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, September 2, 2015
12:00 p.m. to 1:30 p.m.
Judicial Council Room

PRESENT	**EXCUSED**
Judge James Blanch, Chair	Jennifer Andrus
Alison Adams-Perlac, Staff	Professor Carissa Byrne Hessick
Mark Field	David Perry
Sandi Johnson	Judge Michael Westfall
Linda Jones	Scott Young
Karen Klucznik	
Judge Brendon McCullagh	
Steve Nelson	
Jesse Nix	
Nathan Phelps	

1. Welcome, Approval of Minutes **Judge Blanch**

Judge Blanch welcomed everyone to the meeting. All present members of the committee introduced themselves. Judge Blanch asked that committee members who were not present at the meeting introduce themselves at the next meeting.

Judge Blanch expressed condolences for an invaluable member of the committee, Jennifer Andrus, who was seriously injured recently.

Ms. Klucznik moved to approve the minutes from the June 3 meeting. Mr. Phelps seconded the motion and it passed unanimously.

2. Update on CJA 3-418, Website, and Public Comment **Committee**

Ms. Adams-Perlac told the committee that the new criminal jury instruction website is now ready for publication.

She also explained Rule CJA 3-418. This rule makes the committee a committee under the Judicial Council. The committee is no longer a standing committee of the Supreme Court.

3. Sex Offense Definitions **Committee**

Judge Blanch asked for the discussion on the following definitions.

(a) Indecent Liberties

Mr. Phelps stated that the committee already created a definition for Indecent Liberties. He stated that the court, in *State v. Lewis*, 337 P.3d 1053, stated that "the model Utah jury instructions include appropriate legal definition of indecent liberties."

Ms. Jones asked if the committee could adopt the definition that the court cited. Judge Blanch stated that this instruction, although vague, was approved by the Court of Appeals. Mr. Phelps read *State v. Lewis*, 337 P.3d 1053, where the court stated:

> We quote the model instruction here to demonstrate that an instruction on the definition of "indecent liberties" was readily available to trial counsel and because, in this case, the model instruction's definition accurately reflects current law. We note, however, that the model instructions, taken alone, are "merely advisory and do not necessarily represent correct statements of Utah law."

Ms. Jones asked if prosecutors used indecent liberties as an alternative. Ms. Johnson agreed that it is one of several alternatives that prosecutors can use.

Ms. Klucznik stated that the brackets in the instruction should be removed. Ms. Jones asked if the brackets should stay because a case could involve criminal activity not over the clothes. Ms. Klucznik answered that it should be in the general instruction.

Ms. Jones stated that the instruction should include bracketed language. She stated that the committee should research statutes dealing with indecent liberties to determine if they require touching over or under clothing. Ms. Klucznik stated there is a case where the touching can be over clothing even for statutes that otherwise require under clothing. Ms. Jones stated that she was concerned that excluding the brackets would create a problem in a case where touching over clothing is not enough. She stated that the instruction, without brackets, would say that over clothing is enough. She stated that if "indecent liberties" is isolated to cases where over clothing is enough, then the brackets are not necessary. Ms. Klucznik stated that in cases where the skin of the breast must be touched to be liable for touching the breast, "incident liberties" covers this scenario even if skin is not touched. She stated that the bracketed phrase applies in every case.

Mr. Phelps read Utah Code 76-5-407: "In any prosecution for the following offenses, any touching, even if accomplished through clothing, is sufficient to constitute the relevant element of the offense [of sodomy on a child and sexual abuse of a child.]"

Ms. Johnson stated that "indecent liberties" is not defined in statute. It is a catch-all definition.

Mr. Phelps stated that only one statute includes "over clothing." He stated that the other statutes involving "indecent liberties" do not specify that the touching must be over clothing. Ms. Klucznik recommended that the brackets remain until she could research the issue. Judge Blanch stated that keeping the brackets would not preclude practitioners from creating a correct instruction, even if Ms. Klucznik was correct about "over clothing," because the brackets could easily be removed. Ms. Klucznik stated that the brackets suggest that it only applies in certain cases and she believes it applies to all cases.

Judge Blanch stated that if Ms. Klucznik is correct that over clothing can constitute indecent liberties, then the brackets should be removed. Judge McCullagh stated that this is a question that should be answered.

Ms. Jones moved to approve the instruction with the brackets and if Ms. Klucznik finds a case showing that Indecent Liberties can occur over clothing, then the brackets will be removed. Judge McCullagh seconded the motion and it passed unanimously.

Subsequent to the meeting, Ms. Klucznik emailed the committee with the case of *State v. Peters*, 796 P.2d 708, 711 & n.5 (Utah App. 1990). *Based on this case and on the motion made in the meeting, Ms. Adams-Perlac removed the brackets and added the case to the committee notes.*

(b) Position of Special Trust

Ms. Jones asked if the definition was post-*Watkins*. She stated that a pre-*Watkins* instruction was needed because the earlier definition applies to old cases. Ms. Kluznick agreed that prosecutors would be using the old definitions. Ms. Adams-Perlac stated that the alternative instruction could be placed in the archive. Ms. Jones stated that the alternative instruction should be in a committee note rather than hidden in an archive. Judge Blanch explained that the committee already decided to create an archive for older statutes.

Ms. Klucznik stated that the instruction should include, "this jury instruction relies on the statute in effect in [YEAR]." She stated that some cases would be older because of the statute of limitations of certain crimes, especially sexual crimes involving children where disclosure is made years after the crime. Judge Blanch stated that the archive would be the appropriate place for it. Ms. Klucznik stated that if the goal of the committee is to avoid error, placing the instruction in the archive could invite error. Ms. Johnson stated that practioners must be responsible for their jury instructions. Ms. Jones stated that this situation would not happen often because the statutory language changed in response to a Supreme Court decision. The older cases require something different and more specific than this definition. Judge Blanch stated that this is not unique because statutes change all the time. Ms. Klucznik stated that the committee note should include the *Watkins* citation because it is a substantial change from prior law.

Judge Blanch stated that a committee note would not undermine the principle of moving forward instead of backwards because the committee is simply notifying practioners and not creating an old instruction.

Ms. Adams-Perlac stated that she would create proposed language. Judge McCullagh stated that if the conduct proscribed shrinks with a new statute, the old proscribed conduct will not be criminal and the defendant will get the benefit of the shrinkage.

Ms. Johnson stated that the definition matched the statute because she created the instruction.

Mr. Phelps moved to approve the definition. Ms. Johnson seconded the motion and it passed unanimously.

(c) Religious Counselor

Judge Blanch asked for comment and there was none.

Ms. Jones moved to approve the definition. Judge McCullagh seconded the motion and it passed unanimously.

(d) Retaliation

Ms. Jones suggested adding "threatening use of physical force." Ms. Johnson stated that the statute separates threats of physical force, kidnapping, or extortion. Judge Blanch stated that this definition does not make sense because it could be threats of physical force, threats of kidnapping, or threats of extortion, or the acts of physical force, kidnapping, or extortion. Judge McCullagh stated that retaliation is not defined, but exemplified by these three acts. Ms. Johnson stated that this definition does not make sense because it includes threatening to threaten. Ms. Klucznik stated that the plain meaning of retaliate should be enough. Judge Blanch stated that many things could constitute retaliation under the statute that are not captured in the definition because the statute uses the word, "includes."

Ms. Jones moved to not create a definition. Mr. Nelson seconded the motion and it passed unanimously.

(e) Serious Bodily Injury

Ms. Johnson stated that the definition is the statute word for word. Ms. Jones stated that "creates or causes" should be added. Ms. Klucznik stated "creates" must be in all places or it should be removed from the last part. Judge Blanch suggested moving "substantial risk of death" to the beginning of the instruction. Ms. Klucznik asked if there is a difference between "creates" or "causes." Judge McCullagh stated that the instruction should match the statutory language.

Ms. Jones moved to approve the definition. Mr. Phelps seconded the motion and it passed unanimously.

(f) Committee Note

Ms. Klucznik suggested adding, "if the jury requests a definition for a word not defined by statute or case law…"

Ms. Jones moved to approve the definition. Ms. Klucznik seconded the motion and it passed unanimously.

4. Mens Rea Instruction **Committee**

Ms. Adams-Perlac stated that 303B should be amended to include "reasonably certain." Ms. Johnson agreed.

Ms. Klucznik stated that 304A includes "but he/she consciously disregards the risk" for part two. She stated that this language should be included on both prongs. Ms. Jones agreed. Ms. Klucznik suggested using "and" instead of "but" because it makes more sense. Judge Blanch stated that "but" can be interpreted as having a value judgment or condemnation whereas "and" is nonjudgmental statement of the law. Ms. Jones also suggested using "and" instead of "but" in 304B.

Mr. Nelson stated that "but" may be important because it is included in the statutory language and it avoids using two uses of "and." Judge Blanch stated that if there is doubt of what is better, the statutory language should be used.

Ms. Jones moved to approve the definition for 304A, 304B, and 304C. Mr. Nelson seconded the motion and it passed unanimously.

Mr. Field moved to approve the definition for 303B. Ms. Jones seconded the motion and it passed unanimously.

5. Adjourn **Committee**

The meeting was adjourned at 1:25 p.m. The next meeting is Wednesday, October 7, 2015.