# Agenda
## Advisory Committee on Model Civil Jury Instructions

September 19, 2016
4:00 to 6:00 p.m.

Administrative Office of the Courts
Scott M. Matheson Courthouse
450 South State Street
Judicial Council Room, Suite N31

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| Welcome, announcements, and approval of minutes | 4:00 | Tab 1 | Juli Blanch – Chair |
| Subcommittees and subject area timelines | 4:03 | Tab 2 | Juli Blanch |
| Comments on Defamation/Slander/Libel Instructions | 4:05 | Tab 3 | David Reymann |
| Civil Rights | 4:15 | Tab 4 | Heather White |
| Emotional Distress | 5:15 | Tab 5 | Mark Dunn |
| Other business | 5:55 | | Juli Blanch |

**Committee Web Page**

**Published Instructions**

**Meeting Schedule:** Matheson Courthouse, Judicial Council Room, 4:00 to 6:00 p.m. unless otherwise stated.

October 11, 2016
November 14, 2016
December 12, 2016
January 9, 2017
February 13, 2017
March 13, 2017
April 10, 2017
May 8, 2017
June 12, 2017
September 11, 2017
October 9, 2017
November 13, 2017
December 11, 2017

# Tab 1

# ***MINUTES***

Advisory Committee on Model Civil Jury Instructions

June 13, 2016

4:00 p.m.

Present: Juli Blanch (chair), Gary L. Johnson, Marianna Di Paolo, Honorable Andrew H. Stone, Peter W. Summerill, Nancy Sylvester, Joel Ferre, Honorable Ryan M. Harris, and Peter W. Summerill. Also present: Mark Dunn from the Emotional Distress subcommittee.

Excused: Paul M. Simmons, Tracy Fowler, and Patricia C. Kuendig.

1. *Minutes.* On motion of Gary Johnson, seconded by Judge Stone, the committee approved the minutes of the May 9, 2016 meeting.

2. *Subcommittees and subject area timelines.* Ms. Blanch went over the committee's timeline, noting that the Civil Rights instructions would start up in September. The instructions are quite large, around 40, so they will take some time.

3. *Punitive Damages comment.* Peter Summerill went over the comment received from a group of attorneys at Kirton McConkie regarding presumptive ratios. Mr. Summerill said he circulated the comment to the Punitive Damages subcommittee several times. The feedback he got back was that the commenters' proposal was outside the scope of the committee's charge and there's not enough case law to support what they are requesting. The subcommittee determined the instructions should not be altered. The committee discussed the decision and determined someone would get this issue up on appeal at some point and the case law will eventually be instructive.

4. *Defamation/Slander/Libel Instructions (punitive damages).* CV1601 needed to be reapproved for an edit to lines 59-62. Judge Stone moved to approve the change and Mr. Johnson seconded. The committee approved the change unanimously. The committee then looked at an edit to CV 1617, which discussed that the term "actual malice" was not used, but was captured in subsection one. Mr. Johnson moved to approve the change and Judge Stone seconded. The committee approved the change unanimously.

5. *Emotional Distress Instructions.* Mr. Dunn represented the Emotional Distress subcommittee, which consisted of Mr. Dunn, George Waddoups, Michael A. Katz, and Steven A. Combe.

    a. CV 1505 (MUJI 1 22.7): Negligent Affliction of Emotional Distress. Mr. Dunn said the *Hanson* and *Harnicher* cases discussed that the plaintiff must be in the zone of danger. He also mentioned a federal case, *Figueroa*,

which discussed negligence, an objective standard. Mr. Johnson and Ms. Blanch expressed concerns about using "unintentional" versus "negligence." Mr. Dunn said "unintentional" comes from the Restatement of Torts, but there is a caveat that discusses "negligence." Mr. Johnson pointed out that unintentionally causing someone emotional distress isn't actionable unless you owe a duty to that person. The committee then discussed when a duty would be owed. Judge Harris pointed out that there are three requirements for the plaintiff, and two requirements for the defendant and the instruction should be simpler. The committee determined that the instruction could be better written as follows:

In order to recover for negligent infliction of emotional distress, [name of plaintiff] must either:

1) suffer a physical injury, or

2) be in the zone of danger.

If [name of plaintiff] qualifies for one of the above, [name of plaintiff] must prove all of the following:

1) [name of defendant] was negligent;

2) [name of defendant]'s negligence placed [name of plaintiff] in danger of physical impact or injury; and

3) [[name of plaintiff] suffered severe and unmanageable mental distress in a reasonable person normally constituted.

b. CV 1506 and CV 1507. Following some discussion by the committee, Ms. Blanch requested that the subcommittee take on a summer research project: is the zone of danger a judge or a jury question? The subcommittee should draft a zone of danger instruction with a committee note that says something like, "No Utah court has stated whether the zone of danger is a jury question or legal question. If the judge determines it's a jury question, this instruction should be used." The subcommittee will also address the elements of *Harnicher* regarding witnesses and close family members (bystanders and direct victims) and make 1505-1507 into two instructions rather than three.

6. *Next meeting*. The next committee meeting will be on Monday, September 19, 2016 at 4 p.m.

The meeting concluded at 5:06 p.m.

# Tab 2

| Priority | Subject | Sub-C in place? | Sub-C Members | Projected Starting Month | Projected Finalizing Month | Comments Back? |
|---|---|---|---|---|---|---|
| 1 | Defamation | Yes | Dryer, Randy (Chair); Hoole, Greg; Hoole, Roger; Hunt, Jeff; Reymann, David; Stevens, Greg | September-15 | June-16 | Yes. Committee will address them on 9/19/16. |
| 2 | Emotional Distress | Yes | Dunn, Mark (D)(Chair); Combe, Steve (D); Katz, Mike (P); Waddoups, George (P) | May-16 | September-16 | |
| 3 | Civil Rights | Yes | Ferguson, Dennis (D); Mejia, John (P); Guymon, Paxton (P); Stavors, Andrew (P); Burnett, Jodi (D); Plane, Margaret (D); Porter, Karra (P); White, Heather (D) | September-16 | January-17 | |
| 4 | Economic Interference | Yes | Frazier, Ryan (D) (Chair); Shelton, Ricky (D); Stevenson, David (P); Simmons, Paul (P); Kuendig, Patricia (P) | January-17 | March-17 | |
| 5 | Injurious Falsehood | Yes | Dryer, Randy (Chair); Hoole, Greg; Hoole, Roger; Hunt, Jeff; Reymann, David; Stevens, Greg | March-17 | May-17 | |
| 6 | Directors and Officers Liability | Yes | Burbidge, Richard D.; Call, Monica;Von Maack, Christopher (chair); Larsen, Kristine; Talbot, Cory | June-17 | September-17 | |
| 7 | Sales Contracts and Secured Transactions | Yes | Cox, Matt (chair); Boley, Matthew; Maudsley, Ade | October-17 | December-17 | |
| 8 | Assault/False Arrest | Yes | Rice, Mitch (chair); Carter, Alyson; Wright, Andrew (D); Cutt, David (P) | January-18 | March-18 | |
| 9 | Trespass and Nuisance | Yes (more members needed) | Hancock, Cameron; Figueira, Joshua (researcher); Abbott, Nelson (P) | May-18 | September-18 | |
| 10 | Insurance | No (more members needed) | Johnson, Gary (chair); Pritchett, Bruce | October-18 | December-18 | |
| 11 | Wills/Probate | No | Barneck, Matthew (chair) | January-19 | March-19 | |
| 12 | Unjust Enrichment | No (instructions from David Reymann) | David Reymann | April-19 | June-19 | |
| 13 | Abuse of Process | No (instructions from David Reymann) | David Reymann | September-19 | November-19 | |

# Tab 3

# Administrative Office of the Courts

**Chief Justice Matthew B. Durrant**
Utah Supreme Court
Chair, Utah Judicial Council

**Daniel J. Becker**
State Court Administrator
**Raymond H. Wahl**
Deputy Court Administrator

## MEMORANDUM

**To:** Civil Jury Instructions Committee
**From:** Nancy Sylvester
**Date:** September 15, 2016
**Re:** Comment on Defamation Instructions

Below is a comment I received from Lee Warthen about the Defamation Instructions circulated for comment:

"What about truth as a defense? As I read through the instructions I was surprised not to see it. It seemed like there was hole there."

David Reymann will address this comment with the committee.



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# Model Utah Civil Jury Instructions, Second Edition

# Defamation

## Defamation

### CV1601 Defamation—Introductory Notes to Practitioners (not to be read to the jury).

The law of defamation is unique. Although defamation is a common law tort, it is bounded by protections for free speech embodied in the First Amendment to the United States Constitution and Article I, sections 1 and 15 of the Utah Constitution. These instructions are based on the law of defamation as interpreted by the Utah courts and, in certain areas, by governing precedent of the United States Supreme Court.

In some areas of the law, open questions remain. One of those areas is the standard of fault in cases involving a private plaintiff and speech that does not relate to a matter of public concern. The United States Supreme Court has held that the First Amendment requires the standard of fault to be actual malice for claims involving public officials, *see New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), and public figures, *see Curtis Publ'g Co. v. Butts*, 389 U.S. 889 (1967). It has also held that the standard of fault in cases involving speech relating to a matter of public concern must be at least negligence. *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). But a majority of the Court has never resolved whether the same constitutional limitations require a standard of fault above strict liability for private plaintiff, non-public concern cases. *Cf. Dun & Bradstreet v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985) (Powell, J.) (in plurality opinion, declining to extend actual malice rule). The Utah Supreme Court has likewise not resolved this issue. *See Ferguson v. Williams & Hunt, Inc.*, 2009 UT 49, ¶ 26, 221 P.3d 205. As a result, the committee has not included an instruction on the standard of fault for knowledge of falsity in such cases, leaving to the parties the task of arguing for a resolution of that question. *See* CV1604A-E for a discussion of the different types of plaintiffs in defamation cases.

This is not to suggest there is no constitutional protection in private figure, non-public concern cases. The Utah Supreme Court has, in other contexts, stated that defamation claims always implicate the First Amendment. *See Jensen v. Sawyers*, 2005 UT 81, ¶ 50, 130 P.3d 325 ("Defamation claims always reside in the shadow of the First Amendment."); *O'Connor v. Burningham*, 2007 UT 58, ¶ 27, 165 P.3d 1214 ("Defamation requires a departure from the standard treatment, however, primarily because it never arrives at court without its companion and antagonist, the First Amendment, in tow."). And though it declined to extend the actual malice fault standard to private figure, non-public concern cases, the plurality in *Greenmoss Builders* likewise recognized that such "speech is not totally unprotected by the First Amendment." 472 U.S. at 760. The Utah Supreme Court has also recognized that "[t]he First Amendment creates a broad, uniform 'floor' or minimum level of protection that state law must respect," *West v. Thomson Newspapers*, 872 P.2d 999, 1007 (Utah 1994), but that Article I, section 15 of the Utah Constitution "is somewhat broader than the federal clause." *Provo City Corp. v. Willden*, 768 P.2d 455, 456 n.2 (Utah 1989); *cf. West*, 872 P.2d at 1004 n.4 ("The scope of the state constitutional protection for expression may be broader or narrower than the federal, depending on the state constitution's language, history, and interpretation. In any event, state tort law may not impair state constitutional guarantees and is properly confined to constitutionally permissible limits."). It is thus possible that the standard of fault question in

private figure, non-public concern cases would implicate the Utah Constitution even if strict liability is not precluded by the First Amendment.

Similarly, the United States Supreme Court has held that punitive and presumed damages may not be awarded in cases involving speech relating to matters of public concern absent a showing of actual malice. *Gertz*, 418 U.S. at 350. But other than addressing the issue in the plurality decision in *Greenmoss Builders* and declining to extend the rule, the Court has not resolved whether the same constitutional limitation applies in private figure, non-public concern cases. The committee has nonetheless included an instruction for punitive damages in that context stating the statutory requirements for punitive damages under Utah law, but notes that an argument could be made for applying the heightened actual malice standard for punitive damages in all defamation cases.

Finally, these instructions use the term "defamation" throughout, which refers to the claim regardless of the medium of expression. Historically, defamation claims were separated into "slander," which referred to oral communications, and "libel," which referred to written publications. That distinction has become increasingly anachronistic given certain forms of electronic communication (*e.g.*, SMS (text messages), IM (instant messaging), MMS (multi-media messaging services), and online video) that could arguably fall into either category, and it also fails to account for other non-verbal forms of communication that can, in some circumstances, form the basis of a defamation claim. In addition, the distinction between libel and slander is conceivably relevant only to one narrow legal issue—the test for whether a statement is defamatory *per se* for purposes of presumed damages. Because, as explained in the Committee Notes for CV1614 (Presumed Damages), it appears the Utah Supreme Court has merged the historical tests for slander *per se* and libel *per se*, these instructions refer simply to defamation and do not draw any distinction between the medium or form of expression.

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**CV1602 Elements of a Defamation Claim.**

[Name of plaintiff] claims that [name of defendant] defamed [him/her]. To succeed on this claim, [name of plaintiff] must prove the following elements:

(1) [name of defendant] published statement(s) about [name of plaintiff];
(2) the statements were false;
(3) the statements were defamatory;
[(4) the statements were not privileged;]
(5) the statements were published with the required degree of fault; and
(6) the statements caused damages to [name of plaintiff].

Some of these words have special meanings and they will be explained in the following instructions.

**References**
*Jacob v. Bezzant*, 2009 UT 37, 212 P.3d 535
*Oman v. Davis Sch. Dist.*, 2008 UT 70, 194 P.3d 956
*West v. Thomson Newspapers*, 872 P.2d 999 (Utah 1994)

**MUJI 1st Instruction**
10.2, 10.3

**Committee Notes**
There has been some confusion in reported decisions regarding whether a defamation plaintiff bears the burden of proving falsity or whether truth is an affirmative defense for which the defendant bears the burden of proof. In *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1985), the United States Supreme Court held that the First Amendment required a plaintiff to prove falsity in cases involving speech published by a media defendant relating to a matter of public concern. *Cf. Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974) ("Allowing the media to avoid liability only by proving the truth of all injurious statements does not accord adequate protection to First Amendment liberties."). And although there are Utah decisions referring to truth as a "defense," *see, e.g., Brehany v. Nordstrom, Inc.*, 812 P.2d 49, 57 (Utah 1991) ("[T]ruth is an absolute defense to an action for defamation."), the Utah Supreme Court has consistently listed falsity as an essential element of a defamation claim. *See, e.g., Jacob v. Bezzant*, 2009 UT 37, ¶ 21, 212 P.3d 535 ("A prima facie case for defamation must demonstrate that … 'the statements were false….'") (quoting *Oman v. Davis Sch. Dist.*, 2008 UT 70, ¶ 68, 194 P.3d 956); *West v. Thomson Newspapers*, 872 P.2d 999, 1007 (Utah 1994) ("To state a claim for defamation, [the plaintiff] must show that … the statements were false…."). The committee accordingly included falsity as an element of the claim and did not distinguish between defendants or public concern and non-public concern cases.

The Utah legislature has defined "libel" and "slander" in Utah Code § 45-2-2 for purposes of the statutory provisions in that chapter, which include several statutory privileges, retraction requirements, and matters relating to broadcasts. The definitions in that section, however, are inconsistent with the elements of a defamation claim consistently articulated by the Utah Supreme Court, *see, e.g., Jacob v. Bezzant*, 2009 UT 37, ¶¶ 21, 212 P.3d 535; *West v. Thomson Newspapers*, 872 P.2d 999, 1007-08 (Utah 1994), and may suffer from constitutional infirmities for failure to require falsity, *see I.M.L. v. State*, 2002 UT 110, ¶¶ 19, 23, 61 P.3d 1038; *Garrison v. Louisiana*, 379 U.S. 64, 70-73 (1964). For this reason, the committee has used the elements articulated in the caselaw rather than the statutory definitions in Utah Code § 45-2-2.

Element (4) is bracketed because it need not be given in a case where either no privilege has been asserted or the court has determined that the privilege is inapplicable.

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**CV1603 Definition: Publication.**

[Name of plaintiff] must prove [name of defendant] "published" the allegedly defamatory statements. Publication means [name of defendant] communicated the statements to a person other than [name of plaintiff]. Publication can be oral, written, or non-verbal if a person's non-verbal conduct or actions specifically communicate facts about the plaintiff. "Written" statements include statements that are communicated electronically or digitally.

**References**
*Jacob v. Bezzant*, 2009 UT 37, 212 P.3d 535

*Jensen v. Sawyers*, 2005 UT 81, 130 P.3d 325

**MUJI 1st Instruction**
No analogue

**Committee Notes**
None

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**CV1604A Definition: About the Plaintiff – Public Figure or Public Official Plaintiff – Connection to Plaintiff is Reasonable.**

[Name of plaintiff] must prove that each allegedly defamatory statement referred to [him/her].

To do so, [name of plaintiff] must prove that one or more recipients of the statements actually understood the statements to be referring to [him/her], and either:

1) [name of defendant] intended the statement to refer to [name of plaintiff], or
2) [name of defendant] knew or was intentionally blind to the facts or circumstances that would cause the recipient(s) to reasonably understand the statement(s) to refer to [name of plaintiff].

**References**
*Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974)
*New York Times Co. v. Sullivan*, 376 U.S. 254 (1964)
*Pratt v. Nelson*, 2007 UT 41, 164 P.3d 366
Restatement (Second) of Torts § 564 (1977)

**MUJI 1st Instruction**
10.6

**Committee Notes**
This instruction should be used where the plaintiff is a public figure or public official, and the court has determined that it is reasonable to understand the statement(s) at issue to be referring to the plaintiff.

Since *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), the requirement that a defamatory statement be about the plaintiff, often referred to as the "of and concerning" requirement, has been one of constitutional magnitude. *See* Restatement (Second) of Torts § 564 cmt. f (1977). *Sullivan* itself involved statements made generally about "police" in Alabama that did not name Mr. Sullivan specifically. 376 U.S. at 258. The Court found the evidence supporting the "of and concerning" requirement to be "constitutionally defective," explaining that the presumption employed by the Alabama Supreme Court struck "at the very center of the constitutionally protected area of free expression." *Id.* at 288, 292. This holding and the constitutional defamation cases that followed, including *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), displaced the common law rule that imposed a form of strict liability on a defamer who did not intend a statement to refer to a plaintiff, but the statement was nonetheless reasonably understood to do so. *See* 1 Rodney A. Smolla, *Law of Defamation* § 4:42 (2d ed. 2013) ("[T]he consensus

appears to be that in cases governed by *Gertz*, fault is required not merely on the truth or falsity issue, but for all aspects of the cause of action, including reference to the plaintiff."); *see also id.* § 4:40.50; 1 Robert D. Sack, *Sack on Defamation: Libel, Slander, and Related Problems* § 2:9.1 (4th ed. 2013).

As a result of the constitutional overlay on the "of and concerning" requirement, the requirements of this element will vary depending on whether the case involves a public figure/public official plaintiff, a statement relating to a matter of public concern, or a private plaintiff alleging speech unrelated to any matter of public concern. This is similar to the varying level of fault on truth/falsity discussed in later instructions. In public official/public figure cases, mere negligence is not sufficient; therefore, this instruction requires, in cases where the reference was unintended by the defamer, knowledge of or intentional blindness to the facts or circumstances that may lead a recipient to reasonably conclude the statement at issue refers to the plaintiff. The term "intentional blindness" is used here as a counterpart to the "reckless disregard" component of the actual malice standard in the truth/falsity context. Although there is little authority interpreting the contours of the actual malice test in the "of and concerning" context, the Committee determined that "reckless disregard" was imprecise in this context because the facts and circumstances the defamer would be disregarding are facts and circumstances of which he or she is purportedly *unaware*. Using "reckless disregard" in this context therefore risks collapsing that subjective test into an objective negligence test, which would be constitutionally problematic under *Sullivan*. "Intentional blindness" is a better fit for *unknown* facts and captures situations where a defamer intentionally avoids acquiring information that would reveal the reasonable connection between the statements at issue and the plaintiff—conduct that would go beyond mere negligence.

The "of and concerning" test will also vary depending on whether it is reasonable to understand a statement as referring to the plaintiff. Like the related threshold inquiry of defamatory meaning, this determination is a question of law for the court, not the jury. *See, e.g.*, *Gilman v. Spitzer*, 902 F. Supp. 2d 389, 394-95 (S.D.N.Y. 2012) ("Whether a challenged statement reasonably can be understood as of and concerning the plaintiff is a question of law for the Court, which 'should ordinarily be resolved at the pleading stage.'" (quoting *Church of Scientology Int'l v. Behar*, 238 F.3d 168, 173 (2d Cir. 2001))). In cases where the defamer intended the statement to refer to the plaintiff, there is no requirement that the recipient's actual understanding of that reference be reasonable. The element is satisfied "if [the communication] is so understood by the recipient of the communication, no matter how bizarre or extraordinary it is that the communication was in fact so understood." *Law of Defamation* § 4:41; *see also* Restatement (Second) of Torts § 564 cmt. a ("If it is in fact intended to refer to him, it is enough that it is so understood even though he is so inaccurately described that it is extraordinary that the communication is correctly understood."). If there was no such intent, an unreasonable connection cannot sustain a defamation claim. Restatement (Second) of Torts § 564 cmts. b and f. For this reason, there are five possible scenarios, and thus five instructions, for the "of and concerning" element: if the reference is reasonable, three varying levels of fault (with the open question of the standard of fault for purely private cases divided into two possible instructions); and if the reference is unreasonable, a requirement that the plaintiff show the reference was intended. Only one of these instructions should ordinarily be used, unless a case involves multiple statements or multiple plaintiffs that fall into different categories. In the unusual case where different standards

apply to different statements, the court will have to instruct as to which instructions on standards accompany which statements.

The relevant inquiry for the "of and concerning" requirement is not whether any member of the "public" would understand a statement as referring to the plaintiff, as the MUJI 1st instruction on this element suggested. The issue is whether any of the *actual* recipients of the statement understood the statement to refer to the plaintiff (and, if the reference was unintended, did so reasonably). The actual recipients of a statement may have a basis for connecting a statement to the plaintiff that is not widely known or shared with the general public. *See* Restatement (Second) of Torts § 564 cmt. b ("It is not necessary that everyone recognize the other as the person intended; it is enough that any recipient of the communication reasonably so understands it. However, the fact that only one person believes that the plaintiff was referred to is an important factor in determining the reasonableness of his belief.").

When allegedly defamatory statements refer to a group rather than a specific individual, they are subject to the group defamation rule, which is addressed in a separate instruction. *See* CV1612 (Group Defamation Rule).

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**CV1604B Definition: About the Plaintiff – Private Plaintiff – Matter of Public Concern – Connection to Plaintiff is Reasonable.**

[Name of plaintiff] must prove that each allegedly defamatory statement referred to [him/her].

To do so, [name of plaintiff] must prove that one or more recipients of the statements actually understood the statements to be referring to [him/her], and either:

1) [name of defendant] intended the statement to refer to [name of plaintiff], or
2) [name of defendant] acted negligently in failing to anticipate the facts or circumstances that would cause the recipient(s) to reasonably understand the statement(s) as referring to [name of plaintiff].

**References**
*Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974)
*New York Times Co. v. Sullivan*, 376 U.S. 254 (1964)
*Pratt v. Nelson*, 2007 UT 41, 164 P.3d 366
Restatement (Second) of Torts § 564 (1977)

**MUJI 1st Instruction**
10.6

**Committee Notes**
This instruction should be used where the plaintiff is not a public official or public figure, the statement(s) relate to a matter of public concern, and the court has determined that it is reasonable to understand the statement(s) at issue to be referring to the plaintiff.

Under *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), the minimum level of fault required to impose liability for statements relating to a matter of public concern is negligence. *See also*

*Ferguson v. Williams & Hunt, Inc.*, 2009 UT 49, ¶¶ 22-23, 221 P.3d 205. "It is therefore necessary for the plaintiff to prove that a reasonable understanding on the part of the recipient that the communication referred to the plaintiff was one that the defamer was negligent in failing to anticipate. This is particularly important when the recipient knew of extrinsic facts that make the communication defamatory of the plaintiff but these facts were not known to the defamer." Restatement (Second) of Torts § 564 cmt. f (1977).

For a more detailed discussion of the "of and concerning" requirement, *see* the Committee Notes for CV1604A (Definition: About the Plaintiff – Public Figure or Public Official Plaintiff – Connection to Plaintiff is Reasonable).

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**CV1604C Definition: About the Plaintiff – Private Plaintiff – No Matter of Public Concern – Connection to Plaintiff is Reasonable – Negligence.**

[Name of plaintiff] must prove that each allegedly defamatory statement referred to [him/her].

To do so, [name of plaintiff] must prove that one or more recipients of the statements actually understood the statements to be referring to [him/her], and either:

1) [name of defendant] intended the statement to refer to [name of plaintiff], or
2) [name of defendant] acted negligently in failing to anticipate the facts or circumstances that would cause the recipient(s) to reasonably understand the statement(s) as referring to [name of plaintiff].

**References**
*Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974)
*New York Times Co. v. Sullivan*, 376 U.S. 254 (1964)
*Pratt v. Nelson*, 2007 UT 41, 164 P.3d 366
Restatement (Second) of Torts § 564 (1977)

**MUJI 1st Instruction**
10.6

**Committee Notes**
This instruction should be used where the plaintiff is not a public official or public figure, the statement(s) do not relate to a matter of public concern, the court has determined that it is reasonable to understand the statement(s) at issue to be referring to the plaintiff, and the court has determined that the plaintiff must show at least negligence to hold the defendant liable.

As discussed in CV1601, whether strict liability may be constitutionally imposed in cases involving a private plaintiff and speech that does not relate to a matter of public concern has not been resolved by either the United States Supreme Court or the Utah Supreme Court. *See Ferguson v. Williams & Hunt, Inc.*, 2009 UT 49, ¶ 26, 221 P.3d 205. If the court determines negligence is required, this instruction should be used. If the court determines strict liability is the standard of fault, the subsequent instruction (CV1604D Definition: About the Plaintiff – Private Plaintiff – No Matter of Public Concern – Connection to Plaintiff is Reasonable – Strict

Liability Allowed) should be used. Until this open question is resolved by binding appellate authority, parties will need to argue this particular issue in their individual cases.

For a more detailed discussion of the "of and concerning" requirement, *see* the Committee Notes for CV1604A (Definition: About the Plaintiff – Public Figure or Public Official Plaintiff – Connection to Plaintiff is Reasonable).

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**CV1604D Definition: About the Plaintiff – Private Plaintiff – No Matter of Public Concern – Connection to Plaintiff is Reasonable – Strict Liability.**

[Name of plaintiff] must prove that each allegedly defamatory statement referred to [him/her].

To do so, [name of plaintiff] must prove that one or more of the recipients of the statement(s) actually understood the statements(s) to be referring to [name of plaintiff].

**References**
*Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974)
*New York Times Co. v. Sullivan*, 376 U.S. 254 (1964)
*Pratt v. Nelson*, 2007 UT 41, 164 P.3d 366
Restatement (Second) of Torts § 564 (1977)

**MUJI 1st Instruction**
10.6

**Committee Notes**
This instruction should be used where the plaintiff is not a public official or public figure, the statement(s) do not relate to a matter of public concern, the court has determined that it is reasonable to understand the statement(s) at issue to be referring to the plaintiff, and the court has determined that the relevant standard of fault is strict liability.

As discussed in CV1601, whether strict liability may be constitutionally imposed in cases involving a private plaintiff and speech that does not relate to a matter of public concern has not been resolved by either the United States Supreme Court or the Utah Supreme Court. *See Ferguson v. Williams & Hunt, Inc.*, 2009 UT 49, ¶ 26, 221 P.3d 205. If the court determines strict liability is the standard of fault, this instruction should be used. If the court determines negligence is required, the previous instruction (CV1604C Definition: About the Plaintiff – Private Plaintiff – No Matter of Public Concern – Connection to Plaintiff is Reasonable – Negligence) should be used. Until this open question is resolved by binding appellate authority, parties will need to argue this particular issue in their individual cases.

For a more detailed discussion of the "of and concerning" requirement, *see* the Committee Notes for CV1604A (Definition: About the Plaintiff – Public Figure or Public Official Plaintiff – Connection to Plaintiff is Reasonable).

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**CV1604E Definition: About the Plaintiff – Connection to Plaintiff is Unreasonable.**
[Name of plaintiff] must prove that each allegedly defamatory statement referred to [him/her].

To do so, [name of plaintiff] must prove that
(1)[name of defendant] intended the defamatory statement(s) to refer to [name of plaintiff], and
(2) one or more of the recipients of the statement(s) actually understood the statements(s) to be referring to [name of plaintiff].

**References**
*Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974)
*New York Times Co. v. Sullivan*, 376 U.S. 254 (1964)
*Pratt v. Nelson*, 2007 UT 41, 164 P.3d 366
Restatement (Second) of Torts § 564 (1977)

**MUJI 1st Instruction**
10.6

**Committee Notes**
This instruction should be used where the court has determined that it is not reasonable to understand the statement(s) at issue to be referring to the plaintiff, regardless of whether the plaintiff is a public figure or public official, or whether the statement(s) relate to a matter of public concern.

Because the varying standard of fault only arises when the reference to the plaintiff is unintended, and because reasonableness is an essential element of liability for an unintended reference, the varying standard of fault is not relevant where the court has determined the statements cannot reasonably be understood as referring to the plaintiff. This instruction therefore applies where the connection is unreasonable regardless of the status of the plaintiff or the subject matter of the speech.

For a more detailed discussion of the "of and concerning" requirement, *see* the Committee Notes for CV1604A (Definition: About the Plaintiff – Public Figure or Public Official Plaintiff – Connection to Plaintiff is Reasonable).

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**CV1605 Definition: False Statement.**

The allegedly defamatory statement must state or imply facts which can be proved to be false, and [name of plaintiff] must show the statement to be false.

"False" means that the statement is either directly untrue or that it implies a fact that is untrue. In addition, a defamatory statement must be materially false. A statement is "materially false" if it is false in a way that matters; that is, if it has more than minor or irrelevant inaccuracies.

A true statement cannot be the basis of a defamation claim, no matter how annoying, embarrassing, damaging, or insulting it may be. "Truth" does not require that the statement be

absolutely, totally, or literally true. The statement need only be substantially true, which means the gist of the statement is true.

You should determine the truth or falsity of the statement according to the facts as they existed at the time [name of defendant] published the statement.

**References**
*Air Wis. Airlines Corp. v. Hoeper*, __ U.S. __, 134 S. Ct. 852 (2014)
*Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496 (1991)
*Jacob v. Bezzant*, 2009 UT 37, 212 P.3d 535
*Oman v. Davis Sch. Dist.*, 2008 UT 70, 194 P.3d 956
*Jensen v. Sawyers*, 2005 UT 81, 130 P.3d 325
*West v. Thomson Newspapers*, 872 P.2d 999 (Utah 1994)
*Brehany v. Nordstrom, Inc.*, 812 P.2d 49 (Utah 1991)
*Auto West, Inc. v. Baggs*, 678 P.2d 286 (Utah 1984)

**MUJI 1st Instruction**
10.4

**Committee Notes**
Although material falsity is usually a question of fact for the jury, where "the underlying facts as to the gist or sting [of the statements] are undisputed, substantial truth may be determined as a matter of law." *Hogan v. Winder*, 762 F.3d 1096, 1106 (10th Cir. 2014) (internal quotations omitted). See also *Air Wis. Airlines Corp. v. Hoeper*, __ U.S. __, 134 S. Ct. 852, 868 (2014) ("[U]nder the First Amendment, a court's role is to determine whether '[a] reasonable jury could find a material difference between' the defendant's statement and the truth.") (Scalia, J., concurring and dissenting) (quoting *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 522 (1991)) (second alteration in original).

In addition to explaining that "[m]inor inaccuracies" do not make a statement materially false, *Masson*, 501 U.S. at 517, the United States Supreme Court has further explained the concept of whether an inaccuracy is "material" as follows: "[A] materially false statement is one that "'would have a different effect on the mind of the reader [or listener] from that which the … truth would have produced.'" *Air Wis.*, 134 S. Ct. at 863 (quoting *Masson*, 501 U.S. at 517) (further citation omitted) (second alteration and ellipses in original).

There is a potentially open question regarding the standard of proof for falsity in some types of defamation cases. In *Hart-Hanks Communications, Inc. v. Cannaughton*, 491 U.S. 657, 661 n.2 (1989), the United States Supreme Court took note of a split of authority as to whether, in a public figure or public official plaintiff case (where actual malice must be proved by clear and convincing evidence), material falsity must also be proved by clear and convincing evidence. At that time, the Court "express[ed] no view on this issue." Id. Since that time, however, the Supreme Court has twice emphasized that the issues of material falsity and actual malice are inextricably related, such that the definition of the latter requires a finding of the former. See *Masson*, 501 U.S. at 512; *Air Wis.*, 134 S. Ct. at 861 ("[W]e have long held … that actual malice entails falsity."). As a result, many courts have concluded that in public figure and public

official cases, material falsity must also be proved by clear and convincing evidence. See, e.g., *Brokers' Choice of Am., Inc. v. NBC Universal, Inc*., 757 F.3d 1125, 1136 (10th Cir. 2014) ("If the plaintiff is a public figure or the statement involves a matter of public concern, the plaintiff has the ultimate burden in his case-in-chief of proving the falsity of a challenged statement by 'clear and convincing proof.'" (citation omitted) (applying Colorado law)); *DiBella v. Hopkins*, 403 F.3d 102, 110-15 (2d Cir. 2005) (collecting cases and noting that only "a minority of jurisdictions require a public figure to prove falsity only by a preponderance of the evidence"); 1 Robert D. Sack, Sack on Defamation: Libel, Slander, and Related Problems § 3:4 (4th ed. 2013) (collecting cases).

If a case involves a public figure or public official plaintiff, and the court determines that the higher standard of proof applies to material falsity, the first paragraph of the instruction should be amended to state: "The allegedly defamatory statement must state or imply facts which can be proven to be false, and [name of plaintiff] must show the statement to be false by clear and convincing evidence."

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**CV1606 Definition: Opinion.**

A statement that expresses a mere opinion or belief rather than a verifiable statement of fact is protected by the Utah Constitution and cannot support a defamation claim. A statement of opinion can be the basis of a defamation claim only when it implies facts which can be proved to be false, and [name of plaintiff] shows the statement is false and defamatory. I have determined that the following statement(s) are statements of opinion: [insert specific statement(s).]

**References**
*Jacob v. Bezzant*, 2009 UT 37, 212 P.3d 535
*West v. Thomson Newspapers*, 872 P.2d 999 (Utah 1994)
Utah Const. art. 1, §§ 1, 15
Restatement (Second) of Torts § 566 cmt. c (1977)

**MUJI 1st Instruction**
No analogue

**Committee Notes**
The question of whether a statement is one of fact or opinion is a question of law for the court, not the jury. *West v. Thomson Newspapers*, 872 P.2d 999, 1018 (Utah 1994); Restatement (Second) of Torts § 566 cmt. c (1977). Likewise, the questions of whether a statement of opinion reasonably implies verifiable facts, and whether those facts are capable of sustaining defamatory meaning, are also questions for the court. *Id*. at 1019. Only if the court determines that a statement of opinion can reasonably imply facts capable of sustaining defamatory meaning is there a question for the jury as to whether the statement did, in fact, convey that defamatory meaning. *Id*. This instruction should be used in the event the court determines as a matter of law that one or more statements are opinion, but the statement(s) may nonetheless be actionable because they reasonably imply verifiable facts capable of sustaining defamatory meaning. The question for the jury is whether those facts were, in fact, implied, and whether the defamatory meaning was, in fact, conveyed.

The test for whether a statement is "defamatory" is explained in CV1607 (Definition: Defamatory).

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**CV1607 Definition: Defamatory.**

To support a defamation claim, [name of plaintiff] must prove the statement at issue is defamatory. A statement may be false but not necessarily defamatory.

A statement is defamatory if it calls into question a person's honesty, integrity, virtue, or reputation and thereby exposes that person to public hatred, contempt, or ridicule in the eyes of the person to whom it is published or, if published to more than one person, to at least a substantial and respectable minority of its audience. A statement is not necessarily defamatory if it reports only that a person did things that you would not have done, or things of which you or other people might disapprove. A publication that is merely unpleasant, embarrassing, or uncomplimentary is not necessarily defamatory.

I already determined that the following statement(s) is/are capable of conveying a meaning that is defamatory: [insert statements].

Some statements may convey more than one meaning. For example, a statement may have one meaning that is defamatory and another meaning that is not. To support a defamation claim, [name of plaintiff] must prove, for each of these statements, that one or more of the recipients of the statement actually understood it in its defamatory sense—the sense that would expose [name of plaintiff] to public hatred, contempt, or ridicule. If a recipient did not actually understand a particular statement in its defamatory sense, then that statement cannot support a defamation claim.

You must determine whether the recipient actually understood the statement(s) in [its/their] defamatory sense.

**References**
*Jacob v. Bezzant*, 2009 UT 37, 212 P.3d 535
*O'Connor v. Burningham*, 2007 UT 58, 165 P.3d 1214
*West v. Thomson Newspapers*, 872 P.2d 999 (Utah 1994)
*Allred v. Cook*, 590 P.2d 318 (Utah 1979)
*Mast v. Overson*, 971 P.2d 928 (Utah Ct. App. 1998)
*Hogan v. Winder*, 762 F.3d 1096 (10th Cir. 2014)
Restatement (Second) of Torts §§ 559, 614 (1977)

**MUJI 1st Instruction**
10.5

**Committee Notes**
The jury has a very limited role in the determination of whether a plaintiff has satisfied the "defamatory" element of a defamation claim, often referred to as "defamatory meaning." It is

the court's role to decide, as a matter of law, whether a statement is capable of bearing a particular meaning and, if so, if that meaning is defamatory. *See Jacob v. Bezzant*, 2009 UT 37, ¶ 26, 212 P.3d 535; *West v. Thomson Newspapers*, 872 P.2d 999, 1008 (Utah 1994); Restatement (Second) of Torts § 614 (1977). "If the court decides against the plaintiff upon either of these questions, there is no further question for the jury to determine and the case is ended." Restatement (Second) of Torts § 614 cmt. b (1977). Thus, even though this instruction includes a description of what it means to be defamatory—i.e., that a statement exposes the plaintiff to public hatred, contempt, or ridicule—the determination of whether a statement satisfies that standard is for the court. The description is included in the instruction so the jury can differentiate between a defamatory meaning and a non-defamatory one if a statement is capable of more than one meaning.

The only role for the jury, assuming the court decides for the plaintiff on both threshold questions, is "whether a communication, capable of a defamatory meaning, was so understood by its recipient." Restatement (Second) of Torts § 614 (1977). This issue would generally arise only "[i]f the court determines that the statement is capable of two or more meanings, of which at least one is capable of a defamatory meaning[.]" 1 Robert D. Sack, *Sack on Defamation: Libel, Slander, and Related Problems* § 2:4.16 (4th ed. 2013). In that circumstance, it is for the jury to decide which meaning was in fact understood by the recipients of the communication." *Id*.; *see also* Restatement (Second) of Torts § 614 cmt. b (1977) (jury must decide "whether the communication was in fact understood by its recipient in the defamatory sense").

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**CV1608 Conditional Privilege.**

An otherwise defamatory statement cannot support a defamation claim if the statement is privileged. I have already determined that the statements [insert privileged statements] are covered by the [insert] privilege recognized under Utah law. The purpose of the [insert] privilege is [insert]. This privilege protects allegedly defamatory statements [insert applicable description].

Because the [insert] privilege applies to [name of defendant]'s statements, [name of plaintiff] must prove by a preponderance of the evidence that [name of defendant] abused the privilege. The defendant can abuse a conditional privilege by [common law malice,] [actual malice,] [and/or excessive publication].

[To prove abuse by common law malice, [name of plaintiff] must prove that in making the allegedly defamatory statements, [name of defendant] was motivated primarily by ill will and spite towards [name of plaintiff], rather than some other reason.]

[To prove abuse by actual malice, [name of plaintiff] must prove that at the time [name of defendant] made the allegedly defamatory statements, [name of defendant] had actual knowledge the statements were false or actually entertained serious doubts as to whether the statements were true. The question is not whether a reasonable person would have known that the statements were false or entertained serious doubts about their truth, but whether [name of defendant] actually had such knowledge or doubts at the time of publication.]

[To prove abuse by excessive publication, [name of plaintiff] must prove that [name of defendant] published the statements to more persons than needed to serve the purpose of the privilege described above.]

If you find that [name of plaintiff] has failed to prove [common law malice,] [actual malice,] [or excessive publication,] then [name of plaintiff] cannot base [his/her/its] defamation claim on [insert privileged statement].

**References**
*Jacob v. Bezzant*, 2009 UT 37, 212 P.3d 535
*Ferguson v. Williams & Hunt, Inc.*, 2009 UT 49, 221 P.3d 205
*Pratt v. Nelson*, 2007 UT 41, 164 P.3d 366
*O'Connor v. Burningham*, 2007 UT 58, 165 P.3d 1214
*Jensen v. Sawyers*, 2005 UT 81, 130 P.3d 325
*Wayment v. Clear Channel Broad., Inc.*, 2005 UT 25, 116 P.3d 271
*Krouse v. Bower*, 2001 UT 28, 20 P.3d 895
*Russell v. Thomson Newspapers, Inc.*, 842 P.2d 896 (Utah 1992)
*Brehany v. Nordstrom, Inc.*, 812 P.2d 49 (Utah 1991)
*Seegmiller v. KSL, Inc.*, 626 P.2d 968 (Utah 1981)
*Combes v. Montgomery Ward & Co.*, 228 P.2d 272 (Utah 1951)

**MUJI 1st Instruction**
No analogue

**Committee Notes**
A party claiming that a statement is subject to a privilege bears the burden of proving the existence and application of the privilege, which determination is a question of law for the court.

Because applicability of a privilege is a matter of law for the court, *Russell v. Thomson Newspapers, Inc.*, 842 P.2d 896, 900 (Utah 1992), this instruction assumes, and should be used only if, the court has already made that determination and will instruct the jury as to its effect. The instruction should be adapted to describe whatever particular privilege is at issue. Likewise the instruction should be adapted to reflect the particular types of abuse the plaintiff is alleging, if he/she/it is not alleging all three.

Examples of conditional privileges recognized under Utah law include, but are not limited to:

- the public interest privilege, *see Jacob v. Bezzant*, 2009 UT 37, 212 P.3d 535, Utah Code § 45-2-3(5);
- publisher's interest privilege, *see Brehany v. Nordstrom*, 812 P.2d 49 (Utah 1991);
- police report privilege, *Murphree v. U.S. Bank of Utah, N.A.*, 293 F.3d 1220, 1223 (10th Cir. 2002);
- common interest privilege, *see Lind v. Lynch*, 665 P.2d 1276 (Utah 1983), Utah Code § 45-2-3(3);
- family relationships privilege, *see O'Connor v. Burningham*, 2007 UT 58, 165 P.3d 1214;

- fair report privilege, *see Russell v. Thomson Newspapers, Inc.*, 842 P.2d 896 (Utah 1992), Utah Code § 45-2-3(4) and (5); and
- neutral reportage privilege, *see Schwarz v. Salt Lake Tribune*, No. 20030981, 2005 WL 1037843 (Utah Ct. App. May 5, 2005) (unpublished).

The court's determination of whether a privilege applies to a particular statement is based on the circumstances surrounding its publication, such as what was said, to whom, and in what context. In most cases, the relevant aspects of those circumstances are not in dispute, allowing the court to make the applicability determination without the aid of the jury. Importantly, dispute as to the circumstances of publication is not the same as dispute as to the applicability of the privilege. For instance, the parties may dispute whether a particular statement has sufficient connection to a legal proceeding to be covered by the judicial proceedings privilege, or whether a speaker had a legitimate interest to protect for purposes of the publisher's interest privilege, or whether a statement implicates a sufficiently important interest for purposes of the public interest privilege, or whether two parties share a sufficient interest for purposes of the common interest privilege, or whether a statement was a fair and true report of public proceedings for purposes of the fair report privilege. But all of those issues are not factual questions for the jury; they are applicability determinations for the court.

In the event the circumstances of publication are in legitimate dispute in a way that matters to applicability of the privilege, however, such as where the parties dispute what was said in a way that matters to the privilege, or dispute the identity of the speaker (i.e., whether he or she was a litigant for purposes of the judicial proceedings privilege), those disputes may need to be resolved by the jury before the court can determine whether the privilege applies. See, e.g., 1 Robert D. Sack, Sack on Defamation: Libel, Slander, and Related Problems § 9:5 (4th ed. 2013). In such circumstances, a different instruction may need to be given, tailored to that situation, in which the jury is asked to make that specific factual determination. Because those instances are not common, the Committee opted not to include a standard instruction for such circumstances.

With regard to the test for actual malice, the requirement of subjective knowledge is based on the discussion in *Ferguson v. Williams & Hunt, Inc.*, 2009 UT 49, ¶ 30, 221 P.3d 205, which held that "[t]o prove knowledge of falsity, a plaintiff must present evidence that shows the defendant knows the defamatory statement is untrue. Likewise, acting with reckless disregard as to falsity involves a showing of subjective intent or state of mind." Nonetheless, *Ferguson* did recognize certain rare circumstances in which the reckless disregard test could have an objective element: "But while reckless disregard is substantially subjective, certain facts may show, regardless of the publisher's bald assertions of belief, that 'the publisher's allegations are so inherently improbable that only a reckless man would have put them in circulation' or that 'there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports.' Therefore, reckless disregard as to the falsity of a statement that a defendant honestly believed to be true is determined by a subjective inquiry as to the defendant's belief and an objective inquiry as to the inherent improbability of or obvious doubt created by the facts." *Id*. (quoting *St. Amant v. Thompson*, 390 U.S. 727, 732 (1968)). Because not all defamation claims involve allegations of inherent improbability, the committee opted not to include the objective test in the standard instruction, leaving to parties to adapt that portion depending on the facts of their cases.

In addition to conditional privileges, Utah law also recognizes certain absolute privileges that cannot be overcome by a showing of abuse. Examples of absolute privileges include, but are not limited to, the judicial proceedings privilege, *see DeBry v. Godbe*, 1999 UT 111, 992 P.2d 979, and legislative proceedings privilege, *see Riddle v. Perry*, 2002 UT 10, 40 P.3d 1128. Because, like a conditional privilege, application of an absolute privilege is a question of law for the court, and because there is no subsequent issue for the jury regarding abuse of an absolute privilege, the committee has not included an instruction regarding absolute privileges. In the event that the court decides certain statements are absolutely privileged, but those statements have come into evidence for some other purpose, they should be listed as part of the curative instruction set forth in CV1609 (Non-actionable Statements).

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**CV1609 Non-actionable Statements.**

During trial, you may have heard evidence about certain statements made by [name of defendant] that may be considered insulting or damaging to [name of plaintiff]. Just because you heard evidence of those statements does not necessarily mean that those statements can legally be the basis of a defamation claim. I may have admitted evidence of those statements for some purpose other than proof of defamation. I have determined that certain statements cannot be the basis of a defamation claim. Even though you heard evidence of them, you are instructed that the following statements cannot be the basis of [name of plaintiff]'s defamation claim: [insert specific non-actionable statements].

**References**
*Jacob v. Bezzant*, 2009 UT 37, 212 P.3d 535
*O'Connor v. Burningham*, 2007 UT 58, 165 P.3d 1214

**MUJI 1st Instruction**
No analogue

**Committee Notes**
This instruction recognizes that even where the court makes a determination that certain statements are non-actionable defamation as a matter of law, those statements may still be presented to jury for some other purpose or may have been presented prior to the court's legal determination. For that reason, and to effectuate the court's gatekeeping function in defamation cases, this instruction is designed to cure any prejudicial implication that non-actionable but otherwise admitted statements can support a defamation claim.

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**CV1610 Definition: Requisite Degree of Fault – Private Figure – Matter of Public Concern.**

I have already determined that [name of plaintiff] is a private figure and that the subject matter of the allegedly defamatory statements pertains to a matter of public concern. As a result, [name of plaintiff] cannot recover on [his/her/its] defamation claim unless you find [he/she/it] has proved by a preponderance of the evidence that [name of defendant] made the allegedly defamatory statements with negligence. To prove negligence, [name of plaintiff] must prove that at the time [name of defendant] made the allegedly defamatory statements, [name of defendant] did not take reasonable care to avoid the publication of statements that are substantially false. Reasonable

care is the degree of care and caution or attention that a reasonable person would use under similar circumstances.

**References**
*Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974)
*Ferguson v. Williams & Hunt, Inc.*, 2009 UT 49, 221 P.3d 205
*Oman v. Davis Sch. Dist.*, 2008 UT 70, 194 P.3d 956
*Wayment v. Clear Channel Broad. Inc*, 2005 UT 25, 116 P.3d 271
*Russell v. Thomson Newspapers, Inc.*, 842 P.2d 896 (Utah 1992)
*Cox v. Hatch*, 761 P.2d 556 (Utah 1988)
*Van Dyke v. KUTV*, 663 P.2d 52 (Utah 1983)
*Seegmiller v. KSL, Inc.*, 626 P.2d 968 (Utah 1981)

**MUJI 1st Instruction**
No analogue

**Committee Notes**
Because the public/private figure and public concern determinations are questions for the court, *Wayment v. Clear Channel Broad., Inc.*, 2005 UT 25, ¶ 17, 116 P.3d 271; *Dun & Bradstreet v. Greenmoss Builders, Inc.*, 472 U.S. 749, 762 (1985) (Powell, J.) (in plurality opinion, applying test as a matter of law); *Connick v. Myers*, 461 U.S. 138, 147-48 (1983); *Arndt v. Koby*, 309 F.3d 1247, 1252 (10th Cir. 2002), this instruction assumes, and should be used only if, the court has already made those determinations. As explained in CV1601 (Introductory Notes to Practitioners), no instruction is included on the standard of fault for private figure cases where the speech does not relate to a matter of public concern because that question has not yet been answered by the Utah Supreme Court. *See Ferguson v. Williams & Hunt, Inc.*, 2009 UT 49, ¶ 26, 221 P.3d 205.

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**CV1611 Definition: Requisite Degree of Fault –Public Official or Public Figure.**

I have already determined that [name of plaintiff] is a [public official, general purpose public figure, or limited purpose public figure]. As a result, [name of plaintiff] cannot recover on [his/her/its] defamation claim unless you find that [he/she/it] has proved by clear and convincing evidence that [name of defendant] made the allegedly defamatory statements with actual malice. To prove actual malice, [name of plaintiff] must prove that at the time [name of defendant] made the allegedly defamatory statements, [name of defendant] had actual knowledge the statements were false or actually entertained serious doubts as to whether the statements were true. The question is not whether a reasonable person would have known that the statements were false or entertained serious doubts about their truth, but whether [name of defendant] actually had such knowledge or doubts at the time of publication.

**References**
*St. Amant v. Thompson*, 390 U.S. 727 (1968)
*Curtis Publ'g Co v. Butts*, 388 U.S. 130 (1967)
*New York Times Co. v. Sullivan*, 376 U.S. 254 (1964)
*Ferguson v. Williams & Hunt, Inc.*, 2009 UT 49, 221 P.3d 205

*O'Connor v. Burningham*, 2007 UT 58, 165 P.3d 1214
*Wayment v. Clear Channel Broad. Inc*, 2005 UT 25, 116 P.3d 271
*Cox v. Hatch*, 761 P.2d 556 (Utah 1988)
*Van Dyke v. KUTV*, 663 P.2d 52 (Utah 1983)
*Seegmiller v. KSL, Inc.*, 626 P.2d 968 (Utah 1981)

**MUJI 1st Instruction**
10.2

**Committee Notes**
Because the public official/public figure determination is one for the court, *Wayment v. Clear Channel Broad., Inc.*, 2005 UT 25, ¶ 17, 116 P.3d 271, this instruction assumes, and should be used only if, the court has already made that determination. For a discussion of the subjective nature of the actual malice standard, *see* CV1608 (Conditional Privilege), Committee Notes.

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**CV1612 Group Defamation Rule.**

To be actionable, a defamatory statement must refer to [name of plaintiff]. In general, statements that refer only to a group or class of people are not actionable. [Name of plaintiff] can maintain a defamation claim based on such a statement if and only if [he/she/it] shows either:

(1) the referenced group or class is so small that a reasonable person would understand the statement as specifically referring to [name of plaintiff]; or

(2) given the circumstances of publication, a reasonable person would understand the statement as specifically referring to [name of plaintiff]. The fact that a referenced group is large does not by itself preclude [name of plaintiff] from satisfying this requirement.

**References**
*Pratt v. Nelson*, 2007 UT 41, 164 P.3d 366
Restatement (Second) of Torts § 564A (1977)

**MUJI 1st Instruction**
No analogue

**Committee Notes**
The Restatement provides the following illustrative examples of this rule: "A newspaper publishes the statement that the officials of a labor organization are engaged in subversive activities. There are 162 officials. Neither the entire group nor any one of them can recover for defamation…. A newspaper publishes a statement that the officers of a corporation have embezzled its funds. There are only four officers. Each of them can be found to be defamed." Restatement (Second) of Torts § 564A cmt. a (1977).

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**CV1613 Causation.**

In order to prove a claim for defamation, [name of plaintiff] must prove by a preponderance of the evidence that the allegedly defamatory statement[s] caused damage to [name of plaintiff].

You should only award [name of plaintiff] damages that were caused by the defamation. You may not award damages which were the result of other acts of [name of the defendant], such as publication of statements that are true, non-defamatory, privileged, or otherwise fail to satisfy the elements of a defamation claim. You also may not award damages that were caused by [name of plaintiff's] own activities.

**References**
*Jacob v. Bezzant*, 2009 UT 37, 212 P.3d 535
*Proctor v. Costco Wholesale Corp.*, 2013 UT App 226, 311 P.3d 564
*Thurston v. Workers Comp. Fund of Utah*, 2003 UT App 438, 83 P.3d 391

**MUJI 1st Instruction**
10.11

**Committee Notes**
This instruction is not intended to capture the concept of proximate causation. This instruction should be given along with some version of CV209 ("Cause" defined).

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**CV1614 Presumed Damages.**

I have determined that the following statement[s] [is a/are] statement[s] that the law presumes will cause some type of damages to the plaintiff: [text of statement]. If you find that [name of plaintiff] has proved by a preponderance of the evidence that [name of defendant] published that statement, you may presume that [name of plaintiff] has been damaged and thus is entitled at least to nominal damages. The term "nominal damages" means an insignificant amount, such as one dollar. If [name of plaintiff] seeks more than nominal damages, [he/she/it] must prove the amount of damage.

**References**
*Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974)
*Jacob v. Bezzant*, 2009 UT 37, 212 P.3d 535
*Larson v. SYSCO Corp.*, 767 P.2d 557 (Utah 1989)
*Baum v. Gillman*, 667 P.2d 41 (Utah 1983)
*Westmont Mirador, LLC v. Miller*, 2014 UT App 209, __ P.3d __

**MUJI 1st Instruction**
10.8, 10.9

**Committee Notes**
This instruction uses the term "presumed damages" to capture the concept of defamation *per se*. As explained in CV1601 (Defamation – Introduction), there was a historical distinction between the tests for defamation *per se* depending on whether the statements were slander or libel. At

least one older case in Utah suggests in dicta that the four-category test requiring (1) criminal conduct, (2) having contracted a loathsome disease, (3) unchaste behavior (but only if the plaintiff is a woman), or (4) conduct incongruous with the exercise of a lawful business, trade, profession, or office applies only to slander, while the test for libel *per se* is whether the "words must, on their face, and without the aid of [extrinsic] proof, be unmistakably recognized as injurious." *Seegmiller v. KSL, Inc.*, 626 P.2d 968, 977 n.7 (Utah 1981) (dicta) (quoting *Lininger v. Knight*, 226 P.2d 809, 813 (Colo. 1951)). (The actual quote in *Seegmiller* uses the phrase "intrinsic proof," rather than "extrinsic proof." *Id*. But that phrase appears to be either an error or an anachronism that actually means "extrinsic proof," consistent with what it means to be defamatory *per se*. *See, e.g.*, *Gordon v. Boyles*, 99 P.3d 75, 78-79 (Colo. Ct. App. 2004) (citing *Lininger* for the proposition that "[t]o be actionable without proof of special damages, a libelous statement must be … on its face and without extrinsic proof, unmistakably recognized as injurious…. (emphasis added)); 1 Robert D. Sack, *Sack on Defamation: Libel, Slander, and Related Problems* § 2:8.3 (4th ed. 2013) (statement is libelous *per se* if it is defamatory without the aid of "extrinsic facts")).

Subsequent to *Seegmiller*, however, Utah courts have applied the four-category test to written statements, rather than the more amorphous test for libel *per se*. *See, e.g.*, *Larson v. SYSCO Corp.*, 767 P.2d 557, 560 (Utah 1989); *Westmont Mirador, LLC v. Miller*, 2014 UT App 209, ¶ 2, __ P.3d __. In *Jacob v. Bezzant*, 2009 UT 37, 212 P.3d 535, the Utah Supreme Court addressed this issue and explained that the tests for libel and slander *per se* were not distinct, but that "the *Larson* categories merely define injurious words as mentioned in *Seegmiller*." *Id*. at ¶ 26. Accordingly, and due to the increasingly anachronistic nature of a distinction between oral and written communication, this instruction employs the *Larson* categories and does not distinguish between libel *per se* and slander *per se*.

There is no clear Utah authority on what "presumed damages" encompass in defamation cases. Although the Utah Supreme Court has not addressed the issue, the Utah Court of Appeals has suggested that a plaintiff who proves defamation *per se* but presents no proof of actual injury is not entitled to recovery beyond nominal damages. *See Westmont Mirador, LLC v. Miller*, 2014 UT App 209, ¶ 5, __ P.3d __. This instruction reflects that principle. Although the non-binding plurality in *Dun & Bradstreet v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985) (Powell, J.) construed the holding of *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) as applying only to statements relating to matters of public concern, other authorities, including the Restatement, have more broadly interpreted *Gertz* to constitutionally prohibit presumed damages in all defamation contexts, requiring proof of actual injury. *See* Restatement (Second) of Torts § 621 & cmt. b (1977) ("Though the action in the *Gertz* case was one of libel and the defendant would be classified within the term, news media, and the defamatory statement involved a matter of public concern, there is little reason to conclude that the constitutional limitation on recoverable damages will be confined to these circumstances."). Because nominal damages likely do not offend the constitutional protections against presumed and punitive damages established in *Gertz*, limiting presumed damages absent proof of actual injury to nominal damages avoids this potential constitutional problem and makes it unnecessary in this instruction to distinguish between purely private cases and cases involving public officials, public figures, or speech relating to matters of public concern.

**CV1615 Damages – Economic Damages.**

Economic damages are awarded to compensate a plaintiff for actual and specific monetary losses that are caused by the publication of a defamatory statement. Economic damages are out-of-pocket losses and can include such things as loss of salary, employment, income, business, and other similar economic losses. [Name of plaintiff] must prove each item of economic damages with specific evidence.

**References**
*Jensen v. Sawyers*, 2005 UT 81, 130 P.3d 325
*Baum v. Gillman*, 667 P.2d 41 (Utah 1983)
*Allred v. Cook*, 590 P.2d 318 (Utah 1979)
*Prince v. Peterson*, 538 P.2d 1325 (Utah 1975)
*Cohn v. J.C. Penney Co., Inc.*, 537 P.2d 306 (Utah 1975)
*Nichols v. Daily Reporter Co.*, 83 P. 573 (Utah 1905)
Utah R. Civ. P. 9(g)
Restatement (Second) of Torts § 575 cmt. b (1977)

**MUJI 1st Instruction**
10.11

**Committee Notes**
This instruction uses the term "economic damages" to capture the concept of special damages. Utah courts have not addressed whether medical expenses incurred as a proximate result of defamation are recoverable as special damages, and courts in other jurisdictions are split on that issue. With regard to attorneys' fees, it is important to distinguish between a claim for defamation and a claim for "slander of title." Although the two claims share some nomenclature, they are distinct claims. *See Bass v. Planned Mgmt. Servs., Inc.*, 761 P.2d 566, 568 (Utah 1988). While attorneys' fees incurred in clearing a cloud placed on a title are recoverable as special damages in a slander of title claim, *see id*., Utah courts have not recognized attorneys' fees as special damages in a defamation claim. *See Computerized Thermal Imaging, Inc. v. Bloomberg, L.P.*, 312 F.3d 1292, 1299-1300 & n.15 (10th Cir. 2002) (distinguishing slander of title and holding attorneys' fees on defamation claim are "an element of special damages not recognized by Utah law").

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**CV1616 Damages – Noneconomic Damages.**

Noneconomic damages are awarded to compensate a plaintiff for actual injury to [his/her/its] reputation that is caused by publication of a defamatory statement, but that has not been compensated by economic damages. Noneconomic damages do not include specific monetary losses covered by economic damages. Factors you may consider in calculating non-economic damages are harm to reputation, impaired standing in the community, humiliation, shame, mental anguish and suffering, emotional distress and related physical injury, and other similar types of injuries. In making this determination, you may consider the state of [name of plaintiff's] reputation prior to the alleged defamation.

To award noneconomic damages to [name of plaintiff], you must find:

(1) [name of plaintiff] has proved by a preponderance of the evidence that [he/she/it] has actually been injured by the allegedly defamatory statement[s]; and
(2) either:

(a) the statement[s] at issue [is/are] the type for which damages are presumed; or

(b) [name of plaintiff] has proved by a preponderance of the evidence that [he/she/it] has suffered economic damages.

**References**
*Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974)
*Jacob v. Bezzant*, 2009 UT 37, 212 P.3d 535
*Baum v. Gillman*, 667 P.2d 41 (Utah 1983)
*Allred v. Cook*, 590 P.2d 318 (Utah 1979)
*Prince v. Peterson*, 538 P.2d 1325 (Utah 1975)
*Proctor v. Costco Wholesale Corp.*, 2013 UT App 226, 311 P.3d 564
*Thurston v. Workers Comp. Fund of Utah*, 2003 UT App 438, 83 P.3d 391
Restatement (Second) of Torts § 621 (1977)

**MUJI 1st Instruction**
10.11

**Committee Notes**
This instruction uses the term "noneconomic damages" to capture the concept of general damages; use of the term "general damages" in these notes is thus interchangeable with the term "noneconomic damages." The term "actual injury" in this context refers to a determination that the plaintiff has actually suffered damages, as opposed to merely relying on the *presumption* of injury for statements that are defamatory *per se*, which entitles a plaintiff only to nominal damages. "Actual injury" can refer either to general or special damages, the former concerned with harm to reputation, standing in the community, and the other factors listed in this instruction, and the latter concerned with pecuniary, out-of-pocket losses. Actual injury in the context of general damages typically requires the plaintiff to put on evidence that his or her reputation has been diminished, or that he or she has suffered humiliation, shame, mental anguish, suffering, or other similar types of injuries.

The requirements for an award of general damages in this instruction reflect the longstanding common law rule that a plaintiff who does not prove defamation *per se* is entitled to general damages only if he or she also pleads and proves special damages. In cases of defamation *per se*, the jury may award general damages without special damages. *See, e.g.*, *Baum v. Gillman*, 667 P.2d 41, 42 (Utah 1983) ("Inasmuch as the complaint contains no allegation of special damages, in order to state a claim upon which relief can be granted the statements attributed to Gillman must constitute defamation *per se*."); *Allred v. Cook*, 590 P.2d 318, 320-21 (Utah 1979) ("The general rule is that if special damages are not alleged, the slander must amount to slander per se before recovery is allowed."). Because the court determines whether the statements at issue are defamatory *per se*, *see* CV1614 (Presumed Damages), if the case does not involve defamation *per se*, this instruction may be modified to remove the disjunctive (2)(a) and require both actual injury and special damages.

**CV1617 Damages – Punitive Damages – Public Figure/Official and/or Issue of Public Concern.**

In addition to compensatory damages, [name of plaintiff] also seeks to recover punitive damages against [name of defendant]. Punitive damages are intended to punish a wrongdoer for extraordinary misconduct and to discourage others from similar conduct. They are not intended to compensate [name of plaintiff] for [his/her/its] loss.

Punitive damages may only be awarded if [name of plaintiff] has proved both of the following by clear and convincing evidence:

(1) At the time [name of defendant] made the allegedly defamatory statement[s], [name of defendant] had actual knowledge the statements were false or actually entertained serious doubts as to whether the statements were true. The question is not whether a reasonable person would have known that the statements were false or entertained serious doubts about their truth, but whether [name of defendant] actually had such knowledge or doubts at the time of publication; and

(2) [name of defendant]'s conduct:
(a) was [willful and malicious]; or
(b) was [intentionally fraudulent]; or
(c) manifested a knowing and reckless indifference toward, and a disregard of, the rights of others, including [name of plaintiff].

"Knowing and reckless indifference" means that (a) [name of defendant] knew that such conduct would, in a high degree of probability, result in substantial harm to another; and (b) the conduct must be highly unreasonable conduct, or an extreme departure from ordinary care, in a situation where a high degree of danger or harm would be apparent to a reasonable person.
Punitive damages are not awarded for mere inadvertence, mistakes, errors of judgment and the like, which constitute ordinary negligence.

**References**
*Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974)
*Ferguson v. Williams & Hunt, Inc.*, 2009 UT 49, 221 P.3d 205
*Jensen v. Sawyers*, 2005 UT 81, 130 P.3d 325
*Cox v. Hatch*, 761 P.2d 556 (Utah 1988)
Utah Code § 78B-8-201(1)(a)

**MUJI 1st Instruction**
10.12

**Committee Notes**
This instruction is a modified version of the general instruction for punitive damages (CV2026). The primary modification is the addition of the constitutional requirement of proving actual malice in cases involving public officials, public figures, and/or speech relating to matters of public concern. This instruction also removes from the general instruction the possibility of harm "to property" in the definition of knowing and reckless indifference because defamation

claims are always for personal harm to reputation; property damage caused by speech is covered by other torts, such as injurious falsehood. The other modification to this instruction is the removal of the optional brackets around the last paragraph in the instruction regarding negligence. For a discussion of the subjective nature of the actual malice standard, see CV1608 (Conditional Privilege), Committee Notes.

Neither the United States Supreme Court nor the Utah Supreme Court has addressed whether the *Gertz* actual malice requirement for punitive damages in cases involving public officials, public figures, and/or speech relating to a matter of public concern also applies in cases involving private figures and speech that does not relate to a matter of public concern. Cf. *Dun & Bradstreet v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985) (Powell, J.) (in plurality opinion, declining to extend actual malice rule). Because it is an unresolved question, the parties could argue that this instruction should also be used in cases involving private figures and speech unrelated to a matter of public concern instead of the general punitive damages instruction set forth in CV2026 (Punitive Damages. Introduction.).

The concept of "actual malice" is captured in subsection (1) of this instruction, although the term itself is not used.

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**CV1618 Damages – Effect of Retraction.**

If you find the allegedly defamatory statement[s] [was/were] [published in the newspaper] [broadcast on radio or television] by [name of defendant] in good faith, due to a mistake or misunderstanding of the facts, and that [name of defendant] made a full and fair retraction of the statements within [the time prescribed by statute] of [name of plaintiff]'s demand for a retraction or filing of this lawsuit by [the method prescribed by statute], then [name of plaintiff] may recover only those actual damages incurred by [name of plaintiff] as a direct result of the [publication] [broadcast] of the allegedly defamatory statements and no punitive damages may be awarded.

**References**
Utah Code §§ 45-2-1 to 1.5

**MUJI 1st Instruction**
10.13

**Committee Notes**
Several different retraction methods are prescribed by statute, Utah Code §§ 45-2-1 to 1.5, depending on the circumstances of the newspaper publication or radio or television broadcast. This instruction should be modified to reflect those methods. This instruction is necessary only if there was a retraction made or issued by the defendant.

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**CV1619 Affirmative Defense – Consent.**

Consent is an absolute defense to a claim for defamation. That means if [name of defendant] proves by a preponderance of the evidence that [name of plaintiff] consented, by words or

conduct, to [name of defendant]'s communication of the statement[s] at issue to others, there is no liability for defamation.

**References**
*Cox v. Hatch*, 761 P.2d 556 (Utah 1988)
Restatement (Second) of Torts § 583 (1977)

**MUJI 1st Instruction**
No analogue

**Committee Notes**
None

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**CV1620 Affirmative Defense – Statute of Limitations.**

An action for defamation must be filed within one year of the time that [name of plaintiff] could have reasonably discovered publication of the statement. You must decide when [name of plaintiff] could have reasonably discovered the alleged defamatory statement.

**References**
*Russell v. The Standard Corp.*, 898 P.2d 263 (Utah 1995)
*Allen v. Ortez*, 802 P.2d 1307 (Utah 1990)
Utah Code § 78B-2-302(4)

**MUJI 1st Instruction**
No analogue

**Committee Notes**
Application of a statute of limitations can be a question of law for the court, particularly when the statements at issue are published in a widely-available publication, but in certain circumstances a court may determine that a question of fact exists as to when a plaintiff should have reasonably discovered the allegedly defamatory statement. This instruction is intended for such circumstances.

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# Tab 4

# Model Utah Civil Jury Instructions, Second Edition
# Civil Rights

**CV1301 EXCESSIVE FORCE—GENERAL.**

[Plaintiff's name] claims that [Officer's name] used unreasonable force in [arresting/stopping] him.

[Officer's name] claims the force [s]he used in [arresting/stopping] [Plaintiff's name] was reasonable.

It is your duty to determine whether [Plaintiff's name] has proven [his/her] claims against [Officer's name] by a preponderance of the evidence.

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**CV1302 EXCESSIVE FORCE—STANDARD.**

A person interacting with a law enforcement officer has a constitutional right to be free from unreasonable force. A police officer is entitled to use such force as is reasonably necessary to lawfully stop a person, take an arrested citizen into custody or prevent harm to the officer or others. A police officer is not allowed to use force beyond that reasonably necessary to accomplish these lawful purposes.

In determining whether [Officer's name] used unreasonable force with [Plaintiff's name], you should consider all the facts known to [Officer's name] at the time [Officer's name] the force was used. You are not to consider facts unknown to [Officer's name] at the time [Officer's name] applied force to [Plaintiff's name].

The test of reasonableness requires careful attention to the specific facts and circumstances of the case. The reasonableness of a particular use of force must be judged from the perspective of an officer on the scene rather than with the 20/20 vision of hindsight.

You are not to consider [Officer's name] intentions or motivations, whether good or bad. Bad intentions will not make a constitutional violation out of an objectively reasonable use of force, and good intentions will not make an unreasonable use of force proper.

**Reference**:
*Graham v. Connor*, 490 U.S. 386 (1989)

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**CV1303 SEARCH OF RESIDENCE—GENERAL.**

A person has the right to be free from an unreasonable search of [his/her] residence. To prove [Defendant(s)] violated [Plaintiff]'s constitutional rights, [Plaintiff] must prove the following by a preponderance of the evidence:

1. [Defendant(s)] searched [Plaintiff]'s residence;

2. [Defendant(s)] intended to search the residence; and

3. The search was unreasonable.

**References**:
*Katz v. United States*, 389 U.S. 347 (1967)
*Brower v. County of Inyo*, 489 U.S. 593, 109 S. Ct. 1378 (1989)

**Committee Note**:
These instructions often refer to residence. However, they would apply to any constitutionally protected area, which may include homes, outbuildings, curtilage, etc.

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**CV1304 SEARCHES – PROPERTY, DEFINED.**

A search occurs if a [government actor] intrudes into a constitutionally protected area. A constitutionally protected area is one in which a reasonable person would have a reasonable expectation of privacy.

**References**:
*Soldal v. Cook County*, 506 U.S. 56, 62, (1992)
*United States v. Jacobsen*, 466 U.S. 109, 113 (1984)

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**CV1305 SEIZURES – PROPERTY, DEFINED.**

A seizure of property occurs when a [government actor] [takes/removes] personal property or otherwise interferes in a meaningful way with a person's right to possess that property.

**References**:
*Soldal v. Cook County*, 506 U.S. 56, 62, (1992)
*United States v. Jacobsen*, 466 U.S. 109, 113 (1984)

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**CV1306 [ENTRY/SEARCH] OF A RESIDENCE.**

To [enter/search] a residence without a warrant, an officer must either have:
(1) Consent; or
(2) Probable cause and exigent circumstances.

If [Defendant] did not have a warrant, then [Defendant] has the burden to prove by a preponderance of the evidence that there was consent, or probable cause and exigent circumstances.

**References**:
*Steagald v. U.S.*, 451 U.S. 204, 101 S.Ct. 1642 (1981)

**CV 1307 ENTRY OF RESIDENCE PURSUANT TO ARREST WARRANT.**

Absent consent or exigent circumstances and probable cause, an officer can legally enter a residence with an arrest warrant only if there was probable cause to believe that at the time of entry:

1. The person named in the arrest warrant was living at that residence;

and

2. That person was actually in the residence at the time.

**References**:
*Smith v. Oklahoma*, 696 F.2d 784, 786 (10th Cir 1983)
*Payton v. New York*, 445 U.S. 573, 100 S. Ct. 1371 (1980)

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**CV1308 SEARCH OF RESIDENCE PURSUANT TO ARREST WARRANT.**

If an officer has legally entered a residence pursuant to an arrest warrant, the officer is allowed to make a protective security sweep of the residence at the time of arrest only if the suspect is believed to be dangerous. A search warrant must be obtained before any search greater than a protective security sweep is made.

**References**:
*Smith v. Oklahoma*, 696 F.2d 784, 786 (10th Cir 1983)
*Payton v. New York*, 445 U.S. 573, 100 S. Ct. 1371 (1980)

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**CV1309 [ENTRY/SEARCH] OF RESIDENCE PURSUANT TO SEARCH WARRANT.**

A search warrant must be supported by probable cause to be reasonable. To demonstrate that a warrant lacks probable cause, a plaintiff must prove by a preponderance of the evidence that:

(1) The warrant application omitted material information; or

(2) The warrant was issued based on [a false statement/false statements] that an officer made knowingly, intentionally, or with reckless disregard for the truth.

**References**:
*Salmon v. Schwarz*, 948 F.2d 1131, 1139 (10th Cir. 1991)
*Franks v. Delaware*, 438 U.S. 154, 98 S. Ct. 2674 (1978)
*Malley v. Briggs*, 475 U.S. 335, 345, (1986)

## CV1310 CONSENT.

Consent is permission for something to happen, or an agreement to do something. Consent must be voluntary, but it may be either express or implied. [Defendant] has the burden to prove by a preponderance of the evidence that there was consent to a warrantless search, and to prove that such consent was voluntary.

**References**:
*United States v. Dewitt*, 946 F.2d 1497 (10th Cir. 1991)

**Committee Note**:
In determining whether consent to search is voluntary, consider all of the circumstances, including:

- whether the consenting person was in custody;
- whether officers' guns were drawn;
- whether the consenting person was told he or she had the right to refuse a request to search;
- whether the consenting person was told he or she was free to leave;
- whether Miranda warnings were given;
- whether the consenting person was told a search warrant could be obtained;
- any other circumstances applicable to the particular case.

## CV1311 PROBABLE CAUSE – SEARCH OF RESIDENCE.

Probable cause to search exists when the facts and circumstances known to the officer, based on reasonably trustworthy information, are such that a reasonable officer would believe [that the property to be seized/subject of the arrest warrant will be found in the residence or that there is a substantial chance that criminal activity is occurring in the residence].

**References**:
*Anderson v. Creighton*, 483 U.S. 635, 107 S. Ct. 3034 (1987)

**Committee Note**:
Mere suspicion that a suspect might be in the home of a third party generally does not establish probable cause to enter/search the third party's home. Speculation that a suspect was in a home because he visited it in the past does not justify entry/search.

## CV1312 EXIGENT CIRCUMSTANCES.

Exigent circumstances exist when there was insufficient time to get a search warrant, and an officer, acting on probable cause and in good faith, reasonably believes, based on the totality of the circumstances known to the officer at the time, that [entry/search] of the residence is necessary to prevent:

(1) Evidence or contraband from being immediately destroyed; or

(2) An immediate risk of danger to the officer or a third person.

**References**:
*Kirk v. Louisiana*, 536 U.S. 635, 122 S. Ct. 2458 (2002)
*Armijo ex rel. Armijo Sanchez v. Peterson*, 601 F.2d 1065, 1071 (10th Cir. 2010)

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**CV 1313 ENTITY LIABILITY – ELEMENTS.**

[Entity] is not liable for the actions of its employees or agents simply because they are employees or agents of [entity]. To demonstrate [entity] is liable, Plaintiff must prove all of the following by a preponderance of the evidence:

1. [Entity's employee] violated Plaintiff's constitutional rights;
2. [Entity] had policy or practice; and
3. That policy or practice was a moving force behind the violation of Plaintiff's constitutional rights.

**References**:
*Monell v. Department of Social Services of City of New York*, 436 U.S. 658, 98 S. Ct. 2018 (1978)

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**CV1314 ENTITY LIABILITY –DEFINITION OF POLICY OR PRACTICE.**

A policy is a position that has been officially adopted or formally accepted by [entity]. A practice is a custom or course of conduct that has been informally accepted or condoned by [entity].

**References**:
*Monell v. Department of Social Services of City of New York*, 436 U.S. 658, 98 S. Ct. 2018 (1978)

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**CV1315 ENTITY LIABILITY – FINAL DECISION BY POLICYMAKER.**

A single incident of unconstitutional activity demonstrates that [entity] had an unlawful policy or practice only if [Plaintiff] proves by a preponderance of the evidence that the

unconstitutional action was taken pursuant to a decision made by a person with authority to make policy decisions for [entity].

**References:**
*Moss v. Kopp*, 559 F.3d 1155, 1169 (10th Cir. 2009)
*Jenkins v. Wood*, 81 F.3d 988, 994 (10th Cir. 1996)
*Bryson v. City of Oklahoma City*, 627 F.3d 784 (10th Cir. 2010)

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**CV1316 ENTITY LIABILITY – FAILURE TO TRAIN.**

To demonstrate [entity] is liable for failure to train, Plaintiff must prove all of the following by a preponderance of the evidence:

(1) [Entity's employee] violated Plaintiff's constitutional rights;
(2) [Entity] failed to provide adequate training to [entity's employee]; and
(3) That failure to train was a moving force behind the violation of Plaintiff's constitutional rights.

**References**:
*City of Canton, Ohio v. Harris*, 489 U.S. 378, 109 S. Ct. 1197 (1989)
*City of Oklahoma City v. Tuttle*, 471 U.S. 808, 105 S. Ct. 2427 (1985)

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**CV1317 ENTITY LIABILITY – INADEQUATE TRAINING DEFINITION.**

Training is inadequate if the need for more or different training was so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that [entity] could reasonably be said to have been deliberately indifferent to the need.

**References**:
*City of Canton, Ohio v. Harris*, 489 U.S. 378, 109 S. Ct. 1197 (1989)
*City of Oklahoma City v. Tuttle*, 471 U.S. 808, 105 S. Ct. 2427 (1985)

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**CV1318 DELIBERATE INDIFFERENCE.**

[Individual/agency/institution official] acts with deliberate indifference if that person disregards a known or obvious risk that is likely to result in the violation of the [Plaintiff's] constitutional rights. This knowledge can be actual or constructive.

**References**:
*Barney v. Pulsipher*, 143 F.3d 1299, 1307 (10th Cir. 1998)
MUJI 1st 15.6
*Berry v. City of Muskogee*, 900 F.2d 1489 (10th Cir. 1990)
*Miranda v. Munoz*, 770 F.2d 255 (1st Cir. 1985)

*Garcia v. Salt Lake County*, 768 F.2d 303 (10th Cir. 1985)
*Todaro v. Ward*, 565 F.2d 48 (2nd Cir. 1977); affd, 652 F.2d 54 (2nd Cir.1981)
*McClelland v. Facteau*, 610 F.2d 693 (10th Cir. 1979)
*Choate v. Lockhart*, 779 F.Supp. 987 (E.D.Ark. 1991)
*Medcalf v. State of Kansas*, 626 F.Supp. 1179 (D. Kan. 1986)

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**CV1319 DELIBERATE INDIFFERENCE TO SERIOUS MEDICAL NEEDS – POLICY OR PRACTICE.**

Deliberate indifference can also be shown where a policy or practice disregards a known or obvious risk that is likely to result in the violation of an inmate's constitutional rights.

**References**:
*Sealock v. Colorado*, 218 F.2d 1205, 1209 (10th Cir. 2000)
*Self v. Crum*, 439 F.3d 1227, 1232 (10th Cir. 2006)
*Heidtke v. Corr. Corp. of Am.*, 489 F. App'x 275,280 (10th Cir. 2012)
MUJI 1st, 15.9, 15.10
*Hudson v. McMillian*, 503 U.S. ___, 117 L.Ed.2d 156 (1992)
*Whitley v. Albers*, 475 U.S. 312 (1986)
*Estelle v. Gamble*, 429 U.S. 97 (1976), rehearing denied, 429 U.S. 1066 (1977) DeGidio v. Pung, 920 F.2d 525 (8th Cir. 1990)
*Berry v. City of Muskogee*, 900 F.2d 1489 (10th Cir. 1990)
*Miranda v. Munoz*, 770 F.2d 255 (1st Cir. 1985)
*Todaro v. Ward*, 565 F.2d 48 (2nd Cir. 1977)

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**CV1320 DELIBERATE INDIFFERENCE TO SERIOUS MEDICAL NEEDS – [PRISON/JAIL] OFFICIAL.**

A [prison/jail] official's deliberate indifference to an inmate's serious medical needs violates the Eighth Amendment. A [prison/jail] official acts with deliberate indifference to a serious medical need when the official knows of a serious medical need, or the need for medical attention is obvious, and that official disregards the need.

To find an official liable for the violation of [Plaintiff's] constitutional rights, [Plaintiff] must prove by a preponderance of the evidence all of the following:

1. [Plaintiff] was suffering from a serious medical condition that required medical attention while incarcerated;

2. The [prison/jail] official knew of the serious medical need, or the need was obvious; and

3. The [prison/jail] official failed to timely or adequately arrange for medical attention to be provided, or denied the inmate access to medical personnel capable of evaluating the inmate's condition.

**References**:
*Sealock v. Colorado*, 218 F.2d 1205, 1209 (10th Cir. 2000)
*Self v. Crum*, 439 F.3d 1227, 1232 (10th Cir. 2006)
*Heidtke v. Corr. Corp. of Am.*, 489 F. App'x 275,280 (10th Cir. 2012)
MUJI 1st, 15.9, 15.10
*Hudson v. McMillian*, 503 U.S. ___, 117 L.Ed.2d 156 (1992)
*Whitley v. Albers*, 475 U.S. 312 (1986)
*Estelle v. Gamble*, 429 U.S. 97 (1976), rehearing denied, 429 U.S. 1066 (1977) DeGidio v. Pung, 920 F.2d 525 (8th Cir. 1990)
*Berry v. City of Muskogee*, 900 F.2d 1489 (10th Cir. 1990)
*Miranda v. Munoz*, 770 F.2d 255 (1st Cir. 1985)
*Todaro v. Ward*, 565 F.2d 48 (2nd Cir. 1977)

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**CV1321 DELIBERATE INDIFFERENCE TO SERIOUS MEDICAL NEEDS – MEDICAL PROVIDER.**

A medical professional may be deliberately indifferent to an inmate's serous medical needs by failing to treat a serious medical condition properly. Mere negligence does not constitute deliberate indifference. A medical professional is liable for deliberate indifference to an inmate's serious medical needs when the need for additional treatment or referral to a medical specialist is obvious.

**References**:
*Self v. Crum* 439 F.3d 1227, 1232 (lOth Cir. 2006)
*Heidtke v. Corr. Corp. of Am.*, 489 F. App'x 275, 280 (10th Cir. 2012)

**Committee Notes:**
The 10th Circuit has given three specific examples of circumstances where the need is obvious:
1. A provider recognizes an inability to treat the inmate because of the seriousness of the medical condition and/or lack of expertise, but declines or delays referring the inmate for treatment.
2. A provider fails to treat a medical condition so obvious that even a layman would recognize the condition.
3. A provider denies care even though he or she observed or was made aware of recognizable symptoms which could signal a medical emergency.

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**CV1322 SUPERVISORY LIABILITY FOR DELIBERATE INDIFFERENCE TO SERIOUS MEDICAL NEEDS.**

The deliberate indifference standard applies to [prison/jail] officials, as well as those who directly provide medical services. A [prison/jail] official is liable for the violation of [Plaintiff's] constitutional rights regardless of that official's actual knowledge of [Plaintiff's] serious medical needs, if you find that official:

1. Had a supervisory position;

2. Disregarded a known or obvious deficiency in the health care system at the [prison/jail]; and

3. Failed to remedy the deficiencies or alleviate the conditions that led to the constitutional violation,

**References**:
*Berry v. City of Muskogee*, 900 F.2d 1489 (10th Cir. 1990)
*Miranda v. Munoz*, 770 F.2d 255 (1st Cir. 1985)
*Garcia v. Salt Lake County*, 768 F.2d 303 (10th Cir. 1985)
*McClelland v. Facteau*, 610 F.2d 693 (10th Cir. 1979)
*Todaro v. Ward*, 565 F.2d 48 (2nd Cir. 1977), affd, 652 F.2d 54 (2nd Cir.1981)
*Choate v. Lockhart*, 779 F.Supp. 987 (E.D. Ark. 1991)
*Medcalf v. State ofKansas*, 626 F.Supp. 1179 (D. Kan. 1986)

**MUJI 1st Instruction**
15.11

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**CV1323 SERIOUS MEDICAL NEED DEFINED.**

A medical need is serious if:

1. It has been diagnosed by a medical provider as requiring treatment;

2. It is so obvious that even a lay person would easily recognize the necessity for a doctor's attention; or

3. Proper diagnosis would have revealed the seriousness of the problem, but such diagnosis was withheld.

The seriousness of an inmate's medical need may also be determined by considering the effect of denying the particular treatment. Where a delay in medical treatment causes an inmate to suffer a long-term handicap or permanent loss, the medical need is considered serious.

**References**:

*Monmouth Co. Corr'l Inst. Inmates v. Lanzaro*, 834 F.2d 326 (3rd Cir.1987), cert. denied, 486 U.S. 1006 (1988)
*Toombs v. Bell*, 798 F.2d 297 (8th Cir. 1986)
*Ramos v. Lamm*, 639 F.2d 559 (10th Cir. 1980), cert. den., 450 U.S. 1041 (1981)
*Medcalf v. State of Kansas*, 626 F.Supp. 1179 (D. Kan. 1986)
*Weaver v. Jarvis*, 611 F.Supp. 40 (N.D. Ga. 1985)

**MUJI 1st Instruction**
15.13

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**CV1324 SUPERVISORY LIABILITY – ELEMENTS.**

[Supervisory defendant] is not liable for the actions of an individual under [his/her] supervision simply because [he/she] is a supervisor. To demonstrate [supervisory defendant] is liable, Plaintiff must prove all of the following by a preponderance of the evidence:

1. [Supervised employee] violated Plaintiff's constitutional rights;
2. [Supervisory defendant] failed to provide adequate supervision and/or discipline of [supervised employee]; and
3. That failure to supervise was a moving force behind the violation of Plaintiff's constitutional rights.

**References**:
*City of Canton, Ohio v. Harris*, 489 U.S. 378, 109 S. Ct. 1197 (1989)
*Dodds v. Richardson*, 614 F.3d 1185 (10th Cir. 2010)
*Snell v. Tunnell*, 920 F.2d 673 (10th Cir. 1990)
*Valanzuela v. Snider*, 889 F.Supp. 1409, (D. Colo. 1995)

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**CV1325 SUPERVISORY LIABILITY – FAILURE TO SUPERVISE DEFINITION.**

Supervision is inadequate if the need for more or different supervision was so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that [supervisory defendant] could reasonably be said to have been deliberately indifferent to the need.

**References**:
*City of Canton, Ohio v. Harris*, 489 U.S. 378, 109 S. Ct. 1197 (1989)
*Dodds v. Richardson*, 614 F.3d 1185 (10th Cir. 2010)
*Snell v. Tunnell*, 920 F.2d 673 (10th Cir. 1990)
*Valanzuela v. Snider*, 889 F.Supp. 1409, (D. Colo. 1995)

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**CV1326 ELEMENTS OF AGE DISCRIMINATION CLAIM.**

For Plaintiff to establish a claim of age discrimination, Plaintiff must prove by a

preponderance of the evidence that Defendant would not have [adverse action] but for his age.

So long as Plaintiff proves that age was a factor that made a difference in [adverse action], Defendant may be held liable even if other factors contributed to its decision to [adverse action].

**References:**

*Gross v. FBL Financial. Servs., Inc.*, 557 U.S. 167 (2009)
*Burrage v. United States*, ___ U.S. ___, 134 S.Ct. 881, 187 L.Ed.2d 715, 82 U.S.L.W. 4076 (2014) ("Given the ordinary meaning of the word "because, "we held that §2000e-3(a) "require[s] proof that the desire to retaliate [134 S.Ct. 889] was [a] but-for cause of the challenged employment action." *Nassar*, supra, at __, 133 S.Ct. 2517, 186 L.Ed.2d 503 at 2528. The same result obtained in an earlier case interpreting a provision in the Age Discrimination in Employment Act that makes it "unlawful for an employer . . . to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U.S.C. §623(a)(1) (emphasis added). Relying on dictionary definitions of "[t]he words "because of"—which resemble the definition of "results from" recited above—we held that "[t]o establish a disparate-treatment claim under the plain language of [§623(a)(1)] ... a plaintiff must prove that age was [a] 'but for' cause of the employer's adverse decision."
*Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993)
*Jones v. Okla. City Pub. Schools*, 617 F.3d 1273, 1277-78 (10th Cir. 2010)

**Committee Notes:**
Evidence that may be utilized to show that age was a determinative factor in an adverse action differs depending on the specific facts of the case. Where age-based comments are at issue, practitioners may want an instruction on stray remarks. See e.g., *Reeves v. Sanderson Plumbing Products, Inc.*, 120 S.Ct. 2097, 2111-12 (2000); *Hare v. Denver Merch. Mart, Inc.*, 255 F. App'x 298, 303 (10th Cir. 2007); *Danville v. Regional Lab Corp.*, 292 F.3d 1246, 1251 (10th Cir. 2002); *Stone v. Autoliv ASP, Inc.*, 210 F.3d 1132, 1140 (10th Cir. 2000); *McKnight v. Kimberly Clark Corp.*, 149 F.3d 1125, 1129 (10th Cir. 1998); *Cone v. Longmont United Hosp. Ass'n*, 14 F.3d 526, 531-32 (10th Cir. 1994). Where there are issues related to the age of comparable employees or the age of a replacement, practitioners may want a specific instruction on the age of the replacement. See e.g., *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308, 312 (1996)*; Stone v. Autoliv ASP, Inc.*, 210 F.3d 1132, 1138 (10th Cir. 2000)*; Beaird v. Seagate Tech., Inc.*, 145 F.3d 1159, 1167 (10th Cir. 1998)*; Greene v. Safeway Stores, Inc.*, 98 F.3d 554, 560 (10th Cir. 1996).

In many cases an employer will have numerous affirmative defenses. Those affirmative defenses are not set forth in these instructions. Where an employer asserts an affirmative defense based upon a bona fide occupational qualification, a specific instruction should be given consistent with 29 U.S.C. § 623(f)(1); 29 C.F.R. § 1625.6; see also *Smith v. City of Jackson*, 544 U.S. 228, 233 FN3 (2005); *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, (2000); *Western Air Lines, Inc. v. Criswell*, 472 U.S. 400, 413-417 (1985). Where an employer asserts an affirmative defense based upon a bona fide seniority system consistent with 29 U.S.C. § 623(f)(2)(A); 29 C.F.R. § 1625.8;

see also *Hiatt v. Union Pacific R.R.*, 65 F.3d 838, 842 (10th Cir. 1995), *cert. denied* 516 U.S. 1115 (1996).

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**CV1327 PRETEXT - ADEA CLAIM.**

Plaintiff claims that Defendant's stated reason for [adverse action] are not the true reasons for [adverse action], but instead a pretext to cover up for age discrimination.

If you do not believe one or more of the reasons Defendant offered for Plaintiff's [adverse action], or if you do not believe the stated reason is the real reason for [adverse action], then you may, but are not required to, infer that age was a factor that made a difference in Defendant's decision to [adverse action].

**Committee Notes:**
This instruction should only be given when Plaintiff contends that Defendant's stated reasons for its adverse action are pretextual. In the Tenth Circuit, a Plaintiff can show pretext by offering evidence showing weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in Defendant's stated reasons for the adverse action. See e.g., *Reeves v. Sanderson Plumbing Products, Inc.*, 120 S.Ct. 2097, 2108-09 (2000); *Kendrick v. Penske Transp. Servs., Inc.*, 220 F.3d 1220, 1230 (10th Cir. 2000); *Townsend v. Lumberman's Mut. Cas. Co.*, 294 F.3d 1232, 1241 (10th Cir. 2002); *Village of Arlington Heights v. Metropolitan Housing Development Corporation*, 429 U.S. 252, 266-68 (1977) (disturbing procedural irregularities); *Plotke v. White*, 405 F.3d 1092, 1102 (10th Cir. 2005) (rejection of the Defendant's proffered legitimate reason for the adverse employment action will permit the trier of fact to infer the ultimate fact of intentional discrimination); *Green v. New Mexico* 420 F.3d 1189, 1195 (10th Cir. 2005); *Morgan v. Hilti, Inc.*108 F.3d 1319, 1323 (10th Cir. 1997). Practitioners should craft an instruction on pretext related to the evidence at issue in the case.

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**CV1328 ADEA –WILLFUL – DEFINED.**

If you find Defendant discriminated against Plaintiff on the basis of age, you must now determine whether Defendant's violation was "willful." Defendant acted "willfully" if it either knew or showed reckless disregard for whether its decision to [adverse action] was prohibited by the ADEA.

**References**:
29 U.S.C. § 626(b)(7)(b);
*Hazen Paper v. Biggins*, 507 U.S. 604, 616 (1993)
*Minshall v. McGraw Hill Broadcasting Co., Inc.*, 323 F.3d 1273, 1283 (10th Cir. 2003)

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**CV1329 CAUSATION.**

[Refer to CV209 "Cause" defined.]

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**CV1330 DAMAGES—GENERAL.**

If you find that the Defendant did not violate the Plaintiff's constitutional [or statutory] rights, do not award Plaintiff any damages. If you find that the Defendant violated the Plaintiff's constitutional [or statutory] rights, you should determine what damages to award the Plaintiff. There are two kinds of damages, nominal and compensatory. Compensatory damages are the amount of money that you think will reasonably and fairly compensate the Plaintiff for injuries resulting from the deprivation of his/her constitutional [or statutory]rights, and can be both economic and non-economic in nature. Nominal damages are awarded when the only injury is the violation of the constitutional [or statutory] right itself.

**References**:
MUJI 2d CV2002
*Stevens-Henager College v. Eagle Gate College, Provo College, Jana Miller,* 2011 Ut App 37, Para. 16, 248 P.3d 1025.

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**CV1331 COMPENSATORY DAMAGES.**

Plaintiff has the burden to show that he/she is entitled to compensatory damages. To recover compensatory damages, Plaintiff must show that it is more likely than not that he/she suffered injury because of the Defendant's violation of the Plaintiff's constitutional rights beyond just the violation of the right.

**References**:
MUJI 2d CV2002
*Stevens-Henager College v. Eagle Gate College, Provo College, Jana Miller,* 2011 Ut App 37, Para. 16, 248 P.3d 1025.

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**CV1332 COMPENSATORY DAMAGES – ADA TITLE VII/SECTION 1981 CASES ONLY.**

If you find that the Defendant unlawfully discriminated [or retaliated] against the Plaintiff on the basis of [his][her] [protected activity, race, sex, disability, etc.], then you must determine an amount that is fair compensation for Plaintiff's losses. You may award compensatory damages for injuries that the Plaintiff proved were caused by the Defendant's wrongful conduct. The damages that you award must be fair compensation, no more and no less.

*Insert bold provision only if court determines back pay is not a jury question:*
**[In calculating damages, you should not consider any back pay or front pay that the Plaintiff lost. The award of back pay and front pay, should you find the Defendant liable on the Plaintiff's claims, will be calculated and determined by the Court.]**

You may award damages for any emotional distress, pain, suffering, inconvenience or mental anguish [insert all other claimed damages, such as embarrassment, humiliation, damage to reputation, etc.] that Plaintiff experienced as a consequence of the wrongful conduct. No evidence of monetary value of such intangible things as pain and suffering has been, or need be, introduced into evidence. There is no exact standard for setting the compensation to be awarded for these elements of damages. Any award you make should be fair in light of evidence presented at trial.

*Insert bold provision if Plaintiff is seeking other consequential damages.*
**[You may also reimburse the Plaintiff for the value of other out-of-pocket losses or expenses, including expenses for past medical bills, expenses for counseling or mental health care, moving expenses, employment search expenses, and [insert all other quantifiable out-of-pocket expenses sought by the Plaintiff].**

In determining the amount of any damages that you decide to award, you should be guided by dispassionate common sense. You must use sound discretion in making an award of damages, drawing reasonable inferences from the facts in evidence. You may not award damages based on speculation or guesswork. On the other hand, the law does not require that the Plaintiff prove the amount of her losses with mathematical precision, but only with as much definiteness and accuracy as circumstances permit.

**References:**
42 U.S.C. § 1981a. Taken from *Model Employment Law Jury Instructions*, Faculty of Federal Advocates (*Ad Hoc Committee*) (Sept. 2013).

**Committee Notes:**
Under Title VII and the ADA, the amount of compensatory damages is capped by statute. The elements of compensatory damages that are subject to the statutory cap are (1) future pecuniary losses, and (2) all nonpecuniary losses, which includes emotional distress, anguish, loss of enjoyment of life, embarrassment, reputational damage, adverse effects on credit rating, physical harms caused by distress, etc. The statutory cap does not apply to <u>past</u> pecuniary losses that occurred prior to the date of trial. These losses may include past medical bills, expenses for counseling or mental health care, moving expenses, employment search expenses, and other quantifiable out-of-pocket expenses. *See also* EEOC Enforcement Guidance: Compensatory and Punitive Damages Available Under Section 102 of the Civil Rights Act of 1991 (July 1992).

**CV1333 NON-ECONOMIC DAMAGES.**

As mentioned previously, there are two types of compensatory damages: economic and non-economic. Non-economic damages are the amount of money that will fairly and adequately compensate Plaintiff for losses that are not capable of exact measurement in dollars. There is no fixed rule, standard or formula to determine them, so they can be difficult to arrive at. If Plaintiff has shown that he/she has suffered such damages, however, do not let this difficulty stop you from awarding them, but use your calm and reasonable judgment to reach an amount. The law does not require evidence of the monetary value of intangible things like pain, suffering, and other non-economic damages.

**References:**
CV2004 Noneconomic damages defined.
*C.S. v. Neilson,* 767 P.2d 504 (Utah 1988)
*Judd v. Rowley's Cherry Hill Orchards, Inc.*, 611 P.2d 1216 (Utah 1980).

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**CV1334 ECONOMIC DAMAGES.**

Economic damages are the amount of money that will fairly and adequately compensate [name of plaintiff] for measurable losses of money or property caused by [name of defendant]'s violation of the Plaintiffs' constitutional rights.

**References:**
CV2003 Economic Damages defined.

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**CV1335 BACK PAY.**

If you find that the Defendant unlawfully discriminated [or retaliated] against the Plaintiff on the basis of [his][her] [protected activity, race, sex, disability, etc.], then you must determine the amount of back pay that the Plaintiff proved was caused by the Defendant's wrongful conduct.

In determining back pay, you must make several calculations:
First, calculate the amount of pay and bonuses that Plaintiff would have earned had [he][she] not been [describe employment action at issue] from the date of that [describe employment action at issue] until today's date.

Then calculate and add the value of the employee benefits (health, life and dental insurance, vacation leave, etc.) that Plaintiff would have received had [he][she] not been [describe employment action at issue] from the date of that [describe employment action at issue] until the date of trial.

Then, subtract from this sum the amount of pay and benefits that Plaintiff actually earned from other employment during this time.

**References:**
Federal Employment Jury Instructions, § 1:1260; Model Jury Instructions (Civil) Eighth Circuit §5.02 (1998).
*Model Employment Law Jury Instruct.*, Faculty of Fed. Advocates (*Ad Hoc Comm.*) Sept. 2013)

**Committee Notes:**
There is a question as to whether back pay is an issue of fact for a jury determination, or an issue of law for the Court. *Compare Dodoo v. Seagate Tech., Inc.*, 235 F.3d 522, 527 (10th Cir. 2000), as representative of a case where back pay was determined by a jury; *with Mallinson-Montague v. Pocrnick*, 224 F.3d 1224, 1236 (10th Cir. 2000) (where back pay was determined by the Court). In cases where a claim is also brought under 42 U.S.C. § 1981, back pay is properly a jury question. *See Skinner v. Total Petroleum, Inc.*, 859 F.2d 1439, 1444 (10th Cir. 1988).

In appropriate cases, this instruction should be followed by an instruction regarding failure to mitigate.

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**CV1336 FAILURE TO MITIGATE.**

Plaintiff is required to make reasonable efforts to minimize damages. In this case, the Defendant claims that Plaintiff failed to minimize damages because [state the reason, *e.g.*, Plaintiff failed to use reasonable efforts to find employment after discharge.]
It is the Defendant's burden to prove that Plaintiff failed to make reasonable efforts to minimize [his][her] damages. This defense is proven if you find by a preponderance of the evidence that:

1. There were or are substantially comparable positions which Plaintiff could have discovered and for which Plaintiff was qualified; and

2. Plaintiff failed to use reasonable diligence to find suitable employment. "Reasonable diligence" does not require that Plaintiff be successful in obtaining employment, but only that [he][she] make a good faith effort at seeking employment.

If the Defendant has proven the above, then you must deduct from any award of back pay the amount of pay and benefits Plaintiff could have earned with reasonable effort.

**References:**
*Aguinaga v. United Food & Com. Worker's Intern.*, 993 F.2d 1463, 1474 (10th Cir. 1993) *citing* 510 U.S. 1072 (1994); *E.E.O.C. v. Sandia Corp.*, 639 F.2d 600, 627 (10th Cir. 1980).
Taken from *Model Employment Law Jury Instructions*, Faculty of Federal Advocates (*Ad Hoc Committee*) (Sept. 2013)

**Committee Notes:**
There is authority to support language defining "reasonable diligence" to the effect that, "you may find that Plaintiff failed to use reasonable diligence during periods where Plaintiff was not

ready, willing and available for employment," e.g., Plaintiff has enrolled in school. *See Miller v. Marsh*, 766 F.2d 490, 493 (11th Cir. 1985); *Taylor v. Safeway Stores, Inc.*, 524 F.2d 263, 267268 (10th Cir. 1975) *overruled on other grounds; Ruckelshaus v. Sierra Club*, 463 U.S. 680 (1983).

However, where the Defendant fails to bring forward any evidence supporting the first prong of this instruction, then the Defendant has failed to meet its burden of showing that Plaintiff failed to mitigate damages, and the Plaintiff's status as a full-time student is then irrelevant. *Goodman v. Fort Howard Corp.*, No. 93-7067, 1994 U.S. App. LEXIS 17507, *11 (10th Cir. July 18, 1994) (unpublished).

Those cases contrast with cases where the enrollment period is nonetheless recognized as a "reasonable" attempt to mitigate damages: *Bray v. Thurston Motor Lines, Inc.*, 753 F.2d 1269, 1275-76 (4th Cir. 1985); *Dailey v. Societe Generale*, 108 F.3d 451, 455-57 (2d Cir. 1997); *Smith v. American Serv. Co.*, 796 F.2d 1430, 1431-32 (11th Cir. 1986); *Hanna v. American Motors Corp.*, 724 F.2d 1300, 1307-09 (7th Cir. 1984). Those cases recognize that only "reasonable" efforts to mitigate damages are required, not ultimate success.

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**CV1337 UNCONDITIONAL OFFER OF EMPLOYMENT.**

You have heard evidence in this case that Defendant offered to return Plaintiff to work and that Plaintiff rejected that offer. If you find that the Defendant made an unconditional offer of employment (that is, an offer that was not conditioned upon Plaintiff taking any other action or relinquishing any rights) of a job substantially comparable to Plaintiff's former employment and that Plaintiff unreasonably refused that offer, Plaintiff may not recover back pay after the date of the offer, unless special circumstances exist. In considering whether special circumstances exist, you must consider the circumstances under which the offer was made or rejected, including the terms of the offer and Plaintiff's reasons for refusing the offer.

**References:**

*Ford Motor Co. v. EEOC*, 458 U.S. 219 (1982); *Giandonato v. Sybron Corp.*, 804 F.2d 120, 123124 (10th Cir. 1986).

*Model Employment Law Jury Instructions,* Faculty of Fed. Advocates (*Ad Hoc Committee*) (Sept. 2013)

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**CV1338 NOMINAL DAMAGES.**

If you return a verdict for the Plaintiff, but find that the Plaintiff has failed to prove that [he][she] suffered any damages, then you must award the Plaintiff the nominal amount of $1.00.

**References:**

*See* Model Jury Instructions (Civil) Eighth Circuit § 5.23 (1999); *Barber v. T.D. Williamson, Inc.*, 254 F.3d 1223, 1228 (10th Cir. 2001); *Salazaar v. Encinias*, 2000 U.S. App. LEXIS 32022, *7-8 (10th Cir. Dec. 15, 2000).
Taken from *Model Employment Law Jury Instructions,* Faculty of Federal Advocates (*Ad Hoc Committee*) (Sept. 2013).

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**CV1339 PUNITIVE DAMAGES – MUNICIPALITIES GENERALLY IMMUNE.**

Although punitive damages are authorized against individual defendants in civil rights actions, municipalities are generally immune from punitive damage awards.

**References**:
*Smith v. Wade*, 461 U.S. 30, 103 S. Ct. 1625 (1983)
*Garrick v. City and County of Denver*, 652 F.2d 969 (10th Cir. 1981)
*City of Newport v. Facts Concerts, Inc.*, 453 U.S. 247, 101 S. Ct. 2748 (1981)

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**CV1340 PUNITIVE DAMAGES.**

[Refer to CV2026-2032 Punitive Damage Instructions].

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**CV1341 ATTORNEYS' FEES AND TAXES.**

You are not to award damages for the purpose of punishing [Defendant's name]. You must not include any additional damages to compensate [Plaintiff's name] for attorneys' fees or other legal costs incurred in connection with this lawsuit. That is an issue the Court will resolve following the trial. Furthermore, you may not increase the amount of your verdict by reason of federal, state or local income taxes.

**Committee note:**
The first sentence should be given only if punitive damages are no longer an issue for the jury to consider.

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# Tab 5

# Model Utah Civil Jury Instructions, Second Edition
# Emotional Distress

**CV1501 INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS.**

To prove a claim for intentional infliction of emotional distress, [name of plaintiff] must prove each of the following elements:

1. Outrageous and intolerable conduct by [name of defendant]; and
2. [name of defendant] intended to cause emotional distress or acted with reckless disregard of the probability of causing emotional distress; and
3. [name of plaintiff] suffered severe or extreme emotional distress that was caused by the [name of defendant]'s conduct.

These requirements will be explained in the following instructions.

**References:**
*Samms v. Eccles*, 11 Utah 2d 289, 358 P.2d 344 (1961)
*White v. Blackburn*, 787 P.2d 1315 (Utah Ct. App. 1990)
*Nelson v. Target Corporation*, 334 P.3d 1010 (Utah App. 2014)
*Anderson Development Company v. Tobias, et al*, 116 P.3d 323 (Utah 2005)

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**CV1502 OUTRAGEOUS CONDUCT**

"Outrageous and intolerable" conduct is conduct that offends generally accepted standards of decency and morality or, in other words, conduct that is so extreme as to exceed all bounds of what is usually tolerated in a civilized community. Conduct that is merely unreasonable, unkind, or unfair does not qualify as outrageous and intolerable conduct.

**References:**
*Samms v. Eccles*, 11 Utah 2d 289, 358 P.2d 344 (1961)
*White v. Blackburn*, 787 P.2d 1315 (Utah Ct. App. 1990)
Restatement (Second) of Torts § 46 comment d (1964)
*Nelson v. Target Corporation*, 334 P.3d 1010 (Utah App. 2014)
*Anderson Development Company v. Tobias, et al*, 116 P.3d 323 (Utah 2005)

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**CV1503 SEVERE OR EXREME EMOTIONAL DISTRESS**

Emotional distress may include such things as mental suffering, mental anguish, mental or nervous shock, or highly unpleasant reactions, such as fright, horror, grief, or shame. However, you can award damages for emotional distress only when the distress is severe or extreme.

In determining the severity of distress, you may consider the intensity and duration of the distress, observable behavioral or physical symptoms, and the nature of the [name of defendant]'s conduct. It is possible to have severe and extreme emotional distress without observable behavioral or physical symptoms.

**References:**
*Samms v. Eccles*, 11 Utah 2d 289, 358 P.2d 344 (1961)
Restatement (Second) of Torts § 46 comment j (1964)
See also, *Anderson Development Company v. Tobias, et al*, 116 P.3d 323 (Utah 2005)

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## CV1504 DEFINITION OF INTENT AND RECKLESS DISREGARD

[Name of plaintiff] must show that [name of defendant] either (1) acted with the intent of inflicting emotional distress, or (2) with no intent to cause harm, intentionally performed an act so unreasonable and outrageous that [name of defendant] knew or should have known it was highly probable that harm would result.

**References:**
*White v. Blackburn*, 787 P.2d 1315 (Utah Ct. App. 1990)

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## CV1505 NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS—DIRECT VICTIM

In order to recover for negligent infliction of emotional distress, [name of plaintiff] must either:

1. suffer a physical injury, or
2. be in the zone of danger.

If [name of plaintiff] qualifies for one of the above, [name of plaintiff] must prove all of the following:

1. [name of defendant] was negligent;
2. [name of defendant]'s negligence placed [name of plaintiff] in danger of physical impact or injury; and
3. [name of plaintiff] suffered severe and unmanageable mental distress in a reasonable person normally constituted.

This instruction is based upon Restatement (second) of Torts § 313 (1964) pursuant to the references cited below.

**References**:
*Johnson v. Rogers*, 763 P.2d 771 (Utah 1988)
*White v. Blackburn*, 787 P.2d 1315 (Utah Ct. App. 1990) Restatement (second) of Torts § 313 (1964)
*Hanson v. Sea Ray Boats, Inc.*, 830 P.2d 236 (Utah 1992)
*Harnicher v. University of Utah Medical Center*, 962 P.2d 67 (Utah 1998)

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## CV1506 NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS—BYSTANDER

In order to recover for negligent infliction of emotional distress as a bystander, [name of plaintiff] must:

1. be in the zone of danger—in actual physical peril;
2. fear injury to himself/herself; and,
3. witness—contemporaneous observation—an injury to an immediate family member.

If [name of plaintiff] so qualifies, [name of plaintiff] must prove all of the following:

1. [name of defendant] was negligent;
2. [name of defendant]'s negligence placed [name of plaintiff] in danger of physical impact or injury; and
3. [name of plaintiff] suffered severe and unmanageable mental distress in a person normally constituted.

**References:**
*Johnson v. Rogers*, 763 P.2d 771 (Utah 1988)
*White v. Blackburn*, 787 P.2d 1315 (Utah Ct. App. 1990) Restatement (second) of Torts § 313 (1964)
*Hanson v. Sea Ray Boats, Inc.*, 830 P.2d 236 (Utah 1992)
*Harnicher v. University of Utah Medical Center*, 962 P.2d 67 (Utah 1998)
*Figueroa v. United States of America*, 64 F. Supp. 2d 1125 (D. Utah 1999)

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# Note to Committee from Sub-Committee

## REGARDING CV 1506

Three of the four committee members agree that a bystander must witness an injury to a relative or family member in order to recover for negligent infliction of emotional distress (bystander). The cases use various terms for that person/victim—"immediate family member," "relative," "close relative," and "immediate family." The majority of the subcommittee recommends that the committee select the language it deems most appropriate.

One member of the subcommittee maintains that the case of *Straub v Fisher and Paykel Health Care*, 990 P.2d 384 (Utah 1999) rejected the requirement that the plaintiff and the victim must be related. See letter from George T. Waddoups dated August 25, 2016.

Robert J. DeBry
& ASSOCIATES

August 25, 2016

***VIA E-MAIL***

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**Re: Jury Instruction Sub-Committee**

Dear Gentleman:

As you are aware, I disagree with some of the jury instructions and in particularly, some of the language in the jury instructions as follows:

(1) CV1501: It is my view that this should be outrageous or intolerable conduct under paragraph 1;

(2) CV1502: The first 3 words should read "outrageous or intolerable;"

(3) CV1503: No change;

(4) CV1504: No change;

(5) CV1505: Paragraph 6: It is my view that in proving negligent infliction of emotional distress, the damage by the person making the claim should not require severe and unmanageable mental distress and should read "suffered emotional and unmanageable mental distress." The reason for my view is that when the conduct is intentional, we have elevated the damage necessary to severe. It is my view in reading the cases it should

not be severe for negligent infliction of emotional distress. "Negligent infliction of and emotional distress" in paragraph 3 should read "suffered emotional and unmanageable mental distress" as opposed to "severe." It is my view that the word "severe" should be removed.

6) CV1506: We discussed this particular instruction at length. It is my view in applying the Straub opinion to our model jury instructions and the case law previous to this, there is no requirement that it be an immediate family member. I think by asserting immediate family member, you are completely restricting the availability of this tort, thereby denying access to the court, violating the Utah Constitution by only allowing immediate family members to bring a claim for this tort.

It is my view that if a tortfeasor acts negligently and causes graphic injuries to a third person, which is witnessed by a bystander, it is reasonable to assume that the tortfeasor should know that this is going to cause those people witnessing this graphic injury emotional distress.

In reading the Restatement of Tors, the Harnicher case and the language of the Straub case, the courts go back and forth but use the term "other" or "third person" rather than immediate family member. In some places, they do say "family member." However, it is my view and it has been the law in the state of Utah for at least 20 years, that it does not require it to be an immediate family member to bring a claim for negligent infliction of emotional distress. I know I am in the minority on this issue. However, I think when you look at it from the view point of what is stated in prior case law, the Restatement, and having access to the court under the Utah Constitution, I think it discriminates against other potential claimants. This would be a major change under the Utah law which would now violate open access to the courts. There is no additional remedy for those people who will now be denied the opportunity to bring a claim for negligent affliction of emotional distress or intentional infliction of emotional distress since you are now requiring claimants to be an immediate family member.

For these reasons, I suggest we not include the immediate family member, which is a significant change.

With best regards I am

Sincerely,

ROBERT J. DeBRY & ASSOCIATES

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GTW/hj