

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

Via Hybrid Meeting – Matheson Courthouse and Webex
December 6th, 2023 – 12:00 p.m. to 1:30 p.m.

12:00	Welcome and Approval of Minutes		Tab 1	Judge Welch
	Discussion: General Adverse Inference Instruction		Tab 2	Judge Welch/Janet Lawrence
	Discussion: Review of Public Comments on Published Rules		Tab 3	Bryson King
1:30	Adjourn			

COMMITTEE WEB PAGE: <https://www.utcourts.gov/utc/muji-criminal/>

UPCOMING MEETING SCHEDULE:

Meetings are held via Webex on the first Wednesday of each month from 12:00 noon to 1:30 p.m. (unless otherwise specifically noted):

January 3rd, 2024
February 7th, 2024
March 6th, 2024
April 3rd, 2024
May 1st, 2024
June 5th, 2024
July 3rd, 2024
August 7th, 2024
September 4th, 2024
October 2nd, 2024
November 6th, 2024
December 4th, 2024

TAB 1

Meeting Minutes – November 1st, 2023

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

Via Webex
November 1st, 2023 – 12:00p.m. to 1:30p.m.

DRAFT

COMMITTEE MEMBER:	ROLE:	PRESENT	EXCUSED	GUESTS:
Hon. Teresa Welch	District Court Judge [Chair]	•		N/A
Hon. Brendan McCullagh	Justice Court Judge	•		
[Vacant]	Prosecutor	-	-	
Jennifer Andrus	Linguist/Communications Professor		•	STAFF: Bryson King
Hon. Linda Jones	Emeritus District Court Judge	•		
Sharla Dunroe	Defense Attorney		•	
Janet Lawrence	Defense Attorney	•		
Jeffrey Mann	Prosecutor	•		
Richard Pehrson	Prosecutor	•		
Dustin Parmley	Defense Attorney	•		
Freyja Johnson	Defense Attorney	•		
[Vacant]	Prosecutor	-	-	
Hon. Matthew Bates	District Court Judge		•	

(1) WELCOME AND APPROVAL OF MINUTES:

Judge Welch welcomed the committee to the meeting and reviews the last meeting’s minutes. Bryson King offers a correction to the minutes regarding the committee’s decision to offer a body-camera instruction and general adverse inference instruction. The minutes are corrected. Judge McCullagh moves to approve the minutes and Janet Lawrence seconds the motion. Without opposition, the minutes are approved. Judge Welch invites Bryson King to review the applicants for the two prosecutor vacancies on the Committee. Bryson King reviews the applicants with the Committee. Committee members will provide feedback regarding the applicants via email.

(2) AGENDA ITEM 2: ADVERSE INFERENCE INSTRUCTION ON BODY-WORN CAMERAS

Judge Welch then turns the Committee’s attention to CR416, adverse instruction on body-worn cameras. Dustin Parmely reviews the draft proposal with the Committee. Judge McCullagh addresses the intentional or reckless language in the instruction and proposes removing that language. The Committee agrees to remove the intentional or reckless language from the beginning of the instruction. Freya Johnson proposes broadening the language at the end of the instruction to align with case law that broadens the inference against an officer, which could go directly to the officer’s credibility as a whole. The committee agrees to modify the language in the end of the instruction to broaden the inference available against the officer, and based on Janet Lawrence’s suggestion, include a provision for the jury to determine the credibility of the officer and weight of the inference.

Richard Pehrson then suggests including a provision in the Committee Notes of the instruction that practitioners should present the issue of an adverse inference prior to trial. Judge Jones suggests the Criminal Procedure Committee modify its rules to require that a motion for an adverse inference be brought before trial. Judge Jones and Jeff Mann propose some language modifications to clean up the instruction. With those modifications, Judge Welch then requests a motion to approve the instruction. Dustin Parmley moves to approve with Judge McCullagh seconding that motion. Without opposition, the motion passes and the instruction will be published.

(3) AGENDA ITEM 3: GENERAL ADVERSE INSTRUCTION

This item will be continued to the next meeting.

(4) AGENDA ITEM 4: DISCUSSION OF PUBLISHING INSTRUCTIONS FOR PUBLIC COMMENT

Judge Welch invites the Committee to discuss procedures for publishing instructions for public comment. Bryson King reviews the current procedure for the Committee and reviews the MUJI Civil Committee's procedures, which are that once an instruction is published, they issue a notice via email to the Bar's listserv inviting public comment for a 30-day period. Judge Welch proposes that the Committee invite public comment immediately after instructions are approved. Judge McCullagh asks whether this process for public comment mirrors the Supreme Court Advisory Committees processes for public comment. Bryson King reviews the differences between the MUJI Committees' public comment process and the Supreme Court Committees' process. Judge Welch suggests when we publish instructions on the website, we include a note that the instruction is out for public comment, until the comment period ends and then it be removed. The Committee then discusses the timeline for public comment and deadline for the comment period on published instructions. Judge Welch then suggests that the Committee post for public comment all instructions approved by the Committee in 2023.

(5) ADJOURN

The meeting adjourned at approximately 1:17p.m. The next meeting will be held December 6th, 2023 at 12:00p.m. in person at the Matheson Courthouse in Salt Lake City and via Webex for remote participants. remote participants.

TAB 2

General Adverse Inference Instructions

Draft Instruction Adverse Inference for Missing Evidence:

If you determine that the state has concealed, lost, destroyed, altered, or failed to preserve evidence in this case, you may assume that the evidence would have harmed the state's case or been favorable to the defendant.

Sources:

- *Compare* CV131 Spoliation
 - “I have determined that [name of party] intentionally concealed, destroyed, altered, or failed to preserve [describe evidence]. You [may/must] assume that the evidence would have been unfavorable to [name of party].”
 - *Thanks to Judge Jones for pointing me toward the civil spoliation instruction. I agree with her that it would be good to stay in concert with the civil instruction to the degree we can.*
- UTAH R. CRIM. P. 16(e)
- *State v. DeJesus*, 2017 UT 22
 - Gives guidance for court determination
 - Dismissal was the appropriate remedy
 - Does not discuss situation in which jury instruction is appropriate remedy
- *State v. Tiedemann*, 2007 UT 49
- *State v. Alvarado*, 2023 UT App 123
 - Bodycam
- *See Diversified Concepts LLC v. Koford*, 2021 UT App 71

Notes:

- So far, the caselaw has only addressed the “adverse inference” issue in cases where dismissal is the appropriate remedy. But that is not the only possible remedy/sanction. An adverse inference jury instruction could be a remedy/sanction.
 - This could apply to bodycam even when bodycam is **not** “intentional or reckless” as required for §77-7a-104.1.
- *State v. DeJesus*, 2017 UT 22
 - Durrant, J., Durham, J., and Himonas, J.
 - Lee, J. and Pearce, J. concurring (constitution or rules)
 - Applying *State v. Tiedemann*, 2007 UT 49.
 - ¶¶19,27 Def must establish as a threshold matter: *reasonable probability* that the lost or destroyed evidence *would have been*

exculpatory

- ¶39 reasonable probability=a probability sufficient to undermine confidence in the outcome
 - More than mere possibility, but substantially short of the more-probable-than-not standard
 - ¶44 Low threshold
- ¶¶39,40 Proffer is sufficient
 - In many cases little extrinsic, corroborating evidence
 - ¶40 Def will likely never be able to fully establish what evidence would have shown
 - ¶39 If proffer is not pure speculation or wholly incredible, the standard is satisfied
- ¶24 Gov't does **not** need to have lost evidence in bad faith under URCrP 16
 - One consideration, not a bright-line test
- ¶¶19,27,45 If threshold established, then court considers *Tiedemann* factors under principles of fundamental fairness to fashion a remedy/sanction.
 - the culpability of the state
 - ¶45 “the reason for the destruction or loss of the evidence, including the degree of negligence or culpability on the part of the state”
 - prejudice to the defendant
 - ¶45 “the degree of prejudice to the defendant in light of the materiality and importance of the missing evidence in the context of the case as a whole, including the strength of the remaining evidence.”

TAB 3

Review of Public Comments from Published Instructions