Agenda

Advisory Committee on Model Civil Jury Instructions

April 9, 2018
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	Tab 1	Judge Andrew Stone, Chair
Subcommittees and subject area timelines	Tab 2	Judge Andrew Stone
Discussion regarding uniformity	Tab 3	Judge Andrew Stone, Nancy Sylvester
Civil Rights Instructions: first ½ back from comment	Tab 4	Heather White
Other business		Judge Andrew Stone

Committee Web Page

Published Instructions

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

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
March 12, 2018
4:00 p.m.

Present: Honorable Andrew H. Stone (chair), Marianna Di Paolo, Joel Ferre, Tracy H. Fowler, Honorable Keith A. Kelly, Ruth A. Shapiro, Lauren A. Shurman, Paul M. Simmons, Peter W. Summerill, Nancy Sylvester, Christopher M. Von Maack. Also present: Honorable James T. Blanch, chair of the Model Criminal Jury Instructions Committee, and Keisa Williams of that committee

1. *Minutes.* On motion of Mr. Fowler, seconded by Mr. Von Maack, the committee approved the minutes of the February 12, 2018 meeting.

2. *Schedule.* The committee will continue its review of the Civil Rights instructions in April and will also review the Assault and False Arrest instructions. Mr. Fowler noted that the products liability instructions need to be updated. Mr. Von Maack said that the subcommittee Directors and Officers Liability did not think there was a need for a separate section on Directors and Officers Liability. Most claims are covered by statute or other business torts. Ms. Sylvester thought that the same may be true of the Wills/Probate instructions as well. The committee will replace the Directors and Officers Liability instructions on the schedule with revised Products Liability instructions.

3. *Uniformity of the Model Utah Jury Instructions.* Judge Stone noted that the tasks of the civil instructions committee and the criminal instructions committee were essentially the same--to come up with clear, understandable instructions that accurately state the law. The instructions are not the final word on the topics they cover, nor are they a safe harbor for courts and practitioners, but they provide a reasonably solid starting point for courts to instruct juries and avoid the problem of having to come up with a new set of instructions for every case. Uniformity between the two sets of instructions increases the likelihood that they will be accepted and used, particularly by judges who try both types of cases. Some judges are still not using the model instructions but prefer their own stock instructions. Judge Blanch indicated that the criminal committee had initially just set out to update the instruction on electronic devices, which referred to Blackberries and MySpace. They later also updated some of the other general instructions and added an instruction to anticipate common questions, such as, Can we have a copy of the police report? Judge Blanch indicated that he thought the general criminal instructions were good. Because so many criminal jury trials get appealed, he thought that any problems in the instructions would have been identified by now by the appellate courts. Judge Stone thought it made sense to have staff compare the general criminal and civil instructions and point out the differences between them and then see if one committee wanted to adopt the other committee's instructions on particular matters. Judge Kelly noted, for example, that he preferred

CR101 to CV101. Ms. Sylvester volunteered to do the comparison. The committee will then decide what changes, if any, to make to the civil general instructions.

Dr. Di Paolo joined the meeting. Judge Stone and Ms. Williams were excused.

4. *CV1609, Non-actionable Statements* (defamation) and *CV1909, Non-actionable Statements* (injurious falsehood). After the last meeting, Mr. Reymann revised CV1609 to conform with the committee's changes to CV1909. Dr. Di Paolo questioned whether the court needs to explain the "other purposes" for which the non-actionable statements may have been admitted. Ms. Shurman noted that the committee had considered and rejected that approach, deciding to leave the issue for argument rather than having the court instruct, for example, that the jury may consider the statement as evidence of malice, which the jury may think implies that there was malice. Dr. Di Paolo noted that just repeating the statements gives them greater importance in the minds of jurors. Judge Kelly noted that he tries not to give the jury written statements because putting the statement in writing, as in a jury instruction, may appear to give the court's seal of approval to the statement. Mr. Simmons moved to approve CV1609. Ms. Shurman and Ms. Shapiro seconded the motion, which passed without opposition.

5. *CV1605, Definition: False Statement* (defamation) and *CV1905, Definition: False Statement* (injurious falsehood). The committee then revisited the question of "literally" as used in CV1605 and CV1905. Judge Kelly noted that he had voted to follow the committee's approval of CV1905 at the last meeting because it tracked language from the Utah Supreme Court, but he was still not comfortable with the phrase "literally true." Dr. Di Paolo agreed, noting that there was no reason to use "literally." The instructions already say that the statement does not have to be "absolutely" or "totally" true. She noted that intensifiers such as "literally," "absolutely," and "totally" tend to lose their meanings over time. The committee revised the instructions by taking out the sentence "'Truth' does not require that the statement be absolutely, totally, or literally true." and replacing it with "To be considered 'true' in a [defamation/injurious falsehood] case, a statement need not be completely accurate." On motion of Judge Kelly, seconded by Messrs. Simmons and Von Maack, the committee approved this change to the instructions. Judge Stone questioned whether a true statement can be defamatory if it implies a defamatory falsehood. He noted that this is the case in a claim for "false light" invasion of privacy and asked whether we need instructions on invasion of privacy.

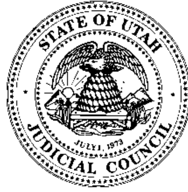
6. *Next meeting.* The next meeting is Monday, April 9, 2018, at 4:00 p.m.

The meeting adjourned at 5:15 p.m.

Tab 2

Priority	Subject	Sub-C in place?	Sub-C Members	Projected Starting Month	Projected Finalizing	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)	Projected: April 2018 Meeting
2	Economic Interference	Yes	Frazier, Ryan (D) (Chair); Shelton, Ricky (D); Stevenson, David (P); Simmons, Paul (P); Kuendig, Patricia (P)	October-17	December-17	Projected: May 2018 Meeting
3	Injurious Falsehood	Yes	Dryer, Randy; Hoole, Greg; Hoole, Roger; Hunt, Jeff; Reymann, David (Chair); Stevens, Greg	December-17	February-18	Projected: June 2018 Meeting
4	Assault/False Arrest	Yes	Rice, Mitch (chair); Carter, Alyson; Wright, Andrew (D); Cutt, David (P)	May-18	June-18	
5	Trespass and Nuisance	Yes (more members needed)	Hancock, Cameron; Figueira, Joshua (researcher); Abbott, Nelson (P); Steve Combe (D)	September-18	November-18	
6	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	
7	Unjust Enrichment	No (instructions from David Reymann)	David Reymann	February-19	February-19	
8	Abuse of Process	No (instructions from David Reymann)	David Reymann	March-19	March-19	
9	Directors and Officers Liability	Yes	Call, Monica;Von Maack, Christopher (chair); Larsen, Kristine; Talbot, Cory; Love, Perrin; Buck, Adam	April-19	June-19	Much of this is codified in statute. There may not be enough instructions to dedicate an entire instruction area.
10	Wills/Probate	No	Barneck, Matthew (chair); Petersen, Rich; Tippet, Rust; Sabin, Cameron	September-19	November-19	
11	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	
12	Sales Contracts and Secured Transactions	Yes	Cox, Matt (chair); Boley, Matthew; Maudsley, Ade	March-20	May-20	
13	Products Liability	No	Tracy Fowler			Time to update due to significant changes in case law.

Tab 3

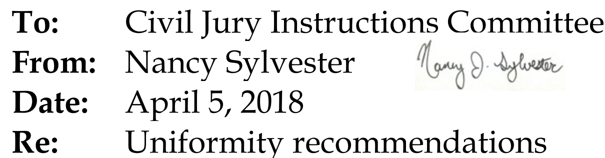


Administrative Office of the Courts

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

Richard H. Schwermer
State Court Administrator
Raymond H. Wahl
Deputy Court Administrator

MEMORANDUM

To: Civil Jury Instructions Committee
From: Nancy Sylvester 
Date: April 5, 2018
Re: Uniformity recommendations

At our March meeting, we discussed whether there was a need for more uniformity between the civil and criminal opening instructions. After reviewing both sets, it appears to make sense for this committee to adopt a modified version of the CR0 Criminal Introduction and also replace the electronic devices admonitions in CV101 with those in CR 109B. It also may make sense to replace CV120 with CR210 and CV121 with CR207.

CV~~R~~0 ~~Criminal~~ Civil Introduction

The Advisory Committee on the Model Utah ~~Criminal~~ Civil Jury Instructions has drafted instructions with the following principles in mind:

1. Plain Language - While the committee recognizes the reticence of practitioners and judges to depart from statutory or case law language, the Committee has been charged with using plain language drafting principles so that statements of the law will be clear to non-lawyers. Therefore, the Committee has attempted to draft instructions using simple structure and words of ordinary meaning.
2. ~~Template - Where possible, the Committee has used the pattern elements instruction found in CR 301 as a template for other instructions. This instruction shifts the language away from that used in older instructions to more appropriately maintain the presumption of innocence. The Committee strongly encourages practitioners and judges to apply this pattern in drafting elements instructions for other crimes.~~

~~3.~~2. Brackets and Parentheses - Brackets [ ] are placed around an element or language that is optional, or when more than one language option is available, e.g. [him][her]. ~~Parentheses~~ Brackets ~~( )~~[ ] ~~are~~ are also used when information must be entered, e.g. (~~DEFENDANT'S~~ [Name of Defendant~~NAME)~~].

~~4. Use of Initials - The Committee has drafted the instructions so that only a victim's initials are used when the victim is a minor. If the victim is an adult, the Committee recommends that the victim's name be used unless the court makes a specific finding that use of the victim's name is inappropriate in a particular case.~~

~~5.~~3. Relevant Law - Jury instructions are current as of the date amended. ~~Practitioners should check the date the offense occurred and review the law to determine what it was at the time of the offense.~~

Where available, the Committee urges practitioners to use jury instructions from the Second Edition of the Model Utah Jury Instructions to the exclusion of other instructions. When an approved instruction is not available, practitioners should focus on substance, as well as format, in drafting proposed instructions.

CV101 General admonitions.

Now that you have been chosen as jurors, you are required to decide this case based only on the evidence that you see and hear in this courtroom and the law that I will instruct you about. For your verdict to be fair, you must not be exposed to any other information about the case. This is very important, and so I need to give you some very detailed explanations about what you should do and not do during your time as jurors.

First, you must not try to get information from any source other than what you see and hear in this courtroom. It's natural to want to investigate a case, but you may not use any printed or electronic sources to get information about this case or the issues involved.

Jurors have caused serious problems during trials by using electronic devices – such as phones, tablets, or computers - to research issues or share information about a case. You may be tempted to use these devices to investigate the case or to share your thoughts about the trial with others. Don't. While you are serving as a juror, you must not use electronic devices for these purposes, just as you must not read or listen to any sources outside the courtroom about the case or talk to others about it.

You violate your oath as a juror if you conduct your own investigation or if you communicate about this trial with others, and you may face serious personal consequences if you do. Let me be clear: do not "Google" the parties, witnesses, issues, or counsel; do not "Tweet" or text about the trial; do not use electronic devices to gather or send information on the case; do not post updates about the trial on Facebook pages; do not use Wikipedia or other internet information sources, etc. Even using something as seemingly innocent as "Google Maps" or a dictionary to look up terms can result in a mistrial.~~This includes the internet, reference books or dictionaries, newspapers, magazines, television, radio, computers, Blackberries, iPhones, Smartphones, PDAs, or any social media or electronic device.~~

~~You may not do any personal investigation. This includes visiting any of the places involved in this case, using Internet maps or Google Earth, talking to possible witnesses, or creating your own experiments or reenactments.~~

~~Second, you must not communicate with anyone about this case, and you must not allow anyone to communicate with you. This also is a natural thing to want to do, but you may not communicate about the case via emails, text messages, tweets, blogs, chat rooms, comments or other postings, Facebook, MySpace, LinkedIn, or any other social media.~~

You may notify your family and your employer that you have been selected as a juror and you may let them know your schedule. But do not talk with anyone about the case, including your family and employer. You must not even talk with your fellow jurors about the case until I send you to deliberate. If you are asked or approached in any way about your jury service or anything about this case, you must respond that you have been ordered not to discuss the matter. And then please report the contact to the clerk or the bailiff, and they will notify me.

Also, do not talk with the lawyers, parties or witnesses about anything, not even to pass the time of day.

I know that these restrictions affect activities that you consider to be normal and harmless and very important in your daily lives. However, these restrictions ensure that the parties have a fair trial based only on the evidence and not on outside information. Information from an outside source might be inaccurate or incomplete, or it might simply not apply to this case, and the parties would not have a chance to explain or contradict that information because they wouldn't know about it. That's why it is so important that you base your verdict only on information you receive in this courtroom.

Courts used to sequester—or isolate—jurors to keep them away from information that might affect the fairness of the trial, but we seldom do that anymore. But this means that we must rely upon your honor to obey these restrictions, especially during recesses when no one is watching.

Please understand that the rules of evidence and procedure have developed over hundreds of years in order to ensure the fair resolution of disputes. The fairness of the entire system depends on you reaching your decisions based on evidence presented to you in court and not on other sources of information.

Post-trial investigations can occur. If improper activities are discovered at any time, they will be brought to my attention and the entire case might have to be retried at substantial cost

~~Any juror who violates these restrictions jeopardizes the fairness of the proceedings, and the entire trial may need to start over. That is a tremendous expense and inconvenience to the parties, the court and the taxpayers. Violations may also result in substantial penalties for the juror.~~

If any of you have any difficulty whatsoever in following these instructions, please let me know now. If any of you becomes aware that one of your fellow jurors has done something that violates these instructions, you are obligated to report that as well. If anyone tries to contact you about the case, either directly or indirectly, or sends you any information about the case, please report this promptly as well. Notify the bailiff or the clerk, who will notify me.

These restrictions must remain in effect throughout this trial. Once the trial is over, you may resume your normal activities. At that point, you will be free to read or research anything you wish. You will be able to speak—or choose not to speak—about the trial to anyone you wish. You may write, or post, or tweet about the case if you choose to do so. The only limitation is that you must wait until after the verdict, when you have been discharged from your jury service.

So, keep an open mind throughout the trial. The evidence that will form the basis of your verdict can be presented only one piece at a time, and it is only fair that you do not form an opinion until I send you to deliberate.

References
CACI 100

MUJI 1st Instruction
1.1; 2.4.

Committee Notes

News articles have highlighted the problem of jurors conducting their own internet research or engaging in outside communications regarding the trial while it is ongoing. See, e.g., Mistrial by iPhone: Juries' Web Research Upends Trials, New York Times (3/18/2009). The court may therefore wish to emphasize the importance of the traditional admonitions in the context of electronic research or communications.

Amended Dates:
9/2011.

CV101A General admonitions. (self-represented litigant version)
Now that you have been chosen as jurors, you are required to decide this case based only on the evidence that you see and hear in this courtroom and the law that I will instruct you about. For your verdict to be fair, you must not be exposed to any other information about the case. This is very important, and so I need to give you some very detailed explanations about what you should do and not do during your time as jurors.

First, you must not try to get information from any source other than what you see and hear in this courtroom. It's natural to want to investigate a case, but you may not use any printed or electronic sources to get information about this case or the issues involved.

Jurors have caused serious problems during trials by using electronic devices – such as phones, tablets, or computers - to research issues or share information about a case. You may be tempted to use these devices to investigate the case or to share your thoughts about the trial with others. Don't. While you are serving as a juror, you must not use electronic devices for these purposes, just as you must not read or listen to any sources outside the courtroom about the case or talk to others about it.

You violate your oath as a juror if you conduct your own investigation or if you communicate about this trial with others, and you may face serious personal consequences if you do. Let me be clear: do not "Google" the parties, witnesses, issues, or counsel; do not "Tweet" or text about the trial; do not use electronic devices to gather or send information on the case; do not post updates about the trial on Facebook pages; do not use Wikipedia or other internet information sources, etc. Even using something as seemingly innocent as "Google Maps" or a dictionary to look up terms can result in a mistrial.

~~This includes the internet, reference books or dictionaries, newspapers, magazines, television, radio, computers, Blackberries, iPhones, Smartphones, PDAs, or any social media or electronic device. You may not do any personal investigation. This includes visiting any of the places involved in this case, using Internet maps or Google Earth, talking to possible witnesses, or creating your own experiments or reenactments.~~

~~Second, you must not communicate with anyone about this case, and you must not allow anyone to communicate with you. This also is a natural thing to want to do, but you may not communicate about the case via emails, text messages, tweets, blogs, chat rooms, comments or other postings, Facebook, MySpace, LinkedIn, or any other social media.~~

You may notify your family and your employer that you have been selected as a juror and you may let them know your schedule. But do not talk with anyone about the case, including your family and employer. You must not even talk with your fellow jurors about the case until I send you to deliberate. If you are asked or approached in any way about your jury service or anything about this case, you must respond that you have been ordered not to discuss the matter. And then please report the contact to the clerk or the bailiff, and they will notify me.

[Name of plaintiff] [name of defendant] is representing him/herself.

[Name of defendant] [name of plaintiff] is represented by __________________.
[Name of plaintiff], [name of defendant], attorneys for the [plaintiff][defense] and witnesses are not allowed to speak with you during the case. When you see [plaintiff's] [defendant's] attorneys at a recess or pass them in the halls and they do not speak to you, they are not being rude or unfriendly – they are simply following the law.

I know that these restrictions affect activities that you consider to be normal and harmless and very important in your daily lives. However, these restrictions ensure that the parties have a fair trial based only on the evidence and not on outside information. Information from an outside source might be inaccurate or incomplete, or it might simply not apply to this case, and the parties would not have a chance to explain or contradict that information because they wouldn't know about it. That's why it is so important that you base your verdict only on information you receive in this courtroom. Courts used to sequester—or isolate—jurors to keep them away from information that might affect the fairness of the trial, but we seldom do that anymore. But this means that we must rely upon your honor to obey these restrictions, especially during recesses when no one is watching.

~~Any juror who violates these restrictions jeopardizes the fairness of the proceedings, and the entire trial may need to start over. That is a tremendous expense and inconvenience to the parties, the court and the taxpayers. Violations may also result in substantial penalties for the juror.~~

Please understand that the rules of evidence and procedure have developed over hundreds of years in order to ensure the fair resolution of disputes. The fairness of the entire system depends on you reaching your decisions based on evidence presented to you in court and not on other sources of information.

Post-trial investigations can occur. If improper activities are discovered at any time, they will be brought to my attention and the entire case might have to be retried at substantial cost.

If any of you have any difficulty whatsoever in following these instructions, please let me know now. If any of you becomes aware that one of your fellow jurors has done something that violates these instructions, you are obligated to report that as well. If anyone tries to contact you about the case, either directly or indirectly, or sends you any information about the case, please report this promptly as well. Notify the bailiff or the clerk, who will notify me.

These restrictions must remain in effect throughout this trial. Once the trial is over, you may resume your normal activities. At that point, you will be free to read or research anything you wish. You will be able to speak—or choose not to speak—about the trial to anyone you wish.

You may write, or post, or tweet about the case if you choose to do so. The only limitation is that you must wait until after the verdict, when you have been discharged from your jury service.

So, keep an open mind throughout the trial. The evidence that will form the basis of your verdict can be presented only one piece at a time, and it is only fair that you do not form an opinion until I send you to deliberate.

References
MUJI CV 101.
Preliminary Jury Instructions for use with self-represented litigants, U.S. District Court, Eastern District of California.

Committee Notes
News articles have highlighted the problem of jurors conducting their own internet research or engaging in outside communications regarding the trial while it is ongoing. See, e.g., Mistrial by iPhone: Juries' Web Research Upends Trials, New York Times (3/18/2009). The court may therefore wish to emphasize the importance of the traditional admonitions in the context of electronic research or communications.

Amended Dates:
12/2013

CV120 Direct and circumstantial evidence.

Facts may be proved by direct or circumstantial evidence. The law does not treat one type of evidence as better than the other.

Direct evidence can prove a fact by itself. It usually comes from a witness who perceived firsthand the fact in question. For example, if a witness testified he looked outside and saw it was raining, that would be direct evidence that it had rained.

Circumstantial evidence is indirect evidence. It usually comes from a witness who perceived a set of related events, but not the fact in question. However, based on that testimony someone could conclude that the fact in question had occurred. For example, if a witness testified that she looked outside and saw that the ground was wet and people were closing their umbrellas, that would be circumstantial evidence that it had rained.

Before you can find the defendant guilty of any charge, there must be enough evidence—direct, circumstantial, or some of both—to convince you of the defendant's guilt beyond a reasonable doubt. It is up to you to decide.

~~A fact may be proved by direct or circumstantial evidence. Circumstantial evidence consists of facts that allow someone to reasonably infer the truth of the facts to be proved. For example, if the fact to be proved is whether Johnny ate the cherry pie, and a witness testifies that she saw Johnny take a bite of the cherry pie, that is direct evidence of the fact. If the witness testifies that she saw Johnny with cherries smeared on his face and an empty pie plate in his hand, that is circumstantial evidence of the fact.~~

References

29 Am. Jur.2d Evidence § 4.
29 Am. Jur.2d Evidence § 1468.
CR210 Direct/Circumstantial Evidence

MUJI 1st Instruction

2.17.

Amended Dates:

9/2011.

CV121 ~~Believability of witnesses.~~ Witness Credibility.

In deciding this case you will need to decide how believable each witness was. Use your judgment and common sense. Let me suggest a few things to think about as you weigh each witness's testimony:

- How good was the witness's opportunity to see, hear, or otherwise observe what the witness testified about?
- Does the witness have something to gain or lose from this case?
- Does the witness have any connection to the people involved in this case?
- Does the witness have any reason to lie or slant the testimony?

- Was the witness's testimony consistent over time? If not, is there a good reason for the inconsistency? If the witness was inconsistent, was it about something important or unimportant?
- How believable was the witness's testimony in light of other evidence presented at trial?
- How believable was the witness's testimony in light of human experience?
- Was there anything about the way the witness testified that made the testimony more or less believable?

In deciding whether or not to believe a witness, you may also consider anything else you think is important.

You do not have to believe everything that a witness said. You may believe part and disbelieve the rest. On the other hand, if you are convinced that a witness lied, you may disbelieve anything the witness said. In other words, you may believe all, part, or none of a witness's testimony. You may believe many witnesses against one or one witness against many.

In deciding whether a witness testified truthfully, remember that no one's memory is perfect. Anyone can make an honest mistake. Honest people may remember the same event differently.

~~Testimony in this case will be given under oath. You must evaluate the believability of that testimony. You may believe all or any part of the testimony of a witness. You may also believe one witness against many witnesses or many against one, in accordance with your honest convictions. In evaluating the testimony of a witness, you may want to consider the following:~~
~~(1) Personal interest. Do you believe the accuracy of the testimony was affected one way or the other by any personal interest the witness has in the case?~~
~~(2) Bias. Do you believe the accuracy of the testimony was affected by any bias or prejudice?~~
~~(3) Demeanor. Is there anything about the witness's appearance, conduct or actions that causes you to give more or less weight to the testimony?~~
~~(4) Consistency. How does the testimony tend to support or not support other believable evidence that is offered in the case?~~
~~(5) Knowledge. Did the witness have a good opportunity to know what [he] is testifying about?~~
~~(6) Memory. Does the witness's memory appear to be reliable?~~
~~(7) Reasonableness. Is the testimony of the witness reasonable in light of human experience?~~
~~These considerations are not intended to limit how you evaluate testimony. You are the ultimate judges of how to evaluate believability.~~

References

Utah Code Ann. § 78B-1-128.
United States v. McKissick, 204 F.3d 1282, 1289 (10th Cir. 2000).
Toma v. Utah Power & Light Co., 365 P.2d 788, 792-793 (Utah 1961).
State v. Shockley, 80 P. 865, 879 (1905).
75 Am. Jur.2d Trial § 819.
CR207 Witness Credibility

MUJI 1st Instruction
2.9.

Tab 4

MODEL UTAH JURY INSTRUCTIONS – PUBLISHED FOR COMMENT

The Utah Judicial Council invites comments about these proposed jury instructions. To view the proposed instructions, click on the link below the instruction batch. To view or submit comments, click on the "comment" button. Comments cannot be acknowledged, but all will be considered. A name and email address must be included with your comment. Comments are saved to a buffer for review before publication.

Posted: November 24, 2017

Utah Courts

Civil Jury Instructions – Civil Rights Set 1 – Comment period expired January 11, 2018

The following proposed Model Utah Civil Jury Instructions addressing civil rights have been published. This is Set 1 of 2. Set 2 will be published at a later date.

CV1301 – Section 1983 Claim–Elements.
CV1302 – Section 1983 Claim–Deprivation of Rights.
CV1303 – Warrantless Arrest.
CV1304 – Probable Cause.
CV1304A – Offenses at Issue.
CV1305 – Unlawful Arrest–Any Crime.
CV1307 – Reasonable Suspicion.
CV1307A – Investigative Stop.
CV1308 – Excessive Force–Introductory Instruction.
CV1309 – Excessive Force–Standard.
CV1310 – Search of Property–Definition.
CV1311 – Search of Property–Constitutional Right.
CV1312 – Lawful Search of Real Property.
CV1313 – Consent.
CV1314 – Probable Cause–Search of Residence.
CV1315 – Exigent Circumstances.
CV1316 – Seizures of Property.
CV1317 – Entry of Residence Pursuant to Arrest Warrant.
CV1318 – Protective Security Sweep.
CV1319 – Validity of Search Warrant Application.

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RECENT POSTS

Civil Jury Instructions – Economic Interference – Comment period expires March 30, 2018

Criminal Jury Instructions – Opening and Closing Instructions – Comment period expires March 5, 2018

Civil Jury Instructions – Civil Rights Set 1 – Comment period expired January 11, 2018

Criminal Jury Instructions – Drug Offenses – Comment period expired June 12, 2017

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

Click **here** to review Set 1 of the Civil Rights Jury Instructions. Please reference the instruction(s) in your comments.

EDIT PAGE

This entry was posted in **Civil**, **Civil, Civil Rights**.

« Criminal Jury Instructions – Opening and Closing Instructions – Comment period expires March 5, 2018

Criminal Jury Instructions – Drug Offenses – Comment period expired June 12, 2017 »

UTAH COURTS

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2 thoughts on "Civil Jury Instructions – Civil Rights Set 1 – Comment period expired January 11, 2018"

W. Earl Webster
November 27, 2017 at 6:48 pm Edit

Regarding CV1301 – Section 1983 Claim–Elements.

The instruction presents a clear, concise, correct summary of federal law as regards 42 USC 1983. However, that law is not, necessarily, applicable to a state-law claim based on the same operative facts. The Utah Supreme Court recently heard the matter of Kuchcinski v. Box Elder County, case no. 20160674, wherein the Court was asked to interpret its 1983-equivalent law (Spackman v. Board of Education of Box Elder County, 2000 UT 87; Jensen v. Cunningham, 2011 UT 17; etc.) such that identification of one or more specific "bad actors" is not required to establish liability.

We recommend delaying implementation of the model instruction until the opinion in Kuchcinski is released. Depending upon the Court's decision, the instruction may need to be altered, or a supplemental instruction drafted, to address

RECENT COMMENTS

umesh on **Civil Jury Instructions – Economic Interference – Comment period expires March 30, 2018**

Josh Lee on **Civil Jury Instructions – Economic Interference – Comment period expires March 30, 2018**

Tony Graf on **Criminal Jury Instructions – Opening and Closing Instructions – Comment period expires March 5, 2018**

Clay Stucki on **Criminal Jury Instructions – Opening and Closing Instructions – Comment period expires March 5, 2018**

Meb Anderson on **Civil Jury Instructions – Civil Rights Set 1 – Comment period expired January 11, 2018**

CATEGORIES

- Civil
- Civil Rights
- Criminal
- Defamation
- Drug Offenses
- Emotional Distress
- Opening and Closing Instructions
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- Uncategorized

those circumstances when the plaintiff is not required to identify a specific bad actor or actors.

Meb Anderson
January 12, 2018 at 1:07 am Edit

Initially, it should be noted that there are many federal sample jury instructions regarding § 1983 violations. Utah judges and juries in a § 1983 action will be applying federal law with many nuances and immunities. Accordingly, the proposed model civil jury instructions regarding § 1983 may not be necessary. At a minimum, they should track the sample federal jury instructions and not attempt to clarify or simplify that language because the specific language involves terms of art and very specific implications under binding federal law.

CV1301 Section 1983 Claim – – Elements:
In CV1301, the proposed instruction states: "First, the [name of the defendant] was a state employee and was acting, purporting to act, or pretending to act in performance of [his/her] official duties." This statement of the law, which omits recognized federal case law terms like "state actor" and "acting under color of state law" may cause confusion to both judge and jury. For example, a defendant in a § 1983 action is not always a "state employee." County employees, municipal employees, and even private actors acting in concert with such employees can be defendants in a § 1983 action and considered "state actors." Also, a guardian ad litem is a state employee, but federal case law determines they are not to be considered "state actors" under the civil rights statutes. See Meeker v. Kercher, 782 F.2d 153, 155 (10th Cir. 1986) (We hold that a guardian ad litem is not acting under color of state law for purposes of § 1983). Other such exceptions exist. To the point, it is not typically in dispute at trial that a defendant was a "state actor" and was "acting under color of state law." But, if disputed, it would likely be less confusing to keep the traditional federal terms in the proposed instruction.
Proposed Revision:
"First, the [name of the defendant] was a state actor and was acting under color of state law. Acting under color of state law means that the defendant was, purporting to act, or pretending to act in performance of [his/her] official duties."

CV1303 Warrantless Arrest:
The term "probable cause" is generally used. In one sentence it says "a probable cause." Eliminate the "a" so that the term "probable cause" is consistent throughout the instruction.

CV1308 Excessive Force – – Introductory Instruction:
This instruction omits "objectively reasonable" and just uses "reasonable." The legal standard is "objectively reasonable." The second sentence of the instruction should read: "[Name of

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officer] claims the force [s]he used in [arresting/stopping] [name of plaintiff] was objectively reasonable."

CV1309 Excessive Force – – Standard:
In the third paragraph, where it uses the term "intentions or motivations" add the term "subjective." The first sentence of paragraph three will thus read: "You are not to consider [name of officer]'s subjective intentions or motivations, whether good or bad."

Finally, I would point out that a prior comment to these proposed instructions discusses Utah case law interpreting causes of action brought under the Utah Constitution. Those cases generally have no application to a § 1983 cause of action.

Thank you for your time and efforts.

Meb W. Anderson
Assistant Attorney General, Utah Attorney General's Office, Civil Rights Section – Litigation Division. I primarily practice in civil rights and § 1983. These comments are my own and are not necessarily those of the Attorney General, or the Office.

Model Utah Civil Jury Instructions, Second Edition
Civil Rights: Set 1

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

To establish [his/her] claims under Section 1983, [name of plaintiff] 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 4/10/17.

The Constitution prohibits the police from carrying out unreasonable seizures. An arrest is considered a "seizure" within the meaning of the Constitution. Under the Constitution 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) (internal quotation marks omitted). 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) (internal quotation marks omitted). '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. APPROVED 4/10/17.

Reasonable suspicion means the officer was aware of specific facts that would lead a reasonable officer to conclude that the person in question 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.

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.

[Name of plaintiff] claims that [name of officer] used unreasonable force in [arresting/stopping] [him/her].

[Name of officer] claims the force [s]he used in [arresting/stopping] [name of plaintiff] was reasonable.

It is your duty to determine whether [name of plaintiff] has proved [his/her] claims against [name of officer] 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 [name of officer] used unreasonable force with [name of plaintiff], you should consider all the facts known to [name of officer] at the time [he/she] applied the force. You are not to consider facts unknown to [name of officer] at the time [name of officer] applied force to [name of plaintiff].

You are not to consider [name of officer]'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)

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CV1310 SEARCH OF PROPERTY--DEFINITION. 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)

CV1311 SEARCH OF PROPERTY—CONSTITUTIONAL RIGHT. Approved 6/12/17.

A person has a constitutional right to be free from an unreasonable [search/entry] of [his/her] [property]. To prove [name of defendant(s)] violated [name of plaintiff]'s constitutional right, [name of plaintiff] must prove the following by a preponderance of the evidence:

1. [Name of defendant(s)] [searched/entered] [name of plaintiff]'s [property];
2. [Name of defendant(s)] intended to [search/enter] the [property]; and
3. The [search/entry] was not "reasonable."

"Reasonable" has a special meaning under the law. I will now instruct you on what "reasonable" means.

References:
Minnesota v. Carter, 525 U.S. 83 (1998)
Kentucky v. King, 563 U.S. 462 (2011)

Committee Note:
These instructions refer to "property" in brackets, but it may be clearer to refer to the specific type of property involved in the case, such as residences, businesses, vehicles, backpacks, computer files, etc.

CV1312 LAWFUL SEARCH OF REAL PROPERTY. Approved 6/12/17.

A search of real property is reasonable if:

1. The officer has a valid warrant;
2. The officer has obtained consent; or
3. The officer has probable cause, and exigent circumstances exist.

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

Committee Note:
If one or more of the above is not at issue in this case, it should be omitted from the instruction. Similar exceptions will be applicable to other searches, such as automobile searches.

The committee has here attempted to define reasonableness in a single, common context. But in contexts other than real property, be it automobiles, backpacks, computers, etc., the parties and the court should define what a reasonable search or entry is.

CV1313 CONSENT. APPROVED 9/11/17.

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 the officer reasonably believed based on all of the circumstances that [name of plaintiff] consented to the search.

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

Committee Note:
This instruction should only be used when consent is at issue, such as in a warrantless search or when a warrant is claimed to be invalid.

The parties should argue whether the circumstances in a given case give rise to consent. Some of the cases that discuss factors relevant to consent include *Eidson v. Owens*, 515 F.3d 1139 (10th Cir. 2008) and *United States v. Jones*, 701 F.3d 1300, 1318 (10th Cir. 2012).

CV1314 PROBABLE CAUSE – SEARCH OF RESIDENCE. APPROVED 9/11/17.

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], [criminal activity], or [the subject of an arrest warrant] will be found in the residence.

References:
State v. Moreno, 2009 UT 15, ¶ 37, 203 P.3d 1000, 1012
Illinois v. Gates, 462 U.S. 213 (1983)

Committee Note:
If the search involves the subject of an arrest warrant, an instruction similar to the second paragraph of CV1315 should also be given.

CV1315 EXIGENT CIRCUMSTANCES. APPROVED 9/11/17.

Exigent circumstances exist when an officer, acting on probable cause and in good faith, reasonably believes, based on all of 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 destroyed immediately];
(2) [an officer or another person being placed in immediate danger]; or
(3) [a suspect potentially escaping].

References:
Kirk v. Louisiana, 536 U.S. 635, 122 S. Ct. 2458 (2002)
Armijo ex rel. Armijo Sanchez v. Peterson, 601 F.2d 1065 (10th Cir. 2010)
State v. Yoder, 935 P.2d 534 (Utah Ct. App. 1997)

Committee Note:
There may be other circumstances beyond those in brackets above. *See State v. Yoder*, 935 P.2d 534 (Utah Ct. App. 1997).

CV1316 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)

CV 1317 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.

CV1318 PROTECTIVE SECURITY SWEEP. Approved 6/12/17.

If an officer has lawfully entered a residence based on 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 a limited inspection of just those spaces where a person may be found.

An arrest warrant does not authorize any search greater than a protective security sweep.

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

CV1319 VALIDITY OF SEARCH WARRANT APPLICATION. Approved 6/12/17.

In this case, [name of plaintiff] claims that, even though the search was based on a search warrant, the search was nonetheless unconstitutional. In order to prevail on this claim, [name of plaintiff] must prove by a preponderance of the evidence that:

1) at the time of the search warrant application, [name of defendant officer(s)] 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 changed the magistrate's decision to issue the warrant.

<u>**References**</u>:
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.