

MINUTES

Advisory Committee on Model Civil Jury Instructions

March 11, 2019

4:10 p.m.

Present: Honorable Andrew H. Stone (chair), Nancy J. Sylvester (staff), Marianna Di Paolo, Alyson McAllister, Ruth A. Shapiro, Lauren A. Shurman, Paul M. Simmons, Peter W. Summerill

Excused: Joel Ferre, Tracy H. Fowler, Honorable Keith A. Kelly, Douglas G. Mortensen

1. *Minutes*. On motion of Mr. Simmons, seconded by Ms. McAllister, the committee approved the minutes of the February 11, 2019 meeting.

2. *Trespass and Nuisance Instructions*. Because no one from the Trespass and Nuisance subcommittee was present, the committee deferred further review of the proposed trespass and nuisance instructions until the next meeting.

3. *Uniformity*. Judge Stone noted that judges are encouraged to use the MUJI 2d instructions. He thought that, as much as possible, the model instructions should be the same regardless of whether the case is a civil case or a criminal case. A subcommittee of Judge Kelly, Ms. McAllister, and Ms. Shurman reviewed the general criminal instructions, compared them with the general civil instructions, and made recommendations to bring the two sets of instructions more in line with each other. Judge Stone noted that, if the committee thinks the relevant civil instruction is better, it should stick with it, but if the committee thinks the relevant criminal instruction is better, it should adopt it and not let pride of authorship stand in the way. But if both instructions are equally good, Judge Stone thought the committee should favor uniformity with the criminal instructions.

Ms. McAllister explained that the subcommittee came up with two subsets of instructions--(1) those instructions that are in the criminal instructions but are not in the civil instructions (CR201-06, proposed CV151-56), and (2) those criminal instructions that it thought were better than the current civil instructions (CR105, CR110, CR210 modified, CR207, and CR216-17 modified). The subcommittee also thought that the current civil general instructions should be divided up between those that are best given at the beginning of the trial and those that are best given at the close of evidence.

The committee discussed the following proposed instructions:

a. *CV151, Closing Roadmap*. Judge Stone noted that none of the proposed instructions had titles. The committee adopted the titles for the corresponding criminal instructions. Judge Stone also thought that new CV151 was already covered in CV104, Order of trial. Ms. McAllister noted that CV104 is

meant to be given at the beginning of the trial, and CV151 is meant to be given before the jury starts its deliberations. Dr. Di Paolo thought that CV151 did not tell the jury *what* to discuss, whereas CV104 says that the jurors are to discuss “the evidence and the instructions among yourselves until you reach a verdict.” She suggested adding this language to CV151. Some committee members thought that the next instruction, CV152, told the jury what to discuss. Dr. Di Paolo thought that it was not clear how the instructions fit together. Ms. Shapiro thought that it may be more harmful than helpful to give too many general instructions; she thought that jurors tended to tune out after a while. Judge Stone noted that, in his experience, jurors do not complain about the length of the instructions; they complain about the length of argument. But he also thought that CV152 interrupted the flow of the instructions. The committee revised the instructions to combine CV151 and CV152 so that CV151 now reads:

Members of the jury, you now have all the evidence. Three things remain to be done:

First, I will give you additional instructions that you will follow in deciding this case.

Second, the lawyers will give their closing arguments. The Plaintiff(s) will go first, then the Defendant(s). The Plaintiff(s) may give a rebuttal.

Finally, you will go to the jury room to decide the case.

In the jury room you will have two main duties as jurors.

First, you will decide from the evidence what the facts are. You may draw all reasonable inferences from that evidence.

Second, you will take the law I give you in the instructions, apply it to the facts, and reach a verdict.

The committee deleted the rest of CV152/CR202 because the concepts are covered in the introductory general instructions.

b. *CV152, Closing Argument.* The committee adopted CR203 as CV152.

c. *CV154, Legal Rulings, and CV155, Judicial Neutrality.* Ms. Shapiro asked whether proposed CV154-55 (CR204-05) were adequately covered by

CV128, Objections and rulings on evidence and procedure. The committee decided to adopt CR204 and CR205 as CV153 and CV154 respectively.

d. *CV156, Evidence Closing.* Judge Stone thought that CV156 (CR206) was incomplete; it does not include judicially noticed facts, for example, and a pretrial ruling may establish a fact that the jury must accept as true. Mr. Simmons suggested adding to the list of “evidence” “any facts that I have told you to accept as true.” Mr. Summerill agreed that the instruction was not a complete statement of the law. He thought it should use the definition of “evidence” in CV119, Evidence, namely, “‘Evidence’ is anything that tends to prove or disprove a disputed fact.” He noted that once an instruction starts listing things, jurors think that they cannot consider anything else, and it would be too cumbersome to list everything that could possibly be considered “evidence,” such as demonstrative exhibits and expert opinion testimony. Dr. Di Paolo and Ms. Shapiro thought that the important thing to say in CV156 was that arguments of counsel are not evidence. They questioned whether the instruction was necessary. Ms. McAllister thought that the sentence, “You may also draw all reasonable inferences from that evidence” was important to include in the instructions. The committee added it to new CV151. The committee decided that, with that change, CV156/CR206 was not necessary and deleted it.

e. *CV137-40.* Ms. Shurman explained that the subcommittee thought that the general instructions should be divided into those that should be given at the beginning of the trial and those that should be given at the end of the trial, after the presentation of evidence. A committee note could explain that it may be appropriate to include some instructions both in the introductory instructions and in the concluding instructions. The subcommittee recommended that current instructions CV137 through CV140 should be moved to the end of the instructions, that is, to the concluding or post-evidence instructions.

Ms. Sylvester volunteered to circulate revised general instructions so that the committee could review them in context. The committee deferred voting on whether to approve the instructions until the committee could review all the general instructions in context.

4. *Next meeting.* The next meeting is Monday, April 8, 2019, at 4:00 p.m.

On motion of Mr. Summerill, the meeting concluded at 5:40 p.m.