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, January 7, 2015
12:00 p.m. to 1:30 p.m.
Judicial Council Room

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

1. Welcome, Approval of Minutes **Alison Adams-Perlac**

Ms. Adams-Perlac welcomed everyone to the meeting. She announced that the Judicial Council approved Judge Blanch as the committee's new chair.

Ms. Johnson moved to approve the minutes from the December 10 meeting as amended. Judge McCullagh seconded the motion and it passed unanimously.

2. CR1615 Aggravated Sexual Assault **Judge Blanch**

Judge Blanch stated that the committee should first discuss CR1615 Aggravated Sexual Assault. He reminded the committee that the creation of a generalized instruction was considered to be too complicated. He asked the committee for input on the committee note.

Mr. Nix suggested removing "very" from the first sentence. Ms. Adams-Perlac suggested replacing "form" to "format" to not confuse it with verdict forms.

Mr. Field restated that there was no way to craft an instruction that covered every scenario. Ms. Johnson suggested stating that an instruction would not be "practical." Ms. Jones agreed and suggested adding "may be confusing." Ms. Adams-Perlac stated that the benefit of an instruction would be outweighed by the problems it could create. Mr. Field asked if this was the first time the committee was unable to create a jury instruction. Ms. Adams-Perlac stated that

this would be the first committee note to act as a "place holder" for an instruction. Judge McCullagh stated that the committee should be addressing "low-hanging fruit" and leave complicated instructions to practitioners who will inevitably argue about them.

Judge Blanch stated that each aggravating factor has its own set of elements; including elements for each potential aggravating factor would result in an unhelpful and lengthy instruction with numerous brackets. Ms. Jones stated that using too many brackets may invite problems. Mr. Field stated that the committee should not have to address every possible factual situation. Ms. Klucznik asked if the committee note should reference the complexity of the statute. Ms. Johnson stated that practitioners who review the statute would realize that the statute is complex. Judge McCullaugh stated that although the committee has previously used brackets in instructions, this was the first instruction that was too complicated because of the factual possibilities. Judge Blanch stated that once the committee realized that the elements of every crime were required to be in the instruction, the committee decided that creating an instruction would be too complicated. Ms. Johnson suggested adding, "case specific and complex." He asked the committee if anyone had further comments.

Ms. Klucznik moved to approve the instruction. Ms. Johnson seconded the motion and it passed unanimously.

3. CR 1622 Conduct Sufficient to Constitute Penetration Committee

Judge Blanch stated that the main idea of this instruction is that penetration is not necessary to satisfy the "sexual intercourse" element of the offense. He stated that the committee was not satisfied with the definition created at the last meeting. He suggested that the committee create a more detailed or graphic instruction to eliminate confusion. Ms. Johnson asked if the committee previously discussed this definition. Ms. Adams-Perlac stated that the committee previously discussed the instruction, but decided that definitions of elements would be necessary. She stated that the committee has not discussed definitions.

Ms. Adams-Perlac reminded the committee that there is a statute that defines "touching." Ms. Klucznik asked if "Rape of a Child" requires skin-to-skin contact. Ms. Adams-Perlac stated yes. Judge Blanch clarified that it must be genital-to-genital contact and does not need to be penetration. Ms. Klucznik stated that penetration is defined differently in this context because the penetration is "however slight." Judge Blanch stated that it is "any touching." He stated the purpose of this instruction is to clarify that penetration is not required for these offenses. He stated that the committee was concerned that simply using a "skin-to-skin" definition would erroneously define acts, such as putting a penis on an arm, as conduct sufficient to constitute penetration. He stated that this definition removes uncertainty from the state of the law.

Ms. Johnson clarified that the committee had not previously adopted a definition of "sexual intercourse." Ms. Adams-Perlac stated yes. Ms. Klucznik asked if this definition was a statutory definition. Ms. Adams-Perlac stated that there was not a definition within the statute. She stated that a judge would have to use the common meaning of "sexual intercourse." Ms. Klucznik stated that CR1622, as written, is not clear enough. Judge Blanch suggested adding more explicit language to solve the problem with imprecision. He suggested adding, "sexual intercourse can be accomplished by any contact or touching of the actor(s) penis to the female's genitals, however slight." Ms. Klucznik stated that because this definition includes "object rape," the instruction should not include reference to a penis. She suggested, "sexual intercourse can be accomplished by any contact, however slight, of the skin of the victim's genitals."

Ms. Jones suggested, “any touching of one person’s genitals by another person’s genitals.” Ms. Klucznik stated that object rape does not require touching of genitals. Judge Blanch agreed. Ms. Jones suggested, “with (VICTIM’S INITIALS)’s genitals.” Ms. Klucznik stated that skin-to-skin contact is required. Ms. Jones suggested, “direct contact or touching.” Ms. Johnson suggested using “sexual act” in place of “sexual intercourse.” Ms. Adams-Perlac stated that she researched the statutory language and “sexual intercourse” is used in “Rape of a Child” and “Object Rape of a Child.”

Ms. Johnson stated that “Rape of a Child” includes sexual intercourse, but “Object Rape of a Child” uses “penetration or touching.” Ms. Klucznik read Utah Code 76-5-407 and confirmed that the language is “any touching, however slight, is sufficient to constitute the relevant element.” Mr. Field suggested creating two instructions for “Rape of a Child” and “Object Rape” because the statutes require different acts (“sexual intercourse” and “penetration or touching”).

Ms. Klucznik asked why the committee focused on “Rape of a Child” and “Object Rape.” Ms. Adams-Perlac stated that other statues use “sexual act” as an element, while these two do not. Ms. Jones asked if “Object Rape” could be included in CR1623 “Conduct Sufficient to Constitute Sexual Intercourse.” Ms. Klucznik stated that the instruction should be different to mirror the statutory language. Ms. Adams-Perlac stated that because CR1623 uses “sexual act” and “Object Rape” does not, the instructions should be separated for clarity.

Ms. Klucznik stated the committee should create different instructions for sexual intercourse, penetration, and sexual act. Ms. Johnson stated that there sould be four: (1) sexual penetration, (2) touching however slight (skin-to-skin), (3) touching over clothes for “Sodomy,” and (4) touching over clothes for “Sexual Abuse of a Child.”

Ms. Klucznik suggested, “skin of the victim’s genitals.” Ms. Jones clarified that the instruction must clearly state that skin contact, not through clothing, is necessary. Ms. Johnson clarified that it must be the genital or anal opening. Judge Westfall suggested replacing “can be” with “is.” Ms. Klucznik asked why “any contact” was used because the statute uses “touching.” Judge McCullagh stated that “touching” means “two objects that touch” as opposed to hands touching a person or object. He stated that the committee chose to use “contact” to clarify “touching.” Ms. Klucznik asked Judge McCullagh if juries would misunderstand and conclude that “touching” requires the use of hands. Judge McCullagh answered that because “touching” has a connotation specific to hands, the committee chose “contact” to avoid misinterpretation. Ms. Johnson stated that some statutes include “any object” when “touching” is used. Mr. Field stated that “Rape of a Child” does not require contact. Ms. Klucznik asked if “touching” *not by a finger* is inherent in the definition of “sexual intercourse.” Mr. Field suggested using “contact or touching” for “Object Rape.” Ms. Johnson suggested removing “contact” because “Rape of a Child” requires “sexual intercourse,” which means a penis is involved. She stated that “Object Rape of a Child” contemplates objects in contact with the victim, so “contact” should be removed. Judge Westfall asked why the committee would remove “contact.” Judge Blanch stated that “contact” is a more precise way of covering the statutory language. Mr. Field asked if the committee must use the statutory language. Judge Blanch stated that “contact” is a better word than “touching.” Judge Westfall stated that “contact” is a better way to express the statutory language. Ms. Klucznik reiterated her concern that “contact” is not in the statute and the committee is adding to the statute. Judge Blanch stated that using both “touching” and “contact” suggests that each word has a separate meaning and no one is suggesting that there is actually a

difference. He stated that "contact" includes "touching" and better expresses the statute. Ms. Johnson reiterated that "touching" should be used instead of "contact."

Judge Westfall clarified that the discussion was not about "intercourse" because intercourse requires "penetration" rather than "touching" or "contact." Ms. Adams-Perlac answered that "touching, however slight" is sufficient. Judge Westfall asked if the language should be, "penetration, however slight." Ms. Adams-Perlac answered that a separate statute, Utah Code 76-5-407, lists sexual offenses against children and states that "touching however slight" satisfies the necessary element of the listed offenses. Judge Westfall asked if "touching however slight" is sufficient to constitute "intercourse." Ms. Klucznik answered that "Rape of a Child" only requires touching, not penetration. Judge Westfall asked if penetration is necessary. Ms. Johnson answered no.

Ms. Johnson stated that the current instruction is correct for "Rape of a Child," but "Object Rape of a Child" should use "penetration or touching" because the statute specifically refers to "penetration or touching." She stated that the concern about "touching" referring only to hands is unnecessary because "Object Rape of a Child" includes, "foreign object, substance, instrument, or device, not including a part of the human body." She stated that "contact" would add an unnecessary term. Ms. Adams-Perlac stated that juries would also receive an elements instruction that would eliminate the concern about "touching" versus "contact."

Mr. Field stated that penetration is "touching." Judge McCullagh stated that a person cannot penetrate without "touching." Ms. Klucznik stated that penetration is superfluous because "touching" is sufficient. Mr. Field stated that generally, penetration is more than touching, but this specific instruction must state that "touching" is penetration. Ms. Jones suggested, "for purposes of object rape of a child, any contact or touching, however slight, with the skin of (VICTIM'S INITIAL)'s genitals or anal opening, is sufficient to constitute "penetration.""

Ms. Jones stated that the statute does not use "contact" and asked if the committee wanted to include it. Judge Blanch stated that members of the committee disagreed with each other. He stated that committee members agreed that either "touching" or "contact" should be used, but members disagreed on which word. Ms. Klucznik stated that she liked "contact." Ms. Adams-Perlac stated that she preferred "touching" because it is the statutory language. Judge Blanch stated that the statutory language should be used unless the committee is concerned that juries may misunderstand "touching" to only include skin or hands as opposed to touching meaning "contact." Ms. Klucznik asked if there was any case law evidencing this potential misunderstanding. Mr. Field stated that it would be unlikely that juries would misunderstand, but understood Judge McCullagh's concern. Ms. Adams-Perlac asked if the confusion would be solved by the elements instruction. Judge Blanch asked if anyone objected to using "touching" and eliminating "contact." There were no objections.

Ms. Adams-Perlac reviewed the elements instruction for "Object Rape of a Child" and stated that it did not include "touching." Mr. Field stated that "touching" is not necessary at the end of the instruction. Ms. Jones stated that the quoted language should only include "penetration" because "touching" is not included in the elements instruction. Ms. Adams-Perlac read the updated instruction. Ms. Klucznik suggested replacing "with the skin" with "of the skin."

Mr. Field asked if touching of specific body parts are necessary. Ms. Adams-Perlac stated that the victim's genitals must be touched. Ms. Klucznik stated that it must be skin-to-skin contact. Judge Blanch stated that "genitals" should be used instead of "penis." Ms. Klucznik

suggested using "skin-to-skin touching." Judge McCullagh stated that the statute is not concerned with the skin of the actor but any touching of the actor to the skin of the victim.

Ms. Klucznik proposed a hypothetical where the defendant is clothed and the victim is naked. She stated that this hypothetical would fit this definition but would not actually be "Rape of a Child" but rather "Sexual Abuse of a Child (not amounting to rape of a child)." Judge Westfall, Judge McCullagh, and Mr. Field disagreed with Ms. Klucznik. Mr. Field stated that if a defendant were clothed, he could commit "Rape of a Child" but it would depend on the facts of the case. Ms. Klucznik disagreed and stated that it would be "Sexual Abuse of a Child (not amounting to rape of a child)." Judge Blanch stated that the committee may need to review case law. Ms. Jones stated that "Rape of a Child" requires "sexual intercourse." She stated that the hypothetical would not be "Rape of a Child," but would definitely be "Sexual Abuse of a Child (not amounting to rape of a child)." Ms. Adams-Perlac stated that she would review case law. Judge Blanch suggested that the committee review case law to create an instruction.

Ms. Adams-Perlac asked the committee to approve CR1622. *Ms. Klucznik moved to approve the instruction. Mr. Field seconded the motion.*

Judge Westfall asked if "Object Rape of a Child" requires "penetration or touching." Judge McCullagh answered yes. Judge Westfall stated that it is absurd to ask juries to define "touching" as "penetration." Ms. Jones stated that the Legislature said any touching equals penetration. Judge Westfall stated that the Legislature did not redefine penetration. He stated that they defined what "touching," as a disjunctive alternative, meant as an element of "Object Rape of a Child." Ms. Klucznik stated that any penetration would include "touching," so "touching" is the determinative factor. Judge Westfall stated that this is the reason he liked "contact" better. Mr. Field agreed. Judge Westfall stated that juries would not agree that all touching equals penetration and this could confuse juries. Judge McCullagh stated that "Object Rape of a Child" contemplates "penetration" and "touching." He stated that "Rape of a Child" requires "sexual intercourse." He stated that under Utah Code 76-5-407(2)(b), the "relevant element of the offense" is "sexual intercourse," so "any touching however slight" is enough to constitute "sexual intercourse." He stated that "sexual intercourse" is an element of "Rape of a Child." Ms. Adams-Perlac stated that she would research the definition of "sexual intercourse." Ms. Klucznik stated that "penetration or touching" is sufficient because it is in the statute. Judge Blanch stated that the elements instruction only included "penetration." He agreed with Judge Westfall that "touching equals penetration" is not a common definition, but a legal definition.

Judge McCullagh stated that the Legislature may have contemplated this definition by including "penetration or touching." He stated that the Legislature should have removed "penetration" and simply used "touching," but the committee should use both because the Legislature used both. Mr. Field asked if it would be sufficient to state, "penetration or touching, however slight, of the skin of (VICTIM'S INITIAL)'s genitals or anal opening, is sufficient to constitute Object Rape of a Child." Ms. Adams-Perlac stated it was not because there are other elements for "Object Rape of a Child." Ms. Jones agreed because penetration is not the only element. Ms. Adams-Perlac stated that slight touching is enough to satisfy that element. Mr. Field agreed with Judge Westfall that the statute contemplates "touching, however slight" or "penetration," and penetration is touching (though touching is not always penetration). Judge Blanch stated that a jury may conclude that an action that is not penetration may be penetration. Ms. Klucznik clarified that the Legislature, in Utah Code 76-5-407, stated "any touching, however slight, is sufficient to constitute the relevant element of the offense," which would be penetration for "Rape of a Child."

Judge Blanch asked if there could be penetration without touching. The committee said no. Judge Blanch stated that the elements instruction should be changed to include "touching." Judge McCullagh stated that the previously approved "Object Rape" may need to be corrected if it does not include "touching" as an alternative to "penetration." Judge Blanch stated that "penetration" is superfluous because penetration requires touching. Judge Blanch stated that the committee should discuss CR1622 at the next meeting.

4. Future Committee Action **Committee**

Judge Blanch stated that he wants to create instructions with a focus on the most commonly charged and tried offenses. He stated that exhausting an area is not necessary. He stated that if the committee completes instructions for the most common offenses, practitioners would use the committee's instructions more frequently. He asked the committee for comment and the committee agreed on this approach.

5. Adjourn **Committee**

The meeting was adjourned at 1:28 p.m. The next meeting is Wednesday, February 4, 2015.