

MINUTES

Advisory Committee on Model Civil Jury Instructions

February 12, 2018

4:00 p.m.

Present: Honorable Andrew H. Stone (chair), Marianna Di Paolo, Joel Ferre, Tracy H. Fowler, Honorable Keith A. Kelly, Ruth A. Shapiro, Lauren A. Shurman, Paul M. Simmons, Peter W. Summerill, Nancy Sylvester. Also present: David C. Reymann, chair of the Injurious Falsehood subcommittee

Excused: Patricia C. Kuendig, Christopher M. Von Maack

1. *Minutes.* On motion of Ms. Shapiro, seconded by Mr. Fowler, the committee approved the minutes of the January 8, 2018 meeting.

2. *Schedule.* Judge Stone noted that the committee will continue its review of the Civil Rights instructions in March. He further noted that the model criminal instructions have been released, and there are some differences between them and the model civil instructions that have been approved. The committee thought it would be a good idea to have the standard instructions in both sets match. Judge Stone will discuss the matter with Judge Blanch, the chair of the model criminal instructions committee.

3. *Injurious Falsehood Instructions.* The Committee continued its review of the Injurious Falsehood instructions.

a. *CV1905, Definition: False Statement.* Judge Stone thought that the committee may not have given sufficient consideration to Dr. Di Paolo's concern with the use of "literally" in CV1905 (namely, that it has lost its meaning). Ms. Shapiro suggested "actually" as a replacement. Mr. Reymann suggested that "absolutely, totally, or literally" could be replaced with "completely." After further discussion, Mr. Simmons moved to leave the instruction as it was approved at the last meeting. Ms. Shapiro seconded the motion, which passed without opposition.

b. *CV1907: Definition: Malice, Committee Note.* On motion of Ms. Shapiro, seconded by Mr. Simmons, the committee voted to approve the committee note.

c. *CV1908, Economic Damages.* Mr. Reymann explained that economic (or "special") damages are the only damages available for injurious falsehood and are an element of the claim. Legal expenses for removing a cloud on title are recoverable, but whether they are recoverable in other contexts is unclear.

Dr. Di Paolo joined the meeting.

Ms. Shurman suggested bracketing the examples of economic damages in the third sentence or saying “[Name of plaintiff] claims economic damages in the form of [describe]” and moving the examples to the committee note. Dr. Di Paolo questioned the use of “mere” in the last sentence. She thought some jurors would understand it to mean a little reduction. Some committee members thought that the last sentence should be bracketed since it would not apply in every case. The committee revised the instruction to read:

[Name of plaintiff] must prove that the alleged injurious statements directly caused [him/her/it] economic damages. Economic damages are specific monetary losses.

In this case, [name of plaintiff] alleges economic damages of [list the specific monetary losses claimed]. [A reduction in estimated value of property that [name of plaintiff] continues to own does not constitute a specific monetary loss.]

The former third sentence, giving examples of economic damages, was moved to the second sentence of the committee note. The committee approved the instruction as revised.

d. *CV1909, Non-actionable Statements.* Mr. Reymann noted that this instruction is a curative instruction that tracks the equivalent defamation instruction, CV1609. He noted that the references stand for the proposition that some statements are not actionable, not necessarily that such an instruction is necessary or proper. Judge Stone thought that the instruction may be misunderstood to mean that the jury cannot consider the statements at all in determining liability and noted that a statement that cannot be an injurious falsehood in and of itself may still be evidence that another statement that is actionable was made with malice, for example. Mr. Fowler thought the use of “may have” was confusing since, by the time the jury receives the instruction, it will have heard the evidence, and the court will have determined its admissibility. Mr. Reymann pointed out that the court will not necessarily have made a conscious decision to let the evidence in. It may have come in without objection, for example. Ms. Shapiro thought that the instruction could do more harm than good by reinforcing the non-actionable statement. Mr. Reymann said that as a defense attorney he would want the instruction because it could cure the misconception that the jury can find for the plaintiff based on any statement it finds injurious. He noted that the court does not have to use the instruction. Mr. Summerill thought the instruction was unnecessary in light of CV127, Limited Purpose Evidence. Mr. Reymann thought that the two instructions address different issues. CV127 addresses admissibility but says nothing about whether

or not the statement can be the basis for liability. He thought that saying that some evidence is received for a limited purpose, in the abstract, does not adequately address the issue and does not address a statement that may not have been expressly admitted for a limited purpose. The committee revised the instruction to read:

During trial, you may have heard evidence of certain statements made by [name of defendant] that I have determined are not injurious falsehoods. Specifically, you may have heard evidence of the following statements: [Insert specific non-actionable statements.]

Even though you heard evidence of these statements, you are instructed that these statements are not injurious falsehoods, but you may consider them for other purposes.

Judge Kelly joined the meeting.

Ms. Shurman suggested saying in the committee note that the court may want to specify the other purpose for which the evidence was admitted, but Judge Stone thought that it was best left for argument. Telling the jury, for example, that it may consider the statement as evidence of malice may imply that the defendant acted with malice. On motion of Ms. Shurman, seconded by Ms. Shapiro, the committee approved the instruction as revised, with Mr. Summerill dissenting. Mr. Reymann will revise CV1609 to conform to CV1909 as much as possible. The revised instruction will be circulated by e-mail for the committee's approval.

e. *CV1606, Definition: Opinion.* Mr. Reymann and Ms. Sylvester revised CV1606 to conform to the changes in CV1906. On motion of Ms. Shapiro, seconded by Mr. Simmons, the committee approved revised CV1606.

f. *CV1901, Injurious Falsehood--Introductory Notes to Practitioners.* The committee changed the last sentence of the second to last paragraph to say that "the parties may wish to use CV1909 (Non-actionable Statements)," rather than cross-referencing CV1609. At Judge Kelly's suggestion, the parenthetical following the citation to *Rehn v. Christensen* in the last paragraph was changed to read "(analyzing statutory and common law claims)." On motion of Mr. Simmons, seconded by Ms. Shapiro, the committee approved CV1901 as revised.

The committee thanked Mr. Reymann for all of his work on the defamation and injurious falsehood instructions and excused him.

4. *Committee Membership.* Judge Stone announced that Ms. Kuendig is dealing with the sudden loss of her mother and has resigned from the committee, leaving a vacancy that needs to be filled.

5. *Next meeting.* The next meeting is Monday, March 12, 2018, at 4:00 p.m.

The meeting adjourned at 5:45 p.m.