation claim, [name of plaintiff] must prove, for each statement, that one or more of the recipients of the statement actually understood it in its defamatory sense–the sense that would expose [name of plaintiff] to public hatred, contempt, or ridicule. If a recipient did not actually understand a particular statement in its defamatory sense, then that statement cannot support a defamation claim.

The committee also added the following sentence to the end of the instruction: "You must determine whether the recipient actually understood the statement[s] in [its/their] defamatory sense."

Dr. Di Paolo asked whether defamation was limited to statements or could also include questions. Mr. Reymann said that it can include questions, but the committee had used "statement" generically to include any type of utterance that could carry defamatory meaning. On motion of Mr. Johnson, seconded by Dr. Di Paolo, the committee approved the instruction as revised.

b. *CV1606. Definition. Opinion.* On motion of Mr. Ferre, seconded by Mr. Simmons, the committee revised the last line of the committee note to delete the word "Meaning" at the end of the sentence, to make it consistent with the title of revised CV1607.

c. *CV1608. Definition. Substantial and Respectable Minority*. Mr. Reymann explained that CV1608 was deleted because whether a statement damaged a person's reputation in the eyes of "at least a substantial and respectable minority of its audience" is a question for the court, not the jury.

d. *CV1609 [renumbered 1608]. Absolute Privilege.* Mr. Reymann added two paragraphs to the committee note to former CV1609 to explain when a jury may need to determine whether a privilege applies. He noted that the paragraphs also applied to new CV1609 on conditional privileges. The note explains that it is generally a question of law as to whether a privilege applies, but a jury may have to find foundational facts as a preliminary matter. For example, in the case of the litigation privilege, the jury may have to decide whether the declarant was a litigant at the time he or she made the statement. The committee asked why the jury needs to be instructed on a privileged statement if the statement is inadmissible because it is privileged. Mr. Reymann explained that

the statement may come in for another purpose. Judge Harris noted that, if a statement is privileged, it would not be included in the statements listed in CV1607. Mr. Johnson thought that CV1611 on non-actionable statements covered the subject. Mr. Reymann agreed that there was no good argument for including the instruction on absolute privilege. The committee tentatively deleted new CV1608 on absolute privilege and moved the new paragraphs of the committee note to the committee note to the instruction on conditional privilege, now numbered CV1608. Mr. Reymann will revise the committee note to new CV1608 to explain why there is no instruction on absolute privilege.

e. *CV1609 [renumbered CV1608]. Conditional Privilege.* Judge Harris asked about the burden of proof. Mr. Reymann explained that privilege is a defense, on which the defendant bears the burden of proof, but the plaintiff has the burden to show that the privilege was abused. At the suggestion of Mr. Von Maack, the committee deleted the phrase "as a matter of law" throughout the instructions, on the grounds that it is meaningless to jurors and likely to be ignored or misunderstood. At Judge Harris's suggestion, the committee changed the phrase, "The Court has already determined" to "I have already determined" throughout. The committee revised the second paragraph of the instruction to read:

> Because the [insert] privilege applies to [name of defendant]'s statements, [name of plaintiff] must prove by a preponderance of the evidence that [name of defendant] abused the privilege. There are three ways to abuse a conditional privilege: common law malice, actual malice, and excessive publication.

Ms. Blanch suggested transposing the order of common law and actual malice. At Dr. Di Paolo's suggestion, the next three paragraphs were revised to read, "To prove that the conditional privilege was abused by . . . ." She also suggested bracketing the alternatives, since the court would only instruct on those types of abuse for which there is evidence. Mr. Von Maack suggested putting something in the introduction to all the instructions saying that only relevant language in the instructions should be used. Other committee members suggested adding an explanation of the brackets in the committee note. The second paragraph of the committee note was revised to add a third sentence saying, "Likewise, jury instructions should be adapted to describe the particular form(s) of abuse the plaintiff is claiming if the plaintiff is not alleging all three." The rest of that paragraph was made a separate paragraph. Mr. Reymann explained that actual malice is a subjective standard unless a defendant's claim that he did not know that a statement was false is inherently improbable, such that no one could believe his denial. Judge Harris noted that a privilege would not bar a defamation claim if there are other, non-privileged statements. The committee

therefore revised the last paragraph of the instruction to read, "If you find that [name of plaintiff] has failed to prove [common law malice,] [actual malice, or] [excessive publication], then [name of plaintiff] cannot base [his/her/its] defamation claim on that privileged statement." Because Mr. Reymann needs to revise the committee note, the committee did not vote on the instruction at this time.

f. *CV1611 [renumbered 1610]. Non-actionable Statements.* Dr. Di Paolo asked when a non-actionable defamatory statement would come in for another purpose. Mr. Reymann gave examples and also noted that such a statement could slip in without objection. The committee revised the instruction to read:

> During trial, you may have heard evidence about certain statements made by [name of defendant] that may be considered insulting or damaging to [name of plaintiff]. Just because you heard evidence of those statements does not mean that those statements can legally be the basis of a defamation claim. I may have admitted evidence of those statements for some purpose other than proof of defamation. I have determined that certain statements cannot be the basis of a defamation claim. Even though you heard evidence of them, you are instructed that the following statements cannot be the basis of [name of plaintiff]'s defamation claim: [Insert specific non-actionable statements.]

On motion of Mr. Simmons, seconded by Mr. Fowler, the committee approved the instruction as revised.

g. *CV1612 [renumbered 1611]. Definition: Requisite Degree of Fault–Private Figure–Matter of Public Concern.* Mr. Reymann noted that there are three categories of cases, those involving (1) a public figure or public official, which require actual malice, (2) a private figure but a matter of public concern, which require at least negligence, and (3) purely private actors and matters. The Utah Supreme Court has not yet decided the requisite degree of fault required in the third category, so the subcommittee has not offered instructions in that category. The subcommittee considered including alternatives, but without any direction from the Utah Supreme Court thought they would not be helpful. Mr. Reymann noted that new CV1611 and CV1612 could omit the introductory sentence, but the committee thought those sentences were useful, particular for the court and attorneys. The committee discussed the word "ascertained" in the phrase "did not take reasonable care to ascertain that nothing substantially false

was published." Dr. Di Paolo did not think jurors would understand it. The committee suggested "ensure," "make sure," "determine," "see," and other synonyms but rejected them all. At Mr. Reymann's suggestion, the phrase was revised to say, "did not take reasonable care to avoid the publication of statements that are substantially false." On motion of Mr. Simmons, seconded by Mr. Von Maack, the committee approved the instruction as revised.

h. *CV1613 [renumbered 1612]. Requisite Degree of Fault–Public Official or Public Figure.* The committee revised new CV1612 to start out, "I have already determined that," consistent with the revisions to new CV1611, and inserted the phrase "or entertained serious doubts about their truth" after "known that the statements were false" in the last sentence. Ms. Sylvester raised the issue of whether the instruction should say "has proved" or "has proven." She will conform the usage to that of prior instructions. On motion of Mr. Johnson, seconded by Mr. Fowler, the committee approved the instruction as amended.

4. *Business Disparagement.* Mr. Reymann noted that the defamation subcommittee did not propose any instructions on business disparagement, a similar tort, and asked if the committee wanted them to propose instructions for business disparagement. Ms. Blanch suggested that he check MUJI 1st to see if it includes such instructions. The committee left the question open until the next meeting.

5. *Next meeting.* The next meeting will be Monday, February 8, 2016, at 4:00 p.m.

The meeting concluded at 6:00 p.m.