MINUTES

Advisory Committee on Model Civil Jury Instructions
September 19, 2016
4:00 p.m.

Present: Juli Blanch (chair), Marianna Di Paolo, Tracy H. Fowler, Honorable Ryan M. Harris, Patricia C. Kuendig (by phone), Paul M. Simmons, Honorable Andrew H. Stone, Nancy Sylvester, Christopher M. Von Maack. Also present: David C. Reymann from the Defamation subcommittee; Heather S. White from the Civil Rights subcommittee; and Mark Dunn from the Emotional Distress subcommittee

Excused: Joel Ferre, Gary L. Johnson, Peter W. Summerill

1. *Minutes.* The committee approved the minutes of the June 13, 2016 meeting as corrected.

2. *Schedule.* Ms. Blanch asked committee members to prioritize the remaining subject areas. The Economic Interference instructions are scheduled next, after the Civil Rights instructions. Mr. Reymann reported that the Injurious Falsehood instructions were ready.

3. *Defamation Instructions.* Lee Warthen of the S.J. Quinney College of Law had asked why there was no instruction in the defamation instructions on truth as a defense. Mr. Reymann explained that, although there is one Utah case that refers to truth as an absolute defense, the Utah Supreme Court has consistently listed falsity as an element of a defamation claim, as opposed to truth being an affirmative defense. The U.S. Supreme Court has held that the states are constitutionally prohibited from putting the burden of proof on the defendant to show truth when the statement involves a matter of public concern. The committee note to CV1602 explains this, and CV1605 reflects this as well. The committee was satisfied that the instructions accurately state the law and saw no need to change them.

Dr. Di Paolo joined the meeting, and Mr. Reymann was excused.

4. *Civil Rights Instructions.* Ms. White reported that the Civil Rights subcommittee started out looking at employment and land use, but the land use attorneys did not think that jury instructions were necessary because the issues are usually resolved by motion or in federal court. Ms. White noted that many civil rights cases are removed to federal court, but some stay in state courts, and the federal courts have relied on MUJI because there are no Tenth Circuit pattern jury instructions in this area. Ms. White said there were a few instructions missing, but the majority were finished. She said that the committee's goals were to put the instructions in plain English and eliminate argument from them.

a. *CV1301. Excessive Force–General.* At Ms. Blanch's suggestion, the title was changed to "Excessive Force–Introductory Instruction." Mr. Simmons asked whether the defendant will always be an "Officer." Ms. White explained that there is no vicarious liability, and there are separate instructions for when a claim is against an entity. Mr. Simmons also noted that the committee had been using "proved" rather than "proven" for the past participle of "prove." On motion of Mr. Von Maack, seconded by Dr. Di Paolo, the committee approved the instruction.

b. *CV1302. Excessive Force–Standard.* Ms. White noted that CV1302 was based on MUJI 15.7. Judge Harris suggested changing the first sentence of the second paragraph to active voice ("all the facts [Officer] knew at the time [Officer] used the force") but acknowledge that "used the force" could have Star Wars overtones, especially to a lay jury. Ms. Sylvester suggested, "at the time [he/she] applied the force." Dr. Di Paolo thought that the passive voice was appropriate in this case. At Mr. Simmons's suggestion, the committee transposed the second and third paragraphs. Ms. Sylvester asked whether the references should include a reference to the Fourth Amendment, but Dr. Di Paolo pointed out that we would need to go back and add constitutional references to a number of other instructions if we started now. The committee thought it was sufficient to cite to case law applying the amendment. On motion of Mr. Simmons, seconded by Mr. Fowler, the committee approved the instruction as modified.

c. *CV1303. Search of Residence–General.* Dr. Di Paolo suggested putting "residence" in brackets if it does not always mean "residence" but can include such things as outbuildings and curtilage. At the suggestions of Messrs. Simmons and Von Maack, , the committee added "a constitutional" before "right" in the first sentence and made "rights" "right" in the second sentence, to make the wording of the two sentences consistent. Ms. Sylvester suggested that the subcommittee double check the references, noting that *Brower* was not a residence case. Mr. Von Maack pointed out that we have not been citing to the Supreme Court Reporter when a U.S. Reports cite is available, so the references were modified. On motion of Mr. Von Maack, seconded by Mr. Fowler, the committee approved the instruction as modified.

d. *CV1304. Searches–Property, Defined.* Judge Harris raised the question of whether something is a "constitutionally protected area" is a question of fact for the jury or a question of law for the court. Ms. White thought it was usually a question of law but noted that there may be a factual dispute over whether the plaintiff had a reasonable expectation of privacy in the area. Ms. Blanch and Judge Harris thought there should be a committee note saying that it is usually a question for the court and suggested that the subcommittee find a case where it was considered a question of fact. Dr. Di Paolo thought that the

first sentence needed something more, such as, "Under the law, a search occurs when . . ." Ms. Sylvester suggested inserting a sentence before it: "'Search' has a special meaning in the law. The legal term 'search' is used to indicate that . . . ." Ms. Blanch and Mr. Simmons thought that something more was required than merely intruding into a space; for example, if an officer blindly stumbled onto the plaintiff's property, would that be enough? Ms. White noted that intent is not required. Mr. Fowler asked whether "intrusion" means something more than simply entering on property. Judge Harris asked whether there is case law defining "intrusion." He noted that *U.S. v. Jacobsen* says that a "search" occurs when an "expectation of privacy is infringed" and asked where the subcommittee got "intrudes." Mr. Simmons suggested looking at the *Black's Law Dictionary* definitions. Dr. Di Paolo asked whether both uses of "reasonable" were necessary in the last sentence. Ms. White explained that the legal standard requires both that a reasonable person would have an expectation of privacy and that the expectation of privacy be reasonable. The committee deferred further discussion of the instruction.

Judge Stone joined the meeting.

e. *CV1305. Seizures–Property, Defined.* Ms. Blanch asked whether a "seizure" is a question for the court. Ms. White said that it often is but that there may be situations where the jury will have to answer special interrogatories relating to whether a "seizure" occurred. Ms. Blanch suggested adding a committee note to that effect. On further reflection, though, Ms. White thought that it was a jury question and that no committee note was necessary. Judge Harris thought that whether or not there has been a "seizure" can be a legal question, while the reasonableness of the seizure is a fact question. He noted that whether or not there has been a "seizure" is a question of law in the context of a motion to suppress. Ms. Sylvester and Dr. Di Paolo noted that it may be useful to include in the instructions definitions of terms (such as "seizure") that the jurors are likely to hear again, even if they are not something that the jury will have to make a finding on. Dr. Di Paolo asked what "personal property" meant. Ms. White explained that there can a seizure, but the plaintiff's constitutional rights may not have been violated if it was not the plaintiff's property. Others thought that it was to distinguish personalty from realty. Dr. Di Paolo asked whether one can have a constitutionally protected interest in loaned property, and Judge Stone asked the same about a leased vehicle, for example. Judge Harris noted that *Jacobsen* required an interference with a possessory interest in the property, which may be less than ownership (such as a lease or bailment). He suggested replacing "personal property" with "a person's property." Judge Stone suggested revising the instruction to read "A seizure of property occurs when a [government actor] interferes in a meaningful way with a person's right to possess that

property." Mr. Fowler suggested adding "or use" after "possess." The committee deferred further discussion of the instruction.

f. *CV1306. [Entry/Search] of a Residence.* Dr. Di Paolo suggested that "exigent" would be a problem for lay jurors. Ms. White and Mr. Simmons noted that "exigent" was defined in CV1312. The committee thought that the definition should be closer in sequence to CV1306.

Ms. White was excused.

5. *Emotional Distress Instructions.* Mr. Dunn, the chair of the Emotional Distress subcommittee, joined the meeting. The committee could not recall whether CV1501-CV1504 were approved; neither the minutes nor Mr. Simmons's notes showed that they had been approved. It deferred further discussion of those instructions and addressed the remaining instructions.

a. *CV1505. Negligent Infliction of Emotional Distress–Direct Victim*. Judge Harris thought that "zone of danger" needed to be defined. Mr. Dunn noted that CV1506 says "in the zone of danger–in actual physical peril" and quoted from *Figueroa v. U.S.*, 64 F. Supp. 2d 1125 (D. Utah 1999), which said that the plaintiffs were "in peril of the very same harm that had befallen their brother." Judge Harris asked, Why use "zone of danger," then; why not just say "in actual physical peril"? Dr. Di Paolo said that she was confused by "zone of danger" and noted that "peril" is not easily understood by lay people. The committee suggested "in danger of being physically injured," "threatened with bodily harm," or "in danger of actual physical injury." Judge Stone questioned the use of "actual." He thought it would leave the door open for the defendant to argue that the plaintiff was not in "actual" danger because the car (or foul ball or whatever) actually missed him, even though it was close enough to him to cause him to suffer a heart attack, for example. Dr. Di Paolo and Mr. Von Maack asked whether there was a perception element involved. Does there have to be a reasonable belief that the plaintiff was in danger? Ms. Blanch asked the subcommittee to draft a "zone of danger" instruction. Mr. Simmons questioned whether "zone of danger" was necessary in CV1505, since it only applied to "direct victims."

b. *CV1506. Negligent Infliction of Emotional Distress–Bystander*. The committee noted that the same problems with "zone of danger" exist in CV1506. There is also an issue as to whether the injured person must be a member of the plaintiff's immediate family. George Waddoups of the subcommittee did not think so and wrote a letter to the other members of the subcommittee explaining his position, which was included in the materials for this meeting. Mr. Simmons indicated that he agreed with Mr. Waddoups; he

could not find anything in Restatement (Second) of Torts § 313 that required the "third person" mentioned there to be an immediate family member. He also thought that the third element in both CV1505 and CV1506 (that the plaintiff "suffered severe and unmanageable mental distress in a reasonable person normally constituted") did not make sense and was not supported by Utah law but should be replaced in both instructions with the plaintiff suffered "illness or bodily harm." Ms. Blanch asked Mr. Simmons and Mr. Fowler to look into those two issues and scheduled a call for them to discuss the matter on Friday, September 23, at 11:00 a.m. They will then have a conference call with Ms. Blanch and Mr. Dunn on Thursday, September 29, at 11:30 a.m. to report on their discussion.

6. *Next meeting.* The next meeting will be Tuesday, October 11, 2016, at 4:00 p.m. (Monday, October 10, being a legal holiday).

The meeting concluded at 6:00 p.m.