

**UTAH JUDICIAL COUNCIL  
STANDING COMMITTEE ON MODEL UTAH CRIMINAL JURY INSTRUCTIONS  
MEETING MINUTES**

Judicial Council Room (N301), Matheson Courthouse  
450 South State Street, Salt Lake City, Utah 84114  
January 9, 2019 – 12:00 p.m. to 1:30 p.m.

**MEMBERS:**

**PRESENT    EXCUSED**

MEMBERS:	PRESENT	EXCUSED
Judge James Blanch, <i>Chair</i>		•
Jennifer Andrus	•	
Mark Field		•
Sandi Johnson	•	
Judge Linda Jones	•	
Karen Klucznik	•	
Judge Brendan McCullagh		•
Stephen Nelson	•	
Nathan Phelps	•	
Judge Michael Westfall (no conference line)		•
Scott Young	•	
VACANT – Criminal Defense Attorney		
VACANT – Criminal Defense Attorney		
VACANT – Criminal Law Professor		

**GUESTS:**

None

**STAFF:**

Michael Drechsel  
Jiro Johnson (minutes)  
Minhvan Brimhall (recording secretary)

**(1) WELCOME AND APPROVAL OF MINUTES:**

Judge Blanch was unable to attend the meeting due to a jury trial. At Judge Blanch’s request, Mr. Drechsel directed the meeting. Mr. Drechsel welcomed the Committee for January 9, 2019.

The committee considered the minutes from the December 5, 2018 meeting.  
Ms. Johnson moved to approve the draft minutes.  
Judge Jones seconded the motion.  
The motion passed unanimously.

**(2) AGGRAVATED ASSAULT SPECIAL VERDICT FORM:**

In the December meeting, the Committee had begun consideration of a special verdict form for Aggravated Assault. Ms. Johnson discussed her efforts to draft such a form with the Committee. She had prepared some draft options, which were provided to the Committee (and made available online as “Meeting Materials – Supplement”).

Those materials were displayed to the Committee as the Committee discussed the special verdict form issues. Ms. Johnson expressed her growing preference for special verdict forms. If special verdict forms are used, it may require the Committee to re-assess some of the assault instructions that have been approved by committee during the last few meetings. Ms. Johnson advocated for keeping both the instructions previously drafted and include the special verdict form, so that both options are available to practitioners depending on the needs in a particular case.

At 12:13pm Mr. Young joined the Committee

Ms. Johnson said that, as it applies to aggravated assault, it would likely be best to not use a special verdict form (though she provided a proposed form as part of the discussion). She explained that a special verdict form would be appropriate for enhancing an aggravated assault (Third Degree Felony variety) to a Second Degree Felony, but did not see the need for such a form for a Third Degree Felony.

Ms. Klucznik stated that the first instruction regarding aggravated assault should not have a special verdict form for the three different Third-Degree aggravated assault variations. Judge Jones agreed with Ms. Klucznik.

Ms. Klucznik was also worried that prosecutors may be confused that separating assault with special verdict forms can be a problem because prosecutors have to charge aggravated assault and defendants must be bound over on aggravated assault. Before going to trial, a prosecutor cannot charge for a misdemeanor assault and then instruct the jury as to aggravated assault in a special verdict form. The Committee discussed whether prosecutors would reference the MUJI instructions when making charging decisions. Mr. Nelson stated that that wasn't likely to be a concern. More interesting to Mr. Nelson was whether a jury would make incorrect inferences in deliberations from receiving an instruction on an underlying crime (i.e., assault) with a special verdict form that raises the level of offense (i.e., to aggravated assault). Mr. Phelps suggested that might lead to more compromise verdicts.

Ms. Klucznik then raised concern that jurors may not make it to instructions at the back of the packet and may not get to a special verdict form, resulting in a conviction in a lesser crime because the jury did not read the special verdict form. Mr. Phelps noted that the only way to be sure is to extensively poll the jury. The committee discussed whether there was a way to structure the special verdict form to ensure that the jury has considered the application of the special verdict form. Judge Jones felt that perhaps the special verdict form could say "check any that apply" as opposed to "check all that apply" to avoid the perception that the jurors have to check a box on the special verdict form. Ms. Johnson felt that a general instruction to the jury about how to use the verdict forms that tells the jury that if they feel the special verdict form does not apply could resolve Judge Jones' concerns.

Ms. Klucznik also raised another concern, that use of special verdict forms pose a greater risk to defendants. By requiring the state to have all elements in a single elements instruction, then the burden of proof is higher because the entire charge hangs in the balance. Special verdict forms eliminate the all or nothing status of an instruction that includes all of the elements. Ms. Klucznik was concerned that this eliminates the defendant's choice to ask for a lesser included because the special verdict form would automatically imply the lesser included. Judge Jones expressed a preference for having elements put inside the elements instruction and not in the special verdict form. Judge Jones highlighted State v. Lowe, 2008 UT 58, which she felt had language that indicated the defendant has a right to chart their own defense. On the other hand, Ms. Klucznik noted that under other case law if a lesser included offense is wholly subsumed by the greater offense, the prosecution will get a lesser included instruction no matter what. Ms. Klucznik wondered if there is a constitutional issue by not providing the defendant a choice, especially where a lesser included might be at issue.

The Committee continued to discuss the proper approach: 1) all elements in a single instruction VS 2) use of special verdict forms. The approach endorsed by the Committee will affect a large number of instruction across a wide range of various offenses (including Aggravated Sexual Abuse of a Child, and upcoming areas like robbery and burglary). Ultimately more members of the Committee did not believe that the use of special verdict forms created constitutional issues.

Ms. Johnson suggested that the committee could have multiple forms, one that is a single complete elements instruction without any special verdict form, and one with the underlying offense accompanied by a special verdict instructions to, for instance, modify aggravated assault to a Second Degree felony. Ms. Andrus believes that the special verdict form option will be more clear for the jury because it breaks the decision-making process down to simpler steps for consideration. Mr. Nelson wondered whether having two separate instructions will cause more or less confusion and more or less disagreement between the parties, which requires more work for judges.

The Committee turned to consideration of the actual language in Ms. Johnson's drafted special verdict forms (first two pages of "Meeting Materials – Supplement"). The Committee agreed that there should NOT be a special verdict form taking an assault charge (MB) to aggravated assault (F3). That language was stricken from the draft. As it related to the special verdict form for Class A Misdemeanor assault for a pregnant person, Ms. Klucznik and Ms. Andrus recommended a change to make the instruction more readable so that the special verdict form language would read "(VICTIM'S NAME) was pregnant at the time of the assault and (DEFENDANT'S NAME) knew of the pregnancy" as opposed to the original language "(VICTIM'S NAME) was pregnant at the time of the assault and (DEFENDANT'S NAME) had knowledge of the pregnancy."

Mr. Young left at 12:51pm.

The Committee noted that there was a standalone instruction for Assault Against a Pregnant Person, Assault Causing Substantial Bodily Injury, and Assault with a special verdict form for the pregnant / substantial injury component. But there wasn't a combined pregnant / substantial injury instruction that didn't require a special verdict form. Ms. Johnson emailed a draft of a combined instruction to committee staff, as follows:

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Assault Class A Causing Substantial Bodily Injury and/or Victim Pregnant [DV]

- 1) (DEFENDANT'S NAME);
  - a) Intentionally, knowingly, or recklessly;
    - i) Attempted, with unlawful force or violence, to do bodily injury to (VICTIM'S NAME); or
    - ii) Committed an act with unlawful force or violence that
      - (a) caused bodily injury to (VICTIM'S NAME); or
      - (b) created a substantial risk of bodily injury to (VICTIM'S NAME); and
  - b) (VICTIM'S NAME) was pregnant; and
  - c) (DEFENDANT'S NAME) had knowledge of the pregnancy;
- OR
- a) Intentionally, knowingly, recklessly;
  - i) Committed an act with unlawful force or violence; and
  - ii) The act caused substantial bodily injury to (VICTIM'S NAME)
- 2) [That the defense of \_\_\_\_\_ does not apply.]
- 3) [(DEFENDANT'S NAME) and (VICTIM'S NAME) were cohabitants]

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Mr. Drechsel asked whether the standard assault instructions should be titled "Simple Assault" or just "Assault." Judge Jones felt that "simple" should be removed because that is not statutory. The Committee agreed. Mr. Drechsel removed "Simple" from the title of that instruction.

The Committee continued discussing the ramifications of using special verdict forms, where, if used too often, the forms could result a greater degree of confusion because everything is so fragmented onto different forms. Ms. Johnson stated that she has had good experience with jurors and special verdict forms, even in complicated matters. Mr. Nelson stated the same.

The Committee felt it may be prudent to finalize the language and review and approve at a future meeting (especially where Judge Blanch had not been able to attend today due to his jury trial matters he was handling).

Ms. Johnson explained how to organize the forms online by degree of offense so that practitioners had the maximum amount of flexibility for the forms between the various versions of assault and their different degrees of offense, as follows:

**Class B Misdemeanor**

Assault

**Class A Misdemeanor**

Assault of Pregnant Person / Substantial Bodily Injury (combined instruction)

Assault of Pregnant Person (stand-alone)

Assault Causing Substantial Bodily Injury (stand-alone)

Assault (MB) + SVF for Pregnant Person / Substantial Bodily Injury

**Third Degree Felony**

Aggravated Assault

**Second Degree Felony**

Aggravated Assault (combined instruction with all possible elements included)

Aggravated Assault (F3) + SVF for “serious bodily injury” OR “loss of consciousness”

**Etc.** [with the following added by staff after the meeting to complete the thinking behind this method of organization]:

**First Degree Felony**

Aggravated Assault - Officer (combined instruction with all possible elements)

Aggravated Assault (F3) + SVF for “targeting officer” AND “serious bodily injury”

These might then include a committee note that states “Depending on the facts of your case, you may choose to employ [the stand-alone version by #] or the [SVF version by #].”

The Committee instructed staff to prepare and organize the instructions in this way for the next meeting.

The Committee returned the conversation to the language in the special verdict forms (“Meeting Materials – Supplement”). The Committee first considered what the appropriate method would be to ensure the jury has considered the special verdict form. The various options were: **1**) leave blank and sign (i.e., “if you have found that none of the above apply, leave the form blank, sign the bottom, and return to the judge); **2**) checkbox options for “has proven” / “has not proven”; **3**) a “none of the above” checkbox after a list of any potentially applicable factors (see example in “Meeting Materials – Supplement”); **4**) multiple checkboxes for each option that are in columns for “has proven” and “has not proven” without a “none of the above” checkbox at the end. Ms. Johnson noted that the judge can be the gatekeeper to review the forms to ensure that they are returned appropriately. As part of the discussion, Ms. Johnson, Judge Jones, and Ms. Klucznik noted that the use of special verdict forms will always require a jury to define specifically what theory of the case they are unanimous about (which is potentially harder for the state, but would never be an issue under the arguments raised in State v. Hummel, 2017 UT 19). The Committee discussed an intro instruction to the special verdict form(s) (i.e., “You have been provided the following special verdict form, which you must carefully consider. Any of the forms that you find to be not relevant to your decision in the case should be left blank, signed by the foreperson, and returned to the judge at the conclusion of your deliberations.” The Committee did not agree to that specific language; it was merely a quick example of what such an intro instruction might say.) The Committee decided that looking at a few of the various options would be helpful.

Ms. Andrus asked to alter the special verdict form for Aggravated Assault as a Second Degree Felony to change “the act that **impeded** the breathing or the circulation of blood produced a loss of consciousness” to “as it relates to element 3B, the act **interfering with** the breathing or the circulation of blood produced a loss of consciousness.”

The Committee discussed other options for that word that would be more common. The Committee agreed to the **“interfering with”** language change.

Mr. Drechsel asked if there was a need for a vote on anything that the Committee had accomplished today. Ms. Johnson stated that every meeting on the assault instructions had resulted in adopting model instructions that were subsequently changed at the next meeting. The Committee agreed that any further approval of assault materials should happen after the Committee completes all of its assault-instruction-related work, so the materials can be approved as a complete group.

Mr. Nelson left at 1:23pm and the Committee no longer had a quorum.

Ms. Klucznik noted that the “peace officer” and “service member in uniform” instructions probably need to be separated. She will make further review and return with any proposed modifications at the next meeting.

**(3) IMPERFECT SELF-DEFENSE INSTRUCTION:**

This item was not considered by the Committee at this meeting. It will be moved to the next meeting agenda. Ms. Klucznik stated that she would provide additional materials to Committee staff to be included in the next agenda materials packet.

**(4) BURGLARY AND ROBBERY INSTRUCTIONS:**

This item was not considered by the Committee at this meeting. It will be moved to a future meeting agenda.

**(5) ADJOURN**

The meeting adjourned at approximately 1:35 p.m. The next meeting will be held on February 6, 2019, starting at 12:00 noon.