

**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
June 5, 2019 – 12:00 p.m. to 1:30 p.m.

MEMBERS:

PRESENT EXCUSED

Judge James Blanch, <i>Chair</i>	•	
Jennifer Andrus		•
Melinda Bowen		•
Mark Field	•	
Jessica Jacobs	•	
Sandi Johnson	•	
Judge Linda Jones, <i>Emeritus</i>	•	
Karen Klucznik	•	
Elise Lockwood	•	
Judge Brendan McCullagh		•
Stephen Nelson		•
Nathan Phelps	•	
Judge Michael Westfall		•
Scott Young		•

GUESTS:

Darian (Intern to Judge Blanch)

STAFF:

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

(1) WELCOME AND APPROVAL OF MINUTES:

Judge Blanch welcomed the committee to the meeting.
The committee considered the minutes from the May 1, 2019 meeting.
Mr. Phelps moved to approve the draft minutes.
Ms. Lockwood seconded the motion.
The motion passed.

(2) CR411 REVIEW IN LIGHT OF STATE V. LANE, 2019 UT APP 86:

Ms. Johnson introduced this matter to the committee. She noted that Judge Harris's statements in the opinion caused her to question whether CR411 needed to be modified. Ms. Klucznik thought that the main opinion and the concurrence each created a need to modify CR411. The committee discussed CR411 and the *State v. Lane* opinion. Judge Blanch pointed out that CR411 contains a bracketed portion that requires the instruction to be modified. Judge Blanch asked whether the instruction itself needs modification or whether the committee notes should be amended to more pointedly direct practitioners to make appropriate modifications to the bracketed language. In his view, if the bracketed material is sufficiently detailed and describes a lawful non-propensity purpose, then CR411 appears to be an accurate statement of the law. The committee discussed ¶128 and ¶144 of the opinion and the . Ms. Klucznik raised the *State v. Bell*, 770 P.2d 100, 111 (Utah 1988) case for consideration. The committee discussed various approaches to addressing the issue, including proposed edits to the existing

language in CR411. Because the details of each case will be fact dependent, the committee is not in a position to draft an instruction that doesn't include a bracketed portion that requires customization. Customization by the parties will always be necessary. The committee discussed whether modifications to CR411 needed additional time for more detailed consideration or whether edits could be agreed upon today.

Ultimately, after significant discussion, the committee agreed upon the following language:

CR411 404(B) INSTRUCTION.

You (are about to hear) (have heard) evidence that the defendant [insert 404(b) evidence] (before) (after) the act(s) charged in this case. This evidence (is) (was) not admitted to prove a character trait of the defendant or to show that (he) (she) acted in a manner consistent with such a trait. You may consider this evidence, if at all, for the limited purpose of [tailor to specify proper non-character purpose such as motive, intent, doctrine of chances, etc. and to which element(s) it applies]. ~~This evidence (is) (was) not admitted to prove a character trait of the defendant or to show that (he) (she) acted in a manner consistent with such a trait.~~ Keep in mind that the defendant is on trial for the crime(s) charged in this case, and for (that) (those) crime(s) only. You may not convict ~~a person~~ the defendant simply because you believe (he) (she) may have committed some other act(s) at another time.

REFERENCES

Utah R. Evid. 105.
Utah R. Evid. 404(b).
Huddleston v. United States, 485 U.S. 681, 691-92 (1988).
State v. Forsyth, 641 P.2d 1172, 1175-76 (Utah 1982).
29 Am. Jur.2d Evidence § 461.
State v. Lane, 2019 UT App 86
State v. Bell, 770 P.2d 100 (1988)

COMMITTEE NOTES

When used, this instruction must be modified in accordance with *State v. Lane* and *State v. Bell*. Further, ~~This~~ this instruction, if given, should be given at the time the 404(b) evidence is presented to the jury and, upon request, again in the closing instructions. Under Rule 105, the court must give a limiting instruction upon request of the defendant.

The committee recognizes, however, that there may be times when a defendant, for strategic purposes, does not want a 404(b) instruction to be given. In those instances, a record should be made outside the presence of the jury that the defendant affirmatively waives the giving of a limiting instruction.

404(b) allows evidence when relevant to prove any material fact, except criminal disposition as the basis for an inference that the defendant committed the crime charged. *State v. Forsyth*, 641 P.2d 1172 (Utah 1982). In the rare instance where, after the jury has been instructed, a party identifies another proper non-character purpose, the court may give additional instruction.

If the 404(b) evidence was a prior conviction admitted also to impeach under Rule 609, see instruction CR409.

If the instruction relates to a witness other than a defendant, it should be modified.

After agreeing upon this language, the committee also agreed that they would wait to adopt the language at the next committee meeting.

(3) SUMMER MEETING SCHEDULE:

The committee discussed what meetings would be held during July and August. It was agreed that a July meeting will not be held. Judge Blanch asked that the committee plan on meeting in August. He instructed staff to reach out to the committee members in advance of that meeting to ensure we will have a quorum.

(4) ASSAULT INSTRUCTIONS:

Judge Blanch asked that Ms. Johnson describe to the committee the various configurations for the assault instructions. Ms. Johnson noted that there is agreement that cohabitant should be determined by a separate special verdict form. The MA for assault of pregnant person will likely not typically need a special verdict form, as that is not usually the issue in the case; the issue is typically "was there an assault" not "did the defendant know of the pregnancy." In terms of the F2 and F3 versions of assault involving serious bodily injury (or the MA for substantial bodily injury), it seemed to Ms. Johnson that a special verdict form is useful because a different mental state is required compared to MB assault. In her view, any time there is an increase in the level of offense, a special verdict form would be appropriate. The committee still needs to determine how the various permutations of the instructions should be organized. Judge Blanch noted that the instructions themselves are not particularly challenging on their own. It is trying to ascertain the best permutation for a specific case that is the difficult question. A one-size-fits-all approach is complicated. One concern with special verdict forms is how they relate to the use of lesser included offense instructions. If the instruction includes all elements without a special verdict form, a lesser included instruction becomes a more important consideration. If the underlying instruction is already drafted for the lower offense, with a special verdict form to get to the higher level offense, there is often no need for lesser included offenses. If standalone instructions are used, there would need to be the following:

- Assault, MB
- Assault – pregnant, MA
- Assault – substantial bodily injury, MA
- Aggravated assault – [force likely to cause serious bodily injury or death / use of weapon], F3
- Aggravated assault – serious bodily injury, F2
- Aggravated assault – strangulation, F2

Any other combinations or permutations would need to be customized by the parties. The committee asked that Ms. Johnson assemble the instructions (including those that have not yet been approved by the committee) into a useful packet prior to the next meeting so that the committee can make final consideration and approval. Mr. Drechsel will provide the materials to Ms. Johnson for organization and assembly.

(5) NEXT PROJECT

The committee agreed to move next to the Traffic / DUI instructions, with Judge McCullagh taking the lead. Mr. Drechsel will coordinate with Judge McCullagh.

(5) ADJOURN

The meeting adjourned at approximately 1:35 p.m. The next meeting will be held on [month] [day], 20__, starting at 12:00 noon.