Agenda
Advisory Committee on Model Civil Jury Instructions

April 10, 2017
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

Welcome, announcements, and approval of minutes	4:00	Tab 1	Judge Ryan Harris
Subcommittees and subject area timelines	4:03	Tab 2	Judge Ryan Harris
Emotional Distress comments	4:05	Tab 3	Judge Ryan Harris, Judge Barry Lawrence
Civil Rights Instructions	4:30	Tab 4	Heather White, Karra Porter
Other business	5:55		Judge Ryan Harris

Committee Web Page

Published Instructions

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

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
March 13, 2017
4:00 p.m.

Present: Juli Blanch (chair), Joel Ferre, Honorable Ryan M. Harris, Patricia C. Kuendig, Ruth A. Shapiro, Paul M. Simmons, Honorable Andrew H. Stone, Nancy Sylvester. Also present: Heather S. White and Karra J. Porter from the Civil Rights subcommittee

Excused: Marianna Di Paolo, Tracy H. Fowler, Peter W. Summerill, Christopher M. Von Maack

1. *Minutes.* On motion of Ms. Shapiro, seconded by Ms. Kuendig, the committee approved the minutes of the February 27, 2017 meeting.

2. *Civil Rights Instructions.* The committee continued its review of the Civil Rights instructions.

a. *CV1306. Unlawful arrest--minor crime.* At Ms. Blanch's suggestion, the committee dropped the second sentence of the first paragraph and the last two paragraphs. At Judge Harris's suggestion, the first sentence was revised to read, "If a police officer has probable cause to believe a person has committed any criminal offense, however minor, in his presence, he may arrest the person without violating the Constitution." Ms. Porter thought that any reference to the seriousness of the offense was commentary and that the instruction could just refer to any offense, but Judge Stone thought it was appropriate to include "however minor" because the instruction is used most often with allegedly pretextual arrests. Judge Harris questioned whether the offense has to be committed in the officer's presence if he otherwise has probable cause. Ms. Kuendig pointed out that CV1303 on warrantless arrests does not require that the offense be committed in the officer's presence. Ms. White suggested deleting "in his presence" and adding a committee note that some offenses, such as infractions, have to be committed in the officer's presence. Ms. Porter also thought that the second paragraph, telling the jury what it could and could not consider, was best saved for argument. Judge Harris and others thought it was appropriate here, to avoid having the jurors judge the officer based on what they would have done under the circumstances. The committee then questioned the phrase "either of the offenses I just described to you" and noted that there is no prior instruction describing the offenses at issue. The committee debated whether to add a description of the offenses and, if so, where. It ultimately decided to add an instruction after CV1304, *Probable cause* (provisionally numbered 1304A and titled "Offenses") that says: "You are to determine whether [name of defendant] had probable cause to believe that [name of plaintiff] committed any of the following offenses:" The instruction will have a committee note to the effect that the court and counsel will need to add the

specific offenses at issue and their elements. (If there are multiple offenses, there should be separate instructions on the elements of each.) On motion of Judge Stone, seconded by Mr. Ferre, the committee approved new CV1304A. It then returned to CV1306.

The committee rewrote the second paragraph of CV1306 to read:

> You are not to consider whether you think [name of defendant] should have arrested [name of plaintiff]. Instead, you must decide whether [name of defendant] had probable cause to believe that [name of plaintiff] committed any offense for which [name of plaintiff] was arrested.

On motion of Mr. Ferre, seconded by Judge Stone, the committee approved CV1306 as modified.

b. *CV1307A. Investigative stop.* Ms. Porter proposed a new instruction on investigative (so-called *Terry)* stops, to go before CV1307, *Reasonable suspicion.* The instruction originally read:

> Some temporary seizures are less intrusive than an arrest. The Constitution permits a law-enforcement officer to temporarily detain a person without a warrant if two requirements are met:
>
> First, the officer must have a reasonable suspicion that the person detained is engaged in criminal activity. Whether an officer has a reasonable suspicion to subject a person to a temporary detention is evaluated objectively according to the totality of the circumstances.
>
> Second, the officer's actions must be reasonably related in scope to the circumstances that justified the interference in the first place.
>
> [Name of officer] has the burden of establishing that these elements were present.

Ms. Porter noted that the wording of the second requirement was taken straight out of *Terry v. Ohio,* 392 U.S. 1, 20 (1968). Judge Stone noted, however, that the justification for the stop may change during the course of the investigation, and when it does it may require a new reasonableness determination. The committee decided that it was too hard to explain such "rolling" detentions in a simple jury instruction and that it was best left to the attorneys to argue that a new stop

began when the initial justification for the stop changed. Ms. White and Ms. Porter thought that the attorneys could argue to the jury when the detention became unreasonable and that no note explaining "rolling" stops was necessary. The committee revised the instruction to read:

> The Constitution permits a law-enforcement officer to temporarily detain a person without arresting [him/her] if two requirements are met:
>
> First, the officer must have a reasonable suspicion that the person detained has committed a crime.
>
> Second, the officer's actions must be reasonably limited in time and scope to the investigation of the suspected crime.

On motion of Judge Harris, seconded by Judge Stone, the committee approved the instruction.

The committee also added the following sentence to the end of CV1307: "Whether an officer has a reasonable suspicion to subject a person to a temporary detention is evaluated objectively according to all the circumstances known to the officer."

3. *Next meeting.* The next meeting is Monday, April 10, 2017, at 4:00 p.m.

The meeting concluded at 6:00 p.m.

Tab 2

Priority	Subject	Sub-C in place?	Sub-C Members	Projected Starting Month	Projected Finalizing Month	Comments Back?
1	Emotional Distress	Yes	Dunn, Mark (D)(Chair); Combe, Steve (D); Katz, Mike (P); Waddoups, George (P)	May-16	December-16	Comment period expired February 25. Committee will review at April meeting.
2	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	June-17	
3	Fault/Negligence	N/A	Judge Lawrence	September-17	September-17	Revisit old instructions
4	Economic Interference	Yes	Frazier, Ryan (D) (Chair); Shelton, Ricky (D); Stevenson, David (P); Simmons, Paul (P); Kuendig, Patricia (P)	October-17	November-17	
5	Injurious Falsehood	Yes	Dryer, Randy (Chair); Hoole, Greg; Hoole, Roger; Hunt, Jeff; Reymann, David; Stevens, Greg	December-17	February-18	
6	Directors and Officers Liability	Yes	Burbidge, Richard D.; Call, Monica;Von Maack, Christopher (chair); Larsen, Kristine; Talbot, Cory; Love, Perrin	March-18	April-18	
7	Sales Contracts and Secured Transactions	Yes	Cox, Matt (chair); Boley, Matthew; Maudsley, Ade	May-18	June-18	
8	Assault/False Arrest	Yes	Rice, Mitch (chair); Carter, Alyson; Wright, Andrew (D); Cutt, David (P)	September-18	October-18	
9	Trespass and Nuisance	Yes (more members needed)	Hancock, Cameron; Figueira, Joshua (researcher); Abbott, Nelson (P); Steve Combe (D)	November-18	December-18	
10	Insurance	Yes	Johnson, Gary (chair); Pritchett, Bruce; Ryan Schriever, Dan Bertch, Andrew Wright, Rick Vazquez; Stewart Harman (D); Ryan Marsh (D)	January-19	February-19	
11	Wills/Probate	No	Barneck, Matthew (chair)	March-19	April-19	
12	Unjust Enrichment	No (instructions from David Reymann)	David Reymann	May-19	September-19	
13	Abuse of Process	No (instructions from David Reymann)	David Reymann	October-19	December-19	

Tab 3

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 [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)

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)

CV1503 SEVERE OR EXTREME 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 [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)

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)

CV1505 NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS.

In order to recover for negligent infliction of emotional distress, [name of plaintiff] must prove all of the following:

1. [name of defendant] was negligent;
2. [name of plaintiff] was in the "zone of danger";
3. [name of plaintiff] feared for [his/her] own safety and/or witnessed an injury to another; and
4. [name of plaintiff] suffered severe emotional distress as a result of [name of defendant]'s negligence.

References*:*
Johnson v. Rogers, 763 P.2d 771, 785 (Utah 1988) (Zimmerman, J., concurring in part, joined by Hall, C.J.; Howe, Associate C.J.; and Stewart, J.) (Adopting Restatement (Second) of Torts § 313 (1964) "as written.")
White v. Blackburn, 787 P.2d 1315 (Utah Ct. App. 1990)
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)
Straub v. Fisher, 990 P.2d 384 (Utah 1999)

Committee Note
For a definition of negligence, please see CV202A "Negligence" defined.

This instruction covers both direct victim NIED claims and bystander NIED claims. The committee determined that although the circumstances giving rise to each claim differ depending on whether the claimant is the direct victim or a bystander, the elements of each are the same. *See, e.g., Lawson v. Salt Lake Trappers, Inc.*, 901 P.2d 1013 (Utah 1995) (bystander claim); *Johnson v. Rogers*, 763 P.2d 771 (Utah 1988) (bystander claim); *Hanson v. Sea Ray Boats, Inc.*, 830 P.2d 236 (Utah 1992) (discussing the distinction between bystander and direct victim claims).

Restatement (Second) of Torts § 313(2) says that the general rule for negligent infliction of emotional distress where the plaintiff suffers emotional distress as a result of fear for his own safety does not apply to illness or bodily harm "caused by emotional distress arising solely from harm or peril to a third person, unless the negligence of the actor has otherwise created an unreasonable risk of bodily harm to the" plaintiff. This is the so-called zone-of-danger test. While the Restatement refers to harm or peril to a "third person," the vast majority of cases where plaintiffs have sought recovery for negligent infliction of emotional distress have involved harm or peril to a member of the plaintiff's immediate family. See *Lawson v. Salt Lake Trappers, Inc.*, 901 P.2d 1013 (Utah 1995) (daughter); *Boucher ex rel. Boucher v. Dixie Med. Ctyr.*, 850 P.2d 1179 (Utah 1992) (son); *Hansen v. Sea Ray Boats, Inc.*, 830 P.2d 236 (Utah 1992) (son); *Johnson v. Rogers*, 763 P.2d 771 (Utah 1988) (son); *White v. Blackburn*, 787 P.2d 1315 (Utah Ct. App. 1990) (son). But see *Straub v. Fisher & Paykel Health Care*, 1999 UT 102, 990 P.2d 384 (respiratory therapist's patient). The Utah Supreme Court has not squarely addressed the issue, and the committee therefore expresses no opinion as to whether a plaintiff can recover where the third person is not a member of the plaintiff's immediate family.

Whether mental illness alone, in the absence of any physical manifestation, is sufficient to support a NIED claim has not been resolved under Utah law. *See Hansen v. Mountain Fuel Supply Co.*, 858 P.2d 970, 983 (Utah 1993) (Zimmerman, J., concurring in part and concurring in the result, joined by Hall, C.J.; Howe, Associate C.J., and Stewart, J.). Cf. id. at 975 ("A plaintiff who can establish through appropriate expert testimony that he or she suffers from mental illness as a result of a defendant's negligent conduct may maintain an action for NIED.") (per Durham, J.). *But see Id.* at 974 (The requirement of resulting "illness or bodily harm" "provides a check on feigned disturbances, thereby ensuring the genuineness of claims." "[E]motional disturbance that is not severe enough to result in illness or physical consequences is likely to be in the realm of the trivial.") (per Durham, J.). In any event, the emotional distress suffered must be severe. It must be "such that 'a reasonable [person,] normally constituted, would be unable to adequately cope with the mental stress

engendered by the circumstances of the case.'" *Id.* at 975 (per Durham, J.) (citation omitted), quoted with approval in *Harnicher v. University of Utah Med. Ctr.*, 962 P.2d 67, 70 (Utah 1998).

CV1506 DEFINITION OF "ZONE OF DANGER."

To be within the "zone of danger," [name of plaintiff] must be in such close proximity to a threat of harm created by [name of defendant]'s negligent conduct that [he/she] is placed in actual physical peril.

References:
Hansen v. Sea Ray Boats, Inc., 830 P. 2d 236, 239-240 (Utah 1992)
Straub v. Fisher, 990 P.2d 384, 387 (Utah 1999)
Boucher v. Dixie Medical Center, 850 P.2d 1179, 1181 (Utah 1992)

Civil Jury Instructions – Emotional Distress – Comment period expires February 25, 2017

The following proposed Model Utah Civil Jury Instructions address **emotional distress**:

CV1501 – Intentional infliction of emotional distress.
CV1502 – Outrageous conduct.
CV1503 – Severe or extreme emotional distress.
CV1504 – Definition of intent and reckless disregard.
CV1505 – Negligent infliction of emotional distress.
CV1506 – Definition of "zone of danger."

Click here to view a pdf version of proposed Model Utah Civil Jury Instructions 1501-1506.

Please reference the instruction number(s) in your comments.

EDIT PAGE

This entry was posted in **Civil**, **Civil, Emotional Distress**.

Criminal Jury Instructions – Controlled Substance Offenses – Comment period expired February 18, 2017 »

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3 thoughts on "Civil Jury Instructions – Emotional Distress – Comment period expires February 25, 2017"

Trevor A. Bradford

January 12, 2017 at 7:29 pm Edit

I am very pleased that the committee has finally decided to add MUJI instructions for both IIED and NIED. In relation to CV1503 "Severe or Extreme Emotional Distress," I think the language should be amended in the following respect (proposed changes are capitalized):

"Emotional distress may include, BUT IS NOT LIMITED TO, . . . "; "In determining the severity of distress, you SHOULD consider . . ."

Randy Andrus

January 17, 2017 at 7:39 pm Edit

"Zone of danger" should not be limited to just "physical" peril.

I propose adding the words "severe or extreme emotional distress."

I have handled cases in which innocent bystanders, such as a parent, have suffered severe and extreme emotional distress even though the bystander is not in any physical peril herself. For example, one case involved a newborn still in the hospital who was being treated by hospital staff drawing blood from the newborn in one last blood test in an already tense neonatal intensive care unit (NICU) with breathing difficulties. It was the last draw just before the mother would be going home with her newborn joy. The mother was right there in the zone, watching. The staff person had difficulty finding a vein/artery to draw the blood because of how small newborns are. Thinking that warm water could help enlarge the vein/artery, the staff person applied a wet diaper with mistakenly scalding hot water. As a result, the newborn's tender skin on the heel and leg was severely burned causing multiple painful burns, burn treatment and permanent scarring. The mother, although not in any physical peril herself, was horrified and powerless to do anything to help her new baby who was crying, screaming and moving her legs in writhing pain. A wound team was called to address the negligence by the hospital staff. Traumatized and in disbelief, the parents went home with their burned baby. Continued care and follow up treatment was necessary. This caused severe and extreme emotional suffering to both baby and mother, with life-long ramifications and re-living the experience when explaining the scars to her daughter as she grows up.

See Johnson v. Rogers, 763 P.2d 771, 782 (Utah 1988). This case supports the above and can be added to the proposed "zone of danger" instruction.

Phillip S. Ferguson

February 14, 2017 at 6:16 pm Edit

The instruction does not address the situations found in Candelaria v. CB Richard Ellis, 2014 UT App 1, 319 P.3d 708, para. 9 & 10, and Anderson Dev. Co. v. Tobias, 2005 UT 36, 116 P.3d 323, para. 57 – 61. In Candelaria the court of appeals discussed whether to allow a cause of action for NIED due to a slip/fall on ice and snow while taking out the trash. They set out the elements for proving such a claim but concluded that the plaintiff had not alleged sufficient facts to prove those elements. In Tobias, the S. Ct. rejected a claim for NIED for filing an abusive lawsuit. Neither situation fits the classic Johnson v. Rogers scenario, which is what the proposed instructions address.

Harris & Lawrence Proposed Instructions:

CV 1505:

In order to recover for negligent infliction of emotional distress, [name of plaintiff] must prove all of the following:

1. [name of defendant] was negligent;
2. [name of plaintiff] was in the "zone of danger";
3. [name of plaintiff] feared for [his/her] own safety and/or witnessed an injury to another; and
4. [name of plaintiff] suffered severe emotional distress as a result of [name of defendant]'s negligence.

CV 1506:

To be within the "zone of danger," [name of plaintiff] must be in such close proximity to a threat of harm created by [name of defendant]'s negligent conduct that [he/she] is placed in actual physical peril.

My Comment and Suggested Instruction:

The cases indicate that in order to ensure that plaintiff's apprehension of fear is reasonable, (because after all, these cases come about because there is an absence of physical injury upon the plaintiff) that a measure of objectivity is required – i.e., that at least *someone* suffered actual harm. In other words, if the plaintiff is in close proximity to the harmed person and witnessed the physical contact, then it is reasonable to assume that that person may have suffered emotional distress. Without actual physical injury to a third person, there is no objective way to verify plaintiff's emotional distress and so there is no zone of danger. [Also, I'm not sure the 'zone of danger" language really needs to be conveyed to the jury]. So, I would recommend the following:

In order to recover for negligent infliction of emotional distress, [name of plaintiff] must prove all of the following:

1. [name of defendant] was negligent;
2. That defendant's negligence caused actual physical harm to a third party;
3. That [name of plaintiff] actually witnessed that harm to a third party;
4. That [name of plaintiff] was in such close proximity to the injured third person, that it was reasonable for him/her to have reasonably feared for his/her safety and to have been placed in actual physical peril himself/herself; and
5. [name of plaintiff] suffered severe emotional distress as a result of [name of defendant]'s negligence.

4/6/17 Comments from Judge Harris:

After reviewing all of the NIED cases, I am convinced that we need to go back to the drawing board in some respects. Chiefly, I think we need to create different NIED instructions for direct victim claims and for bystander claims. The instruction we have (especially as amended by Judge Lawrence) is great for bystander claims, but is not accurate as pertains to direct victim claims. For instance, you do not necessarily have to be "within the zone of danger" to bring a direct victim claim under Section (1) of the Restatement. See Harnicher, Hansen v. Mountain Fuel.

The two instructions below are my take on solving this.

I also think we need to make clear that CV1503, regarding "severe or extreme emotional distress," applies only to IIED claims and not to NIED claims. In that instruction, we state that "it is possible to have severe and extreme emotional distress without observable behavioral or physical symptoms." This may be true in IIED cases, see Samms v. Eccles; see also Restatement (Second) of Torts § 46, cmt. k, but the question is not yet settled in Utah in NIED cases, see Harnicher, Hansen v. Mountain Fuel. Reading between the lines of Harnicher and Mountain Fuel, if I had to guess I would say that the majority of the Supreme Court would hold that, in order to have sufficient injuries for a NIED claim, a plaintiff must have either (a) a diagnosed mental illness or (b) a physical manifestation of the emotional distress. But as I read the cases, the question remains unsettled. We should make clear that citation to CV1503 in NIED cases is therefore not appropriate.

CV1504.5
Negligent Infliction of Emotional Distress – Direct Victim

In order to recover for negligent infliction of emotional distress, [name of plaintiff] must prove all of the following:

1. [name of defendant] unintentionally engaged in conduct that [he/she] should have realized involved an unreasonable risk of causing emotional distress to others,
2. [name of defendant] should have realized that the emotional distress [his/her] conduct could cause was the sort of distress that might result in illness or bodily harm; and
3. [name of defendant]'s conduct caused [name of plaintiff] to sustain severe emotional distress, characterized by illness or bodily harm.

References:
Candelaria v. CB Richard Ellis, 2014 UT App 1, ¶ 9, 319 P.3d 708
Harnicher v. University of Utah Med. Ctr., 962 P.2d 67, 69-72 (Utah 1998)
Hansen v. Mountain Fuel Supply Co., 858 P.2d 970, 974, 982-83 (Utah 1993)
Restatement (Second) of Torts, § 313(1)

CV1505

Negligent Infliction of Emotional Distress – Bystander

In order to recover for negligent infliction of emotional distress, [name of plaintiff] must prove all of the following:

1. [name of defendant] unintentionally engaged in conduct that [he/she] should have realized involved an unreasonable risk of causing emotional distress to others,
2. [name of defendant] should have realized that the emotional distress [his/her] conduct could cause was the sort of distress that might result in illness or bodily harm; and
3. [name of defendant]'s conduct caused actual physical harm to a third party;
4. [name of plaintiff] actually witnessed the third party sustain physical harm;
5. [name of plaintiff] was within the zone of danger; and
6. [name of defendant]'s conduct caused [name of plaintiff] to sustain severe emotional distress, characterized by illness or bodily harm.

References:

Johnson v. Rogers, 763 P.2d 771, 780, 785 (Utah 1988)
Hansen v. Sea Ray Boats, Inc., 830 P.2d 236, 239-42 (Utah 1992)
Lawson v. Salt Lake Trappers, Inc., 901 P.2d 1013, 1016 (Utah 1995)
Straub v. Fisher and Paykel Health Care, 1999 UT 102, ¶¶ 7-15, 990 P.2d 384
Restatement (Second) of Torts, § 313(2)

Tab 4

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: April 4, 2017
Re: Civil Rights Instructions

Here is where we left off at the March meeting:

- CV1303: Change "Fourth Amendment to the United States Constitution" to "the Constitution" and reapprove.
- 1307 (reasonable suspicion): The committee thinks this instruction needs to be before a Terry Stop instruction. Karra and Heather were going to talk about whether there is a missing instruction.
- 1310 (search of residence): The committee thinks this instruction also needs to discuss entry of residence or that maybe there should be a separate instruction that discusses entry of residence. See 1313 [Entry/Search] of a Residence (committee note temporarily added to flag issue).
- On CV1315, the committee felt that the instruction needed to be reworked to include within it a definition for protective sweep. I inserted Heather's suggestion into the instructions, including updated case references.
- On CV1316, the committee had a question about who the person charged with knowledge or omission is? Does it go just to the affiant (the officer)? To the agency? The committee grappled with passive versus active voice, and with active voice, it matters who is charged with this. Here is her response (I made her suggested change):
    - "You can state a 1983 unlawful search claim against the officer who signed the false/misleading probable cause affidavit. Other officers have quasi-judicial immunity for executing a facially valid search warrant. But, if the search warrant is so facially defective, others cannot rely on it. I cannot think of how to construct one instruction that covers all situations. My suggestion would be to take out the "to be reasonable" and then leave the instruction as is. It would apply to (1) the issuing

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officer and (2) the officers who relied on it if it is so clearly not valid. This might need to be included in the commentary."

Model Utah Civil Jury Instructions, Second Edition
Civil Rights

CV1301 SECTION 1983 CLAIM—ELEMENTS. Approved 12/12/16.

To establish [his/her] claims under Section 1983, [plaintiff's name] must demonstrate, by a preponderance of the evidence, the following three elements:

First, that [name of defendant] was a state employee and was acting, purporting to act, or pretending to act in performance of [his/her] official duties.

Second, that this conduct deprived [name of plaintiff] of a right protected by federal law; and

Third, that [name of defendant]'s conduct was a cause of harm sustained by [name of plaintiff].

References
W. v. Atkins, 487 U.S. 42, 49, 108 S. Ct. 2250, 2255, 101 L. Ed. 2d 40 (U.S. 1988)

Committee Note

See CV209 for a definition of "cause."

In the first element above, the committee has attempted to define "acting under color of state law" in plain language. The United States Supreme Court case of *W. v. Atkins*, 487 U.S. 42, 49, 108 S. Ct. 2250, 2255, 101 L. Ed. 2d 40 (U.S. 1988) provides that "[t]he traditional definition of acting under color of state law requires that the defendant in a § 1983 action have exercised power possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law."

If the claim is that the defendant was purporting to act under color of state law, the judge may need to define what it means to purport to do something.

CV1302 SECTION 1983 CLAIM—DEPRIVATION OF RIGHTS. APPROVED 11/14/16.

The second element of [name of plaintiff]'s claims is that [name of defendant]'s conduct deprived [him/her] of a right protected by federal law. [Name of plaintiff] claims in this case that [he/she] was deprived of [his/her] right to [list the right or rights].

I will explain [this/these] right[s]] later in the Instructions.

CV1303 WARRANTLESS ARREST. Approved 12/12/16.

Comment [NS1]: Change 4th Amendment to the Constitution

The Fourth Amendment to the United States Constitution prohibits the police from carrying out unreasonable seizures. An arrest is considered a "seizure" within the meaning of the Fourth Amendment. Under the Fourth Amendment an arrest may be made only when 1) a police

officer has an arrest warrant, or 2) when a police officer has probable cause to believe that the person arrested has engaged in criminal conduct. An arrest without either an arrest warrant or a probable cause is an unreasonable seizure.

[Name of plaintiff] claims that [he/she] was unlawfully arrested by [name of defendant] on [date]. [Name of defendant] did not have an arrest warrant. Therefore, you must determine whether [name of defendant] had probable cause to arrest [name of plaintiff].

Committee Note

Utah Code section 77-7-2 places limitations on when a police officer can make a warrantless arrest.

CV1304 PROBABLE CAUSE. Approved 1/9/2016.

Probable cause does not require that the officer had proof beyond a reasonable doubt, or even proof by a preponderance of the evidence. Probable cause exists when an officer has knowledge of facts and circumstances that are of such weight and persuasiveness as to convince a prudent and reasonable person of ordinary intelligence, judgment, and experience that it is reasonably likely that a crime has been committed and the person arrested committed that crime.

The existence of probable cause is measured as of the moment of the arrest, not on the basis of later developments. Thus, the ultimate resolution of the criminal charges is irrelevant.

CV1304A OFFENSES AT ISSUE. Approved 3/13/17.

You are to determine whether [name of defendant] had probable cause to believe [name of plaintiff] committed [any of] the following offense[s]:

1)
2)
3)

Committee note

In this instruction, the parties will need to insert each offense. The elements of each offense will need to be listed in separate instructions.

CV1305 UNLAWFUL ARREST–ANY CRIME. Approved 1/9/2016.

It is not necessary that [name of officer[s]] had probable cause to arrest [name of plaintiff] for the offense with which [he/she] was charged, so long as [name of officer[s]] had probable cause to arrest [name of plaintiff] for some criminal offense.

CV1306 UNLAWFUL ARREST – MINOR CRIME. APPROVED 3/13/17.

If a police officer has probable cause to believe a person has committed any criminal offense, however minor, he may arrest the person without violating the Constitution.

You are not to consider whether you think [name of defendant] should have arrested [name of plaintiff]. Instead, you must decide whether [name of defendant] had probable cause to believe that [name of plaintiff] committed [any of] the offense[s] listed in [CV1304A].

CV 1307A INVESTIGATIVE STOP. Approved 3/13/17.

The Constitution permits a law enforcement officer to detain a person without arresting [him/her] if two requirements are met.

First, the officer must have reasonable suspicion that the person detained has committed a crime.

Second, the officer's actions must be reasonably limited in time and scope to the investigation of the suspected crime.

References:
U.S. v. Fonseca, 744 F. 3d 674, 680-81 (10th Cir. 2014) ("A twofold inquiry determines whether a Terry stop is reasonable under the Fourth Amendment. 'First, the officer's action must be 'justified at its inception.'" *United States v. King*, 990 F.2d 1552, 1557 (10th Cir.1993) (quoting *Terry*, 392 U.S. at 20, 88 S.Ct. 1868). Thus, "[f]or an investigative detention, the officer must have an articulable and reasonable suspicion that the person detained is engaged in criminal activity.' *Id.* Second, the officer's actions must be 'reasonably related in scope to the circumstances which justified the interference in the first place.'" *Id.* (*quoting Terry*, 392 U.S. at 20, 88 S.Ct. 1868). 'There is no bright-line rule to determine whether the scope of police conduct was reasonably related to the goals of the stop; rather our evaluation is guided by common sense and ordinary human experience.' *United States v. Albert*, 579 F.3d 1188, 1193 (10th Cir.2009) (internal quotation marks omitted)."
State v. Chettero, 2013 UT 9 n.11 (Terry stop "must be justified at its inception")

CV1307 REASONABLE SUSPICION.

Comment [NS2]: This needs to be before a Terry Stop instruction. Karra will talk to Heather about whether there is a missing instruction.

Reasonable suspicion means the officer was aware of and can identify specific facts that would lead a reasonable officer to conclude that the person in question has committed a crime. The level of suspicion required for reasonable suspicion is considerably less than proof of wrongdoing by a preponderance of the evidence. But reasonable suspicion requires something more than a mere guess or hunch.

~~Reasonable suspicion means that the police officer must be able to articulate specific facts which, taken together with rational inferences from the facts, reasonably warrant the officer's conclusion that the individual is engaging in particular conduct, here, carrying or concealing weapons or other contraband.~~

~~Reasonable suspicion may be based upon such factors as the nature of the offense for which the arrestee is charged, the arrestee's appearance and conduct, and the arrestee's prior criminal record, if any.~~ Whether an officer has reasonable suspicion is evaluated objectively under all of the circumstances known to the officer.

References

State v. Peterson, 2005 UT 17 ¶ 11 ("Whether an officer has reasonable suspicion to subject an individual to a Terry stop and frisk is 'evaluated objectively according to the totality of the circumstances.'")

CV1308 EXCESSIVE FORCE—INTRODUCTORY INSTRUCTION. APPROVED 9/19/16.

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

[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 proved [his/her] claims against [Officer's name] by a preponderance of the evidence.

CV1309 EXCESSIVE FORCE—STANDARD. APPROVED 9/19/16

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.

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.

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 [he/she] applied the force. You are not to consider facts unknown to [Officer's name] at the time [Officer's name] applied force to [Plaintiff's name].

You are not to consider [Officer's name]'s 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)

MUJI 1st
15.7

CV1310 SEARCH OF RESIDENCE—GENERAL. APPROVED 9/19/16.

Comment [NS3]: Have new instruction that says Entry of Residence? Or present in the alternative in this instruction? Karra will take back to subcommittee.

A person has a constitutional right to be free from an unreasonable search of [his/her] [residence]. To prove [Defendant(s)' name(s)] violated [Plaintiff's name]'s constitutional right, [Plaintiff's name] 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:
Minnesota v. Carter, 525 U.S. 83 (1998)
Kentucky v. King, 563 U.S. 462 (2011)

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

CV1311 SEARCHES OFPROPERTY. Approved 1/9/2017.

Search has a special meaning under the law. A "search" of property occurs if a [government actor] intrudes into an area in which a 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)
United States v. Hutchings, 127 F.3d 1255, 1259 (1997)

CV1312 SEIZURES OF PROPERTY. Approved 1/9/2017.

Seizure has a special meaning under the law. A "seizure" of property occurs when a [government actor] [takes/removes] a person's 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)

CV1313 [ENTRY/SEARCH] OF A RESIDENCE.

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

If [name of ~~D~~defendant] did not have a warrant, then [~~Defendant~~he/she] 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)

Committee note:
All entries are searches, but not all searches are entries. The parties should select the term that fits the case.

CV 1314 ENTRY OF RESIDENCE PURSUANT TO ARREST WARRANT. Approved 2/27/17.

To lawfully enter a residence based on an arrest warrant, the officer must have reason to believe at the time of entry that 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:
Payton v. New York, 445 U.S. 573, 100 S. Ct. 1371 (1980)

Committee note:
This instruction is limited to entries of residences based only on an arrest warrant. It does not apply to entries based on a search warrant, consent, or exigent circumstances and probable cause.

CV1315 SEARCH OF RESIDENCE PURSUANT TO ARREST WARRANT.

Comment [NS4]: Below is what the subcommittee came up with in response to the committee's questions.

If an officer has lawfully entered a residence pursuant to an arrest warrant, the officer is allowed to conduct a "protective security sweep" if the officer has reasonable suspicion that a person posing danger to the officer or others Is in the area to be searched. A "protective security sweep" is a limited search of the residence for the sole purpose of securing the officers' safety during the arrest. It is limited to a cursory inspection of those spaces where a person may be found. A search warrant must be obtained before any search greater than a protective security sweep is made.

~~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:

Maryland v. Buie, 494 U.S. 325, 327 (1990)

Fishbein ex rel. Fishbein v. City Of Glenwood Springs, Colorado, 469 F.3d 957, 961 (10th Cir. 2006)

State v. Grossi, 2003 UT App 181, 72 P.3d 686

~~*Smith v. Oklahoma*, 696 F.2d 784, 786 (10th Cir 1983)~~

~~*Payton v. New York*, 445 U.S. 573, 100 S. Ct. 1371 (1980)~~

CV1316 [ENTRY/SEARCH] OF RESIDENCE PURSUANT TO SEARCH WARRANT.

Comment [NS5]: Question for subcommittee: who is the person charged with knowledge or omission? Does it go just to the affiant (the officer)? To the agency? The committee grappled with passive versus active voice and with active voice, it matters who is charged with this.

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) at the time of the search warrant application, the officer who made the application knowingly, intentionally, or with reckless disregard for the truth, omitted information from or included false statements in the application, and 2) the information, if accurately included, would have affected the magistrate's decision to issue the warrant..

Alternative:

1) the search warrant application contained one or more omissions and/or false statements that were made knowingly, intentionally, or with reckless disregard for the truth, and 2) the information, if accurately included, would have affected the magistrate's decision to issue the warrant.

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)

Committee note:
Some of the issues in this instruction may be questions for the judge to decide, rather than the jury. It will be up to the parties and the judge to determine how to appropriately tailor the instruction for the jury.

CV1317 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.

CV1318 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.

CV1319 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)

CV 1320 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)

CV1321 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)

CV1322 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)

CV1323 ENTITY LIABILITY – FAILURE TO TRAIN. (FIX NUMBERING)

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)

CV1324 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)

CV1325 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)

CV1326 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)

CV1327 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)

CV1328 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.

CV1329 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

CV1330 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

CV1331 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)

CV1332 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)

CV1333 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).

CV1334 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.

CV1335 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)

CV1336 CAUSATION.

[Refer to CV209 "Cause" defined.]

CV1337 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.

CV1338 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.

CV1339 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).

CV1340 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).

CV1341 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.

CV1342 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.

CV1343 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.

CV1344 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)

CV1345 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).

CV1346 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)

CV1347 PUNITIVE DAMAGES.

[Refer to CV2026-2032 Punitive Damage Instructions].

CV1348 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.
