Agenda
Advisory Committee on Model Civil Jury Instructions

May 14, 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, introduction of new committee member, and approval of minutes	4:00 p.m.	Tab 1	Tracy Fowler, Chair Pro Tem
Subcommittees and subject area timelines	4:05 p.m.	Tab 2	Tracy Fowler
Civil Rights Instructions: comment discussion wrap up	4:10 p.m.	Tab 3	Heather White
Economic Interference Instructions: discussion of comments	5:00 p.m.	Tab 4	Ryan Frazier
Other business	5:50 p.m.		Tracy Fowler

Committee Web Page

Published Instructions

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

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
April 9, 2018
4:00 p.m.

Present: Honorable Andrew H. Stone (chair), Marianna Di Paolo, Joel Ferre, Lauren A. Shurman, Paul M. Simmons, Nancy J. Sylvester, Christopher M. Von Maack. Also present: Heather S. White, Chair of the Civil Rights subcommittee

Excused: Tracy H. Fowler, Honorable Keith A. Kelly, Ruth A. Shapiro, Peter W. Summerill

1. *Minutes.* Mr. Ferre pointed out that the reference to Judge Stone being excused at the top of page 2 of the March 12, 2018 minutes should be to Judge Blanch, not Judge Stone. With that correction, on motion of Mr. Ferre, seconded by Ms. Shurman, the committee approved the minutes of the March 12, 2018 meeting.

2. *Schedule.* Ms. Sylvester reported that the economic interference jury instructions went out for comment. We should have the comments back to discuss at the next meeting. The injurious falsehood instructions will go out for comments this month, and the comments should be back to discuss at the June meeting.

3. *Civil Rights Instructions.* The committee received comments on the first set of Civil Rights instructions from two attorneys--W. Earl Webster and Meb Anderson.

a. *CV1301, Section 1983 Claim--Elements.* Mr. Webster thought that CV1301 was a clear, concise, and correct statement of federal law on section 1983 actions but not necessarily of Utah law and suggested that the committee delay implementation of the instruction until the Utah Supreme Court issues its decision in *Kuchcinski v. Box Elder County*, case no. 20160674. The committee thought the instruction was clear that it only applies to claims based on 42 U.S.C. § 1983 and was not meant to cover claims based on state constitutional violations. Mr. Ferre noted that most plaintiffs rely on section 1983 because it provides for attorney's fees for the prevailing plaintiff, whereas state law does not. Ms. White noted that she has never had a state constitutional claim go to trial. At the suggestion of Ms. Shurman and Mr. Simmons, the committee added a paragraph to the end of the committee note stating that the instruction addresses federal section 1983 claims only and adding some references to Utah cases addressing state constitutional claims. On motion of Mr. Simmons, seconded by Mr. Ferre, the revised committee note was approved.

Mr. Anderson suggested that the proposed instructions on section 1983 may not be necessary since there are many federal model civil rights instructions. Ms. White noted that the subcommittee considered the availability of federal instructions but thought it would be helpful to include instructions on federal

civil rights claims in the model Utah instructions because the federal instructions were not as clear and concise. She noted that the federal district court in Utah has used the MUJI instructions.

Mr. Anderson also thought that CV1301 should use the terms "state actor" and "acting under color of state law," the terms federal case law uses. He noted that "state actor" is a term of art in civil rights cases and can be broader than "state employee," which might be construed as an employee of the State of Utah and not merely any governmental actor. Mr. Anderson also noted that it is generally not disputed at trial that a defendant was a "state actor" and was acting "under color of state law," but thought keeping the traditional federal terms could avoid problems where those elements are disputed. Ms. White noted that the subcommittee and committee had avoided the term "state actor" on purpose to try to make the instruction more understandable to a lay audience. The committee decided to do away with the term "state employee," however, for the reasons Mr. Anderson raised. Ms. White suggested saying "government [employee] [official]," since a state actor may not necessarily be an employee of the government, but could be, for example, a city councilperson. Mr. Ferre suggested using "state actor" but then defining it in a separate instruction. Dr. Di Paolo suggested saying, "state actor, that is, someone acting on behalf of the government." Ms. Sylvester suggested adding, "I have determined that [name of defendant] was a state actor" or whatever other term the committee decided to use. The committee eventually decided to avoid the term "state actor" or any of its synonyms altogether and changed the first element to read: "First, that [name of defendant] had authority to act on behalf of the government."

Dr. Di Paolo asked what the difference between the first and second elements was. The committee explained that the person whose conduct gave rise to the claim must have actually had authority to act on behalf of the government, but the person may have been acting outside the scope of his authority; as long as he was purporting to act in his official capacity, the governmental unit can still be liable. Ms. White suggested that the first element could be omitted because it is generally decided as a matter of law before the case goes to the jury. But Dr. Di Paolo thought that it would be helpful for the jury to understand the difference between the two elements.

Dr. Di Paolo and Judge Stone questioned the phrase "pretending to act" in the second element. Dr. Di Paolo thought that a lay person would not draw any distinction between "purporting to act" and "pretending to act" and thought that "pretending to act" was the more common term and would suffice. Others thought that "pretending to act" implied an element of intent or deception that was not required and preferred "purporting to act," which they thought included

"pretending to act" but was broader. "Purporting to act in performance of official duties," for example, would cover a police officer who uses excessive force, whereas "pretending to act" may not. Dr. Di Paolo did not think that "purporting" was sufficiently clear for a lay juror. The committee searched the case law and found support for the use of "pretending" in cases from the Fifth and Ninth Circuits. The committee decided to revise the second element to read: "Second, was acting, purporting to act, or pretending to act in performance of [his/her] official duties."

Ms. White thought that the references for the instruction should come from U.S. Supreme Court or Tenth Circuit decisions. She and Ms. Sylvester will try to find controlling authority for the use of "pretending" and add it to the references.

b. *CV1303, Warrantless Arrest.* At Mr. Anderson's suggestion, on motion of Mr. Simmons, seconded by Mr. Ferre, the committee struck "a" before "probable cause" in the last line of the first paragraph.

c. *CV1308, Excessive Force--Introductory Instruction.* Mr. Anderson objected to the omission of the term "objectively" from the reasonableness standard. Dr. Di Paolo thought that lay jurors would ignore the term "objectively" and would not understand how objective reasonableness was any different from reasonableness.

Mr. Ferre was excused. The committee no longer had a quorum but continued to discuss the instructions.

The committee thought that CV1308 and CV1309, read together, adequately explained the "objectively reasonable" standard, without using the term "objectively reasonable." The committee felt that adding "objectively" was an unnecessary legalism. Mr. Von Maack noted that CV1308 talks about "unreasonable" and "reasonable" force, but the title of the instruction is "Excessive Force," and CV1309 defines the "test of reasonableness," not "reasonable." Ms. Sylvester added "Unreasonable or" to the titles of CV1308 and CV1309. At Mr. Simmons's suggestion, the committee added a sentence to the end of the first paragraph of CV1308 that reads, "Excessive force is unreasonable force." At Judge Stone's suggestion, the committee also added a sentence to the end of the second paragraph: "I will explain what force is reasonable in another instruction." At Dr. Di Paolo's suggestion, the committee added a committee note that says: "*Graham v. Connor*, 490 U.S. 386 (1989), confirms objective reasonableness as the standard by which an officer's use of force is measured.

Although the term 'objectively reasonable' is not used in these instructions, CV1309 provides a definition of the term."

Dr. Di Paolo moved to approve the changes to CV1308 and CV1309, subject to any objections from any of the absent committee members. Mr. Simmons seconded the motion. The committee decided instead to vote on the changes to the instructions at the next meeting, when a quorum is present.

4. *Next meeting.* The next meeting is Monday, May 14, 2018, at 4:00 p.m.

The meeting adjourned at 6:00 p.m.

Tab 2

Priority	Subject	Sub-C in place?	Sub-C Members	Projected Starting Month	Projected Finalizing Month	Comments Back/Notes
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	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) (Chair))	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	Yes	Tracy Fowler, Todd Wahlquist, Nelson Abbott			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: May 10, 2018
Re: Civil Rights Instructions

We will spend Monday's meeting wrapping up the Civil Rights Instructions. According to the minutes, the committee will need to discuss and approve the changes to 1308 and 1309 that were made at the end of last month's meeting. We will also be back to discussing 1301 and the term "pretending."

Heather and I were tasked with searching for 10th Circuit and Supreme Court case law that discusses "pretending" in the section 1983 context. I found two 10th Circuit cases below, but one of them is unpublished. Neither of them uses "pretending" in the case holding.

> Where, as here, the employee was on duty, serving as a detention officer at the time he sexually assaulted or permitted the sexual assault of a Plaintiff, and the assaults occurred while he was, at least *pretending*, to perform his duties, the employee was acting under color of state law. But for each man's position as a detention officer for the CCDC he would have had no access to or authority over the women he allegedly victimized or permitted others to victimize."

Blueberry v. Comanche Cty. Facilities Auth., 183 F. Supp. 3d 1149, 1153–54 (W.D. Okla.), aff'd, 672 F. App'x 814 (10th Cir. 2016) (emphasis added).

> The Teppers went on to allege in their complaint that the defendants, *pretending* to act in their respective offices for the State of Utah, conspired with each other to put Challenger Foundation II out of business, and that their efforts culminated on August 23, 1990, when they filed in a state court in Utah a civil action on behalf of the State of Utah against Challenger Foundation II wherein the state sought to enjoin Challenger Foundation II's operation in Utah on the ground that such was not in compliance with Utah's child welfare and licensing laws.

Tepper v. Van Dam, 974 F.2d 1345 (10th Cir. 1992) (Unpublished) (emphasis added).

The case law in the 9th Circuit, on the other hand, does use "pretending" in its color of law definition:

> We hold that Warner was acting under color of state law when he invoked his law enforcement status to keep bystanders from interfering with his assault on Anderson. In the circumstances of this case, there are three critical requirements that must be satisfied. First, the defendant's action must have been 'performed while the officer is acting, purporting, or pretending to act in the performance of his or her official duties."

Anderson v. Warner, 451 F.3d 1063, 1068–69 (9th Cir. 2006) (quoting *McDade v. West*, 223 F.3d 1135, 1140 (9th Cir.2000)). See also *Ricky R. v. City of Alhambra*, 330 F. App'x 639, 640 (9th Cir. 2009). There was apparently some 5th Circuit case law use of the same, but I couldn't find it presented in the same way I found the 9th Circuit cases. I'm not sure we have enough in our circuit to use the term "pretending" but an argument could be made that the 9th Circuit's use is persuasive.

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

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~~ four elements:

First, that [name of defendant] had authority to act on behalf of the government;

Second, was acting, purporting to act, or pretending to act in performance of [his/her] official duties.

~~was a~~
~~state employeeand was acting, purporting to act, or pretending to act in performance of [his/her] official duties.~~

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

~~Third~~Fourth, 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)
Better references needed (pretending and purporting from 9th and 5th Circuits)

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.

This instruction addresses federal section 1983 claims. For state civil rights claims, see *Spackman v. Board of Education of Box Elder County*, 2000 UT 87, and *Jensen v. Cunningham*, 2011 UT 17.

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. 4/9/19

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 UNREASONABLE OR EXCESSIVE FORCE—INTRODUCTORY INSTRUCTION. Approved 9/19/16.

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

[Name of officer] claims the force [s]he used in [arresting/stopping] [name of plaintiff] was reasonable. I will explain what force is reasonable in another instruction.

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 UNREASONABLE OR 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)

MUJI 1st
15.7

Committee Note:
Graham v. Connor, 490 U.S. 386 (1989), confirms objective reasonableness as the standard by which an officer's use of force is measured. Although the term" objectively reasonable" is not used in these instructions, CV1309 provides a definition of the term.

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.

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.

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: February 12, 2018

Utah Courts

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

The following proposed Model Utah Civil Jury Instructions addressing economic interference have been published.

CV1401 – Elements of a Claim for Intentional Interference with Economic Relations.
CV1402 – "Economic Relationship" Defined.
CV1403 – "Intentionally Interfered" Defined.
CV1404 – "Improper Means" Defined.
CV1405 – Defenses: Privilege.
CV1406 – Damages.
CV1407 – Damages: Lost Profits.

Click here to review the Economic Interference Jury Instructions. Please reference the instruction(s) in your comments.

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

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2 thoughts on "Civil Jury Instructions – Economic Interference – Comment period expires March 30, 2018"

Josh Lee
February 14, 2018 at 11:07 pm Edit

The "established standard of a trade or profession" aspect of "improper means" has a very shaky foundation under Utah law. "Improper means" include interference which involves "violations of statutes, regulations, or recognized common-law rules." Leigh Furniture & Carpet Co. v. Isom, 657 P.2d 293, 308 (Utah 1982). Also "[c]ommonly included among improper means are violence, threats or other intimidation, deceit or misrepresentation, bribery, unfounded litigation, defamation, or disparaging falsehood." Id., quoting Top Service Body Shop, Inc. v. Allstate Insurance Co., 582 P.2d 1365, 1371 & n. 11 (Or. 1978). Of all the bases for establishing improper means, a violation of trade or professional standards is the least supported by legal precedent and has a tenuous genesis in Utah. In Utah, the concept was first proposed in Leigh Furniture which cited Top Service, 582 P.2d at 1371 ("They [the alleged means of interference] may be wrongful by reason of a statute or other regulation, or a recognized rule of common law, or perhaps an established standard of a trade or profession" [emphasis added]). Notably, the Top Service decision contained no specific citation for that proposition, but only a general reference to the Restatement (Second) of Torts § 767: "Business ethics and customs. Violation of recognized ethical codes for a particular area of business activity or of established customs or practices regarding disapproved actions or methods may also be significant in evaluating the nature of the actor's conduct as a factor in determining whether his interference with the plaintiff's contractual relations was improper or not." In turn, the Restatement references no definitive case law in support of this proposition. The closest reference is a Massachusetts' case which, in a "predictive approach," determined that the approach

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

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"a Massachusetts court would most likely follow under the circumstances is as follows: a violation of established standards in a trade or profession may satisfy the 'improper means' element of tortious interference with an existing or prospective business relationship." Ary Jewelers, LLC. v. IBJTC Bus. Credit Corp., 414 F. Supp. 2d 90, 95 (D. Mass. 2006) (emphasis added). Other jurisdictions which have evaluated this basis for improper means have uniformly required "well-defined, established rules or standards of a trade, association or profession," see e.g., Stevenson Real Estate Servs., Inc. v. CB Richard Ellis Real Estate Servs., Inc., 138 Cal. App. 4th 1215, 1221–23, 42 Cal. Rptr. 3d 235, 240–42 (2006), such as banking industry confidentiality standards, Ary Jewelers, LLC. v. IBJTC Bus. Credit Corp., 414 F. Supp. 2d 90, 94 (D. Mass. 2006). These standards most often take the form of a written advisory code recognized as a standard of ethics in an industry, see e.g., Volt Servs. Grp., Div. of Volt Mgmt. Corp. v. Adecco Employment Servs., Inc., 178 Or. App. 121, 130–32, 35 P.3d 329, 336 (2001), or written rules made available to all association, trade, or professional members, see e.g., Stephenson Real Estate Servs., 42 Cal. Rprt. at 241. "Nebulous" industry standards fall well short of satisfying the improper means standard. Gemini Aluminum Corp. v. California Custom Shapes, Inc., 95 Cal. App. 4th 1249, 1259, 116 Cal. Rptr. 2d 358, 366 (2002). The sole Utah case to address this issue required the plaintiff to "establish the existence of an industry-wide standard" which must be an "external and objective one." Walker v. Anderson-Oliver Title Ins. Agency, Inc., 2013 UT App 202, ¶¶ 20-21, 309 P.3d 267, 274.

Therefore, the instruction should clarify that only "well-defined, objective, and codified" industry standards can form the basis for a claim.

umesh
February 23, 2018 at 12:55 pm Edit

really useful information

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Model Utah Civil Jury Instructions, Second Edition
Economic Interference

CV1401. ELEMENTS OF A CLAIM FOR INTENTIONAL INTERFERENCE WITH ECONOMIC RELATIONS. Approved 10/2/2017.

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

(1) That [name of defendant] intentionally interfered with [an existing] or [a 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 harm 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

Committee Note

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

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 committee decided to treat the elements of a tortious interference claim in a single instruction.

CV1402. "ECONOMIC RELATIONSHIP" DEFINED. Approved 10/2/2017.

An economic relationship exists when [name of plaintiff] has a reasonable expectation of economic benefit from [his/her/its] relationship with one or more third parties. This expectation must be present at the time of the interference.

An economic relationship can be based upon an existing contract but does not have to be. 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 economic benefit. The expected benefit must be likely to occur but does not have to be a certainty.

References

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

MUJI 1st Instruction

19.2

Committee 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. Approved 11/13/17.

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

1) acted for the purpose of interfering with that relationship or
2) 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. "IMPROPER MEANS" DEFINED. Approved 12/11/17.

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 action that was contrary to law or violated an established standard of a trade or profession. [Name of plaintiff] claims the improper means [was/were] [state the 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

Committee Note

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. The court and parties should tailor examples of improper means to the facts of the case. Depending on the theory of improper means, this instruction may be used in conjunction with other instructions. 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 committee was not certain whether this part of the *Leigh* decision 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 might also counsel against finding liability for intentional interference with economic relations for even a malicious breach of contract. The court in *Eldridge* did not specifically address the issue but recognized that a defendant's motivation may still be relevant to an intentional interference claim, including "relevant to the improper means prong of the *Leigh Furniture* test." *Id.* ¶ 67. The committee thought that the Utah Supreme 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 may in effect reinstate the abandoned "improper purpose" alternative.

CV1405. DEFENSES: PRIVILEGE. Approved 11/13/17.

[Name of defendant] claims that [his/her/its] actions in interfering with [name of plaintiff]'s economic relations were privileged [Name of defendant] claims that [his/her/its] conduct was privileged under the [describe the privilege]. [Name of defendant] must prove the following: [Describe the elements of the privilege.] To the extent you find [name of

defendant]'s actions were subject to a privilege, you cannot find those actions to be an "improper means."

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

Committee 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.

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. Approved 11/13/17.

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 will reasonably

compensate for any harm [name of the plaintiff] has suffered because of the interference with economic relations.

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

Committee Note

Practitioners should also use the tort damages instructions at CV2001, et. seq., that are applicable. Damages could include lost monetary or other benefits or expectations under a contract, any actual harm to plaintiff's reputation, lost profits, or emotional distress caused by defendant's interference.

CV1407. DAMAGES: LOST PROFITS. Approved 11/13/17.

To award damages for lost profits, you must have 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.

References:

TruGreen Cos. v. Mower Bros., Inc., 2008 UT 81, 199 P.3d 929

MUJI 1st Instructions

19.15 & 19.16