MINUTES

SUPREME COURT'S ADVISORY COMMITTEE ON THE
MODEL UTAH JURY INSTRUCTIONS – CRIMINAL

Administrative Office of the Courts
450 South State Street
Salt Lake City, Utah 84114

Wednesday, December 10, 2014
12:00 p.m. to 1:30 p.m.
Judicial Council Room

PRESENT	**EXCUSED**
Judge Denise Lindberg, Chair	Mark Field
Alison Adams-Perlac, Staff	Karen Klucznik
Professor Jensie Anderson	Thomas Pedersen, Intern
Judge James Blanch	Scott Young
Jennifer Andrus	
Sandi Johnson	
Linda Jones	
Judge Brendon McCullagh	
Jesse Nix	
John West	
Judge Michael Westfall (remotely via VIAC)	

1. Welcome, Approval of Minutes **Judge Denise Lindberg**

Judge Lindberg welcomed everyone to the meeting and asked for corrections to the November 5 minutes. Ms. Johnson clarified that she appeared by telephone at the November meeting. Ms. Jones provided Mr. Nix with non-substantive corrections to the minutes.

Ms. Jones moved to approve the minutes from the November 5 meeting as amended. Professor Anderson seconded the motion and it passed unanimously.

2. Presentation to Judge Lindberg **Committee**

Ms. Adams-Perlac presented Judge Lindberg with a plaque in honor of Judge Lindberg's service to the committee. Judge Lindberg thanked the committee.

3. Table of Sexual Offense Instructions **Committee**

Judge Lindberg asked Judge Blanch to recap the discussion from the November 5 meeting. Judge Blanch stated that CR1615 was tabled because it became complicated. He stated that the instruction would have to include aggravating factors with their own separate set of elements and these elements were not presently included in a draft of the instruction. He stated that the committee should revise the instruction in the future.

Judge Lindberg asked the committee if they reached a decision on formulating an approach to creating the instruction. Ms. Johnson stated that revising the instruction would be difficult. Judge Blanch stated that reducing the instruction to simplicity would be impossible because of the complexities of the instruction. He stated that creation of an instruction should be left to practitioners based on the different facts of their case. He suggested a placeholder instruction that instructs practitioners on the necessary parts to create their own instruction. Judge McCullagh agreed that a placeholder instruction would be helpful to practitioners. Judge Lindberg asked who would create the placeholder instruction. Judge Blanch stated that no one had been assigned. Ms. Adams-Perlac volunteered to create the instruction and will discuss at the next meeting.

Ms. Johnson stated that the placeholder instruction should include the title and an indication that the committee may provide an instruction in the future. Ms. Adams-Perlac suggested creating a committee note that explains to practitioners that a generalized instruction was too difficult to create. Ms. Jones stated that a generalized instruction was complicated for the committee because elements needed to be defined with each of the possible aggravators. She stated that creation of CR1615 for a real case would not be impossible, but a generalized and all encompassing instruction for every alternative would be too long and unhelpful.

Judge Blanch stated that the committee note should explain that the nature of each offense would make it difficult and unfeasible to create a generalized instruction. Judge Lindberg stated that the instruction should be specifically tailored to the specific facts of each offense. Judge McCullagh stated that the committee should clearly provide an explanation in deciding not to greate a generalized instruction. Judge Lindberg suggested the explanation that the committee struggled with CR1615, the facts of the case would drive the necessary elements in the jury instruction, and practitioners should look to other instructions with elements to create their own instruction.

Ms. Johnson suggested stating, “The committee determined that any jury instruction under this instruction ise case specific and a model jury instruction would not be useful and would not assist the litigator. Please refer to other model jury instructions for assistance.”

Judge McCullagh stated that he hoped that in the near future, jury instructions would be available electronically and practitioners would easily build them. He stated that if done electronically, drop down options would replace brackets.

4. CR 1621 Penetration **Committee**

Professor Andrus asked if “unlawful sexual activity with a minor” within the first paragraph was necessary. Ms. Adams-Perlac stated that the statute has the same name. Ms. Jones asked if “unlawful sexual activity with a minor” involves sexual intercourse. Judge McCullagh asked if the committee used the titles of the statute as the title of the jury instruction.

Ms. Johnson stated that the title is "Unlawful Sexual Activity with a Minor," but the penetration only applies to a subsection. She explained that there are three ways a person commits "Unlawful Sexual Activity with a Minor": (1) a person engages in sexual intercourse, (2) the mouth or genitals, or (3) penetration, however slight, of the anal opening. Judge MuCullagh clarified if sexual intercourse was one of the options. Ms. Johnson stated it was the first subsection.

Ms. Adams-Perlac stated that the statute was confusing because there is also a penetration and touching statute. Ms. Johnson stated that the title "Unlawful Sexual Activity with a Minor" is sufficient and "involving sexual intercourse" within the title is not necessary because it is only necessary with penetration. Professor Andrus asked if penetration always means sexual intercourse. Ms. Johnson stated it does not.

Mr. West stated that there could be a situation where multiple ways of committing "Unlawful Sexual Activity with a Minor" occur. Professor Anderson asked if "sexual intercourse" includes penetration. Ms. Jones answered that "sexual intercourse" is one variation of "Unlawful Sexual Activity with a Minor." Professor Anderson then asked why penetration needed to be defined. Ms. Johnson stated the definition of "sexual intercourse" is when the penis penetrates the vagina, however slight.

Professor Anderson suggested, "Sexual intercourse, for the purposes of the offense of [ ], is penetration of the genital or anal opening, however slight." She stated that the title troubles her because she thought penetration was the offense. She stated that her suggestion clears up the internal inconsistency.

Professor Andrus stated that if penetration is not just sexual intercourse, more brackets are needed. Ms. Johnson stated that under this statute, the only time penetration is relevant is when it involves sexual intercourse. She explained that under the "Unlawful Sexual Activity with a Minor" statute, sexual intercourse equals penetration. She explained that under the "Unlawful Sexual Activity with a 16 or 17 year old" statute, any penetration is sexual intercourse. She explained that under the "Rape" statute, any penetration is sexual intercourse. She suggested using, "Sexual intercourse as defined in these three statutes is any penetration, however slight." Judge McCullagh clarified that the instrument of penetration is irrelevant. Professor Andrus suggested moving "sexual intercourse" to clarify meaning. Ms. Johnson suggested using "any sexual penetration" because the statute uses that language.

Mr. West stated that unless a wedgie is sexual penetration, "sexual" should be added for clarity. Judge Westfall asked if "sexual penetration" needed to be defined as opposed to "penetration." Judge Lindberg asked how "penetration" is defined under the rape statute. Ms. Johnson answered that it is "sexual intercourse without the victim's consent" and "sexual penetration" is not defined.

Ms. Jones stated that the committee should not define words if a definition does not exist. Judge Blanch stated that case law provides that unless there is a statutory definition, a jury should not be given a definition and should be left to the jury to decide what it means. Judge Westfall questioned whether jury should decide the difference between "sexual penetration" and "penetration." Judge Blanch stated that the only alternative would be the committee's creation of a definition. Judge Westfall stated that legislature has not defined it so the committee must accept that omission. He stated that the definition suggests that "sexual penetration" is different than "penetration" and as a juror, he would wonder about this difference. Judge Lindberg used Mr. West's wedgie example and asked if a wedgie is penetration. Judge Westfall replied that it depended on the purpose. Judge Lindberg stated that this would be argument for the jury. Judge

Blanch stated that there is not a proper way of defining "sexual penetration" even if the committee wants to define it.

Judge Westfall stated that in order to commit the crime, there are additional elements. He stated the purpose of this instruction is to instruct a jury that any penetration is necessary. He stated "sexual penetration" is confusing because other elements establish the crime or tell the jury what they need to find. He stated that the Legislature decided that "sexual penetration" is necessary only when other elements establish the sexual nature of the crime. Ms. Jones stated that penetration is not the element of rape but that sexual intercourse is the element of rape. Judge Westfall stated that penetration is one aspect of sexual intercourse.

Judge Blanch agreed with Judge Westfall's dissatisfaction of "sexual penetration," but stated that the statute would need to be amended to use better language. Judge Westfall and Judge Lindberg agreed.

Ms. Jones asked if the title of the instruction needed to be changed because the committee defines intercourse in the context of penetration. Judge Blanch suggested, "Penetration Sufficient to Constitute Sexual Intercourse." Ms. Johnson and Judge Lindberg agreed with this amended title.

Ms. Jones moved that the committee accept CR 1621 with committee note. Professor Anderson seconded the motion and it passed unanimously.

5. CR 1622 Committee

Judge Blanch suggested amending the title to "Conduct Sufficient to Constitute Touching." Ms. Johnson stated that touching is not an element in the crimes described in the statute. She stated that "forcible sodomy" does not include "touching" as an element. Judge Blanch asked if a person could violate the statute without "touching.' Ms. Johnson stated that all of the crimes involve touching. She stated that the committee is trying to define "touching," but "touching" is never used in the language of the statute.

Judge Lindberg asked for comment on "sexual act." Mr. West stated that "offense" is as clearly defined as "sexual act." Ms. Johnson stated that "sexual act" is more definite. Judge Blanch stated that it is an element of the offense and not the offense itself. Ms. Jones suggested using the language, "Any sexual act involving the touching of [these things], however slight, is enough to establish the element of the offense for [these things]." Judge McCullagh suggested using, "Any contact between these two things, however slight." Ms. Jones stated that "act" and "activity" are separate elements. Ms. Johnson stated that "sexual act" is the most common term.

Judge McCullagh stated that the definition of "touching" seems to involve fingers. He stated that the statute really means the proximity of two objects, neither one being a finger. He asked why "touching, however slight" is necessary. Professor Andrus asked if "brushing" could satisfy the element. Professor Anderson asked if touching had to be "sexual touching." Ms. Jones stated that the committee is trying to define "sexual act." She suggested, "For the purposes of these offenses, touching these things, however slight, is enough to establish the element of the sexual act." Professor Andrus suggested removing "the element." Professor Anderson asked if it would be easier to state, "a sexual act is…" Professor Andrus stated that "element" does not mean the same thing to the committee as it would to a jury. Ms. Jones suggested using, "For the purposes of these offenses, touching these things, however slight, is enough to establish a sexual act." Professor Andrus stated that she preferred "a sexual act means" because too many words

between the main noun and main verb can be confusing. Ms. Jones asked if a comma was needed before "a sexual act."

Judge Lindberg asked if Ms. Johnson agreed with the instruction. Ms. Johnson read the definition of sodomy, "A person commits sodomy when the actor engages in any sexual act involving the genitals of one person and the mouth or anus of another person." She stated that the elements of sodomy specifically require a sexual act and the genitals of one and the mouth/anus of another. She stated that using, "A sexual act means…" removes the elements of sodomy where the sexual act requires genitals and the mouth/anus.

Judge Blanch stated that this instruction will not stand alone. He stated that a sexual act constituting sodomy is narrower and involves more elements. Ms. Johnson stated that criminal statutes define "sexual acts" and include elements for each specific sexual act. She stated that she is concerned with defining "sexual act" without being more specific.

Judge Blanch stated that the current instruction would meet the definition of sodomy. Judge Blanch stated that this instruction defines "sexual act" in a general way. Ms. Johnson stated that using "sexual act *means*" could be confusing because it does not include all the elements of the required crime and it may cause an inconsistency within the instructions.

Ms. Jones stated that the elements instruction should clearly articulate the elements and identifies the subparts to those elements. She stated that a definitional instruction that differs from the element instruction could cause jury confusion and potentially an appealable issue. Ms. Jones stated that if the jury had a question, she believed there might be an appealable issue depending the judge's response. She stated that the element instruction would trump a generalized instruction. Judge Lindberg stated that the attorneys at trial would push for the judge to answer the jury with "do your best." Ms. Johnson suggested omitting the anus, buttocks, or other part and using, "for the purposes of these offenses, the sexual act can be accomplished by any touching, however slight." Judge Blanch asked if all the statutes provide further definitions of the sexual act.

Professor Anderson asked why this instruction is necessary because all the crimes will define the sexual act. Ms. Johnson provided the example of rape of a child, which defines the touching of a penis to the vagina, without penetration, as rape. Professor Anderson asked if this is included in the definition of rape of a child. Ms. Johnson said no and Professor Anderson asked why. The committee did not have an answer.

Mr. West suggested removing "genitals" because it is already defined in the elements instruction. Ms. Johnson stated "unlawful sexual activity with a minor" refers to a sexual act that involves genitals of one person and mouth or anus of another. Judge McCullagh asked why the "however slight" language was needed in this context. Ms. Johnson provided the example of a defendant who testified that his penis accidentally touched the vagina of an alleged victim. Mr. West and Judge McCullagh stated that intent would be the issue in that example.

Judge McCullagh asked where "however slight" comes from. Ms. Adams-Perlac stated it was in the definition of touching in section 76-5-407. Professor Andrus stated that the language reinforces the "however slight" definition of touching. Professor Anderson stated she was concerned that a touch of the arm would satisfy the definition. Judge Blanch stated that the other statutes state that the touching must be of the anus, buttocks, etc.

Judge Blanch stated that this instruction is necessary to prevent a defendant from saying it was a minor or de minimus touching. He stated that the statutes should include references to the nature of the sexual act in the same manner as the sodomy and unlawful sexual conduct with a 16- or 17-year-old statutes. Ms. Jones stated that the unlawful sexual conduct with a 16- or 17-

year-old statute describes "sexual conduct" that includes sexual intercourse and a sexual act involving genital, anus, or mouth. Judge Blanch stated that the instruction can be simple because the elements are in the statute.

Ms. Johnson stated that "rape of a child" uses "sexual intercourse" and not "sexual act." She stated that "rape of a child" does not require any penetration. Ms. Jones clarified that "rape of a child" falls under the "touching" definition. Judge Blanch stated that it would be easier if the Legislature stated "sexual act" instead of "sexual intercourse" in the statute.

Judge Blanch stated that he liked the updated instruction.

Ms. Johnson stated that "object rape of a child" includes any penetration or touching, however slight. Ms. Jones asked how the committee would communicate that this instruction is different between CR 1623 "over clothing." Professor Andrus suggested, "with the victim's skin" or "direct skin contact." Mr. West suggested using another instruction to make the distinction. Professor Andrus suggested, "the contact or touching requires direct contact with the skin." Ms. Johnson stated that it must be the victim's skin. Ms. Jones stated that "victim" should not be included in the jury instructions. Professor Anderson suggested, "…however slight, with (VICTIM'S INITIALS)'s skin."

Ms. Jones asked if the last phrase, defining penetration, was necessary. Professor Anderson stated that penetration through clothing was not possible. Ms. Jones stated that she suspected it could happen and should be included in the definition. Ms. Johnson stated that the definition in section 76-5-407(2)(b) addresses this scenario by including "touching." Ms. Adams-Perlac agreed that the statute requires skin.

Judge Lindberg stated that she liked the updated instruction. She asked Judge Westfall if he agreed with the instruction. Judge Westfall stated that "object rape" requires touching of the genital area, but the instruction only includes "touching of skin." Ms. Jones stated that the touching statute itself distinguishes between offenses that requires touching of skin and offenses where touching can be accomplished through clothing. Professor Anderson stated that each crime would define what had to be touched. Judge Westfall asked if there would be another instruction defining "touching of skin." The committee agreed that another instruction would be necessary.

Ms. Johnson stated that "sexual touching" or "any sexual touching" is not necessary because the elements instructions explain what the touching must be. Ms. Adams-Perlac suggested using, "sexual intercourse can be accomplished even by slight contact." Ms. Johnson agreed with the modification. Judge Westfall agreed that "skin" was too broad. Ms. Jones suggested having Ms. Adams-Perlac review the statutes to see if the approved instructions match the elements in the statute.

Professor Anderson suggested putting the second part of the instruction in the "sexual intercourse" instruction. The committee agreed with this method and made the modifications.

Ms. Adams-Perlac will review the statutes to see if the approved instructions match the elements in the statute.

6. CR1623 **Committee**

Professor Anderson suggested changing the title of the instruction to "Conduct Sufficient to Constitute Sexual Intercourse" in CR1623. Ms. Johnson stated that sexual intercourse and rape of a child to defined as "touching" and the other as "penetration" and they should be separate.

Ms. Johnson suggested, “for purposes of rape of a child, sexual intercourse can be accomplished by any touching, however slight.” Professor Andrus asked if “victim’s skin” should be included. Ms. Johnson stated that it must be included because it is under the touching subsection.

Judge Lindberg asked if the instruction was acceptable.

Ms. Jones suggested having Ms. Adams-Perlac review the statutes to see if the approved instructions match the elements in the statute.

Ms. Adams-Perlac will review the statutes to see if the approved instructions match the elements in the statute.

7. Adjourn **Committee**

The meeting was adjourned at 1:33 p.m. The next meeting is Wednesday, January 7, 2015.