

## ***MINUTES***

Advisory Committee on Model Civil Jury Instructions

April 11, 2016

4:00 p.m.

Present: Juli Blanch (chair), Marianna Di Paolo, Joel Ferre, Tracy H. Fowler, Gary L. Johnson, Paul M. Simmons, Honorable Andrew H. Stone, Nancy Sylvester, Christopher M. Von Maack

Excused: Honorable Ryan M. Harris, Patricia C. Kuendig, Peter W. Summerill, David C. Reymann, from the Defamation subcommittee

1. *Minutes.* On motion of Mr. Johnson, seconded by Judge Stone, the committee approved the minutes of the February 22, 2016 meeting.

2. *Schedule.* Ms. Blanch is meeting with Mr. Summerill this week to discuss his taking over the remaining punitive damage instructions. The next set of instructions that the committee will review after that are the Civil Rights instructions. Mr. Von Maack will chair the Directors and Officers Liability subcommittee because of Mr. Gurmankin's untimely death. Mr. Simmons noted that the Economic Interference subcommittee is meeting this month and will likely complete its work, so its instructions should be ready to review earlier than those of some of the other subcommittees. Ms. Sylvester penciled them in for February 2018.

Dr. Di Paolo joined the meeting.

3. *Defamation Instructions.* The committee continued its review of the defamation instructions. Mr. Reymann was not present but had previously sent an e-mail explaining the proposed instructions.

a. *CV1616. Noneconomic Damages.* The committee deleted "Some" in the fourth line because it thought the word suggested that the jury's discretion was unlimited, changed "economic damages" in the fifth line to "noneconomic damages," and made other minor changes. It also revised the committee note to show that the types of general damages mentioned are disjunctive, that is, that a plaintiff need not prove every type of general damage mentioned. On motion of Judge Stone, seconded by Mr. Von Maack, the committee approved the instruction as revised.

b. *CV1617. Damages–Punitive Damages–Public Figure/Official and/or Issue of Public Concern.* Judge Stone questioned the use of "intentionally fraudulent" in subparagraph (2)(b). He noted that the term is redundant, since fraud is an intentional tort, and, in a defamation case, the plaintiff does not have to prove all of the elements of fraud, such as that the plaintiff relied on the false statement. Other committee members questioned whether the instruction needed to explain "willful and malicious" as used in subparagraph (2)(a). Mr.

Von Maack noted that “willful and malicious” and “intentionally fraudulent” are used in the punitive damage statute (Utah Code Ann. § 78B-8-201(1)(a)), and the committee was reluctant to vary from the statute. Dr. Di Paolo did not think that jurors would be confused by the terms. Ms. Sylvester questioned whether the terms should be bracketed, or whether each subparagraph of paragraph (2) should be bracketed. Judge Stone and Mr. Fowler asked whether the “willful and malicious” standard was met if a plaintiff met the “actual malice” standard of paragraph (1). Mr. Simmons and Mr. Von Maack thought that “malice” did not necessarily mean the same thing in paragraphs (1) and (2). “Actual malice” is a term of art meaning that the defendant must have made the statement with actual knowledge that the statement was false or actually entertaining serious doubts as to whether the statement was true, whereas “willful and malicious” in the context of punitive damages implies an intent to harm the plaintiff. Dr. Di Paolo noted that “willful” was synonymous with “intentional.” Mr. Johnson questioned whether the “intentionally fraudulent” standard was met if the “actual malice” standard was met, since actual malice requires that the defendant know the statement was false (or that he entertain serious doubts as to whether the statement is true). Mr. Simmons questioned whether the instruction was necessary. It is essentially CV2026, the general tort instruction on punitive damages, with the addition of the “actual malice” requirement in paragraph (1). But CV1611 already requires a finding of actual malice for liability in a case involving a public official or figure, so the jury will have necessarily already found actual malice as required in paragraph (1) before it can reach the question of punitive damages. On motion of Mr. Fowler, seconded by Mr. Ferre, the committee voted to delete the instruction and add a statement to the committee note in CV1616 to the effect that, if punitive damages are at issue, the court and parties should see CV2026. The committee also added to the committee note part of the committee note to CV1617 to the effect that whether actual malice is also required in cases involving private figures and speech not involving a matter of public concern is an open issue.

c. *CV1618. Damages–Effect of Retraction.* Ms. Blanch questioned the phrase “in good faith due to a mistake,” etc. At Dr. Di Paolo’s suggestion, the committee added a comma between “faith” and “due to.” Mr. Von Maack noted that the instruction does not cover the most common ways defamation is committed nowadays, such as through Facebook or other social media. Judge Stone pointed out that the defense is a statutory defense. As such, it is limited to newspapers and radio and television broadcasts. The committee deleted the last sentence. It could not find support for the language in the statute or case law, thought the concept was adequately covered in the remainder of the instruction, and thought that jurors would not understand such phrases as “without any untrue reservation.” Mr. Fowler asked whether the only consequence of a retraction was that it prevented a plaintiff from recovering punitive damages and,

if so, whether the committee note should also say that the instruction is only necessary if there was a retraction made *and* the plaintiff is seeking punitive damages. The committee made a few other minor changes to the instruction. On motion of Mr. Simmons, seconded by Judge Stone, the committee approved the instruction as revised.

d. *CV1619. Affirmative Defense–Consent.* On Dr. Di Paolo’s suggestion, the committee inserted the phrase “That means that,” at the start of the second sentence. On motion of Dr. Paolo, seconded by Mr. Simmons, the committee approved the instruction as revised.

e. *CV1620. Affirmative Defense–Statute of Limitations.* Mr. Von Maack noted that the committee has avoided the phrase “as a matter of law” and suggested that it be deleted from the second sentence. Mr. Fowler noted that the instruction does not tell the jury what it is supposed to do. Mr. Simmons suggested replacing the second sentence with “You must decide when [name of plaintiff] could have reasonably discovered the publication.” and moving the second sentence of the instruction to the committee note. On motion of Mr. Johnson, seconded by Mr. Fowler, the committee approved the instruction as revised.

4. *Next meeting.* The next meeting will be Monday, May 16, 2016, at 4:00 p.m.

The meeting concluded at 5:45 p.m.