

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

Judicial Council Room
Wednesday, September 4, 2013
12:00 p.m. to 2:00 p.m.

PRESENT

Judge Denise Lindberg - Chair
Professor Jensie Anderson
Sandi Johnson
Linda Jones
Judge Brendan McCullagh
John West

EXCUSED

Diane Abegglen
Mark Field
Karen Klucznik
Scott Young

STAFF

Alison Adams-Perlac

1. Welcome and Approval of Minutes

Judge Denise Lindberg

Judge Lindberg welcomed the committee. As a quorum was not present, the committee tabled approval of the minutes from the last meeting.

When a quorum was later present, Judge McCullagh moved to approve the minutes from the August 7, 2013 meeting. Ms. Johnson seconded the motion and it passed unanimously.

2. Committee Note on Use of Victim's Name and Minor's Initials

Alison Adams-Perlac

Ms. Adams-Perlac discussed the committee note she drafted on use of a victim's name and a minor's initials. She suggested putting the note in an introduction to the instructions. Mr. West stated that there may be other things that belong in an introduction. Judge Lindberg stated that the homicide section has an introduction. Ms. Johnson stated that the introduction should begin with the MUJI template, the committee note proposed by Ms. Adams-Perlac, the special verdict forms, and anything else that applies to all the instructions. Ms. Jones suggested an intro to the sexual assault section. Judge Lindberg stated that the template could be highlighted and explained in an introduction at the beginning of the instructions. Ms. Johnson suggested that the section be called "MUJI Construction" instead of introduction. Ms. Jones suggested that the section be alphabetized. Judge Lindberg stated her concern that people still use the language in the old instructions where the presumption is reversed. She suggested that the introduction contain a note that the instructions are constructed to maintain the presumption of innocence and that is the burden of proof.

Ms. Adams-Perlac and Judge Lindberg will draft an introduction section and bring it back for discussion at the next meeting.

Ms. Johnson stated that she would prefer not to use the word “policy”. Ms. Jones suggested using “recommendation” instead of “policy.” Professor Anderson suggested that the note state at the beginning, “the committee recommends the...”

When a quorum was present, Professor Anderson moved to amend the proposed note to “the committee recommends...” Judge McCullagh seconded the motion and it passed unanimously.

3. Unlawful Sexual Conduct with a Minor

Sandi Johnson

The committee reviewed Ms. Johnson’s proposed instruction on unlawful sexual conduct with a minor. Professor Anderson suggested removing “with a 16 or 17 year old” at the beginning of the proposed instruction, since it is listed as an element. Ms. Johnson stated that the crime is called “unlawful sexual conduct with a 16 or 17 year old. Judge Lindberg said it has been our policy to name the crime as listed in the statute.

Judge McCullagh joined the meeting and the committee returned to agenda items 1 and 2. After resolving items 1 and 2, the committee returned to its discussion of the proposed instruction on unlawful sexual conduct with a minor.

Judge Lindberg recommended changing the language to “seven to nine” from “seven, eight, or nine”. Judge McCullagh moved to approve the language change to “seven to nine.” Ms. Johnson seconded the motion and it passed unanimously.

The committee reviewed the special verdict form. Both the third and the fourth bullet should include “intent to arouse or gratify the sexual desire of any person” and “with the intent to cause substantial emotional or bodily pain.” Judge McCullagh suggested that the “intent to arouse or gratify” language should go first since it is the longer clause.

Professor Anderson moved to approve the special verdict form with changes to bullets 3 and 4. Judge McCullagh seconded the motion and it passed unanimously.

4. In-custody Informant

Committee

The committee discussed the proposed in-custody informant instruction. Judge McCullagh suggested changing the word “informer” to “informant” throughout the instruction. Ms. Johnson suggested stating “in-custody informant” throughout. Judge McCullagh suggested that only “informant” is needed. Ms. Adams-Perlac suggested adding a committee note that this instruction is specific only to the kind of informant in *Charles*. The committee stated that the attorneys should be able to argue whether the instruction should be limited to an informant like the one in *Charles*. The committee decided that the instruction should include a neutral reference to *Charles*.

Professor Anderson stated that the first sentence of the second paragraph is not correct because it needs more than just a lighter sentence, etc. She suggested that it leaves out monetary payment and other incentives. She suggested that the language should be, “The witness who receives an incentive for his testimony should be...” then as outlined in factors 1 and 2. Ms. Jones suggested adding, “for example”. Ms. Johnson suggested taking the first sentence, and making it factor 6, and combining the rest of paragraph 2 with paragraph 1. Professor Anderson suggested adding the first sentence of paragraph 2 to the first factor. Ms. Jones expressed concern that such a change would make that sentence a factor, not an inference, and the “motive to testify falsely” message would be lost. Judge Lindberg stated that the issue is the inconsistency in *Charles*. *Charles* approved an instruction that is broader than the “in-custody informant” situation in *Charles*.

Professor Anderson proposed that the first paragraph be changed as follows: “bear in mind... different from that of an ordinary witness, including the motive to testify falsely”, then adding “or believes he may receive” to the first factor. Mr. West and Ms. Jones expressed concern with changing the instruction too much from the one listed in *Charles*. Ms. Jones said judges may default to the *Charles* footnote. Professor Anderson stated that the instruction makes more sense taken exactly as it is in the *Charles* footnote.

Ms. Jones moved to adopt the Charles instruction verbatim, calling it “in-custody informant”, and changing “informer” to “informant” throughout. Mr. West seconded the motion and it passed unanimously.

5. Object Rape

Committee

The committee discussed the proposed object rape instruction.

Judge McCullagh moved to approve the instruction as written, but reversing the “based on the evidence” clause. Mr. West seconded the motion and it passed unanimously.

6. Object Rape of a Child

Committee

The committee discussed the proposed object rape of a child instruction. Judge Lindberg stated that a consent instruction is needed. Ms. Jones stated that she has a case before the Utah Supreme Court on consent, and the committee decided to wait to draft a consent instruction until that opinion is delivered.

Mr. West moved to approve the instruction as written, but reversing the “based on the evidence” clause. Judge McCullagh seconded the motion and it passed unanimously.

7. Forcible Sodomy

Committee

The committee discussed the proposed forcible sodomy instruction.

Judge McCullagh moved to approve the instruction as written, but reversing the “based on the evidence” clause. Ms. Johnson seconded the motion. The motion passed with five approving it, and Ms. Jones abstaining from the vote.

8. Sodomy on a Child

Committee

The committee discussed the sodomy on a child instruction. The committee suggested moving the “based on the evidence” clause, and striking “regardless of the sex of any participant”. Ms. Jones stated that she thinks sodomy on a child is a strict liability crime, so that the general intent language is not necessary.

The committee requested that Ms. Adams-Perlac research whether sodomy on a child is a strict liability crime, and review the Utah Supreme Court’s *Martinez* case on sexual conduct with a minor.

9. Child Pornography Instructions

Committee

These instructions were tabled for a future meeting.

10. Other Business

11. Adjourn

The meeting was adjourned.