Agenda
Advisory Committee on
Model Civil Jury Instructions

October 2, 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	Juli Blanch, Chair
Subcommittees and subject area timelines	4:03	Tab 2	Juli Blanch
Negligence Instructions Revisited	4:05	Tab 3	Judge Barry Lawrence
Economic Interference	5:00	Tab 4	Ryan Frazier
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.

November 13, 2017
December 11, 2017
January 8, 2018
February 12, 2018
March 12, 2018
April 9, 2018
May 14, 2018
June 11, 2018
September 10, 2018
October 15, 2018
November 19, 2018
December 10, 2018

Tab 1

MINUTES

Advisory Committee on Model Civil Jury Instructions
September 11, 2017
4:00 p.m.

Present: Juli Blanch (chair), Marianna Di Paolo, Joel Ferre, Tracy H. Fowler, Honorable Ryan M. Harris, Ruth A. Shapiro, Paul M. Simmons, Honorable Andrew H. Stone, Peter W. Summerill, Nancy Sylvester, Christopher M. Von Maack. Also present: Heather White from the Civil Rights subcommittee

Excused: Patricia C. Kuendig

1. *Judge Harris.* The committee congratulated Judge Harris on his appointment to the Utah Court of Appeals and thanked him for his five years of service on the committee. Judge Harris was then excused. His parting words of wisdom echoed those of Frank Carney: "Don't let the perfect be the enemy of the good."

2. *Committee Chair.* Ms. Blanch announced that she would be leaving the committee and stepping down as the chair in November 2017. Judge Stone will be the new chair.

3. *Minutes.* On motion of Ms. Shapiro, seconded by Judge Stone, the committee approved the minutes of the June 12, 2017 meeting.

4. *Schedule.* Ms. Blanch reported that the first hour of the October meeting will be devoted to Judge Lawrence's comments on the negligence instructions. Ms. Sylvester will re-circulate them before the next meeting. The second hour will be devoted to the Economic Interference instructions.

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

a. *CV1317, Consent.* At the last meeting, the committee had questioned who had the burden of proof and whether there was a difference in the definition of voluntariness between civil and criminal cases. Ms. White said that the plaintiff has the burden to prove all elements of the claim, but the defendant has the burden of proving that consent was freely given, by a preponderance of the evidence, based on the totality of the circumstances. The definition of voluntariness is the same in both the civil and criminal contexts. The committee decided against listing, in either the instruction or the committee note, factors for the jury to consider in determining the voluntariness of the consent but instead to leave it to the attorneys to argue what factors they think are relevant in a particular case. At Judge Stone's suggestion, the committee changed "voluntary" to "freely given." The committee revised the instruction to read:

> Consent is permission for something to happen, or an agreement to do something. Consent must be freely given, but it may be either expressly stated or implied by the circumstances. [Name of defendant] has the burden to prove by a preponderance of the evidence that [he/she] reasonably believed based on all the circumstances that [name of plaintiff] consented to the search and to prove that the consent was freely given.

Dr. Di Paolo joined the meeting.

The committee revised the committee note to say that the instruction should be used only when consent is at issue, such as in the case of a warrantless search or when a warrant is claimed to be invalid. Ms. Blanch suggested also adding citations to some of the cases that discuss factors relevant to the issue of consent. On motion of Ms. Shapiro, seconded by Judge Stone, the committee approved the instruction as revised.

b. *CV1318, Probable cause--search of a residence.* At the suggestion of Ms. Blanch and Ms. White, the committee note was deleted. It was thought that examples of what is *not* probable cause were not appropriate and better left for argument. Judge Stone asked how CV1318 differed from CV1314, "Entry of residence pursuant to arrest warrant." Ms. White explained that CV1314 applied when someone was entering a residence to arrest someone, whereas CV1318 applied to warrantless entries of a residence to search for evidence. Judge Stone suggested adding a committee note to the effect that the instruction should only be used in conjunction with CV1319 on exigent circumstances. Dr. Di Paolo thought that CV1318 and CV1319 speak to different things and thought how they were supposed to fit together was confusing. Ms. Blanch noted that CV1312(3) lists as an exception to the warrant requirement cases where the officer has both probable cause to search real property *and* exigent circumstances exist. Mr. Von Maack suggested adding a definition of probable cause to CV1312 and found a definition in *State v. Moreno*, 2009 UT 15, ¶ 37, 203 P.3d 1000. Based in part on that definition, the committee revised CV1318 to read:

> 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 [contraband] [evidence of a crime] [or] [the subject of an arrest warrant] will be found in the residence [or] [there is a substantial chance that criminal activity is occurring in the residence].

Judge Stone and Dr. Di Paolo thought that an instruction on the permissible scope of the search was needed. The committee added a reference to CV1315, on

protective sweeps, to the committee note and added a reference to *Illinois v. Gates*, 462 U.S. 213 (1983).

Messrs. Ferre and Summerill were excused.

On motion of Ms. Shapiro, seconded by Ms. Blanch, the committee approved the instruction as revised.

c. *CV1319, Exigent circumstances.* At Ms. Blanch's suggestion, the committee revised the instruction to read:

> Exigent circumstances exist when an officer, acting on probable cause and in good faith, reasonably believes, based on all the circumstances known to the officer at the time, that the delay in getting a search warrant will result in:
>
> [(1) evidence or contraband being immediately destroyed; or]
>
> [(2) an officer or another person being placed in immediate danger; or]
>
> [(3) a suspect potentially escaping.]

The committee added a note to the effect that there may be other circumstances that might be considered "exigent," citing *State v. Yoder*, 935 P.2d 534 (Utah Ct. App. 1997). The committee also added *Yoder* and *Brigham City v. Stuart*, 547 U.S. 398 (2006) to the references. On motion of Mr. Simmons, seconded by Ms. Blanch, the committee approved the instruction as revised.

At the suggestion of Ms. Blanch, instructions CV1317-19 were moved to follow CV1312. The remainder of the Civil Rights instructions will be discussed at later meetings.

6. *Next meeting.* The next meeting is Monday, October 2, 2017, at 4:00 p.m. (the second Monday of the month being Columbus Day). Mr. Simmons asked to be excused from the October meeting.

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	Civil Rights: Set 1	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	September 2017 (wrap up 1/2, then send for comment)	
2	Fault/Negligence	N/A	Judge Lawrence	October-17	October-17	Revisit old instructions
3	Economic Interference	Yes	Frazier, Ryan (D) (Chair); Shelton, Ricky (D); Stevenson, David (P); Simmons, Paul (P); Kuendig, Patricia (P)	October-17	November-17	
4	Injurious Falsehood	Yes	Dryer, Randy; Hoole, Greg; Hoole, Roger; Hunt, Jeff; Reymann, David (Chair); Stevens, Greg	December-17	February-18	
5	Assault/False Arrest	Yes	Rice, Mitch (chair); Carter, Alyson; Wright, Andrew (D); Cutt, David (P)	March-18	May-18	
6	Trespass and Nuisance	Yes (more members needed)	Hancock, Cameron; Figueira, Joshua (researcher); Abbott, Nelson (P); Steve Combe (D)	June-18	October-18	
7	Insurance	Yes	Johnson, Gary (chair); Pritchett, Bruce; Ryan Schriever, Dan Bertch, Andrew Wright, Rick Vazquez; Stewart Harman (D); Ryan Marsh (D)	November-18	January-19	
8	Unjust Enrichment	No (instructions from David Reymann)	David Reymann	February-19	February-19	
9	Abuse of Process	No (instructions from David Reymann)	David Reymann	March-19	March-19	
10	Directors and Officers Liability	Yes	Call, Monica;Von Maack, Christopher (chair); Larsen, Kristine; Talbot, Cory; Love, Perrin; Buck, Adam	April-19	June-19	
11	Wills/Probate	No	Barneck, Matthew (chair); Petersen, Rich; Tippet, Rust; Sabin, Cameron	September-19	November-19	
12	Civil Rights: Set 2	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)	December-19	February-20	
13	Sales Contracts and Secured Transactions	Yes	Cox, Matt (chair); Boley, Matthew; Maudsley, Ade	March-20	May-20	

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 29, 2017
Re: Negligence Instructions

Judge Barry Lawrence raised an issue with the negligence instructions as currently written. He wrote, "The basic concept is that 'Fault' means 'Negligence' plus 'Cause.' If both negligence and cause are proved, then fault is established and there can be an apportionment of that fault. In a few instances, MUJI seems to use the terms negligence and fault interchangeably. And, I think the MUJI format doesn't flow very well."

Juli Blanch responded as follows:

> I see what Judge Lawrence is saying. If you read the "fault" and "negligence" instructions in conjunction with CV 209 "Cause defined" and CV299, the model special verdict form, that was our attempt to make it clear to the jurors that it isn't enough that a person, whether it be defendant(s) or plaintiff, have fault. That fault must cause the harm. On the special verdict form, they are instructed, at the fault apportionment section, to put "zero percent" by a person if they haven't answered both fault and cause in the positive.
>
> However, now that I read Judge Lawrence's concerns, if we added a sentence to the end of the first paragraph [that might address his concerns:] "I've instructed you before that fault is a wrongful act or failure to act. You must also determine whether a person's fault caused the harm. If a person wrongfully acts or fails to act, but that act does not cause plaintiff's harm, that act or failure to act is not considered/does not matter when determining the damages, if any, to award to plaintiff."
>
> The fault/negligence instructions were some of the first ones approved by the committee, and the discussions on this (do we use the word

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> "fault"? If so, how do we define it, and should we include the concept of "cause" within "fault" or separate it, and why?) were lengthy. I also recall that once we approved CV201, "fault defined," then went on to CV202A, "negligence defined," there was a long debate on the fact that we were now introducing the word "negligence" into the instructions when it seemed we were still talking about the "fault" concept we had defined in the preceding instruction, so why not use "fault" in CV202A instead of "negligence."

Included in your materials are Judge Lawrence's stock instructions and a comparison Juli ran between our current instructions and the ones Judge Lawrence supplied.

Judge Lawrence's Stock Instructions
Regarding Fault and Negligence

INSTRUCTION NO. ___
("Fault" Defined)

Your goal as jurors is to decide whether Plaintiff was harmed and, if so, whether anyone is at fault for that harm. If you decide that more than one person is at fault, you must then allocate fault among them.

Fault means: i) any wrongful act or failure to act that, ii) causes harm. The wrongful act or failure to act alleged in this case is "negligence."

Your answers to the questions on the Special Verdict Form will determine whether anyone is at fault. We will review the verdict form in a few minutes.

[MUJI 201, REVISED]

INSTRUCTION NO. ___
("Negligence" Defined)

So, to establish whether a party is at fault, you must first decide whether that party was negligent.

Negligence means that a person did not use reasonable care. We all have a duty to use reasonable care to avoid injuring others, including ourselves. Reasonable care is simply what a reasonably careful person would do in a similar situation. A person may be negligent in acting or in failing to act.

The amount of care that is reasonable depends upon the situation. Ordinary circumstances do not require extraordinary caution. But some situations require more care because a reasonably careful person would understand that more danger is involved.

[MUJI 202A, REVISED]

INSTRUCTION NO. __
(Cause Defined)

To establish fault you must next decide whether the party's negligence was a cause of plaintiff's harm.

As used in the law, the word "cause" has a special meaning, and you must use this meaning whenever you apply the word. "Cause" means that:

(1) the persons act or failure to act produced the harm directly or set in motion events that produced the harm in a natural and continuous sequence; and

(2) the persons act or failure to act could be foreseen by a reasonable person to produce a harm of the same general nature.

There may be more than one cause of the same harm.

[MUJI 209, modified]

INSTRUCTION NO. __
(As Applied In This Case)

In this action, Plaintiff alleges that Defendant was negligent in the following respects:

(1)
(2)
(3)

To establish that Defendant was at fault, Plaintiff has the burden of proving:

(1) that the Defendant was negligent in any of the respects stated above; and
(2) that this negligence was a cause of Plaintiff's harm.

Also, in this case, the Defendant claims that Plaintiff was negligent in the following respects:

(1)
(2)
(3)

To establish that Plaintiff was at fault, Defendant has the burden of proving:

(1) that the Plaintiff was negligent in any of the respects stated above; and
(2) that this negligence was a cause of Plaintiff's own harm.

INSTRUCTION NO. ___
Apportionment

If you decide that more than one person is at fault, you must decide each person's percentage of fault that caused the harm. This allocation must total 100%.

You may decide to allocate a percentage to Plaintiff. If you do, Plaintiff's total recovery will be reduced by the percentage you attribute to him/her. If you decide that Plaintiff's percentage of fault is 50% or greater, Plaintiff will recover nothing.

When you answer the questions regarding damages, do not reduce any award by Plaintiff's percentage of fault. I will make that calculation later.

[MUJI 211, modified]

STOCK INSTRUCTIONS REGARDING FAULT AND NEGLIGENCE

INSTRUCTION NO. ___

~~CV201 "Fault~~("FAULT" ~~defined.~~DEFINED)

Your goal as jurors is to decide whether ~~[name of plaintiff]~~ Plaintiff was harmed and, if so, whether anyone is at fault for that harm. If you decide that more than one person is at fault, you must then allocate fault among them.

Fault means~~:~~ i) any wrongful act or failure to act that, ii) causes harm. The wrongful act or failure to act alleged in this case is ~~[~~"negligence~~, etc.]~~."

Your answers to the questions on the ~~verdict form~~ Special Verdict Form will determine whether anyone is at fault. We will review the verdict form in a few minutes.

~~References~~

~~Utah Code Sections 78B-5-817(2); 78B-5-818; 78B-5-820.~~

~~Bishop v. GenTec, 2002 UT 36.~~

[MUJI 201, REVISED]

INSTRUCTION NO. ___

("NEGLIGENCE" DEFINED)

~~Haase v. Ashley Valley Medical Center, 2003 UT App 260.~~

~~Biswell v. Duncan, 742 P.2d 80, (Utah App. 1987).~~

~~MUJI 1st Instruction~~

~~3.1.~~

~~CV202A "Negligence" defined.~~

~~You must~~ So, to establish whether a party is at fault, you must first decide whether ~~[names of persons on the verdict form] were~~ that party was negligent.

Negligence means that a person did not use reasonable care. We all have a duty to use reasonable care to avoid injuring others, including ourselves. Reasonable care is simply what a reasonably careful person would do in a similar situation. A person may be negligent in acting or in failing to act.

The amount of care that is reasonable depends upon the situation. Ordinary circumstances do not require extraordinary caution. But some situations require more care because a reasonably careful person would understand that more danger is involved.

~~To establish negligence, [name of plaintiff] has the burden of proving that:~~

~~(1) [name of defendant] was negligent; and~~

[MUJI 202A, REVISED]

INSTRUCTION NO. __

(CAUSE DEFINED)

~~(2) this~~ To establish fault you must next decide whether the party's negligence was a cause of ~~[name of plaintiff]'s~~ plaintiff's harm.

~~In this action, [name of plaintiff] alleges that [name of defendant] was negligent in the following respects:~~

~~(1)~~

~~(2)~~

~~(3)~~

~~If you find that the [name of defendant] was negligent in any of these respects, then you must determine whether that negligence was a cause of [name of plaintiff]'s harm.~~

~~[[Name of defendant] claims that [name of plaintiff] was negligent in causing [his] own harm. To establish [name of plaintiff]'s negligence, [name of defendant] has the burden of proving that:~~

~~(1) [name of plaintiff] was negligent; and~~

~~(2) this negligence was a cause of [name of plaintiff]'s harm.~~

~~In this action, [name of defendant] alleges that [name of plaintiff] was negligent in the following respects:~~

~~(1)~~

~~(2)~~

~~(3)~~

~~If you find that the [name of plaintiff] was negligent in any of theserespects, then you must determine whether that negligence was a cause of [his] harm.]~~

~~References~~

~~Dwiggins v. Morgan Jewelers, 811 P.2d 182 (Utah 1991).~~

~~Mitchell v. Pearson Enterprises, 697 P.2d 240 (Utah 1985).~~

~~Meese v. BYU, 639 P.2d 720 (Utah 1981).~~

~~CV209 "Cause" defined.~~

~~I've instructed you before that fault is a wrongful act or failure to act. You must also determine whether a person's fault caused the harm.~~

As used in the law, the word "cause" has a special meaning, and you must use this meaning whenever you apply the word. "Cause" means that:

(1) the person~~'~~s act or failure to act produced the harm directly or set in motion events that produced the harm in a natural and continuous sequence; and

(2) the person~~'~~s act or failure to act could be foreseen by a reasonable person to produce a harm of the same general nature.

There may be more than one cause of the same harm.

~~References~~

~~Nebeker v. Summit Cnty., 2014 UT App 137, ¶¶ 41-43, --- P.3d --- (foreseeability element).~~

~~Raab v. Utah Railway Company, 2009 UT 61, 221 P3d 219.~~

~~Steffensen v. Smith's Management Corp., 862 P.2d 1342 (Utah 1993).~~

~~Proctor v. Costco Wholesale Corp., 2013 UT App 226, ¶¶ 9-17, --P.3d --(foreseeability element).~~

~~McCorvey v UDOT, 868 P.2d 41, 45 (Utah 1993) ("there can be more than one proximate cause or, more specifically, substantial causative factor, of an injury").~~

~~Mitchell v. Pearson Enterprises, 697 P2d 240 (Utah 1985).~~

~~Rees v. Albertson's, Inc., 587 P.2d 130 (Utah 1978).~~

~~Dee v. Johnson, 2012 UT App 237.~~

~~Holmstrom v. C.R. England, Inc., 2000 UT App 239, 8 P3d 281.~~

~~**CV211 Allocation of fault.**~~

[MUJI 209, modified]

INSTRUCTION NO. __

(AS APPLIED IN THIS CASE)

In this action, Plaintiff alleges that Defendant was negligent in the following respects:

(1)

(2)

(3)

To establish that Defendant was at fault, Plaintiff has the burden of proving:

(1) that the Defendant was negligent in any of the respects stated above; and

(2) that this negligence was a cause of Plaintiff's harm.

Also, in this case, the Defendant claims that Plaintiff was negligent in the following respects:

(1)

(2)

(3)

To establish that Plaintiff was at fault, Defendant has the burden of proving:

(1) that the Plaintiff was negligent in any of the respects stated above; and

(2) that this negligence was a cause of Plaintiff's own harm.

INSTRUCTION NO. ___

APPORTIONMENT

~~[Name of party] claims that more than one person's fault was a cause of the harm.~~ If you decide that more than one person is at fault, you must decide each person's percentage of fault that caused the harm. This allocation must total 100%.

You may ~~also~~ decide to allocate a percentage to ~~the plaintiff~~Plaintiff. ~~[Name of plaintiff]'s~~ If you do, Plaintiff's total recovery will be reduced by the percentage ~~that~~ you attribute to ~~[~~him~~]~~/her. If you decide that ~~[name of plaintiff]'s~~ Plaintiff's percentage of fault is 50% or greater, ~~[name of plaintiff]~~ Plaintiff will recover nothing.

When you answer the questions ~~on~~ regarding damages, do not reduce ~~the~~ any award by ~~[name of plaintiff]'s~~ Plaintiff's percentage of fault. I will make that calculation later.

~~**References**~~

~~Utah Code Sections 78B-5-817(2); 78B-5-818; 78B-5-820.~~

~~Bishop v. GenTec, 2002 UT 36.~~

~~Haase v. Ashley Valley Medical Center, 2003 UT App 260.~~

~~Biswell v. Duncan, 742 P.2d 80, (Utah App. 1987).~~

[MUJI ~~**1st Instruction**~~211, modified]

~~3.1; 3.17; 3.19.~~

~~**Committee Notes**~~

~~"Fault" under the Comparative Negligence Act includes negligence in all its degrees, comparative negligence, assumption of risk, strict liability, breach of express or implied warranty of a product, products liability, and misuse, modification, or abuse of a product. This applies to intentional torts as well. Graves v. North Eastern Services, Inc., 2015 UT 28.~~

~~The judge should ensure that the verdict form is written so that fault is allocated only among those parties for whom the jury finds both breach of duty and cause.~~

~~**CV299 Verdict Forms**~~

~~Personal Injury (Word file)~~

~~Wrongful Death (Word file)~~

~~**Committee Notes**~~

~~These verdict forms must be tailored to fit the circumstances of the case. The templates include questions of fault about two defendants, a third party and plaintiff/decedent. Add or remove sections about parties and other actors as needed. Similarly, in the section on comparative fault, add or remove lines as needed to account for different actors. In the Wrongful Death Verdict Form, the section on damages for survival claims and wrongful death claims, add or remove lines as needed to describe the damages of each heir and of each decedent. Some damages for the estate may be authorized only if the decedent survived for a time after injury.~~

~~After editing the form to account for all of the parties and other actors, renumber the questions and the references to the questions accordingly, remembering to do so also in the "next set of instructions."~~

~~Regarding the question on damages, there must be some evidence to support each item of damages listed on the verdict form. The court should delete or add items as needed to conform to the evidence.~~

Tab 4

Model Utah Civil Jury Instructions, Second Edition
Economic Interference

CV1401. ELEMENTS OF A CLAIM FOR INTENTIONAL INTERFERENCE WITH ECONOMIC RELATIONS.

[Name of plaintiff] claims that [name of defendant] intentionally interfered with [name of plaintiff]'s economic relations. To award damages for this claim, you must find that [name of plaintiff] proved three things:

(1) That [name of defendant] intentionally interfered with an existing or potential economic relationship that [name of plaintiff] had;

(2) That [name of defendant] did so by improper means; and

(3) That [name of defendant]'s interference caused injury to [name of plaintiff].

References

Eldridge v. Johndrow, 2015 UT 21, ¶ 70, 345 P.3d 553
Anderson Dev. Co. v. Tobias, 2005 UT 36, 116 P.3d 323

MUJI 1st Instruction

19.1

Subcommittee Note

The Utah Supreme Court first recognized a claim for intentional interference with prospective economic relations in *Leigh Furniture & Carpet Co. v. Isom*, 657 P.2d 293 (Utah 1982). In defining the elements of the tort, the court rejected the approaches of both the Restatement of Torts and the Restatement (Second) of Torts and instead followed the approach of the Oregon Supreme Court in *Top Service Body Shop, Inc. v. Allstate Insurance Co.*, 582 P.2d 1365 (1978). As originally adopted, the court held that a plaintiff could make out a claim for tortious interference by proving that the defendant interfered with the plaintiff's economic relationship either for an improper purpose or by improper means. In *Eldridge v. Johndrow*, the court dropped the "improper purpose" prong of a tortious interference claim. Accordingly, the

committee has eliminated "improper purpose" from this instruction and the former definition of "improper purpose" in MUJI 19.4.

MUJI 1st included separate instructions for intentional interference with prospective economic relations (MUJI 19.1 through 19.6) and interference with contract (MUJI 19.7 through 19.13). But MUJI 19.1, entitled "Intentional Interference with Prospective Economic Relations: Elements of Liability," expressly applied to both the plaintiff's "existing or potential economic relations." MUJI 19.8, titled "Interference with Contract: Elements of Liability," listed five elements for interference with contract. Those elements, however, are not found anywhere in Utah case law. Utah cases dealing with interference with contract have used the same elements as those dealing with "interference with economic relations." *See, e.g., Eldridge,* 2015 UT 21, ¶ 70; *Alpine Orthopaedic Specialists, LLC v. Intermountain Healthcare, Inc.,* 2012 UT App 29, ¶¶ 4-10, 271 P.3d 174; *Jones & Trevor Mktg., Inc. v. Lowry,* 2010 UT App 113, ¶ 17 n.16, 233 P.3d 538. Other cases have referred broadly to intentional or tortious "interference with economic relations." *See Eldridge,* 2015 UT 21, ¶¶ 1, 8; *St. Benedict's Dev. Co. v. St. Benedict's Hosp.,* 811 P.2d 194, 200 (Utah 1991); *Anderson Dev. Co. v. Tobias,* 2005 UT 36, ¶ 20, 116 P.3d 323. Because the elements of the two claims, as stated in *Eldridge,* are the same (the only difference being whether the economic relation is existing, as in the case of a contract, or prospective), the subcommittee decided to treat the elements of a tortious interference claim in a single instruction.

The next three instructions define the critical terms of the first two elements--"economic relationship" (CV1402), "intentionally interfered" (CV1403), and "improper means" (CV1404).

CV1402. "ECONOMIC RELATIONSHIP" DEFINED.

As part of the first element, you must first determine whether [name of plaintiff] had an existing or potential economic relationship with [name of third party] from which, at the time of the interference, [name of plaintiff] expected or was likely to receive some future economic benefit. A contract is a form of an existing economic relationship, but the relationship does not have to be evidenced by a contract. It is enough if you find that there were either dealings or a course of conduct between [name of plaintiff] and [name of third party] from which [name of plaintiff] had a reasonable expectation of future economic benefit. [Name of plaintiff] must show that this expected benefit was likely to occur and was not just a mere hope, but [he/she/it] does not have to show that it was certain to occur.

References

Leigh Furniture & Carpet Co. v. Isom, 657 P.2d 293 (Utah 1982)

MUJI 1st Instruction

19.2

Subcommittee Note

If the case involves a claim of interference with an existing contract and the existence of the contract is disputed, the court should give the relevant general instructions regarding the creation and elements of a contract. *See* CV2103-07.

CV 1403. "INTENTIONALLY INTERFERED" DEFINED.

You must next determine whether [name of defendant] intentionally interfered with [name of plaintiff]'s existing or potential economic relationship. For [name of defendant] to have intentionally interfered with an existing or potential economic relationship of [name of plaintiff], [name of defendant] must have acted for the purpose of interfering with that

relationship or acted knowing that the interference was substantially certain to occur as a result of [his/her/its] actions.

References:

Leigh Furniture & Carpet Co. v. Isom, 657 P.2d 293 (Utah 1982)

Mumford v. ITT Commercial Fin. Corp., 858 P.2d 1041, 1044 (Utah Ct. App. 1993)

Restatement (Second) of Torts § 8A (the word "intent" denotes that the actor desires to cause the consequences of his act or believes that the consequences are substantially certain to result from it)

MUJI 1st Instruction

19.3

CV1404. DEFINITION OF "IMPROPER MEANS."

The second element of [name of plaintiff]'s claim is that [name of defendant] interfered with [name of plaintiff]'s existing or potential economic relations by improper means. "Improper means" is defined as some action that was contrary to law or violated an established standard of a trade or profession. Improper means may include such things as [acts of violence, threats or other intimidation], [bribery], [false statements], [defamation], [a wrongful lien], [bringing a lawsuit without any basis], [taking money or property to which one was not entitled], or [violating a court order].

A deliberate breach of contract, even when used to secure economic advantage, is not, by itself, an "improper means"; nor is an intent to inflict injury, by itself, an "improper means."

References:

Eldridge v. Johndrow, 2015 UT 21, 345 P.3d 553

Leigh Furniture & Carpet Co. v. Isom, 657 P.2d 293 (Utah 1982)

Sampson v. Richins, 770 P.2d 998 (Utah Ct. App. 1989)

MUJI 1st Instructions

19.5 & 19.6

Subcommittee Note

The court and parties should tailor examples of improper means to the facts of the case. If there is some question as to whether the defendant violated a statute or rule or committed a separate tort as part of his improper means, the court may have to give separate instructions on the elements of the statute or tort.

Leigh Furniture & Carpet Co. v. Isom, 657 P.2d 293, 309 (Utah 1982), suggested that an intentional breach of contract with the intent to inflict injury may constitute improper means. The subcommittee did not think this part of *Leigh* survived the Utah Supreme Court's abandonment of the "improper purpose" prong of *Leigh* in *Eldridge v. Johndrow*, 2015 UT 21. Arguably, the same considerations that caused the court to abandon the "improper purpose" prong would also counsel against finding liability for tortious interference for even a malicious breach of contract. The court in *Eldridge*, however, did not specifically address the issue but recognized that a defendant's motivation may still be relevant to a tortious interference claim, including "relevant to the improper means prong of the *Leigh Furniture* test." *Id.* ¶ 67. The subcommittee thought that the court was probably referring to improper means that require intent as an element of the tort or crime and not to lawful actions that were taken with a bad motive. To hold otherwise would in effect reinstate the abandoned "improper purpose" alternative.

CV1405. DEFENSES: PRIVILEGE

[Name of defendant] claims that [his/her/its] actions in interfering with [name of plaintiff]'s economic relations were privileged. [Name of defendant] has the burden of

establishing this defense. [Name of defendant] claims that [his/her/its] conduct was privileged under the [describe the privilege]. To prevail on this defense, [name of defendant] must prove the following: [Describe the elements of the privilege.]

References:

Mumford v. ITT Commercial Financial Corp., 858 P.2d 1041 (Utah Ct. App. 1993)
Leigh Furniture & Carpet Co. v. Isom, 657 P.2d 293 (Utah 1982)

MUJI 1st Instructions

None

Subcommittee Note

Privilege has been recognized by the Utah Supreme Court and the Utah Court of Appeals as an affirmative defense to an intentional interference with prospective economic relations claim. It does not become an issue unless "'the acts charged would be tortious on the part of an unprivileged defendant.'" *Mumford v. ITT Commercial Financial Corp.*, 858 P.2d 1041, 1043-44 (Utah Ct. App. 1993) (quoting *Leigh Furniture & Carpet Co. v. Isom*, 657 P.2d 293, 304 (Utah 1982)).

The Utah Court of Appeals has explained that "'[e]ven a recognized privilege may be overcome when the means used by defendant are not justified by the reason for recognizing the privilege.'" *Mumford*, 858 P.2d at 1043-44 (quoting *Top Serv. Body Shop, Inc. v. Allstate Ins. Co.*, 582 P.2d 1365, 1371 (Or. 1978) (en banc)). Therefore, a privilege is not an absolute defense. If the plaintiff claims that a recognized privilege should not apply because the reason for recognizing the privilege does not apply under the facts of the case, the court may also need to instruct the jury on the reason for the privilege and the parties' arguments for why it should or should not apply under the circumstances.

Whether a privilege instruction will be given in a particular case is within the discretion of the trial court. If a privilege instruction is given to the jury, an instruction defining and describing the applicable privilege should be given to the jury so that it can properly assess whether the privilege applies. For example, an individual may be able to raise a privilege for statements that would otherwise be defamatory if the statements were made in the course of or incident to juridical or quasi-judicial proceedings. Because of the number and variety of possible privileges, the subcommittee did not think it practicable to provide instructions on each possible privilege. Where a privilege is claimed, the court should instruct the jury as to the nature of the privilege claimed and what the jury must find to conclude that it bars the plaintiff's claim.

CV1406. DAMAGES

If you find that [name of the defendant] intentionally interfered with [name of plaintiff]'s economic relations, then you should award [name of the plaintiff] damages that you believe, based on the evidence, will reasonably compensate for the losses [name of the plaintiff] has suffered because of the interference with economic relations. [Name of defendant] may be liable for any losses or damages that are caused by [name of defendant]'s interference. Such damages could include lost monetary or other benefits or expectations under a contract, any actual harm to [name of plaintiff's] reputation, lost profits, or emotional distress caused by [name of defendant's] interference.

For lost profits to be recovered as damages, there must be a reasonable basis for calculating them. Although past profits cannot be taken as an exact measure of future or anticipated profits, you may consider the past profits and losses of the plaintiff's business in determining lost future profits. You may also consider any increase or decrease in business that

might have been reasonably expected if there had been no interference, as shown by the evidence.

References:

TruGreen Cos. v. Mower Bros., Inc., 2008 UT 81, 199 P.3d 929
Sampson v. Richins, 770 P.2d 998 (Utah Ct. App. 1989)
Restatement (Second) of Torts § 774A (1979)

MUJI 1st Instructions

19.15 & 19.16

Subcommittee Note

If punitive damages have been alleged in connection with this tort, the parties should use the instructions found at CV2026 to CV2034.