

MINUTES

Advisory Committee on Model Civil Jury Instructions

September 9, 2019

4:00 p.m.

Present: Honorable Andrew H. Stone (chair), Nancy J. Sylvester (staff), Marianna Di Paolo, Joel Ferre, Honorable Keith A. Kelly, Alyson McAllister, Douglas G. Mortensen, Ruth A. Shapiro, Lauren A. Shurman, Paul M. Simmons, Peter W. Summerill. Also present: Honorable Su J. Chon; Andrew M. Morse; Cameron M. Hancock, chair of the Trespass and Nuisance subcommittee.

Excused: Tracy H. Fowler

1. *Minutes*. On motion of Judge Kelly, seconded by Ms. Shapiro, the committee approved the minutes of the June 10, 2019 meeting.

2. *“Improving Jury Deliberations.”* Mr. Morse was introduced. He explained that he sits on the Jury Committee of the American College of Trial Lawyers (ACTL) and that they have prepared a paper titled “Improving Jury Deliberations Through Jury Instructions Based on Cognitive Science.” Mr. Morse encouraged the committee to read the paper, which was included with the materials for today’s meeting, and to consider the changes it proposes. He summarized the main points of the paper: Juries sometimes reach the wrong decisions because they rely on gut feelings and emotions and decide quickly. Once they decide where they think the case should end up, they generally don’t waiver from it and may not consider evidence that supports a different result. The paper discusses four flaws in the current jury system: (1) intuition trumps rational decision-making; (2) jurors are governed too much by confirmation bias; (3) glucose depletion affects their cognitive performance; and (4) dominant jurors tend to dominate, and submissive jurors are not heard. The paper proposes three new jury instructions: (A) accountability, (B) devil’s advocate, and (C) deliberation guide. Judge Chon thought that the ACTL’s work goes along with her subcommittee’s work on an implicit bias instruction. She noted that she has been working with Kimberly Papillon on implicit bias. Ms. Sylvester suggested calling the jury foreperson the “facilitator,” suggesting that he should not dominate the deliberations but should elicit participation from all the jurors. Judge Stone asked if any jurisdictions have adopted the proposed instructions. Mr. Morse thought that some had. Judge Chon and Mr. Morse thought that Judge Landau of the Third District Justice Court had used instruction C. Judge Stone thought that instructions A and B could be given as opening instructions, and instruction C could be given at the end of the case. Mr. Simmons pointed out that instructions A and B in the exhibits were the same. Others pointed out that what should be instruction A in the exhibits is found on p. 15 of the report. Judge Stone noted that, if the committee were to adopt the instructions, district and justice court judges would need to be educated on them. Ms. Sylvester suggested that there could be a presentation at the spring judicial training for district and justice court judges and suggested that Mr. Morse contact Tom Langhorne, the courts’ Education Director. Judges Stone and Kelly thought that Judge Kelly’s subcommittee on uniformity could

try to incorporate the suggested instructions into the revised general instructions the subcommittee is working on and come back to the committee with a recommendation. The other members of the subcommittee (Ms. McAllister and Ms. Shurman) were willing to take on the task. Mr. Summerill expressed concerns. He questioned the merits of instructions telling the jurors how to go about their deliberations and questioned the accuracy of some of the research underlying the proposal. He thought the best way to vet the instructions would be through the adversarial process. He questioned whether a general instruction on implicit bias would do any good. He also thought that some of the instructions favored one party over another. Several committee members questioned the use of the term “accountability.” They thought it might put undue pressure on jurors and could make them think that their service could expose them to liability.

Dr. Di Paolo joined the meeting.

Other committee members thought that some jurors may object to being asked to play “devil’s advocate.” Ms. McAllister noted that asking jurors to, in effect, marshal the evidence in support of and in opposition to their opinions could run counter to the instruction that the greater weight of the evidence is not determined by counting the number of witnesses on each side. Ms. Shapiro noted that there is no real way to enforce the instructions and see that the jurors follow them. Judge Stone noted that the proposed instructions impose an added structure on deliberations but also noted that the current instructions invite nonparticipation on the part of jurors. Mr. Mortensen suggested leaving it to the attorneys to suggest how the jury go about its deliberations. Mr. Morse noted that such suggestions mean more when they come from the judge. Dr. Di Paolo noted that there is value in “scenarios” or “scaffolds” that create a structure for how information is to be received, and that creating a structure at the beginning and reinforcing it at the end of trial may be beneficial. Judge Stone noted that this is new territory for the committee and is more legislative in nature than the committee’s other work, which was to update the old MUJI instructions and restate them in plain English. Judge Stone noted that he can tell the jury what the law is, but he can’t tell the jury that the law requires them to deliberate in any particular way because it doesn’t. He noted that historically the right to trial by jury was a right to trial by the intuition of one’s peers, not a right to a trial by 12 people who all think like lawyers. Others agreed that words like “requires” and “duty” overstate the law with respect to deliberations. Mr. Ferre suggested telling jurors that they “should be prepared to explain” their reasoning rather than “have to explain.” Judge Stone wondered if the Supreme Court should be involved in any changes. Ms. Sylvester thought that the Judicial Council might want to consider the matter and noted that there will be an opportunity for attorneys to comment on the proposed jury instructions. Judge Stone noted that he now gives the jury all of the instructions up front, including the verdict form, and noted that Utah Rule of Civil Procedure 51 seems to encourage the practice. The committee deferred further

discussion until Judge Kelly's subcommittee can review the proposed instructions and come back with a recommendation.

Mr. Hancock joined the meeting, and Judge Chon and Mr. Morse were excused.

3. *Trespass and Nuisance Instructions.* The committee continued its review of the Trespass and Nuisance Instructions. Ms. Sylvester distributed with the agenda a memorandum giving the responses of Mr. Hancock and Ryan Beckstrom to the committee's questions at the last meeting. Their conclusions were that (a) the same reasonableness standard should apply to claims for both statutory nuisance (CV1208) and common-law nuisance (CV1209); (b) there are differences between the two types of claims, and the differences are spelled out in the instructions (CV1208 and CV1209); (c) it may make sense to include a committee note that in most cases the differences between the instructions may be immaterial; and (d) because some form of the word "reasonable" (or "unreasonable") appears in four different instructions (CV1208, CV1209, CV1210, and CV1211), there should be a stand-alone instruction on reasonableness.

a. *CV1208, Statutory Nuisance Claim.* The committee moved the last two paragraphs to new CV1213, "Reasonableness," and added to the committee note the following statement: "Although the statutes do not mention reasonableness, the committee added a reasonableness requirement to conform to case law. See CV1213 for a discussion of reasonableness."

Mr. Summerill and Ms. McAllister were excused.

On motion of Mr. Simmons, seconded by Ms. Shurman, the committee approved CV1208 as revised.

b. *CV1209, Common Law Private Nuisance Claim.* The committee changed "an actual property interest" in paragraph 1 to "a legal interest" and put paragraph 1 in brackets, since in many cases whether the plaintiff owned or possessed a legal interest in the property will be decided as a matter of law before trial. The committee also deleted the quotation marks around "otherwise actionable" in paragraph 3. The committee also numbered the alternatives in the last paragraph, describing when an unintentional use is "otherwise actionable." The committee added two paragraphs to the committee note, the first to explain that the first element may be omitted if there is no factual dispute over whether the plaintiff had a legal interest in the real property, and the second to explain that the differences between common-law and statutory private nuisance claims will only be material in a limited number of cases, so the attorneys and judges may want to use only the instruction most applicable to the circumstances of

their case. On motion of Ms. Shapiro, seconded by Dr. Di Paolo, the committee approved the instruction as revised.

c. *CV1213, Reasonableness.* The committee created a new instruction, made up of the deleted paragraphs of CV1208 revised to read as follows:

[Name of defendant]’s [conduct, action, or thing] may be “unreasonable” under circumstances where the harm caused by [name of defendant]’s [conduct, action, or thing] outweighs whatever benefit it may have to society, or the [conduct, action, or thing] is not suitable to the location.

To determine if [name of defendant]’s [conduct, action, or thing] is “reasonable” or “unreasonable,” you should consider things such as the specific location where the nuisance is alleged to have occurred, when [name of defendant]’s [conduct, action, or thing] began, the nature and value of [name of defendant]’s [conduct, action, or thing], the character of the neighborhood, the extent and frequency of the injury to [name of plaintiff], and the effect on the enjoyment of [name of plaintiff]’s life, health, and property.

Mr. Mortensen questioned the meaning of “when [defendant’s conduct] began.” Does it mean how long ago it began or what time of day it began or something else? Dr. Di Paolo recommended replacing the bracketed phrases with actual examples and then seeing how the instruction reads. The committee also moved most of the former committee note to CV1209 to CV1213. The committee deferred further discussion of CV1213 until the next meeting.

4. *Next meeting.* The next meeting is Tuesday, October 15, 2019, at 4:00 p.m. (Monday, October 14, being a holiday).

The meeting concluded at 6:00 p.m.