

## 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, February 4, 2015  
12:00 p.m. to 1:30 p.m.  
Judicial Council Room

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#### PRESENT

Judge James Blanch, Chair  
Alison Adams-Perlac, Staff  
Mark Field  
Sandi Johnson  
Linda Jones  
Karen Klucznik  
Judge Brendon McCullagh  
Jesse Nix  
John West  
Judge Michael Westfall (remotely via VIAC)  
Scott Young

#### EXCUSED

Professor Jensie Anderson  
Jennifer Andrus  
Thomas Pedersen, Intern

#### 1. Welcome, Approval of Minutes

**Judge Blanch**

Judge Blanch welcomed everyone to the meeting. He thanked John West for serving on the committee for five years and presented him with a certificate thanking him for his service. Mr. West thanked the committee for the gesture.

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

#### 2. CR 1621A Conduct Sufficient to Constitute Sexual Intercourse

**Committee**

Ms. Adams-Perlac stated that she researched case law for a definition for “sexual intercourse” but could not find one. She recommended having practitioners and courts define the term.

Judge Blanch asked for comment on CR1621A. Ms. Klucznik asked why the committee note suggested that “sexual intercourse” be defined for the jury because it is a term of plain meaning. Ms. Johnson stated that “sexual intercourse” is a common term and should not be defined unless the jury asks for a definition. Judge Blanch stated that if a term has common usage and understanding, the jury should not receive a definitional instruction. Ms. Adams-Perlac asked if one committee note, included with the definitions instruction, should direct

practioners to create definitions for words that a jury may ask to be defined. Judge McCullagh agreed and stated that this would provide practioners with complete definitions rather having practioners spontaneously create them. Judge Blanch stated that the committee should be judicious with definitions. He stated that unless a statute or a specific case contain a definition, the committee should not create a definition. Mr. Young and Ms. Jones agreed. Ms. Adams-Perlac suggested having a committee note explain why the committee did not create definitions. Ms. Johnson suggested, "Some terms have not been defined by the committee because they are terms of common meaning." Ms. Jones stated that the second paragraph in the committee note should be moved to the definitions instruction. Judge Blanch stated that there is a stock instruction that already directs a jury to use the common and usual meanings for undefined words. Ms. Johnson stated that a committee note should not be in CR1621A. Judge Blanch asked the committee if the committee note should be in the definition instruction. Ms. Klucznik stated that a committee note should direct practioners to the stock instruction on defining terms. Mr. West stated that a committee note, with an explanation of why the committee did not define certain words, would be helpful to prevent practioners from unnecessarily defining commonly used words.

*Ms. Klucznik moved to remove the second paragraph from the committee note in CR1621A. Ms. Jones seconded the motion and it passed unanimously.*

Ms. Johnson moved to remove the first paragraph of the committee note because she stated it was unnecessary. Ms. Klucznik asked if the title of the instruction should include the name of the charge. Judge Blanch stated that practitioners looking for instructions on the website would appreciate the name of the crime in the title of the instruction. *Ms. Johnson moved to amend the title and remove the first paragraph of the committee note. Ms. Klucznik seconded the motion and it passed unanimously.*

*Ms. Jones moved to approve CR1621A. Ms. Johnson seconded the motion. Ms. Klucznik asked the committee why "Rape" was not included in the instruction. Ms. Adams-Perlac added "Rape" to the title and added "Rape" as a bracketed option. The motion passed unanimously.*

### **3. CR 1621B Conduct Sufficient to Constitute Sexual Intercourse                      Committee**

Ms. Johnson stated that "sexual penetration" should be replaced with "sexual touching." Ms. Klucznik stated that the statute does not include "sexual touching." Judge Westfall asked the committee why "sexual" is needed before "touching." Ms. Johnson suggested "any touching, however slight, is sufficient to constitute sexual intercourse." Ms. Jones stated that because this instruction is defining an element of the offense, it should refer to the elements instruction. Ms. Johnson stated that the question is whether "sexual" is needed before "touching." She stated that Rape of a Child requires "sexual intercourse." Ms. Klucznik stated that the only touching at issue in Rape of a Child is sexual intercourse. Judge Blanch stated the committee is not defining "sexual intercourse," for the purpose of Rape of a Child, as any touching anywhere on a child's body. Mr. Field said it could be read that way without including "sexual touching." Mr. Young asked if there would be harm with adding "sexual." Ms. Klucznik stated that the statute requires skin-to-skin touching.

The committee reviewed CR1607 Rape of a Child. Judge Blanch stated that "Rape of a Child" includes "touching." Ms. Klucznik stated including "sexual touching" would change the meaning of the statute. Ms. Adams-Perlac stated that this could be confused with sodomy or object rape. Mr. West stated that the problem is that the Legislature did not define "sexual

intercourse.” Judge Blanch suggested stating, “Sexual intercourse can be accomplished by any touching, however slight.” Ms. Jones agreed and suggested removing “for purposes of Rape of a Child” to make the instruction clean. Ms. Klucznik stated that “for purposes of Rape of a Child” would be helpful if a defendant has multiple charges. Judge Blanch stated that including “for purposes of Rape of a Child” would not be harmful.

Judge Blanch asked if the committee should include “skin-to-skin.” Ms. Adams-Perlac asked if including “skin-to-skin” would lead a jury to believe that contact with skin is the only requirement. Ms. Klucznik agreed. Ms. Johnson stated that it should not be included in the general definition and practitioners can modify it based on the facts of their case. Ms. Klucznik agreed. Mr. Young stated that without “skin-to-skin,” the instruction is vague and could be misinterpreted. Judge Blanch stated that a jury can use the ordinary and common meaning to define “sexual intercourse,” and this instruction would help the jury understand that “any touching, however slight” is enough and clarifies that penetration is not required. Ms. Klucznik asked if the committee should state, “proof of sexual penetration is not required.” Judge Blanch suggested adding, “proof of actual penetration is not required.” Ms. Jones stated that the proposed clarification is not in the statute. Ms. Klucznik stated that it is implied because the statute only requires touching. Ms. Johnson stated that it should not be included because the facts of each case are different and practitioners must make necessary modifications. Ms. Adams-Perlac removed the second paragraph of the committee note.

*Ms. Johnson moved to remove the first paragraph of the committee note. Mr. West seconded the motion and it passed unanimously.*

#### **4. CR 1622 Conduct Sufficient to Constitute Penetration**

#### **Committee**

Ms. Jones suggested changing the title to make it searchable for practitioners. Judge Westfall disagreed with the entire instruction because only “touching” is required and redefining “penetration” is not necessary. Ms. Johnson stated that this instruction is only for “Object Rape of a Child.” Judge Westfall stated that redefining “penetration” is not necessary when “touching” is sufficient to constitute Object Rape of a Child. Judge Blanch suggested “touching, however slight” because penetration is included in the definition. He stated that penetration would not be needed because “penetration” includes “touching.” Ms. Johnson suggested including “penetration” to be true to the statute. Ms. Klucznik stated that including “penetration” requires a definition. Ms. Jones stated that she agreed with Ms. Johnson that “penetration” should be included without a definitional instruction. Judge Westfall suggested, “penetrated or touched, however slightly.”

Judge Blanch stated that “skin-to-skin” contact is absent in CR1622 but appears in CR1609. Ms. Jones stated that the statute requires contact with skin. Ms. Johnson asked if the committee should include “skin-to-skin” or “over the clothes” for each definition or elements instruction. Ms. Jones stated that it was an important distinction that the committee should include in definitional instructions. Ms. Klucznik stated that the statute does not require “skin-to-skin.” She stated that the skin must be the victim’s skin and not the defendant’s skin. Judge Blanch stated that he thought the “skin-to-skin” requirement is addressed in the elements instruction and therefore excluded in the definitional instruction. Ms. Jones stated that a jury may misunderstand that a victim must be naked. Ms. Johnson suggested using a committee note, instead of an elements instruction, to state, “This crime must be accomplished by touching the victim’s skin.” Judge Blanch stated that there would not be a problem if the instruction did not

require skin contact but the undisputed evidence involved skin contact. Ms. Johnson presented an example where a child states that a person reached under her pants but cannot recall if the person reached under her underwear. Ms. Johnson stated that putting “skin-to-skin” in the elements instruction is not necessary because some Object Rape of a Child cases will not involve “skin-to-skin.” Ms. Klucznik stated that the committee could avoid a potential appeal by clarifying “skin-to-skin.” Ms. Jones stated that “skin-to-skin” might leave a jury with the impression that the child must be naked. Judge Blanch suggested, “touching the skin of (VICTIM’S NAME).” Ms. Klucznik suggested “penetrated, or touched the skin of, however slightly.” Ms. Johnson suggested “the skin of.” Mr. Young suggested “touched the skin of or penetrated, however slightly” because skin does not need to be penetrated. Ms. Johnson agreed with Mr. Young’s suggestion. She stated that “skin-to-skin” only modifies “touching” and not “penetration.”

*Ms. Klucznik moved to approve CR1609 and delete CR1622.* Ms. Johnson asked if CR1622 should instead be modified to refer to “touching.” Ms. Klucznik suggested removing “skin-to-skin” in the elements instruction and provide a definitional instruction. Ms. Johnson stated that it should be included in the elements instruction for clarity. Judge Blanch stated that the committee should review the other previously approved elements instructions to ensure that the concept of “skin-to-skin” or “under clothing” is adequately and consistently addressed.

Ms. Johnson stated that “touching” can be accomplished in four ways for Unlawful Sexual Conduct with a 16 or 17 year old: (1) sexual intercourse, (2) sexual act involving genitals, (3) penetration, (4) or touching of anus, buttocks, or any part of the genitals of the minor, or touching breast of female minor. She suggested that the committee review this elements instruction and state, “touches the skin of” and provide a list of what is touched. She stated that this language would not require a definition instruction. She stated that Sexual Abuse of a Minor also includes “touching” so it can be addressed in the elements instruction. She stated that “touching” is not included in adult crimes besides Forcible Sexual Abuse.

Judge Blanch suggested that the committee review previously approved elements instructions to determine if “skin” should be mentioned. Ms. Jones stated that Unlawful Sexual Activity with Minor includes an element that defines “sexual intercourse” and this definition is not included in the definitional section. She stated that this was why the committee chose to create a definitional instruction to define “sexual intercourse” to be consistent with “penetration” and “touching.” She stated that a review may not be relevant to all elements instructions. Judge Blanch stated that he was not suggesting removing CR1621A or CR1621B which define “sexual intercourse.” He stated that he believed a review of the elements instructions was needed to determine if “skin” should be mentioned. Ms. Klucznik suggested that a review should also address the new Utah Supreme Court case, *State v. Barela*, 2015 UT 22, that a mens rea instruction must be included for each element.

Judge Blanch asked if members of the committee would volunteer to (1) review elements instructions that may require an amendment to specify contact with skin and (2) consider what amendments are necessary in light of *State v. Barela*. Ms. Johnson suggested tabling CR1622 and the modification of CR1609. She volunteered to review previously approved elements instructions to determine if “skin” should be mentioned and will email Ms. Adams-Perlac with suggested modifications.

*Judge Blanch moved to table CR1622 and the modification of CR1609. Ms. Klucznik seconded the motion and the motion passed unanimously.*

Mr. West asked if the committee had a mechanism to review instructions on recently amended statutes by the Legislature. Ms. Adams-Perlac stated that she reviews all passed bills with the instructions to determine if changes to instructions are necessary.

Ms. Klucznik stated that the committee should review all elements instructions to see if they are impacted by the mens rea requirement in *State v. Barela*. Ms. Jones volunteered to review the instructions.

**5. CR 1623 Conduct Sufficient to Constitute Sexual Act** **Committee**

Ms. Klucznik stated that discussion should be tabled until Ms. Johnson completes her research.

**6. CR 1624 Touching Over Clothing Sufficient to Constitute Offense** **Committee**

Ms. Klucznik stated that discussion should be tabled until Ms. Johnson completes her research.

**7. Future Committee Action** **Committee**

Judge Blanch stated that Ms. Klucznik's subcommittee has met and created instruction language for drug offenses. These instructions will be presented and discussed in a future meeting.

Ms. Johnson asked if the instructions would be published for comment. Ms. Adams-Perlac stated that the committee must decide how to handle the comment period. Based on the mechanics of having a comment period, she suggested waiting until the committee passes more instructions. She stated that the process could take two to three months. Judge Blanch asked how the civil instructions committee handles comment period. Ms. Adams-Perlac stated that they plan to ask for comment. Ms. Johnson asked why the process would take two to three months. Ms. Adams-Perlac stated that it is an IT issue. Judge McCullagh stated that comment periods are necessary for new rules that attorneys must follow, but jury instructions do not have the same requirement or necessity.

**8. Adjourn** **Committee**

*The meeting was adjourned at 1:18 p.m. The next meeting is Wednesday, March 4, 2015.*