Agenda
Advisory Committee on Model Civil Jury Instructions

September 9, 2019
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 and approval of minutes	Tab 1	Judge Andrew Stone, Chair
Subcommittees and subject area timelines	Tab 2	Judge Andrew Stone
Improving Jury Deliberations	Tab 3	Andrew M. Morse
Trespass and Nuisance Instructions	Tab 4	Cameron Hancock, Ryan Beckstrom
Uniformity	Tab 5	Judge Keith Kelly, Alyson McAllister, Lauren Shurman
CV632. Threshold	Tab 6	Alyson McAllister
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.

October 15, 2019 (Tuesday)
November 12, 2019 (Tuesday)
December 9, 2019

Tab 1

MINUTES
Advisory Committee on Model Civil Jury Instructions
June 10, 2019
4:00 p.m.

Present: Honorable Andrew H. Stone (chair), Nancy J. Sylvester (staff), Marianna Di Paolo, Joel Ferre, Tracy H. Fowler, Honorable Keith A. Kelly, Alyson McAllister, Douglas G. Mortensen, Ruth A. Shapiro, Lauren A. Shurman, Paul M. Simmons, Peter W. Summerill. Also present: Cameron M. Hancock, chair of the Trespass and Nuisance subcommittee.

Judge Stone was excused for the first part of the meeting because he was in a jury trial. Ms. Sylvester conducted until Judge Stone could join the meeting.

1. *Minutes.* On motion of Mr. Simmons, seconded by Mr. Fowler, the committee approved the minutes of the May 13, 2019 meeting.

2. *Schedule.* The committee will take July and August off. The anticipated schedule for September and October is to finish the Trespass and Nuisance instructions and the revised General Instructions and to start on the Products Liability instruction updates.

3. *Trespass and Nuisance Instructions.* The committee continued its review of the Trespass and Nuisance Instructions. Ms. Sylvester distributed with the agenda a memorandum from Ryan Beckstrom of the subcommittee addressing the questions that the committee raised at the last meeting.

a. *CV1209, Common Law Private Nuisance Claim.* Mr. Hancock said that the subcommittee thought that the current instruction accurately states the law with respect to the definition of "unreasonable." He noted, however, as noted in the memorandum, that Utah courts appear to be conflicted on the applicable considerations, with some addressing "unreasonableness" from the standpoint of the actor, and some addressing it from the standpoint of the injured party. The committee added Mr. Beckstrom's discussion of this issue in his memorandum to the committee note to CV1209.

Mr. Ferre and Judge Kelly joined the meeting.

The subcommittee also recommended keeping "otherwise" in the phrase "otherwise actionable" and noted that it is defined in Restatement (Second) of Torts § 822 as "reckless, negligent or abnormally dangerous." Mr. Hancock also recommended adding to the references citations to *Cannon v. Neuberger,* 268 P.2d 425 (Utah 1954), and *Dahl v. Utah Oil Ref. Co.,* 71 Utah 1, 262 P. 269 (1927). He recommended that *Branch v. Western Petroleum, Inc.,* 657 P.2d 267 (Utah 1982), not be cited, since that decision's discussion of nuisance was dicta; a nuisance theory was not presented to the trial court in that case.

Mr. Fowler noted that CV1208 ("Statutory Nuisance Claim") and CV1209 ("Common Law Private Nuisance Claim") have different definitions of "unreasonableness" and questioned whether they should be the same. Ms. Shurman noted that CV1208 does not purport to define "unreasonable" but just sets out factors the jury should consider in determining unreasonableness. And Mr. Summerill noted that the statute refers to the unreasonableness of the conduct, whereas the case law refers to the unreasonableness of the injury to the property.

Judge Stone joined the meeting.

The committee thought that the two instructions should probably have a consistent definition of unreasonableness unless there is some reason not to. Mr. Hancock offered to have the subcommittee look at the issue and to propose a separate instruction defining unreasonableness if it thought one was necessary.

Dr. Di Paolo joined the meeting.

The committee discussed whether a definition of unreasonableness should be included in each instruction (CV1208 & CV1209) or whether it should be its own instruction. The committee thought it best to include it in each instruction. Judge Kelly noted that otherwise the jury might think that the separate instruction also applies to other claims where unreasonableness might be relevant, such as negligence. Judge Stone suggested adding to the committee note that the committee relied on the statute and case law in defining unreasonableness, that there is no case saying that the test is different for each form of private nuisance, and that counsel should have some leeway to argue reasonableness or unreasonableness under the circumstances.

b. *CV1210, Public Nuisance*. The committee had asked the subcommittee if there was a common-law public nuisance claim as well as the statutory claim. The subcommittee thought that there was but that the elements for such a claim were not clearly set forth in Utah law. At Mr. Simmons's suggestion, the committee added a committee note that says: "This instruction cites the elements for a statutory public nuisance claim. There may also be a common law claim. *See Riggins v. Dist. Court of Salt Lake Cty.,* 51 P.2d 645, 662 (1935)."

Ms. McAllister and Mr. Hancock were excused.

4. *General Instructions*. Judge Kelly gave some background on the committee's decision to revisit the general instructions. It started out as an attempt to

make the general civil and general criminal instructions consistent. That attempt was not successful, but in the process, Judge Kelly and his subcommittee thought that some of the general criminal instructions were better than their civil counterparts and that they should be adopted or adapted for the civil instructions. The subcommittee also tried to define more clearly which general instructions should be given at the beginning of trial and which should be given after the presentation of evidence. The general instructions numbered CV151 et seq. have been renumbered and are meant to be given post-evidence. Finally, the subcommittee also edited and updated some of the instructions.

a. *CV109, Juror Questions*. Judge Stone asked if there was an instruction on juror questions. There was not a separate instruction on juror questions in the model civil instructions. Judge Stone suggested adapting CR111, "Juror Questions," for the general civil instructions. He thought that the instruction should make it clear that jurors were not required to ask questions. Dr. Di Paolo thought CR111 was problematic to the extent it told the jury that the court would allow the question only if "it is legally permissible" and "appropriate." The committee thought it better to just say that some questions may not be allowed. They may be relevant and appropriate questions, for example, but just not for the particular witness or may be covered in other, future testimony. The committee adopted the following instruction as new CV109:

> During the trial you may submit questions to be asked of the witnesses, but you are not required to do so. You should write your questions down as they occur to you. Please do not ask your questions out loud. To make sure the questions are legally appropriate, we will use the following procedure: After the lawyers have finished questioning each witness, I will ask if you have any questions. You should hand your questions to the bailiff when I ask for them. I will review them with the lawyers to make sure they are allowed. I will tell you if your questions are allowed or not.

Ms. Shurman asked whether the instruction should address other issues covered in Utah Rule of Civil Procedure 47(j), such as that the court may rephrase the question or discontinue questioning altogether. The committee did not think it needed to say so. On motion of Ms. Shapiro, seconded by Judge Kelly, the committee approved new CV109.

b. *CV101, General Admonitions*. Dr. Di Paolo suggested restructuring the second and fourth paragraphs of CV101, to start by saying "although it may seem natural," and then to say why it is not allowed. The committee also approved dropping outdated references to Blackberries, PDAs, Facebook,

MySpace, and LinkedIn and to refer generically to "social media," since social media platforms can change so quickly. On motion of Judge Kelly, seconded by Mr. Summerill, the committee adopted CV101 and approved revising CV101A to conform to the changes to CV101.

c. *CV102, Role of Judge, Jury, and Lawyers, and CV102A, Role of the Judge, Jury, Parties, Lawyers (Self-Represented Litigant Version).* Judge Kelly noted that the subcommittee preferred the general criminal instruction on the role of the participants in the trial to the general civil instruction. Dr. Di Paolo thought that jurors would not understand the phrase "legal issues." Judge Stone suggested "questions of law." Judge Kelly noted that the only legal issue the jurors are usually concerned with (other than the law as stated in the instructions) is the admissibility of evidence. At his suggestion, the committee revised the second paragraph to read, "As the judge I will supervise the trial, decide what evidence is admissible, and instruct you on the law." Dr. Di Paolo suggested stating in the last paragraph, "Do not try to guess what I or the lawyers may think." The committee declined to adopt the change. The committee also agreed to revise CV102A to conform to the new CV102, adding references to "[name of self-represented [party]]."

d. *CV128A, Objections and Rulings on Evidence and Procedure: Self-Represented Parties.* The committee decided to add an instruction addressing objections and rulings on evidence where a party represents himself or herself. Judge Stone noted the special problems that may arise when a party is self-represented. Ordinarily, the jury is instructed to ignore the opinions of the attorneys, but a self-represented party serves two roles--a lawyer and a witness--and as a witness a self-represented party may offer opinions that the jury may consider evidence.

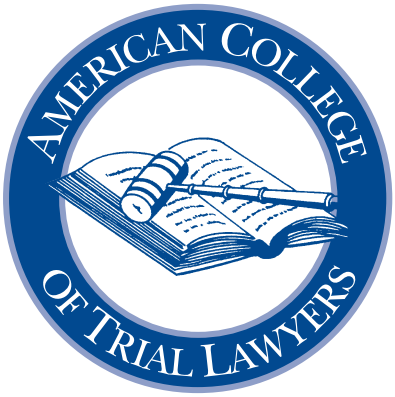
5. *Next meeting*. The next meeting is Monday, September 9, 2019, at 4:00 p.m.

The meeting concluded at 6:05 p.m.

Tab 2

Subject	Sub-C in place?	Sub-C Members	Projected Starting Month	Projected Finalizing	Comments Back/Notes
Trespass and Nuisance	Yes	Hancock, Cameron; Beckstrom, Ryan	November-18	September-19	
Uniformity	Yes	Judge Keith Kelly (chair), Alyson McAllister, Lauren Shurman	February-19	September-19	
Caselaw updates	n/a	n/a	September-19	September-19	
Implicit Bias	TBD	Judge Su Chon (chair)	TBD	TBD	
Products Liability	Yes	Tracy Fowler, Nelson Abbott, and Todd Wahlquist	October-19	December-19	Time to update due to significant changes in case law.
Assault/False Arrest	Yes	Rice, Mitch (chair); Carter, Alyson; Wright, Andrew (D); Cutt, David (P)	TBD	TBD	
Insurance	Yes	Johnson, Gary (chair); Pritchett, Bruce; Ryan Schriever, Dan Bertch, Andrew Wright, Rick Vazquez; Stewart Harman (D); Ryan Marsh (D)	TBD	TBD	
Unjust Enrichment	No (instructions from David Reymann)	David Reymann	TBD	TBD	
Abuse of Process	No (instructions from David Reymann)	David Reymann	TBD	TBD	
Directors and Officers Liability	Yes	Call, Monica;Von Maack, Christopher (chair); Larsen, Kristine; Talbot, Cory; Love, Perrin; Buck, Adam	TBD	TBD	
Wills/Probate	No	Barneck, Matthew (chair); Petersen, Rich; Tippet, Rust; Sabin, Cameron	TBD	TBD	Much of this is codified in statute. There may not be enough instructions to dedicate an entire instruction area.
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)	TBD	TBD	
Sales Contracts and Secured Transactions	Yes	Cox, Matt (chair); Boley, Matthew; Maudsley, Ade	TBD	TBD	

Tab 3



IMPROVING JURY DELIBERATIONS THROUGH JURY INSTRUCTIONS BASED ON COGNITIVE SCIENCE

Jury Committee

Approved by the Board of Regents
February 2019

MISSION STATEMENT OF THE
AMERICAN COLLEGE OF TRIAL LAWYERS

The American College of Trial Lawyers is an invitation only fellowship of exceptional trial lawyers of diverse backgrounds from the United States and Canada. The College thoroughly investigates each nominee for admission and selects only those who have demonstrated the very highest standards of trial advocacy, ethical conduct, integrity, professionalism and collegiality. The College maintains and seeks to improve the standards of trial practice, professionalism, ethics, and the administration of justice through education and public statements on important legal issues relating to its mission. The College strongly supports the independence of the judiciary, trial by jury, respect for the rule of law, access to justice, and fair and just representation of all parties to legal proceedings.

◆◆◆

"In this select circle, we find pleasure and charm in the illustrious company of our contemporaries and take the keenest delight in exalting our friendships."

—Hon. Emil Gumpert,
Chancellor-Founder, ACTL

American College of Trial Lawyers
1300 Dove Street, Suite 150
Newport Beach, California 92660
Telephone: (949) 752-1801
Website: www.actl.com
Email: nationaloffice@actl.com

American College of Trial Lawyers

American College of Trial Lawyers

PAST PRESIDENTS

1950-51 EMIL GUMPERT*
Los Angeles, California

1951-52 C. RAY ROBINSON*
Merced, California

1952-53 CODY FOWLER*
Tampa, Florida

1953-54 E. D. BRONSON*
San Francisco, California

1954-55 CODY FOWLER*
Tampa, Florida

1955-56 WAYNE E. STICHTER*
Toledo, Ohio

1956-57 JESSE E. NICHOLS*
Oakland, California

1957-58 LEWIS C. RYAN*
Syracuse, New York

1958-59 ALBERT E. JENNER, JR.*
Chicago, Illinois

1959-60 SAMUEL P. SEARS*
Boston, Massachusetts

1960-61 LON HOCKER*
Woods Hole, Massachusetts

1961-62 LEON JAWORSKI*
Houston, Texas

1962-63 GRANT B. COOPER*
Los Angeles, California

1963-64 WHITNEY NORTH SEYMOUR*
New York, New York

1964-65 BERNARD G. SEGAL*
Philadelphia, Pennsylvania

1965-66 EDWARD L. WRIGHT*
Little Rock, Arkansas

1966-67 FRANK G. RAICHLE*
Buffalo, New York

1967-68 JOSEPH A. BALL*
Long Beach, California

1968-69 ROBERT W. MESERVE*
Boston, Massachusetts

1969-70 HON. LEWIS F. POWELL, JR.*
Washington, District of Columbia

1970-71 BARNABAS F. SEARS*
Chicago, Illinois

1971-72 HICKS EPTON*
Wewoka, Oklahoma

1972-73 WILLIAM H. MORRISON*
Portland, Oregon

1973-74 ROBERT L. CLARE, JR.*
New York, New York

1974- AUSTIN W. LEWIS*
New Orleans, Louisiana

1975-76 THOMAS E. DEACY, JR.*
Kansas City, Missouri

1976-77 SIMON H. RIFKIND*
New York, New York

1977-78 KRAFT W. EIDMAN*
Houston, Texas

1978-79 MARCUS MATTSON*
Los Angeles, California

1979-80 JAMES E. S. BAKER*
Chicago, Illinois

1980-81 JOHN C. ELAM*
Columbus, Ohio

1981-82 ALSTON JENNINGS*
Little Rock, Arkansas

1982-83 LEON SILVERMAN*
New York, New York

1983-84 GAEL MAHONY*
Boston, Massachusetts

1984-85 GENE W. LAFITTE
New Orleans, Louisiana

1985-86 GRIFFIN B. BELL*
Atlanta, Georgia

1986-87 R. HARVEY CHAPPELL, JR.*
Richmond, Virginia

1987-88 MORRIS HARRELL*
Dallas, Texas

1988-89 PHILIP W. TONE*
Chicago, Illinois

1989-90 RALPH I. LANCASTER, JR.
Portland, Maine

1990-91 CHARLES E. HANGER*
San Francisco, California

1991-92 ROBERT B. FISKE, JR.
New York, New York

1992-93 FULTON HAIGHT*
Santa Monica, California

1993-94 FRANK C. JONES*
Atlanta, Georgia

1994-95 LIVELY M. WILSON*
Louisville, Kentucky

1995-96 CHARLES B. RENFREW*
San Francisco, California

1996-97 ANDREW M. COATS
Oklahoma City, Oklahoma

1997-98 EDWARD BRODSKY*
New York, New York

1998-99 E. OSBORNE AYSCUE, JR.
Charlotte, North Carolina

1999-2000 MICHAEL E. MONE
Boston, Massachusetts

2000-2001 EARL J. SILBERT
Washington, District of Columbia

2001-2002 STUART D. SHANOR
Roswell, New Mexico

2002-2003 WARREN B. LIGHTFOOT
Birmingham, Alabama

2003-2004 DAVID W. SCOTT, Q.C.
Ottawa, Ontario

2004-2005 JAMES W. MORRIS, III*
Richmond, Virginia

2005-2006 MICHAEL A. COOPER
New York, New York

2006-2007 DAVID J. BECK
Houston, Texas

2007-2008 MIKEL L. STOUT
Wichita, Kansas

2008-2009 JOHN J. (JACK) DALTON
Atlanta, Georgia

2009-2010 JOAN A. LUKEY
Boston, Massachusetts

2010-2011 GREGORY P. JOSEPH
New York, New York

2011-2012 THOMAS H. TONGUE
Portland, Oregon

2012-2013 CHILTON DAVIS VARNER
Atlanta, Georgia

2013-2014 ROBERT L. BYMAN
Chicago, Illinois

2014-2015 FRANCIS M. WIKSTROM
Salt Lake City, Utah

2015-2016 MICHAEL W. SMITH
Richmond, Virginia

2016-2017 BARTHOLOMEW J. DALTON
Wilmington, Delaware

2017-2018 SAMUEL H. FRANKLIN
Birmingham, Alabama

* Deceased

Jury Committee

Chair
Robert T. Adams
Kansas City, Missouri

Vice Chair
Bruce R. Parker
Baltimore, Maryland

Members

Alex Alvarez
Coral Gables, Florida

Jeptha F. Barbour
Jacksonville, Florida

Michael L. Bell
Birmingham, Alabama

Arthur P. Brock
Chattanooga, Tennessee

Michael A. Brown
Baltimore, Maryland

Cheryl A. Bush
Troy, Michigan

William J. Conroy
Berwyn, Pennsylvania

Rudy A. Englund
Seattle, Washington

Mark R. Filip
Chicago, Illinois

Vincent Galvin, Jr.
San Jose, California

Gerald R. Kowalski
Toledo, Ohio

Gregory M. Lederer
Cedar Rapids, Iowa

Andrew M. Morse
Salt Lake City, Utah

Joel A. Mullin
Portland, Oregon

Kenneth A. Murphy
Philadelphia, Pennsylvania

Joseph E. O'Neil
Philadelphia, Pennsylvania

Timothy G. O'Neill
Denver, Colorado

Larry Ottaway
Oklahoma City, Oklahoma

Angelo M. Patacca, Jr.
Jacksonville, Florida

Jane Paulson
Portland, Oregon

John R. Penhallegon
Towson, Maryland

Lyn P. Pruitt
Little Rock, Arkansas

James S. Rogers
Seattle, Washington

Joseph J. Roper
Kansas City, Missouri

Perrin Rynders
Grand Rapids, Michigan

Daniel J. Scully, Jr.
Detroit, Michigan

Ralph A. Weber*
Milwaukee, Wisconsin

Marc E. Williams
Huntington, West Virginia

Sheryl J. Willert
Seattle, Washington

Regent Liaison
Martin F. Murphy
Boston, Massachusetts

Ralph A. Weber was the primary author of this publication

TABLE OF CONTENTS

IMPROVING JURY DELIBERATIONS THROUGH JURY INSTRUCTIONS BASED ON COGNITIVE SCIENCE

With this closing instruction ringing in their ears, jurors across the country are sent off to their deliberation rooms to reach a verdict:

> *"Free your minds of all feelings of sympathy, bias and prejudice and let your verdict speak the truth, whatever the truth may be."*

For decades we believed this instruction was effective and its goals attainable. People could simply "free their minds of all feelings" and reach a verdict based on reason and objective facts—or so we thought.

Recent advances in the science of decision-making, however, undercut our assumptions about how jurors make decisions. Science now teaches that our cerebral cortex (and its deliberate, logical power) does not either solely or separately rule the day. Instead, logic or reason (described below as "System 2" thinking) operates alongside and in conjunction with the evolutionary brain and its quick, instinctual impulses (described below as "System 1" thinking). Thus, instructing someone simply to shut down part of their brains and "free their minds of all feelings . . ." is as effective as telling a child perched on a garage roof to ignore gravity.

Nobel Laureate Daniel Kahneman is among the leaders in the developing understanding of human decision-making. Kahneman and his colleague Amor Tversky relentlessly challenged the received wisdom that human beings are motivated to—and do—routinely make rational, logical decisions. Kahneman summarized his and Tversky's work in the 2011 best seller, THINKING, FAST AND SLOW. This book brings to the general public a lifetime of cognitive and social psychology research about the many non-rational ways that human beings make decisions—including the multiple ways we predictably and without awareness commit errors in logic and reasoning.[1]

Jonathan's Haidt's book, THE RIGHTEOUS MIND: WHY GOOD PEOPLE ARE DIVIDED BY POLITICS AND RELIGION (2012), likewise pulls back the curtain of myth and misunderstanding to show how humans actually make decisions. Haidt uses the tools of neuroscience and social psychology to explain how humans' intrinsic moralistic, judgmental nature is moved by forces that operate more through rapid intuitive judgment than through careful "reasoning why." Like Kahneman and his Systems 1 & 2, Haidt likewise differentiates between two types of thinking, one that is conscious (reasoning) while the other operates intuitively.

This paper first summarizes the core insights of Kahneman, Haidt and other scientists into common flaws in human decision-making. Next, Part 2 discusses recent efforts by courts to improve jury instructions about the dangers of eyewitness identifications by taking account of (and trying to offset) flaws in human decision-making. Then, Part 3 offers several model jury instructions based on the science of decision-making that are designed to counter cognitive flaws and focus jurors' attention,

---

1 Kahneman began this research with Tversky in 1969. *Id.* at 5-6, which led to a number of highly influential papers. *Id.*, Appendices A, B, at 419-48.

increase their use of deliberative thought, mitigate "confirmation bias," and broaden participation during jury deliberation.

The goals here are straightforward: to increase the thoroughness of jurors' evidence review and to improve jurors' deliberations. The premise is that jurors who focus and deliberate in a meaningful way are more likely to reach the correct decision.[2] Ideally, this paper responds to Professor Burns' request for cognitive science insights to help improve jury trials:

> I would like to see a sustained attempt by experimental psychologists and other social scientists to identify those systematic failures in human cognitive capacities (heuristics) about which there is the highest level of certainty in the scientific community and which pose special dangers of distorting jury reasoning.

Robert P. Burns, *The Death of the American Trial* (2011).

Part 1: Cognitive Science Insights into Human Decision-Making

The core concept captured in the title of THINKING, FAST AND SLOW is that our brains are wired so that they reflexively default to fast, intuitive thinking—what Kahneman calls "System 1" thinking—instead of using slow, deliberate "System 2" thinking, which requires more effort but is better suited to working through complex and difficult issues.

A simple example of System 1 "fast thinking" is the effortless decision-making we use when driving down an open highway.[3] System 1 "operates automatically and quickly, with little or no effort and no sense of voluntary control."[4]

System 2 or "slow thinking," on the other hand, "allocates attention to the effortful mental activities that demand it, including complex computations."[5] In contrast to easy highway driving, System 2 involves focus and effort such as is required to "[p]ark in a narrow space (for most people except garage attendants)."[6]

People who predominantly rely on System 1 thinking boast that they "trust their gut" and do not want to be bothered with explaining themselves or considering contrary evidence. People who predominantly use System 2, on the other hand, are marked by their patience and intentional effort to see all sides of the issue before coming to a conclusion.

If any one of us were parties to a trial (especially if the facts were in our favor) we would want jurors to use their System 2 skills—namely, deliberate and careful thought. This is because fast, System 1 thinking can be misled by its tendency to employ cognitive shortcuts that can take us to the wrong conclusion. Unfortunately, System 2 thinking does not just take over and remain in control

---

2 D. Devine, JURY DECISION MAKING: THE STATE OF THE SCIENCE 9-10 (2012).
3 Kahneman, *supra* note 1, at 29.
4 *Id.* at 20.
5 *Id.* at 21.
6 *Id.* at 22.

once the subject matter becomes more complicated—as in a trial and during deliberations. The highly diverse operations of System 2 have one feature in common: they require attention and are disrupted when attention is drawn away."[7] "The defining feature of System 2 . . . is that its operations are effortful, and one of its main characteristics is laziness, a reluctance to invest more effort than is strictly necessary."[8] System 1 thus jumps into the fray when a complex problem is presented in order to save System 2 the effort.

Jonathan Haidt similarly explains human decision-making as a combination of two interrelated types of cognition: (1) intuition, which runs automatically and efficiently, and (2) reasoning, which requires effort and attention. He describes these two types of cognition through the metaphor of an elephant lumbering down a road (representing automatic processes such as intuition and emotion) while the rider atop the elephant attempts with varying degrees of success to control the large beast (representing conscious and effortful reasoning).[9]

As applied to trials, aiming arguments and instructions only at the rider ignores (pardon the pun) the elephant in the room. Haidt puts it succinctly: "if you want to change people's minds, you've got to talk to their elephants."[10] The many trial lawyer articles and seminars dissecting the "reptilian brain" are applying the same insights to different species.

A third helpful resource comes from neurologist Dr. Robert Burton. In accord with Kahneman and Haidt, Dr. Burton urges us to appreciate the powerful drivers of decision-making that operate outside conscious thought. Burton's book, ON BEING CERTAIN: BELIEVING YOU ARE RIGHT EVEN WHEN YOU ARE NOT describes the problem as follows:

> Despite how certainty feels, it is neither a conscious choice nor even a thought process. Certainty and similar states of "knowing what we know" arise out of involuntary brain mechanisms that, like love or anger, function independently of reason.[11]

We can be led astray when the "feeling of knowing" drives us to reject or discount evidence that our "knowledge" is wrong. Burton uses the famous *Challenger* study to make his point. The morning after the January 28, 1986, space shuttle *Challenger* explosion, a psychologist studying the recall of highly dramatic events ("flashbulb memories") asked his class of 106 students at Emory University to write down exactly how they'd heard of the explosion, where they were, what they'd been doing and how they felt. Two and a half years later they were again interviewed. Twenty-five percent of the students' subsequent accounts were strikingly different from their original journal entries; more than half the people had lesser degrees of error; less than ten percent had all the details correct.

While we all understand in a general sense the flaws of memory (but see Part 2, *infra*), Burton uses the *Challenger* study to make a more shocking point: when students were confronted with their

---

7 *Id.*
8 *Id.* at 31.
9 Haidt, *supra*, at 53-54.
10 *Id.* at 57.
11 Burton, *supra,* at xiii.

journals showing their contemporaneous account that conflicted with their "memory," (prior to seeing their original journals, most students presumed that their memories were correct)[12] many persisted in the belief that their false recollections were correct nonetheless! As one student responded when shown the journal, "*That's my handwriting, but that's not what happened*."[13]

As applied to trials, the feeling of certainty—especially when one is unwilling to test that certainty against the evidence—can lead to the wrong conclusion. Each of us has known a colleague about whom it could be said, "he's not always right but he's never in doubt." That is not how we would want to describe a model juror.

THE INVISIBLE GORILLA, a fourth book, is the work of cognitive psychologists Christopher Chabris and Daniel Simons who created the famous experiment for which their book is named. Subjects were shown a short video of two teams moving around and passing a basketball. They were told that as they watched they should count the number of passes made by the players wearing white while ignoring any passes by the players wearing black. Immediately afterwards the subjects were asked to report the number of passes. The real question came next: did you notice "anything unusual" or "anything or anyone other than the players" while watching the video and counting passes.[14]

Amazingly, *roughly half of the viewers did not see* that halfway through the video a female student wearing a full-body gorilla suit walks in the scene, stops in the middle of the players, faces the camera, thumps her chest and then walks off having spent about nine seconds onscreen. It turns out that this half of the subjects were "concentrating so hard on counting the passes that they were 'blind' to the gorilla right in front of their eyes."[15]

Based on this and other mental flaws outlined in their book, the authors of THE INVISIBLE GORILLA issued a call to action to the legal profession: "In our view, what is most in need of reform is the legal system's understanding of how the mind works."[16]

Decision-Making Flaws in Practice

Kahneman explains that System 1 silently "takes over" from System 2 by introducing unconscious mental shortcuts known as "heuristics." These mental shortcuts "are not chosen; they are the consequence of the mental shotgun, the imprecise control we have over targeting our responses to questions."[17] Thus, we are not even aware of the tricks our mind is playing in order to solve a problem. "The mental shotgun makes it easy to generate quick answers to difficult questions without imposing much hard work on your lazy System 2."[18] Again, this process occurs automatically without conscious awareness and these shortcuts take over our thinking easily and automatically.

---

12 *Id.* at 10.
13 *Id.* at 11 (emphasis supplied). *See also* C. Chabris & D. Simons, THE INVISIBLE GORILLA 72-73 (2010) (discussing *Challenger* study).
14 Chabris & Simons, *supra* note 12, at 6.
15 *Id.* at 7.
16 *Id.* at 114.
17 Kahneman, *supra* note 1, at 98.
18 *Id.* at 99.

Flaw 1—The "Affect" Heuristic

One System 1 mental shortcut is described as the "affect heuristic." This heuristic shifts our mind from how to respond to a difficult question—one that requires the use of logic and facts to answer correctly—to the simpler "affect" question namely: "do I like this?" The mind thereby avoids the question that requires effort and instead answers the easier "affect" question—"do I like this?"

Kahneman gives this example of the affect heuristic at work. He asked the chief investment officer of a large financial firm why he had invested tens of millions of dollars in the stock of Ford Motor Company. The right answer, according to economists, would have involved an explanation of how the current market price of Ford stock was below where it should have been (i.e., Ford's stock was undervalued by the market); how the CIO had reason to know this; and thus why the CIO chose to take advantage of his insight into the true, higher stock value by buying at the below-value market price. But that is not what the sophisticated CIO said. The CIO instead replied that he had recently attended an auto show and had been impressed by the Ford cars he saw: "'Boy, do they know how to make a car,'" he said. He made it clear that in making the stock investment he had trusted his gut feeling.[19]

Kahneman points out that this sophisticated investor had avoided the difficult question of weighing Ford's market price versus its "true" value and instead allowed the affect heuristic to take over: he liked the cars, he liked the company, and he liked the idea of owning the stock. Instead of focusing on whether Ford stock was currently underpriced, System 1 and the affect heuristic guided his judgment with a feeling of liking and disliking, with little deliberation or reasoning.[20] "If a satisfactory answer to a hard question is not found quickly, System 1 will find a related question that is easier and will answer it."[21] The question the investor faced (should I invest in Ford stock?) was difficult, but the answer to an easier and related question (do I like Ford cars?) came readily to his mind and determined his choice.

Trial lawyers (and experienced witnesses) play to the power of the affect heuristic by trying to ingratiate themselves to the court and jury. The reason is simple: we intuitively appreciate the affect heuristic and want the judge and jurors to like us (and not like the other side), because we know it can impact how they decide the case. Court personnel can attest to the Cheshire cat-like grins plastered on counsels' faces as the jurors file into the court room. Similarly, the weakest jokes shared by the judge evoke near-paroxysms of laughter from the lawyers. Conversely, we work to make our opponents unlikeable, highlighting corporate greed or malingering claimants.

We grimace at the idea of a justice system predicated on the rule "reward those you like and punish those you do not," but the affect heuristic nonetheless takes us down that path. Accordingly, juries are more likely to acquit attractive defendants and beautiful people convicted of crimes on average get lighter sentences.[22]

---

19 Kahneman, *supra* note 1, at 12.
20 *Id.*
21 *Id.* at 97.
22 Haidt, *supra*, at 69 & n.17 (citing studies).

Flaw 2—Confirmation Bias

Confirmation bias is a second powerful mental shortcut that is especially impactful in a jury trial. Because our minds dislike the discomfort of uncertainty we want to answer questions or solve riddles as quickly as possible. We do so by creating a hypothesis and then looking for facts to support—"confirm"—that hypothesis.[23] In short, *first* we pick an answer and *then* we look for facts to support that choice.[24]

In a jury trial, confirmation bias drives jurors to develop premature conclusions and then to interpret evidence received thereafter in a manner that supports their initial conclusion, *i.e*., favoring supporting evidence over contrary evidence.[25] One explanation for this distortion of evidence is that postponing all evaluation of evidence until the conclusion of the trial—as jurors are repeatedly instructed to do—is contrary to an urge too natural to suppress.[26]

The problem with confirmation bias is that it blinds us to subsequently received contradictory evidence, which, if we considered it, could cause us to change our minds. Unfortunately, confirmation bias takes over and causes us to ignore or discount as untrustworthy evidence that contradicts what we already have come to believe. To paraphrase Paul Simon's lyric in *The Boxer*, "we hear what we want to hear and disregard the rest …."[27]

One of the best-known studies on confirmation bias demonstrates why the bias can be a serious issue when a jury is tasked with evaluating evidence during the course of a trial.[28] Two groups of participants, one group that supported the death penalty and one that was against it, were shown two fake studies on the death penalty.[29] The first fake study *confirmed* participants' pre-existing beliefs (pro or con) about the effectiveness of the death penalty in reducing crime, while the other fake study *contradicted* these pre-existing beliefs.[30] When asked to rate how convincing each study was, the participants were more likely to accept the findings in the study that was in line with their pre-existing beliefs and to question the other, contradicting study's results.[31] But worse than that, not only did the confirmatory evidence strengthen people's pre-existing views, the contradicting evidence also had the effect of strengthening the pre-existing beliefs! Each side found that "those procedures that produced confirming results [were] methodologically superior to those that produced disconfirming results, and both used the perceived disparity in the quality of evidence on the two sides of the issue as justification for adopting more polarized attitudes."[32] Thus, when anti-death penalty people were shown pro-death penalty evidence, they became *more* anti-death penalty. The same held true for pro-death penalty people.

---

23 *See, e.g.*, Scott O. Lilienfeld, Rachel Ammirati & Kristin Landfield, *Giving Debiasing Away: Can Psychological Research on Correcting Cognitive Errors Promote Human Welfare?*, 4 Persp. Psychol. Sci. 390, 392 (2009) ("Confirmation bias predisposes us not merely to interpret evidence in a self-fulfilling manner, but to seek out evidence supporting only one side of a polarized issue.")

24 *Id.*

25 Kurt A. Carlson & J. Edward Russo, *Biased Interpretation of Evidence by Mock Jurors*, 7 J. of Experimental Psych.: Applied 91 (2001); Bill Kanasky, Jr., *Juror Confirmation Bias: Powerful, Perilous, Preventable*, 33 No. 2 Trial Advoc. Q. 35 (2014).

26 Carlson & Russo, *supra* note 25, at 91.

27 Simon & Garfunkel, The Boxer (Columbia Records 1969).

28 Charles G. Lord, et al., *Biased Assimilation and Attitude Polarization: The Effects of Prior Theories on Subsequently Considered Evidence*, 37 J. Personality & Soc. Psychol. 2098, 2099 (1979).

29 *Id.*

30 *Id.*

31 *Id.*

32 Charles G. Lord, Mark R. Lepper and E. Preston, *Considering the Opposite: A Corrective Strategy For Social Judgment*, 47 Journal of Personality and Social Psychology 1231, 1232 (1984).

"Belief Perseverance" bears a family relationship to confirmation bias. It is the tendency to maintain a belief despite receiving evidence that contradicts the belief, even evidence that destroys the factual basis for the belief. So strong is belief perseverance that offering contradictory evidence may serve only to bolster the belief.[33] One explanation for this phenomenon is that jurors more easily process information confirming—rather than falsifying—propositions and arguments. It is easier for a juror to see how information supports a proposition than refutes it.[34]

Confirmation bias' impact has been demonstrated in other studies using polarizing subjects such as political candidates and climate change. A Yale study sought to understand why the public was so divided on the subject of climate change: was it due to scientific illiteracy or opposing cultural values? [35] According to the author, the study found that "ordinary members of the public credit or dismiss scientific information on disputed issues based on whether the information strengthens or weakens their ties to others who share their values."[36] The participants were more likely to accept information that confirmed the beliefs of those with whom they shared values.

In another study in 2004, brain scans were conducted on participants as they read statements from then-presidential candidates George W. Bush and John Kerry in which the candidates clearly contradicted themselves.[37] Republican participants were far more critical of John Kerry's statements, ignoring the contradictions of their own candidate, while Democrat participants took George W. Bush to task and gave Kerry a pass.[38] The brain scans revealed that as the participants evaluated the statements the part of the brain most associated with reasoning was dormant while the parts of the brain associated with emotions and resolving conflict were very active.[39] "Essentially, it appears as if partisans twirl the cognitive kaleidoscope until they get the conclusions they want, and then they get massively reinforced for it, with the elimination of negative emotional states and activation of positive ones."[40]

---

33 Kanasky, *supra* note 25, at 35 (citing L. Ross, C. Anderson, *Shortcomings in the attribution process: On the origins and maintenance of erroneous social assessments,* in D. Kahneman, P. Slovic, A. Tversky (eds.)), JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES, at 149 (1982)); Sara Gordon, *Through the Eyes of Jurors: The Use of Schemas in the Application of "Plain Language" Jury Instructions*, 64 Hastings L. J. 643 (2013).

Many authors quote a powerful statement by Ross and Anderson about belief perseverance:

> In summary, it is clear that beliefs can survive potent logical or empirical challenges. They can survive and even be bolstered by evidence that most uncommitted observers would agree logically demands weakening of such beliefs. They can even survive the total destruction of their original evidential bases.

Ross & Anderson, *supra*, at 149.

34 Kanasky, *supra* note 25, at 35.

35 Kahan, et al., *The Polarizing Impact of Science Literacy and Numeracy on Perceived Climate Change Risks*, 2 Nature Climate Change 732 (2012) (discussing that when climate change deniers are shown contradictory evidence, they have even more confidence that their initial position is correct).

36 "Yale study concludes public apathy over climate change unrelated to science literacy", www.phys.org, (May 27, 2012), https://phys.org/news/2012-05-yale-apathy-climate-unrelated-science.html.

37 Drew Westen et al., *Neural bases of motivated reasoning: An fMRI study of emotional constraints on partisan political judgment in the 2004 U.S. presidential election*, 18 J. of Cogn. Neurosci. 1947 (2006).

38 *Id.*

39 *Id.*

40 Michael Shermer, *The Political Brain*, 295 Sci. Am. 36 (July 1, 2006), https://www.scientificamerican.com/article/the-political-brain.

Flaw 3—Brain Glucose Depletion and Cognitive Performance

Biology provides yet another barrier to the careful, deliberative thought that we call System 2 thinking. The brain is a physical system that requires energy to work. The adult human brain is only 2% of total body mass but uses approximately 20% of daily calorie intake.[41] System 2 thinking draws on more mental energy in an actual, physical sense and can diminish the brain's supply of glucose (the simple sugar that is a primary energy source for living organisms).[42] Difficult cognitive tasks drain brain glucose and such depletion limits cognitive performance.[43]

The famous study of busy Israeli parole judges provides a stunning demonstration of this phenomenon.[44] Parole decisions are difficult, the default decision is to deny parole, and judges must decide each case in short order. The study methodically analyzed the parole judges' cases and decision, controlling for all relevant variables about the crime and the criminal. Incredibly, after controlling for all these variables it turned out that the most powerful determinant of whether an applicant received parole was the time of day that the case file came before the panel. The statistical regression analysis showed a dramatic correlation between outcomes and morning and afternoon snack breaks and lunch. After each opportunity to eat, the judges granted parole at a rate of 65%, which then declined essentially to zero in the ensuing hours before the next break.[45]

Trial lawyers observe something similar in jury deliberations. It is a commonplace that juries render verdicts after the lunch break. The received wisdom is they want to have one last county-supplied meal before leaving, but the Israeli parole judges' study may provide a better explanation. Jurors with their glucose stores replenished following the lunch breaks now have the mental energy to resolve disputes over verdict questions and come to a consensus.

Researchers have investigated other contexts in which decision-making is impacted. For example, a study of primary care physicians found that the likelihood of prescribing antibiotics increased over the course of clinic sessions, "consistent with the hypothesis that decision fatigue progressively impairs clinicians' ability to resist ordering inappropriate treatments."[46]

Even more concerning was a study of reaction times on a "first-person shooter task," in which persons are seated at a computer and shown a simplified video game where they assume the role of a police officer surveilling public spaces.[47] Study participants who were cognitively depleted showed exacerbated racial bias in the decision to shoot.

The common denominator in these studies is that people resort to less effortful decision

---

41 Benjamin C. Ampel, Mark Muraven and Ewan C. McNay, *Mental Work Requires Physical Energy: Self-Control is Neither Exception nor Exceptional,* 9 Front. Psychol. 1005 (2018).
42 Kahneman, *supra* note 1, at 43.
43 *Id*.
44 Shai Danziger, Jonathan Levav, Liora Avnaim-Pesso, *Extraneous Factors in Judicial Decisions*, 108 Proc. Nat'l Acad. Sci. U.S. 6889 (2011), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3084045/
45 Kahneman*, supra* note 1, at 43-44.
46 Jeffrey A. Linder, et al., *Time of Day and the Decision to Prescribe Antibiotics*, 174 JAMA Intern. Med. 2029, 2031 (2014).
47 Debbie S. Ma, et al., *When Fatigue Turns Deadly: The Association Between Fatigue and Racial Bias in the Decision to Shoot*, 35 Basic & Applied Soc. Psychol. 515, 516 (2013).

techniques (i.e., heuristics) when their cognitive functioning is diminished.[48]

Flaw 4—Juror Dominance and Submissiveness

The pitfalls in individual decision-making described above take on added importance when coupled with the impact of dominant versus submissive jurors. In theory, as more thoughtful and attentive minds work on a problem the odds of getting the right answer increase. For example, while each juror may not see or grasp each bit of evidence, when multiple people are watching and listening the odds are better that taken as a whole the group will get everything. Post-trial juror interviews and mock trial observations support this belief.

The theoretical benefit of group decision-making is undercut, however, if a "loud mouth juror" takes over and imposes his or her will on the others. Researchers have found that in a typical six-person group half of the people do 70% of the talking. [49] This author has observed many mock juries and typically observes "jury argument" in place of "jury deliberation." In such situations, jurors come into the room knowing which side should win and their competitive drive reveals itself as they work to make sure their view prevails.

"Dominance" refers to the personality trait to behave in an assertive, forceful and self-assured manner.[50] Dominant personalities gain disproportionate control over group decisions. They speak first and speak more and their opinions are more prominent in group decisions, even when their opinions are not more insightful or accurate than the opinions held by those who speak less.[51] Dominant personalities are motivated to take charge of decision-making groups and do so by appearing more competent to others, even when they lack competence.[52] On juries, a dominant person is likely to be the foreperson, whose election to that position increases his or her ability to influence the group decision.[53]

The converse of the effect of a dominant personality is the resulting "spiral of silence" on the part of more reticent jurors.[54] A dominant person who speaks first will change the nature of opinion of the group. More reticent jurors who agree will feel more correct and confident in voicing their opinions, and those who feel their opinions are not gaining acceptance will fear isolation within the group, remain silent, and vote with the majority, regardless of whether they hold a dissenting opinion. Dominant jurors thus have the ability to influence group decisions and silence dissent, not based on their competence or the merit of their opinions but based on their ability to appear

---

48 Mindy Engle-Friedman, et al. *The Role of Sleep Deprivation and Fatigue in the Perception of Task Difficulty and Use of Heuristics*, 11 Sleep Sci. 74 (2018).

49 Leigh Thompson, *How to Neutralize a Meeting Tyrant,* Fortune (2013), http://fortune.com/2013/02/11/how-to-neutralize-a-meeting-tyrant/

50 Cameron Anderson & Gavin J. Kilduff, *Why Do Dominant Personalities Attain Influence in Face-to-Face Groups? The Competence-Signaling Effects of Trait Dominance*, 96 J. Pers. & Soc'y Psych. 491 (2009).

51 *Id.* at 491, 500; Adam M. Chud & Michael L. Berman*, Six-Member Juries: Does Size Really Matter?* 67 Tenn. L. Rev. 743, 758 (2000).

52 Anderson & Kilduff, *supra* note 51, at 491.

53 Chud & Berman, *supra* note 52, at 757.

54 *Id.* at 759 (citing Elizabeth Noelle-Neuman, *The Spiral of Silence: Public Opinion-Our Social Skin* 5 (1984)).

competent and on group dynamics.[55]

The film 12 ANGRY MEN (United Artists 1957) portrays both the dominant juror problem and a way to overcome it. The author, Reginald Rose, drew on his own jury service in a murder trial.[56] The jury in the movie must decide whether a poor Puerto Rican teenager killed his abusive father. Juror 10—a loudmouth and a bigot—argues immediately that the prosecution has presented an open-and-shut case of guilt. Several of the jurors are clearly content to let others lead while they stay quiet. A vote is taken; except for a lone dissenter, Juror 8, everyone agrees with Juror 10 and votes for conviction.

Juror 8, played by Henry Fonda, then quietly, persistently and in a non-confrontational way induces his fellow jurors to examine the evidence more carefully. He begins by explaining that he voted "not guilty" in the initial round not because he's certain the defendant is innocent, but instead because he wanted more time to discuss the case and the evidence. He also encourages the other jurors—some of whom are quite reticent—to express themselves. Juror 8 takes up each piece of the prosecution's critical evidence and questions it, including improbable eyewitness testimony. Slowly the other jurors see the points Juror 8 is making and switch their votes. Through calm, deliberate (Type 2) thinking and discussion Juror 8 transforms a truncated process initially dominated by the loudest voice in the room into a genuinely collaborative effort.

Part 2: How Courts and Jury Instruction Committees Have Used Cognitive Science Regarding Eyewitness Testimony

State jury instruction committees are beginning to accept that instructions should take into consideration how humans make decisions. This acceptance is evident in the evolution of model instructions related to eyewitness identifications. What began as an instruction promulgated by the D.C. Circuit in 1972 asking jurors to consider several factors in assessing the accuracy of an identification has evolved in recent years based on extensive social science research. Numerous states now offer an explanation to jurors about how human memory works, what circumstances can affect the reliability of an identification, and how race plays a role in identification.

In 1972, the D.C. Circuit held in *U.S. v. Telfaire* that "[t]he presumption of innocence that safeguards the common law system must be a premise that is realized in instruction and not merely a promise."[57] Accordingly, the D.C. Circuit "pointed out the importance of and need for a special instruction on the key issue of identification, which emphasizes to the jury the need for finding that the circumstances of the identification are convincing beyond a reasonable doubt."[58] The court included a model instruction in the appendix of the opinion "[t]o further the administration of justice[.]"[59]

---

55 Chud & Berman, *supra* note 52, at 759-760; Nicole L. Waters & Valerie P. Hans, *A Jury of One: Opinion Formation, Conformity, and Dissent on Juries*, 6 J. Empirical Legal Stud. 513 (2009) ("Classic studies in social psychology on social pressure to conform have found that individuals regularly conform to the majority views of a group, particularly if they are alone and without other supporters, and we see that operating in the jury context.").

56 Myrna Oliver, *Reginald Rose, 81; Writer Honored for '12 Angry Men,'* L.A. Times, April 23 2002, *available at http://articles.latimes.com/2002/apr/23/local/me-rose23*.

57 *U.S. v. Telfaire*, 469 F.2d 552, 555 (D.C. Cir. 1972).

58 *Id.*

59 *Id.* at 557.

This "*Telfaire* Instruction" has become the most commonly used jury instruction on eyewitness identification.[60] The instruction explains that "[i]dentification testimony is an expression of belief or impression by the witness. Its value depends on the opportunity the witness had to observe the offender at the time of the offense and to make a reliable identification later."[61] It identifies four potential factors depending on the specific facts of the case that jurors should consider in appraising identification testimony.[62]

Since the '70s the effectiveness of the *Telfaire* Instruction has been studied repeatedly. Courts began to see the need for improvement because the 1972-era instruction was not effective in assisting jurors evaluate the accuracy of an eyewitness identification.[63] For example, the instruction was criticized for not explaining how memory process works and not describing "the lack of any positive relationship between witness confidence and identification accuracy."[64] Most significantly, "[w]ithout any background in science or psychology, most jurors are unable to assess the impact of various psychological factors on the accuracy of the eyewitness."[65] According to one study, "such guidance is essential if jury instructions are to be effective."[66]

Acknowledging this research on the *Telfaire* instruction's limited effect, state jury committees have begun to implement changes to eyewitness identification instructions that go further than identifying in general terms four factors to consider in assessing reliability. Leading the charge is New Jersey. In *State v. Cromedy*, the Supreme Court of New Jersey in 1999 began by addressing jury instructions related to eyewitness identifications involving a cross-racial identification. After reviewing decisions from other jurisdictions, a New Jersey Supreme Court Task Force on Minority Concerns report, and "the professional literature of the behavioral and social sciences," it held "that a cross-racial identification, as a subset of eyewitness identification, requires a special jury instruction in an appropriate case."[67] The *Cromedy* court discussed the forty years of empirical studies on the psychological factors affecting eyewitness cross-racial identifications and went on to "request the Criminal Practice Committee and the Model Jury Charge Committee revise the current charge on identification to include an appropriate statement on cross-racial eyewitness identification that is consistent with this opinion."[68] The New Jersey Model Jury Charge Committee then did just that.[69]

Twelve years later in *State v. Henderson*, the Supreme Court of New Jersey acknowledged further research in the area, made the instruction mandatory whenever there is a cross-racial

---

60 Angela M. Jones, et al., *Comparing the Effectiveness of Henderson Instructions and Expert Testimony: Which Safeguard Improves Jurors' Evaluations of Eyewitness Evidence?* Journal of Experimental Criminology (forthcoming), https://www.law.upenn.edu/live/files/6280-jonesbergoldetal).

61 *Telfaire*, 469 F.2d at 558.

62 *Id.* at 558-59.

63 *See, e.g.*, Brian L. Cutler, Hedy R. Dexter, & Steven D. Penrod, *Nonadversarial Methods for Sensitizing Jurors to Eyewitness Evidence*, 20 J. of Applied Social Psychol. 1197 (1990); Edith Greene, *Judge's Instruction on Eyewitness Testimony: Evaluation and Revision*. 18 J. of Applied Social Psychol. 252 (1988); Gabriella Ramirez, *Judges' Cautionary Instructions on Eyewitness Testimony*, 14 Am. J. Forensic Psychol. 31, 45 (1996).

64 Christian Sheehan, *Making the Jurors the "Experts": The Case for Eyewitness Identification Jury Instructions*, 52 B.C. L. Rev. 651, 681 (2011).

65 *Id.*

66 *Id.* (citing Ramirez, *supra* note 7).

67 *State v. Cromedy*, 158 N.J. 112, 131, 727 A.2d 457, 467 (1999), *abrogated by State v. Henderson*, 208 N.J. 208, 27 A.3d 872 (2011).

68 *Id.* at 133.

69 N.J. Model Instruction, Non 2C: Identification.

identification, and updated New Jersey's model instructions on eyewitness identifications.[70] The *Henderson* court again conducted a survey of the state of scientific research on the issue of eyewitness identification and described in detail how memory works based on numerous studies: "Science has proven that memory is malleable. The body of eyewitness identification research further reveals that an array of variables can affect and dilute memory and lead to misidentifications."[71] The court detailed those variables, which were significantly more than the four factors identified in the *Telfaire* Instruction, and crafted a jury instruction that took each one into consideration.[72] The instruction was quickly adopted as a model instruction.

As a result of *Henderson*, New Jersey now has the most thorough model jury instruction regarding eyewitness identification. The ten-page instruction relies on social science and explains (1) how human memory works, (2) the factors that can affect an eyewitness identification and (3) how those factors can potentially affect the identification.[73] Thus, New Jersey juries are told in some detail why they must be especially cautious in using such evidence. The following are just a few examples taken from the instruction:

- Human beings have the ability to recognize other people from past experiences and to identify them at a later time, but research has shown that there are risks of making mistaken identifications. That research has focused on the nature of memory and the factors that affect the reliability of eyewitness identifications.[74]

- Human memory is not foolproof. Research has revealed that human memory is not like a video recording that a witness need only replay to remember what happened. Memory is far more complex.[75]

- The process of remembering consists of three stages: acquisition -- the perception of the original event; retention -- the period of time that passes between the event and the eventual recollection of a piece of information; and retrieval -- the stage during which a person recalls stored information. At each of these stages, memory can be affected by a variety of factors.[76]

Following New Jersey's lead, Massachusetts also implemented a detailed model jury instruction on eyewitness identification.[77] After initiating a Court study on eyewitness evidence,[78]

---

70 *State v. Henderson*, 208 N.J. 208, 299, 27 A.3d 872, 926 (2011), holding modified by *State v. Chen*, 208 N.J. 307, 27 A.3d 930 (2011) ("Since then, the additional research on own-race bias . . . , and the more complete record about eyewitness identification in general, justify giving the charge whenever cross-racial identification is in issue at trial.").

71 *Id.* at 247.

72 *Id.* at 248-272.

73 N.J. Model Instruction, Non 2C: Identification.

74 *Id.*

75 *Id.*

76 *Id.*

77 Mass. Instruction 9.160.

78 Supreme Judicial Court Study Group on Eyewitness Evidence: Report and Recommendations to the Justices (July 25, 2013), http://www.mass.gov/courts/docs/sjc/docs/eyewitness-evidence-report-2013.pdf [http://perma.cc/WY4MYNZN].

the Massachusetts Supreme Judicial Court recognized that it was "not alone in concluding that certain scientific principles should be incorporated into a model jury instruction on eyewitness identification."[79] Thus the Massachusetts's Supreme Judicial Court likewise proposed a model jury instruction (since adopted)[80] that mirrors New Jersey's.[81]

Other states have followed suit in acknowledging the importance of scientific research on crafting jury instructions. In 2012, the Supreme Court of Hawaii held that "[i]t is apparent . . . that, based on the empirical studies, it cannot be assumed that juries will necessarily know how to assess the trustworthiness of eyewitness identification evidence."[82] The state's committee on pattern criminal jury instructions adopted the court's proposed instruction, which was more robust than the *Telfaire* Instruction.[83]

In 2016, the Supreme Court of Maine acknowledged that "a significant body of scientific research has emerged concerning the mechanics of human memory and the reliability of eyewitness identifications generally. These extensive scientific studies have provided new insights into the fallibility of eyewitness identifications, and as a result many state and federal courts now instruct jurors accordingly."[84] The Maine Jury Instruction Manual now includes an instruction like Hawaii's.[85]

Utah,[86] Florida,[87] Connecticut,[88] and Georgia[89] have also incorporated the extensive research on eyewitness identification into their pattern jury instructions.

In addition to the States' efforts outlined above, federal Judge Mark W. Bennett of the United States District Court for the Northern District of Iowa has likewise used insights from cognitive science in his courtroom. While he is especially known for his efforts at offsetting implicit bias,[90] he has also pioneered efforts to incorporate scientific research in jury instructions in order to inform

---

79 *Com. v. Gomes*, 470 Mass. 352, 368, 22 N.E.3d 897, 910–11 (2015), *holding modified by Com. v. Bastaldo*, 472 Mass. 16, 32 N.E.3d 873 (2015).

80 *Id.* at 376.

81 Mass. Instruction 9.160.

82 *State v. Cabagbag*, 127 Haw. 302, 313–14, 277 P.3d 1027, 1038–39 (2012) (mandating that "when eyewitness identification is central to the case, circuit courts must give a specific jury instruction . . . to focus the jury's attention on the trustworthiness of the identification.").

83 Hi. Pattern Criminal Instruction 3.17.

84 *State v. Mahmoud*, 2016 ME 135, ¶ 13, 147 A.3d 833, 837–40 (concluding that "in light of the voluminous body of scientific research that has emerged regarding the reliability of eyewitness identification, and the subsequent evolving trend among both state and federal courts to instruct juries on this matter, we conclude that it is permissible, where relevant, to instruct jurors on the reliability of eyewitness identification.").

85 Me. Jury Instructions at § 6–22A.

86 Ut. Model Instructions, CR404 Eyewitness Identification.

87 Fl. Model Instruction 3.9(e) Eyewitness Identification.

88 Conn. Criminal Jury Instruction 2.6–4 Identification of Defendant.

89 *See Brodes v. State*, 279 Ga. 435, 442, 614 S.E.2d 766, 771 (2005) ("In light of the scientifically-documented lack of correlation between a witness's certainty in his or her identification of someone as the perpetrator of a crime and the accuracy of that identification, and the critical importance of accurate jury instructions as "the lamp to guide the jury's feet in journeying through the testimony in search of a legal verdict," we can no longer endorse an instruction authorizing jurors to consider the witness's certainty in his/her identification as a factor to be used in deciding the reliability of that identification.")

90 *See, e.g.*, Justin D. Levinson, Mark W. Bennett & Koichi Hioki, *Judging Implicit Bias: A National Empirical Study of Judicial Stereotypes*, 69 FLA. L. REV. 1 (2017); Bennett, Mark W., *The Implicit Racial Bias in Sentencing: The Next Frontier*, 126 YALE L.J. (Forum Essay Collection, Jan. 31, 2017), https://www.yalelawjournal.org/forum/the-implicit-racial-bias-in-sentencing.

jurors about the problems of eyewitness identification and the limitations of human memory.[91]

Part 3: Model Instructions Based on Cognitive Science

So, can these insights from Kahneman and his colleagues improve jury deliberations? Can we continue the momentum begun by courts' adoption of science-based jury instructions in the area of eyewitness identification and broaden the benefits of using cognitive science to improve jury work?

The answer to these questions is yes. Building on foundations laid by the jurisdictions and courts that recognize the value of cognitive science, we wish to add several simple jury instructions aimed at improving jurors' thinking and deliberations. Here are a few suggestions on how to use what we have learned from science to help improve the likelihood that jurors will think carefully and deliberate well.

1. **Activate System 2 Thinking by an "Accountability" Instruction**

Fortunately, researchers have found ways to move people toward more careful thinking. One way to do this is to make people feel "accountable." Studies have shown that if you tell a decision maker at the outset that at the end of the process they will be called upon to justify their decision to others, then they pay more attention to the facts needed to support their vote.

Jennifer Lerner and Philip Tetlock are leading researchers in accountability.[92] Lerner and Tetlock report that accountability can offset the cognitive shortcuts described above and thereby improve the quality of thinking and deliberations:

> Self-critical and effortful thinking is most likely to be activated when decision makers learn prior to forming any opinions that they will be accountable to an audience (a) whose views are unknown, (b) who is interested in accuracy, (c) who is interested in processes rather than specific outcomes, (d) who is reasonably well informed, and (e) who has a legitimate reason for inquiring into the reasons behind participants' judgments.

Id. at 259. Others have corroborated this conclusion: "[I]f jurors know that they will be accountable for the accuracy of their decisions, this can motivate them to prolong the decision-making process and think more carefully."[93]

---

91 *E.g.*, Instructions to the Jury, Dkt. Entry 72-4 at 10, *Gosch et al. v, Sergeant Bluff Comm. Sch. Dist., et al.*, Casse No. 15-4242-MWB.The instruction with regard to memory states, in part: "Scientific research has established that human memory is not at all like video recordings . . . human memory can be distorted, contaminated, or changed, and events and conversations can even be falsely imagined." *Id. See also See* Bennett, Mark W., *Unspringing The Witness Memory And Demeanor Trap: What Every Judge And Juror Needs To Know About Cognitive Psychology And Witness Credibility*, 64 Am. U. L.R. 1331, 1373-75 (2015).

92 Jennifer Lerner & Philip Tetlock, *Bridging Individual, Interpersonal, and Institutional Approaches to Judgment and Decision-making: the Impact of Accountability on Cognitive Bias, in* EMERGING PERSPECTIVES ON JUDGMENT AND DECISION RESEARCH (Sandra L. Schneider & James Shanteau eds., 2003); Jennifer Lerner & Philip Tetlock, *Accounting for the Effects of Accountability,* 125 Psychol. Bull. 255, 256 (1999).

93 Sara Gordon, *What Jurors Want to Know: Motivating Juror Cognition to Increase Legal Knowledge & Improve Decisionmaking,* 81 Tenn. L. Rev. 751, 772 (2014).

The reason accountability has this impact is people do not want to look foolish in front of others and thus prepare themselves for the upcoming justification by paying attention to facts that justify their beliefs.[94] With this in mind, courts should give the following instruction as soon as the panel is seated for voir dire and before the lawyers begin to try to impact the prospective jurors' thinking.

Model Accountability Instruction:

People Of The Jury

This is the first step of a process that ultimately will lead to some of you going into the jury room at the conclusion of the trial. When you go into that room you will be asked to decide the case. But you not only will have to vote "yes" or "no" on certain verdict questions; in order to do your duty as a juror you will have to explain to your fellow jurors what evidence you believe supports your decision to vote a certain way.

I tell you this now because research has shown that jurors who understand they will be accountable to their fellow jurors for their vote pay more attention to the evidence and are more engaged in jury deliberation. Our system wants you to pay attention and to engage fully in jury deliberation because jurors who do these things help make sure the trial reaches a just result. Thus, good jurors pay attention and participate with their fellow jurors during deliberation.

2. Offset Confirmation Bias by a "Devil's Advocate" Instruction

Assuming that the accountability instruction achieves our purpose of having jurors pay more attention to the evidence, we then run into the problem presented by confirmation bias. As outlined above, *supra*, pp. 9-12, confirmation bias unfortunately directs our attention to evidence that supports our initial hypotheses and finds ways to ignore or discount evidence pointing in a different direction. (Again, can you hear Paul Simon's voice from "The Boxer," "*Still a man hears what he wants to hear and disregards the rest*."). So how do we get jurors to look at evidence going both ways which, of course, is at the core of what we expect from a jury?

Again, fortunately, science provides an answer. Building upon the insights from accountability research and a decision maker's desire not to look foolish when justifying a decision, confirmation bias can be offset by an explicit instruction that the decision maker must consider and explain facts that would support an answer *different from* the one they have selected. In short, we require the decisionmakers to be their own "devil's advocate."

---

94 Philip E. Tetlock, *Accountability and Complexity of Thought*, 45 J. Person. & Soc. Psychol. 74, 81 (1983).

Telling someone they have to think about ways to justify a different decision requires one "to give serious weight to the possibility that their preferred answers are wrong. Accountability, in this view, does not simply motivate thought; it functions as a social brake on judgmental biases that occur in our less reflective moments."[95]

Support for such an instruction is found in the words of the legendary Judge Learned Hand. In his June 28, 1951 Senate Committee testimony, Judge Hand warned against unquestioned certainty. Judge Hand quoted from Oliver Cromwell's letter asking the Scots to reconsider their position and avoid what became the Battle of Dunbar. Judge Hand then urged that Cromwell's plea—"*I beseech ye in the bowels of Christ, think that ye may be mistaken*."[96]—be inscribed over the door of every court house and used to begin every court session. Hand understood the value of challenging your own thinking and wanted that value broadly and permanently expressed in our courts.

Science has affirmed the usefulness of Judge Hand's admonition -- to consider that we "may be mistaken" -- as a way to improve decision-making. Professor Lord and his colleagues tested this strategy and described their findings in *Considering the Opposite*.[97] Their work investigated whether the kind of confirmation bias found in the death penalty opinion study described above, *supra*, pp. 11-12, could be overcome either (1) by an instruction to "be unbiased" or (2) by an instruction to "consider the opposite."[98] The "consider the opposite" instruction was worded as follows:

> Ask yourself at each step whether you would have made the same high or low evaluations had the same study produced results on the *other* side.[99]

The experiment showed that the "consider the opposite" approach worked. While those instructed to "be unbiased" became more extreme in their beliefs, those told to "consider the opposite" were able to offset confirmation bias. The authors reported, "We cannot but conclude that Judge Hand's advice should be taken literally."[100]

Therefore, following the accountability instruction, *supra*, p. 26, the Court should give the following Devil's Advocate Instruction:

---

95 Philip E. Tetlock, Jae I. Kim, *Accountability and Judgment Processes in a Personality Prediction Task,* 52 J. Pers. & Soc. Psychol. 700, 708 (1987).

96 Learned Hand, THE SPIRIT OF LIBERTY 229 (1953). 17th-century readers would understand "in the bowels of Christ" as akin to "in the pity/compassion/mercy of Christ." Glen, *Bowels of Mercy*, The King's English (2012), http://kingsenglish.info/2012/12/08/bowels-of-mercy/

97 Lord, Preston & Lepper, *supra* note 33.

98 *Id*. at 1233. The "be unbiased" instruction is of course familiar to trial lawyers and judges; Wisconsin's version is quoted at the outset of this paper.

99 *Id.* (emphasis in original).

100 *Id.* at 1241.

Model Devil's Advocate Instruction:

People Of The Jury

I have just explained to you that jurors in the jury deliberation room will be accountable for their vote. That is, you will be required to talk about the reasons for your vote.

Now I will add another element. Research shows that people tend to look for facts to support their beliefs and to disregard facts that do not fit their beliefs. The problem with this tendency in a jury trial is you may miss important facts and reach the wrong result.

Therefore, after you explain to your fellow jurors why you believe the evidence supports your decision to vote a certain way, you then will also be asked to be your own "Devil's Advocate." This means you will also state a fact or facts that you believe would support a decision reaching a different result. The reason we ask you to do this—to focus both on evidence that supports and does not support a certain result—is because it will help each of you keep an open mind throughout the trial. If you stop considering evidence that goes against your thinking you may reach the wrong result.

3. **Schedule Juror Breaks and Nutrition to Offset Brain Drain**

Judges should acknowledge the insights from the Israeli Parole Board Study.[101] If highly educated and well-trained judges are impacted by the effects of cognitive load, jurors surely are as well. A tired mind will take the path of least resistance, which means defaulting to intuitive System 1 thinking and avoiding the effort and concentration that System 2 thinking requires. Judges thus should help jurors preserve their ability to think clearly and effectively. If we want jurors to stay focused on the evidence and maintain a willingness to change their minds, then they need regular breaks and nutrition to replenish the glucose that is essential to high cognitive functioning. Jury rooms thus should be supplied with items that contain simple carbohydrates, such as foods like fruit and fruit drinks that naturally taste sweet. Foods that get their sweetness from artificial sweeteners, however, have no effect on glucose depletion.[102]

---

101 *See, supra,* p. 14.

102 Will Tumonis, *Ego-Depletion: 4 Effective Methods for Restoring Ego Strength*, Swaycraft (2015), http://www.swaycraft.com/restoring-ego-depletion/.

4. Instruct on the Processes of Jury Deliberation and the Foreperson's Role in Order to Counteract Dominant Jurors

It will be the rare jury that includes a juror with the wisdom and care shown by "Juror No. 8" in 12 ANGRY MEN, *supra*, pp. 17-18. Therefore, judges should create processes for jury deliberation that help mitigate the impact of dominant jurors. For example, when jurors discuss their views before voting they are less likely to shape their expressed views to conform to the majority view as revealed by their fellow jurors' votes.[103] Also, if a juror writes down some initial thoughts before discussion begins, they are more likely to share thoughts that go against the majority view.[104] Further, having jurors speak in reverse order of likely dominance (with the foreperson speaking last) will help counter ingrained deference to the authority figure.[105] The following instruction builds on these insights into dominance, submissiveness and participation.

Model Deliberation Guide Instruction:

People Of The Jury, And Especially The Jury Foreperson

You may be wondering why we ask a group of lay people to decide cases instead of just having an experienced person, such as a judge, hear the evidence and issue a ruling. The reason is we believe that there is great value in group decision-making.

For example, when a group hears and sees evidence, we have found that all the evidence is heard and seen by some if not all of the individual jurors. In other words, each of you acts as a backstop for each other, picking up on evidence that one or more of your fellow jurors may have missed. That helps make for a fair trial for everyone.

In addition, we have found that when a group deliberates fairly and respectfully then such a group is most likely to come to a fair and just result. Again, that is why the parties are here and why this process works.
Accordingly, because you will be deliberating as a group, here are a few simple practices to follow during deliberation to help ensure that the process runs well. I will have a copy of these practices for the jury foreperson's reference during deliberation, but I want every juror to understand how the process should work so you can help the foreperson do a good job.

---

103 Tetlock, *supra* note 95, at 82.
104 Kahneman, supra note 1, at 85.
105 Cass R. Sunstein & Reid Hastie, *Making Dumb Groups Smarter*, 92 Harv. Bus. Rev. (2014) https://hbr.org/2014/12/making-dumb-groups-smarter.

First, before you vote on any verdict question, you should discuss the pros and cons of the evidence. Discussing before voting will make the process work better.

Second, as I explained before, each of you will be expected not only to discuss what evidence you think supports your decision on each verdict question, but also what evidence you believe would best support a different decision. To make this work, before you begin discussions you should jot down in your notebook one or more of the reasons for and against your initial answer to the verdict question.

Third, as your fellow jurors speak about the evidence they found important, PLEASE LISTEN. In order for this process to work best I want each of you to have the benefit of your fellow jurors' insights and ideas. Those insights and ideas may impact your thinking—or they may not—but unless you listen and allow them to speak you will not have the chance to have your own thinking challenged and improved.

Fourth, as in any group some of you will be more comfortable than others in sharing your thoughts. But just as others will lose out if they do not listen, the group will also lose out if they do not have the benefit of everyone's input. So, I will ask the foreperson to speak last and allow everyone else to have their say before providing your input. And, I would suggest that those most hesitant to speak out go first so their ideas are sure to be heard.

Conclusion

If we want to increase the chances that jury verdicts reflect careful consideration of all the evidence by jurors who actually deliberate with each other, we should use insights from cognitive science that inform how humans make decisions. The instructions and procedures set forth above are premised on insights from leading cognitive scientists and build upon work already done by courts and Jury Instruction Committees in the area of eyewitness evidence. Let's continue this progress in making our juries perform in a thoughtful and effective manner.

EXHIBIT A

Accountability Instruction

I have just explained to you that jurors in the jury deliberation room will be accountable for their vote. That is, you will be required to talk about the reasons for your vote.

Now I will add another element. Research shows that people tend to look for facts to support their beliefs and to disregard facts that do not fit their beliefs. The problem with this tendency in a jury trial is you may miss important facts and reach the wrong result.

Therefore, after you explain to your fellow jurors why you believe the evidence supports your decision to vote a certain way, you then will also be asked to be your own "Devil's Advocate." This means you will also state a fact or facts that you believe would support a decision reaching a different result. The reason we ask you to do this—to focus both on evidence that supports and does not support a certain result—is because it will help each of you keep an open mind throughout the trial. If you stop considering evidence that goes against your thinking you may reach the wrong result.

EXHIBIT B

Devil's Advocate Instruction

I have just explained to you that jurors in the jury deliberation room will be accountable for their vote. That is, you will be required to talk about the reasons for your vote.

Now I will add another element. Research shows that people tend to look for facts to support their beliefs and to disregard facts that do not fit their beliefs. The problem with this tendency in a jury trial is you may miss important facts and reach the wrong result.

Therefore, after you explain to your fellow jurors why you believe the evidence supports your decision to vote a certain way, you then will also be asked to be your own "Devil's Advocate." This means you will also state a fact or facts that you believe would support a decision reaching a different result. The reason we ask you to do this—to focus both on evidence that supports and does not support a certain result—is because it will help each of you keep an open mind throughout the trial. If you stop considering evidence that goes against your thinking you may reach the wrong result.

EXHIBIT C

Deliberation Guide Instruction

You may be wondering why we ask a group of lay people to decide cases instead of just having an experienced person, such as a judge, hear the evidence and issue a ruling. The reason is we believe that there is great value in group decision-making.

For example, when a group hears and sees evidence, we have found that all the evidence is heard and seen by some if not all of the individual jurors. In other words, each of you acts as a backstop for each other, picking up on evidence that one or more of your fellow jurors may have missed. That helps make for a fair trial for everyone.

In addition, we have found that when a group deliberates fairly and respectfully then such a group is most likely to come to a fair and just result. Again, that is why the parties are here and why this process works.

Accordingly, because you will be deliberating as a group, here are a few simple practices to follow during deliberation to help ensure that the process runs well. I will have a copy of these practices for the jury foreperson's reference during deliberation, but I want every juror to understand how the process should work so you can help the foreperson do a good job.

First, before you vote on any verdict question, you should discuss the pros and cons of the evidence. Discussing before voting will make the process work better.

Second, as I explained before, each of you will be expected not only to discuss what evidence you think supports your decision on each verdict question, but also what evidence you believe would best support a different decision. To make this work, before you begin discussions you should jot down in your notebook one or more of the reasons for and against your initial answer to the verdict question.

Third, as your fellow jurors speak about the evidence they found important, PLEASE LISTEN. In order for this process to work best I want each of you to have the benefit of your fellow jurors' insights and ideas. Those insights and ideas may impact your thinking—or they may not—but unless you listen and allow them to speak you will not have the chance to have your own thinking challenged and improved.

Fourth, as in any group some of you will be more comfortable than others in sharing your thoughts. But just as others will lose out if they do not listen, the group will also lose out if they do not have the benefit of everyone's input. So, I will ask the foreperson to speak last and allow everyone else to have their say before providing your input. And, I would suggest that those most hesitant to speak out go first so their ideas are sure to be heard.

American College of Trial Lawyers
Phone: 949-752-1801
Website: www.actl.com
Email: nationaloffice@actl.com

Tab 4

Administrative Office of the Courts

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

Hon. Mary T. Noonan
State Court Administrator
Catherine J. Dupont
Deputy Court Administrator

MEMORANDUM

To: Civil Jury Instructions Committee
From: Nancy Sylvester
Date: September 9, 2019
Re: Trespass and Nuisance

The following questions in purple were generated by our discussions at the last MUJI-Civil meeting. Cameron Hancock and Ryan Beckstrom responded in red.

- Should there be two different definitions on reasonableness between 1208 and 1209? Should they be consistent?

It appears that Utah courts apply the same "reasonableness" requirement to both 1208 and 1209. The word "reasonable" does not appear in the statute. Instead, Courts have been reading a "reasonableness" requirement into nuisance claims—both common law and statutory—since at least Dahl v. Utah in 1927. We cannot find any case that applies separate reasonableness definitions to common-law and statutory claims.

- Cameron and Ryan will look at whether there is a difference between the two instructions: common law vs. statutory.

As a practical matter, the two instructions will almost always cover the same behavior—which is likely why Utah appellate courts have not yet taken pains to carefully outline the contours of the two claims. However, there is a difference in that the statute defines "nuisance" to specifically include things that are "indecent, injurious to health, offensive to the senses, or an obstruction to the free use of property" and the common-law elements more generally include any "substantial interferences" with property interests. Courts have also made a distinction in the common law elements—observable in the final element of CV1209—between "intentional and unreasonable" actions, on the one hand, and "unintentional and actionable," on the other. The statute makes no such distinction and cases specifically addressing the statute appear to require only that the interference be "unreasonable, unwarrantable or unlawful"—which we have shortened to

"unreasonable or unlawful." In short, the two instructions are different, but in most cases it will be a distinction without a difference. It may make sense to consider a drafters note that the difference between the instructions will only be material in limited cases and practitioners and judges may wish to present the jury only with the instruction most applicable to the circumstances of their case.

- Cameron and Ryan will also look at whether there should be a standalone reasonableness instruction.

Because the word "reasonable" or "unreasonable" appears in four different instructions—common law, statutory, public nuisance, and damages—we recommend a standalone "reasonableness" instruction that can be used for any nuisance case. The best (and most complete) "reasonableness" instruction is the one currently at the bottom of 1208:

> **To determine if a use is "reasonable" or "unreasonable," you should consider things such as the specific location where the nuisance is alleged, when [name of defendant]'s [conduct, action, or thing] began, the nature and value of [name of defendant]'s use of its property, the character of the neighborhood, the extent and frequency of the injury to [name of plaintiff], and the effect on the enjoyment of [name of plaintiff]'s life, health, and property.**

The "reasonableness" instruction at the bottom of 1209 is a holdover from an earlier draft and is correct but oversimplified.

Draft: June 10, 2019

MUJI 2nd Trespass and Nuisance Jury Instructions

CV1201 TRESPASS TO REAL PROPERTY. Approved January 15, 2019.

In this action, [name of plaintiff] seeks to recover damages from [name of defendant] for a trespass to [name of plaintiff]'s property.

To establish [name of plaintiff]'s claim for trespass against the property involved in this case, you must find that:

1. [name of plaintiff] [owned/lawfully possessed] the property;
2. [name of defendant] interfered with [name of plaintiff]'s exclusive right to possession of the property by physically entering or encroaching upon [or causing some thing to physically enter or encroach upon] [name of plaintiff]'s land;
3. [name of defendant] intended to perform the act that resulted in the unlawful entry or encroachment upon [name of plaintiff]'s property; and
4. [name of defendant] had no right to do the act that constituted the unlawful entry or encroachment upon [name of plaintiff]'s property.

References:

Sycamore Family, L.L.C. v. Vintage on the River Homeowners Ass'n, Inc., 2006 UT App 387, ¶ 4, 145 P.3d 1177

Purkey v. Roberts, 2012 UT App 241, ¶ 17, 285 P.3d 1242

John Price Associates v. Utah State Conference, 615 P.2d 1210 (Utah 1980)

Wood v. Myrup, 681 P.2d 1255 (Utah 1984)

CV1202 TRESPASS TO PERSONAL PROPERTY. Approved January 15, 2019.

In this action, [name of plaintiff] seeks to recover damages from [name of defendant] for a trespass to [name of plaintiff]'s property.

To establish [name of plaintiff]'s claim for trespass against the property involved in this case, you must find that:

1. [name of plaintiff] had [ownership/lawful possession] of the property at the time of the alleged trespass;

2. [name of defendant] interfered with [name of plaintiff]'s exclusive right to possession of the property, by [specify briefly the acts alleged to constitute wrongful interference with [name of plaintiff]'s personal property];

3. [name of defendant] intended to perform the act that amounted to the unlawful interference with the personal property of [name of plaintiff]; and

4. [name of defendant] had no right to do the act that constituted the interference with the personal property of [name of plaintiff].

References:

Purkey v. Roberts, 2012 UT App 241, ¶ 17, 285 P.3d 1242

Peterson v. Petterson, 117 P. 70, 71 (Utah 1911)

CV1203 CONSENT. Approved January 15, 2019.

[Name of defendant] asserts that [he/she/it] was given consent by [name of plaintiff] or [name of plaintiff]'s agent to [use/enter upon] [name of plaintiff]'s property, and that [name of defendant] is thus not liable for trespass.

[Name of defendant] is not liable for trespass if [he/she/it] can establish that [name of plaintiff] consented to the entry or encroachment upon the property, but only to the extent that the entire entry or encroachment was authorized.

Consent means permission to enter or encroach upon property was communicated. Consent can be expressed or implied.

Committee note: The MUJI 1 instructions enumerated express and implied consent separately. But the Utah case law speaks only of consent, which may be express or implied.

References:

Lee v. Langley, 2005 UT App 339, ¶ 20 n.3, 121 P.3d 33

Haycraft v. Adams, 24 P.2d 1110, 1115 (Utah 1933)

Restatement (Second) of Torts § 252 (1965)

CV1204 IMPLIED CONSENT - CUSTOM AND USAGE. Approved January 15, 2019.

[name of defendant] asserts that [name of defendant] had the implied consent of [name of plaintiff] or [name of plaintiff]'s agent to [use/enter upon] [name of plaintiff]'s property, and that [name of defendant] is thus not liable for trespass.

Consent is an absolute defense to an action for trespass. Consent for [use of/entry upon] real property need not be expressly given but may be implied from the circumstances. The implied consent may be derived from custom, usage, or conduct. Therefore, [name of defendant] is not liable for trespass if [name of defendant] can show that:

1. [name of defendant] was a member of a category of persons for whom [use of/entry upon] the property would be considered customary or common;
2. [name of defendant]'s [use of/entry upon] [name of plaintiff]'s property was within the fair and reasonable bounds of the implied consent to [use/enter upon] the property; and
3. [name of plaintiff] did not indicate, either verbally or by posted signs on the property, that [name of plaintiff] did not consent to the entry.

References:
Lee v. Langley, 2005 UT App 339, ¶ 20 n.3, 121 P.3d 33
Haycraft v. Adams, 24 P.2d 1110, 1115 (Utah 1933)
Restatement (Second) of Torts § 252 (1965)

CV1205 DAMAGES - NOMINAL DAMAGES. Approved January 15, 2019.

If you found that [name of defendant] trespassed [name of plaintiff]'s [real/personal] property, you may award economic, non-economic, or nominal damages to [name of plaintiff].

Even if you find that no actual damage was suffered by [name of plaintiff] as a result of [name of defendant]'s trespass, you may still award [name of plaintiff] a trivial amount, called "nominal damages," to compensate [name of plaintiff] for the invasion of [name of plaintiff]'s property rights. "Nominal damages" has been defined as a trivial sum such as one dollar.

References:
Haycraft v. Adams, 24 P.2d 1110, 1115 (Utah 1933)
Henderson v. For-Shor Co., 757 P.2d 465 (Utah App. 1988)

Committee note:
For a definition of economic and non-economic instructions, see CV2001 et. seq. For instructions on the measure of damages for injury to personal or real property resulting from a trespass, see CV2004-2011. The damages instructions may be adapted to the circumstances of the case. For example, the noneconomic damages in trespass may include the addition of discomfort and annoyance to CV2004's list of considerations. *See Walker Drug Co. v. La Sal Oil Co.*, 972 P.2d 1238, 1245-1249 (Utah 1998).

CV1206 NUISANCE - INTRODUCTORY INSTRUCTION. Approved February 11, 2019.

One person can interfere with the use or enjoyment of another person's property even without entering that other person's property. In some instances, the legal term for this is "nuisance."

In this case, [name of plaintiff] claims that [name of defendant], through [describe the conduct, action, or thing], has created a nuisance that has interfered with [name of plaintiff]'s use or enjoyment of [his/her/its] property.

[Name of plaintiff] claims that [name of plaintiff] has suffered harm as a result of this nuisance, and seeks to recover damages from [name of defendant] for that harm.

References:
Utah Code § 76-10-801
Morgan v. Quailbrook Condominium Co., 704 P.2d 573 (Utah 1985)
Branch v. Western Petroleum, Inc., 657 P.2d 267 (Utah 1982)
Vincent v. Salt Lake County, 583 P.2d 105 (Utah 1978)
Turnbaugh v. Anderson, 793 P.2d 939 (Utah App. 1990)

CV1207 NUISANCE PER SE. Approved February 11, 2019.

The court has determined that, under the law, [name of defendant]'s conduct, [describe the conduct, action, or thing], constitutes a nuisance.

References:
Utah Code § 78B-6-1101 (defining certain nuisances)
Erickson v. Sorensen, 877 P.2d 144, 149 (Utah App. 1994)
Branch v. Western Petroleum, Inc., 657 P.2d 267 (Utah 1982)
Turnbaugh v. Anderson, 793 P.2d 939 (Utah App. 1990)

Committee note:
This instruction will only be given when the court has already made a determination that the conduct constitutes nuisance per se. Utah Code §§ 78B-6-1101 and 78B-6-1107 list some things that constitute nuisance per se, but there may be others. A nuisance per se exists when the conduct creating the nuisance is specifically prohibited by statute.

CV1208 STATUTORY NUISANCE CLAIM. Approved May 13, 2019.

You must decide whether [name of plaintiff] has established a claim under the nuisance statutes.

To establish such a claim, [name of plaintiff] must show that [name of defendant]'s [describe the conduct, action, or thing]:

1) Was indecent, injurious to health, offensive to the senses, or an obstruction to the free use of property so as to interfere with the comfortable enjoyment of life or property;
2) [name of defendant]'s conduct was unreasonable or unlawful; and
3) [name of plaintiff]'s property was injuriously affected or plaintiff's personal enjoyment was lessened by [describe the conduct, action, or thing].

[Name of defendant]'s use of its property may be "unreasonable" under circumstances where the harm caused by [name of defendant]'s activity outweighs any benefit to society ~~it produces~~, or ~~and~~ the activity is not suitable to the location.

Comment [NS1]: This is pulled up from 1209.

To determine if a use is "reasonable" or "unreasonable," you should consider things such as the specific location where the nuisance is alleged, when [name of defendant]'s [conduct, action, or thing] began, the nature and value of [name of defendant]'s use of its property, the character

of the neighborhood, the extent and frequency of the injury to [name of plaintiff], and the effect on the enjoyment of [name of plaintiff]'s life, health, and property.

References:
Utah Code § 78B-6-1101 et al.
Cannon v. Neuberger, 268 P.2d 425, 426 (Utah 1954)
Dahl v. Utah Oil Ref. Co., 262 P. 269, 273 (Utah 1927)

Committee note:
Although the statutes do not mention reasonableness, the committee added a reasonableness requirement to conform to case law.

The statute provides specific instructions for when tobacco smoke, manufacturing and agricultural operations, and certain types of criminal activity may or may not be considered a nuisance. Those specific statutory causes of action and exceptions to nuisance liability are not included herein, but specially tailored instructions may be warranted in cases involving those statutory provisions.

There is a reasonableness test on both: Cannon
The cases don't make clear distinctions as to statutory and common law

CV1209 COMMON LAW PRIVATE NUISANCE CLAIM

A private nuisance is any activity that substantially and unreasonably interferes with the use and enjoyment by another of that person's property, other than by entering upon it.

[Name of plaintiff] claims that [name of defendant] has interfered with [name of plaintiff]'s use and enjoyment of [name of plaintiff]'s property by [specify nature of alleged nuisance].

To establish [name of p~~P~~laintiff]'s claim for private nuisance, you must find that:
1. [name of plaintiff] owned or possessed an actual property interest in the real property that is the subject of this action;
2. [name of ~~D~~defendant] caused or was responsible for a substantial interference with [name of plaintiff]'s use and enjoyment of [name of plaintiff]'s property;
3. ~~[name of plaintiff][~~name of defendant]'s use of the property was either (a) intentional and unreasonable, or (b) unintentional and "otherwise actionable."

[Name of defendant]'s use of its property may be "unreasonable" under circumstances where the harm caused by [name of defendant]'s activity outweighs any benefit to society ~~it produces~~, or~~and~~ the activity is not suitable to the location.

A "substantial interference" with [name of plaintiff]'s use and enjoyment of the land is typically one that results in substantial annoyance, discomfort, or harm. The degree of interference~~, which~~ is measured by what would be offensive to a reasonable person, or to a person ~~one~~ who has ordinary health and ordinary ~~and reasonable~~ sensitivities.

Comment [NS2]: Should there be two different definitions on reasonableness between 1208 and 1209? Should they be consistent?

Cameron and Ryan will look at whether there is a difference between the two instructions: common law vs. statutory.

Cameron and Ryan will also look at whether there should be a standalone reasonableness instruction.

It may make sense for us to say in a committee note that we don't know why there would be reason to have different definitions of reasonableness in both.

An unintentional use that is "otherwise actionable" is generally one that is negligent or reckless, or that results in abnormally dangerous conditions or activities in an inappropriate place.

References:
Whaley v. Park City Mun. Corp., 2008 UT App 234, 190 P.3d 1
Sanford v. Univ. of Utah, 488 P.2d 741 (Utah 1971)
Johnson v. Mount Ogden Enterprises, Inc., 460 P.2d 333 (Utah 1969)
Turnbaugh v. Anderson, 793 P.2d 939 (Utah Ct. App. 1990)
Walker Drug Co. v. La Sal Oil Co., 972 P.2d 1238, 1245 (Utah 1998)
Canon v. Neuberger, 268 P.2d 425, 426 (Utah 1954)
Dahl v. Utah Oil Ref. Col, 71 Utah 1, 262 P. 269, 273 (1927)

Committee note:
Negligence is defined in CV202A and it may be appropriate to also give that instruction to the jury.

Utah courts appear to be conflicted on the applicable considerations of "unreasonableness," with some addressing it from the standpoint of the actor:

> [W]hat is a reasonable use of one's property must necessarily depend upon the circumstances of each case, for a use for a particular purpose and in a particular way, in one locality, that would be lawful and reasonable might be unlawful and a nuisance in another. The test of whether the use of the property constitutes a nuisance is the reasonableness of the use complained of in the particular locality and in the manner and under the circumstances of the case.

Cannon v. Neuberger, 268 P.2d 425, 426 (Utah 1954) (cleaned up) (emphasis in original). While others address it from the standpoint of the injured party:

> Unlike most other torts, [private nuisance law] is not centrally concerned with the nature of the conduct causing the damage, but with the nature and relative importance of the interests interfered with or invaded. The doctrine of nuisance has reference to the interests invaded, to the damage or harm inflicted, and not to any particular kind of action or omission which has lead to the invasion…. Distinguished from negligence liability, liability in nuisance is predicated upon unreasonable injury rather than upon unreasonable conduct.

Whaley v. Park City Mun. Corp., 2008 UT App 234, ¶22, 190 P.3d 1. This conflict seems understandable because "no hard and fast rule controls the subject, for a use that is reasonable under one set of facts would be unreasonable under another." *Dahl v. Utah Oil Ref. Co.*, 71 Utah 1, 262 P.269, 273 (1927). This a fact-specific inquiry that "requires the finder of tact to evaluate, among other things, the severity of the harm vis-a-vis its social value or utility." *Walker Drug Co. v. La Sal Oil Col*, 972 P.2d 1238, 1245 (Utah 1998).

CV1210 STATUTORY PUBLIC NUISANCE CLAIM

To establish [name of plaintiff]'s claim that defendant created a public nuisance, you must find:

1. The alleged nuisance consists of unlawfully doing any act or omitting to perform any duty;
2. [name of defendant]'s conduct was unreasonable;
3. The act or omission either
    a. Annoys, injures, or endangers the comfort, repose, health, or safety of three or more persons;
    b. Offends public decency;
    c. Unlawfully interferes with, obstructs, or tends to obstruct, or renders dangerous for passage, any lake, stream, canal, or basin, or any public park, square, street, or highway; or
    d. In any way renders three or more persons insecure in life or the use of property.
4. Plaintiff has suffered damages different from those of society at large.

An act which affects three or more persons in any of the ways specified in this instruction is still a nuisance regardless of the extent of annoyance and regardless of whether the damage inflicted on individuals is unequal.

References:
Utah Code § 76-10-803 (2009)
Whaley v. Park City Mun. Corp., 2008 UT App 234, 190 P.3d 1
Solar Salt Co. v. Southern Pac. Transp. Co., 555 P.2d (Utah 1976)
Monroe City v. Arnold, 452 P.2d 321 (Utah 1969)
Turnbaugh v. Anderson, 793 P.2d 939 (Utah Ct. App. 1990)
Erickson v. Sorensen, 877 P.2d 144, 148 (Utah App. 1994)

Committee note
This instruction cites the elements for a statutory public nuisance claim. There may also be a common law claim. *See Riggins v. Dist. Court of Salt Lake Cty.*, 51 P.2d 645, 662 (1935).

CV1211DAMAGES FOR NUISANCE. Approved May 13, 2019.

If you determine that [name of defendant] is liable to [name of plaintiff] for nuisance, you must award some amount of damages. To determine the proper amount of damages, you must consider:

1) the degree of [name of defendant]'s interference in the use and enjoyment of [name of plaintiff]'s land; and
2) the reasonableness of the interference in the context of wider community interests.

Considering these factors and the evidence presented at trial, you may award damages that range from "nominal damages" up to an amount necessary to fully compensate name of plaintiff] for [name of plaintiff]'s economic and/or non-economic harm..

"Nominal damages" is an amount such as one dollar.

Economic and non-economic damages are defined in other instructions.

References:
Walker Drug Co. v. La Sal Oil Co., 972 P.2d 1238, 1245 (Utah 1998)

Committee note:
For a definition of economic and non-economic damages, see CV2001 et. seq. For instructions on the measure of damages for injury to personal or real property resulting from a nuisance, see CV2004-2011. The damages instructions may be adapted to the circumstances of the case. For example, the noneconomic damages in a nuisance case may include the addition of discomfort and annoyance to CV2004's list of considerations. See *Walker Drug Co. v. La Sal Oil Co.*, 972 P.2d 1238, 1245-1249 (Utah 1998) and CV1212. A possessor of land may be allowed to recover "incidental damages for harms to his person or chattels" in an action for nuisance. See *Turnbaugh for Benefit of Heirs of Turnbaugh v. Anderson*, 793 P.2d 939, 942–43 (Utah Ct. App. 1990). The committee concluded that "incidental damages" are included in either economic or non-economic damages. In public nuisance claims, the first element of interference in the use and enjoyment of land may not apply; there may be other factors to consider.

CV1212 NON-ECONOMIC DAMAGES FOR NUISANCE. Approved May 13, 2019.

In addition to any economic damages incurred by [name of plaintiff], you may also award damages for personal inconvenience, annoyance, and discomfort caused by the existence of a nuisance.

References:
Wade v. Fuller, 365 P.2d 802, 805 (Utah 1961)
Walker Drug Co. v. La Sal Oil Co., 972 P.2d 1238, 1245–49 (Utah 1998)

Committee note
This instruction reflects the language of the case law on nuisance. Parties may also consider adapting CV2004.

Tab 5

Draft: June 10, 2019

MUJI 2D GENERAL INSTRUCTIONS

Table of Contents

MUJI 2d GENERAL INSTRUCTIONS

OPENING INSTRUCTIONS

CV101 GENERAL ADMONITIONS. Approved June 10, 2019.

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, although it may seem natural to want to investigate a case, 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 y~~You may not use any printed or electronic sources to get information about this case or the issues involved. This includes the I~~i~~nternet, 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, although it may seem natural, 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 y~~You may not communicate about the case by any means, including by ~~via~~ emails, text messages, tweets, blogs, chat rooms, comments, ~~or~~ other postings, ~~Facebook, MySpace, LinkedIn, or any other~~ or any 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.

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). Approved June 10, 2019.

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, although it may seem natural to want to investigate a case, you must not try to get information from any source other than what you see and hear in this courtroom. You may not use any printed or electronic sources to get information about this case or the issues involved. This includes the Internet, reference books or dictionaries, newspapers, magazines, television, radio, computers, iPhones, Smartphones, or any social media or electronic device.

~~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. 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, although it may seem natural, you must not communicate with anyone about this case, and you must not allow anyone to communicate with you. You may not communicate about the

case by any means, including by emails, text messages, tweets, blogs, chat rooms, comments, other postings, or any social media.

~~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.

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~~

CV101B FURTHER ADMONITION ABOUT ELECTRONIC DEVICES.

Removed 9/2011. Incorporated into CV 101.

CV102 ROLE OF JUDGE, JURY, AND LAWYERS.~~ROLE OF THE JUDGE, JURY AND LAWYERS.~~

Replaced with CR105 (modified)

All of us, judge, jury and lawyers, are officers of the court and have different roles during the trial:

As the judge I will supervise the trial, decide what evidence is admissible, and instruct you on the law.

As the jury, you must follow the law as you weigh the evidence and decide the factual issues. Factual issues relate to what did, or did not, happen in this case.

The lawyers will present evidence and try to persuade you to decide the case in one way or the other.

Neither the lawyers nor I decide the case. That is your role. Do not be influenced by what you think our opinions might be. Make your decision based on the law given in my instructions and on the evidence presented in court.

References

Utah Code Ann. § 77-17-10(1).

Utah Code Ann. § 78A-2-201.

State v. Sisneros, 631 P.2d 856, 859 (Utah 1981).

State v. Gleason, 40 P.2d 222, 226 (Utah 1935).

75 Am. Jur.2d Trial §§ 714, 719, 817.

~~You and I and the lawyers play important but different roles in the trial.~~

~~I supervise the trial and to decide all legal questions, such as deciding objections to evidence and deciding the meaning of the law. I will also explain the meaning of the law.~~

~~You must follow that law and decide what the facts are. The facts generally relate to who, what, when, where, why, how or how much. The facts must be supported by the evidence.~~

~~The lawyers present the evidence and try to persuade you to decide the case in favor of his or her client.~~

~~Television and the movies may not accurately reflect the way real trials should be conducted. Real trials should be conducted with professionalism, courtesy and civility.~~

MUJI 1st Instruction

1.5; 2.2; 2.5; 2.6.

Amended Dates:

~~9/2011.~~

CV102A ROLE OF THE JUDGE, JURY, PARTIES, LAWYERS. (SELF-REPRESENTED LITIGANT VERSION)

All of us, judge, jury, lawyers, [name of plaintiff] [name of defendant] have different roles during the trial:

As the judge I will supervise the trial, decide what evidence is admissible, and instruct you on the law.

As the jury, you must follow the law as you weigh the evidence and decide the factual issues. Factual issues relate to what did, or did not, happen in this case.

The lawyers and [name of self-represented plaintiff] [name of self-represented defendant] will present evidence and try to persuade you to decide the case in one way or the other.

Neither the lawyers, parties, nor I decide the case. That is your role. Make your decision based on the law given in my instructions and on the evidence presented in court.

~~You and I and [name of plaintiff] [name of defendant] and the lawyers play important but different roles in the trial.~~

~~I supervise the trial and to decide all legal questions, such as deciding objections to evidence and deciding the meaning of the law. I will also explain the meaning of the law.~~

~~You must follow that law and decide what the facts are. The facts generally relate to who, what, when, where, why, how or how much. The facts must be supported by the evidence.~~

~~The lawyers present the evidence and try to persuade you to decide the case in favor of his or her client.~~

~~It is the self-represented [plaintiff] [defendant] and [plaintiff] [defense] counsel's duty to object when the other side offers testimony or other evidence that the self-represented [plaintiff] [defendant] or [plaintiff][defense] counsel believes is not admissible. You should not be unfair or prejudiced against the self-represented [plaintiff] [defendant], [plaintiff] [defense] counsel, or [plaintiff] [defendant] because the self-represented [plaintiff] [defendant] or [plaintiff] [defense] counsel has made objections. Television and the movies may not accurately reflect the way real trials should be conducted. Real trials should be conducted with professionalism, courtesy and civility.~~

References

MUJI CV 102.

Preliminary jury instructions for use with pro se litigants, U.S. District Court, Eastern District of California.

Amended Dates:

12/2013

CV103 NATURE OF THE CASE.

In this case [Name of plaintiff] seeks [describe claim].

[Name of defendant] [denies liability, etc.].

[Name of defendant] has filed what is known as a [counterclaim/cross-claim/third-party complaint/etc.,] seeking [describe claim].

MUJI 1st Instruction

1.1.

Amended Dates:

9/2011.

CV104 ORDER OF TRIAL.

The trial will proceed as follows:

(1) The lawyers will make opening statements, outlining what the case is about and what they think the evidence will show.

(2) [Name of plaintiff] will offer evidence first, followed by [name of defendant]. I may allow the parties to later offer more evidence.

(3) Throughout the trial and after the evidence has been fully presented, I will instruct you on the law. You must follow the law as I explain it to you, even if you do not agree with it.

(4) The lawyers will then summarize and argue the case. They will share with you their views of the evidence, how it relates to the law and how they think you should decide the case.

(5) The final step is for you to go to the jury room and discuss the evidence and the instructions among yourselves until you reach a verdict.

MUJI 1st Instruction

1.2.

Amended Dates:

9/2011.

CV105 SEQUENCE OF INSTRUCTIONS NOT SIGNIFICANT.

The order in which I give the instructions has no significance. You must consider the instructions in their entirety, giving them all equal weight. I do not intend to emphasize any particular instruction, and neither should you.

MUJI 1st Instruction

2.1.

Amended Dates:

9/2011.

CV106 JURORS MUST FOLLOW THE INSTRUCTIONS.

Removed 9/2011. Incorporated into CV 102.

MUJI 1st Instruction

1.5.

CV107 JURORS MAY NOT DECIDE BASED ON SYMPATHY, PASSION AND PREJUDICE.

You must decide this case based on the facts and the law, without regard to sympathy, passion or prejudice. You must not decide for or against anyone because you feel sorry for or angry at anyone.

MUJI 1st Instruction

2.3.

Amended Dates:

9/2011

CV108 NOTE-TAKING.

Replaced with CR110

Feel free to take notes during the trial to help you remember the evidence, but do not let note-taking distract you. Your notes are not evidence and may be incomplete.

~~You may take notes during the trial and have those notes with you when you discuss the case. If you take notes, do not over do it, and do not let your note-taking distract you from following the evidence. Your notes are not evidence, and you should use them only as a tool to aid your personal memory. [I will secure your notes in the jury room during breaks and have them destroyed at the end of the trial.]~~

References

URCP 47(n).

MUJI 1st Instruction

1.6.

Committee Notes

The judge may instruct the jurors on what to do with their notes at the end of each day and at the end of the trial.

Amended Dates:

~~9/2011.~~

CV109 JUROR QUESTIONS. [Optional for judges who permit questions.] Approved 6/10/19.
Added from CR111 (modified)

During the trial you may submit questions to be asked of the witnesses, but you are not required to do so. You should write your questions down as they occur to you. Please do not ask your questions out loud. To make sure the questions are legally appropriate, we will use the following procedure: After the lawyers have finished questioning each witness, I will ask if you have any questions. You should hand your questions to the bailiff when I ask for them. I will review them with the lawyers to make sure they are allowed. I will tell you if your questions are allowed or not.

References
Utah R. Civ. P. 47(j).

CV110 RULES APPLICABLE TO RECESSES.

Removed 9/2011. Incorporated into CV 101.

MUJI 1st Instruction

1.8; 1.7

CV111A DEFINITION OF "PERSON."

"Person" means an individual, corporation, organization, or other legal entity.

Amended Dates:

9/2011.

CV111B ALL PERSONS EQUAL BEFORE THE LAW.

The fact that one party is a natural person and another party is a [corporation/partnership/other legal entity] should not play any part in your deliberations. You must decide this case as if it were between individuals.

MUJI 1st Instruction

2.8.

Amended Dates:

9/2011.

CV112 MULTIPLE PARTIES.

There are multiple parties in this case, and each party is entitled to have its claims or defenses considered on their own merits. You must evaluate the evidence fairly and separately as to each plaintiff and each defendant. Unless otherwise instructed, all instructions apply to all parties.

Amended Dates:

9/2011.

CV113 MULTIPLE PLAINTIFFS.

Although there are _____ plaintiffs, that does not mean that they are equally entitled to recover or that any of them is entitled to recover. [Name of defendant] is entitled to a fair consideration of [his] defense against each plaintiff, just as each plaintiff is entitled to a fair consideration of [his] claim against [name of defendant].

MUJI 1st Instruction

2.21.

Amended Dates:

9/2011.

CV114 MULTIPLE DEFENDANTS.

Although there are _____ defendants, that does not mean that they are equally liable or that any of them is liable. Each defendant is entitled to a fair consideration of [his] defense against each of [name of plaintiff]'s claims. If you conclude that one defendant is liable, that does not necessarily mean that one or more of the other defendants are liable.

MUJI 1st Instruction

2.22.

Amended Dates:

9/2011.

CV115 SETTLING PARTIES.

[Name of persons] have reached a settlement agreement.

There are many reasons why persons settle their dispute. A settlement does not mean that anyone has conceded anything. Although [name of settling person] is not a party, you must still decide whether any of the persons, including [name of settling person], were at fault.

You must not consider the settlement as a reflection of the strengths or weaknesses of any person's position. You may consider the settlement in deciding how believable a witness is.

References

Slusher v. Ospital, 777 P.2d 437 (Utah 1989).

Paulos v. Covenant Transp., Inc., 2004 UT App 35 (Utah App. 2004).

Child v. Gonda, 972 P.2d 425 (Utah App. 1998).

URE 408.

MUJI 1st Instruction

2.24.

Committee Notes

The judge and the parties must decide whether the fact of settlement and to what extent the terms of the settlement will be revealed to the jury in accordance with the principles set forth in *Slusher v. Ospital*, 777 P.2d 437 (Utah 1989).

Substitute other legal concepts if "fault" is not relevant. For example, in commercial disputes.

Amended Dates:

9/2011.

CV116 DISCONTINUANCE AS TO SOME DEFENDANTS.

[Name of defendant] is no longer involved in this case because [explain reasons]. But you must still decide whether fault should be allocated to [name of defendant] as if [he] were still a party.

MUJI 1st Instruction

2.23.

Committee Notes

This instruction should be given at the time the party is dismissed. The court should explain the reasons why the defendants have been dismissed to the extent possible. If allocation of fault to the dismissed party is not appropriate under applicable law the final sentence should not be given.

CV117 PREPONDERANCE OF THE EVIDENCE.

You may have heard that in a criminal case proof must be beyond a reasonable doubt, but this is not a criminal case. In a civil case such as this one, a different level of proof applies: proof by a preponderance of the evidence.

When I tell you that a party has the burden of proof or that a party must prove something by a "preponderance of the evidence," I mean that the party must persuade you, by the evidence, that the fact is more likely to be true than not true.

Another way of saying this is proof by the greater weight of the evidence, however slight. Weighing the evidence does not mean counting the number of witnesses nor the amount of testimony. Rather, it means evaluating the persuasive character of the evidence. In weighing the evidence, you should consider all of the evidence that applies to a fact, no matter which party presented it. The weight to be given to each piece of evidence is for you to decide.

After weighing all of the evidence, if you decide that a fact is more likely true than not, then you must find that the fact has been proved. On the other hand, if you decide that the evidence regarding a fact is evenly balanced, then you must find that the fact has not been proved, and the party has therefore failed to meet its burden of proof to establish that fact.

[Now] [At the close of the trial] I will instruct you in more detail about the specific elements that must be proved.

References

Johns v. Shulsen, 717 P.2d 1336 (Utah 1986).

Morris v. Farmers Home Mut. Ins. Co., 500 P.2d 505 (Utah 1972).

Alvarado v. Tucker, 268 P.2d 986 (Utah 1954).

Hansen v. Hansen, 958 P.2d 931 (Utah App. 1998)

MUJI 1st Instruction

2.16; 2.18.

Amended Dates:

9/2011

CV118 CLEAR AND CONVINCING EVIDENCE.

Some facts in this case must be proved by a higher level of proof called "clear and convincing evidence." When I tell you that a party must prove something by clear and convincing evidence, I mean that the party must persuade you, by the evidence, to the point that there remains no serious or substantial doubt as to the truth of the fact.

Proof by clear and convincing evidence requires a greater degree of persuasion than proof by a preponderance of the evidence but less than proof beyond a reasonable doubt.

I will tell you specifically which of the facts must be proved by clear and convincing evidence.

References

Essential Botanical Farms, LC v. Kay, 2011 UT 71.

Jardine v. Archibald, 279 P.2d 454 (Utah 1955).

Greener v. Greener, 212 P.2d 194 (Utah 1949).

See also, *Kirchgestner v. Denver & R.G.W.R. Co.*, 233 P.2d 699 (Utah 1951).

MUJI 1st Instruction

2.19.

Committee Notes

In giving the instruction on clear and convincing evidence, the judge should specify which elements must be held to this higher standard. This might be done in an instruction and/or as part of the verdict form. If the judge gives the clear and convincing evidence instruction at the start of the trial and for some reason those issues do not go to the jury (settlement, directed verdict, etc.) the judge should instruct the jury that those matters are no longer part of the case.

Amended Dates:

9/2011.

CV119 EVIDENCE.

"Evidence" is anything that tends to prove or disprove a disputed fact. It can be the testimony of a witness or documents or objects or photographs or certain qualified opinions or any combination of these things.

You must entirely disregard any evidence for which I sustain an objection and any evidence that I order to be struck.

Anything you may have seen or heard outside the courtroom is not evidence and you must entirely disregard it.

The lawyers might stipulate—or agree—to a fact or I might take judicial notice of a fact. Otherwise, what I say and what the lawyers say usually are not evidence.

You are to consider only the evidence in the case, but you are not expected to abandon your common sense. You are permitted to interpret the evidence in light of your experience.

MUJI 1st Instruction

1.3; 2.4.

Amended Dates:

9/2011.

CV119A EVIDENCE. (SELF-REPRESENTED LITIGANT VERSION)

"Evidence" is anything that tends to prove or disprove a disputed fact. It can be the testimony of a witness or documents or objects or photographs or certain qualified opinions or any combination of these things.

You must entirely disregard any evidence for which I sustain an objection and any evidence that I order to be struck.

Anything you may have seen or heard outside the courtroom is not evidence and you must entirely disregard it.

In reaching your verdict, you may consider only the testimony and exhibits received into evidence. Certain things are not evidence, and you may not consider them in deciding what the facts are. I will list them for you:

(1) Arguments and statements by pro se [plaintiff] [defendant] and [plaintiff] [defense] counsel are not evidence. Pro se [plaintiff] [defendant] when acting as counsel and [plaintiff] [defense] counsel are not witnesses. What they have said in their opening statements, will say in their closing arguments, and at other times is intended to help you interpret the evidence, but it is not evidence. If the facts as you remember them differ from the way they have stated them, your memory of them controls. However, pro se [plaintiff] [defendant]'s statements as a witness are evidence.

(2) Questions and objections by pro se [plaintiff] [defendant] and [plaintiff] [defense] counsel are not evidence.

The lawyers might stipulate -- or agree -- to a fact or I might take judicial notice of a fact. Otherwise, what I say and what the lawyers say usually is not evidence.

You are to consider only the evidence in this case, but you are not expected to abandon your common sense. You are permitted to interpret the evidence in light of your experience.

References

CV 119.

Preliminary jury instructions for use with pro se litigants, U.S. District Court, Eastern District of California.

Amended Dates:

November 2013.

CV120 DIRECT ~~AND~~ /CIRCUMSTANTIAL EVIDENCE.

Replaced with CR210 (modified)

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.

~~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.~~

MUJI 1st Instruction

2.17.

References

29 Am. Jur.2d Evidence § 4.
29 Am. Jur.2d Evidence § 1468.

Amended Dates:

~~9/2011.~~

CV121 ~~BELIEVABILITY OF WITNESSES.~~WITNESS CREDIBILITY.

CV121-123 replaced with CR207

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.

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).

Gittens v. Lundberg, 3 Utah 2d 392, 284 P.2d 1115 (1955).

State v. Shockley, 80 P. 865, 879 (1905).

75 Am. Jur.2d Trial § 819.

~~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.~~

MUJI 1st Instruction

2.9, 2.10, 2.11.

~~**CV122 INCONSISTENT STATEMENTS.**~~

~~You may believe that a witness, on another occasion, made a statement inconsistent with that witness's testimony given here. That doesn't mean that you are required to disregard the testimony. It is for you to decide whether to believe the witness.~~

~~**MUJI 1st Instruction**~~

~~2.10.~~

~~CV123 EFFECT OF WILLFULLY FALSE TESTIMONY.~~

~~If you believe any witness has intentionally testified falsely about any important matter, you may disregard the entire testimony of that witness, or you may disregard only the intentionally false testimony.~~

~~References~~

~~*Gittens v. Lundberg*, 3 Utah 2d 392, 284 P.2d 1115 (1955).~~

~~MUJI 1st Instruction~~

~~2.11.~~

CV124 STIPULATED FACTS.

A stipulation is an agreement. Unless I instruct you otherwise, when the lawyers on both sides stipulate or agree to a fact, you must accept the stipulation as evidence and regard that fact as proved.

The parties have stipulated to the following facts:

[Here read stipulated facts.]

Since the parties have agreed on these facts, you must accept them as true for purposes of this case.

MUJI 1st Instruction

1.3; 1.4

Committee Notes

This instruction should be given at the time a stipulated fact is entered into the record.

CV125 JUDICIAL NOTICE.

I have taken judicial notice of [state the fact] for purposes of this trial. This means that you must accept the fact as true.

MUJI 1st Instruction

1.3.

Committee Notes

This instruction should be given at the time the court takes judicial notice of a fact.

CV126 DEPOSITIONS.

A deposition is the sworn testimony of a witness that was given previously, outside of court, with the lawyer for each party present and entitled to ask questions. Testimony provided in a deposition is evidence and may be read to you in court or may be seen on a video monitor. You should consider deposition testimony the same way that you would consider the testimony of a witness testifying in court.

MUJI 1st Instruction

2.12.

Amended Dates:

9/2011.

CV127 LIMITED PURPOSE EVIDENCE.

Some evidence is received for a limited purpose only. When I instruct you that an item of evidence has been received for a limited purpose, you must consider it only for that limited purpose.

MUJI 1st Instruction

1.3.

Amended Dates:

9/2011.

CV128 OBJECTIONS AND RULINGS ON EVIDENCE AND PROCEDURE.

From time to time during the trial, I may have to make rulings on objections or motions made by the lawyers. Lawyers on each side of a case have a right to object when the other side offers evidence that the lawyer believes is not admissible. You should not think less of a lawyer or a party because the lawyer makes objections. You should not conclude from any ruling or comment that I make that I have any opinion about the merits of the case or that I favor one side or the other. And if a lawyer objects and I sustain the objection, you should disregard the question and any answer.

During the trial I may have to confer with the lawyers out of your hearing about questions of law or procedure. Sometimes you may be excused from the courtroom for that same reason. I will try to limit these interruptions as much as possible, but you should remember the importance of the matter you are here to decide. Please be patient even though the case may seem to go slowly.

MUJI 1st Instruction

2.5.

CV128A OBJECTIONS AND RULINGS ON EVIDENCE AND PROCEDURE: SELF-REPRESENTED PARTIES.

Comment [NS1]: Need to modify based on SRP.

From time to time during the trial, I may have to make rulings on objections or motions made by the lawyers or the parties . Lawyers and parties on each side of a case have a right to object when the other side offers evidence that the lawyer believes is not admissible. You should not think less of a lawyer or a party because the lawyer makes objections. You should not conclude from any ruling or comment that I make that I have any opinion about the merits of the case or that I favor one side or the other. And if a lawyer objects and I sustain the objection, you should disregard the question and any answer.

During the trial I may have to confer with the lawyers out of your hearing about questions of law or procedure. Sometimes you may be excused from the courtroom for that same reason. I will try to limit these interruptions as much as possible, but you should remember the importance of the matter you are here to decide. Please be patient even though the case may seem to go slowly.

MUJI 1st Instruction

2.5.

CV129 STATEMENT OF OPINION.

Under limited circumstances, I will allow a witness to express an opinion. Consider opinion testimony as you would any other evidence, and give it the weight you think it deserves.

You may choose to rely on the opinion, but you are not required to do so.

If you find that a witness, in forming an opinion, has relied on a fact that has not been proved, or has been disproved, you may consider that in determining the value of the witness's opinion.

References

Lyon v Bryan, 2011 UT App 256 (jury entitled to disregard even unrebutted expert testimony).

MUJI 1st Instruction

2.13; 2.14.

Committee Notes

This instruction may be given if an expert or another witness is permitted to express an opinion on a matter that the jury is capable of deciding with or without expert testimony. This instruction should not be given if the jury is required to rely on expert testimony to establish the standard of care or some other fact. See, for example, Instruction CV 326. Expert testimony required..

If the jury is required to rely on expert testimony for some decisions and is allowed to decide other facts with or without expert testimony, the court's instructions should distinguish for the jury which matters the jury must decide based only on expert testimony and which matters they may decide by giving the expert testimony the weight they think it deserves.

Amended Dates:

September, 2011; November 13, 2012.

CV130A CHARTS AND SUMMARIES AS EVIDENCE.

Charts and summaries that are received as evidence will be with you in the jury room when you deliberate, and you should consider the information contained in them as you would any other evidence.

MUJI 1st Instruction

2.15.

Committee Notes

Use this instruction if the charts and summaries used at trial are introduced as evidence under URE 1006.

Amended Dates:

9/2011.

CV130B CHARTS AND SUMMARIES OF EVIDENCE.

Certain charts and summaries will be shown to you to help explain the evidence. However, these charts and summaries are not themselves evidence, and you will not have them in the jury room when you deliberate. You may consider them to the extent that they correctly reflect the evidence.

MUJI 1st Instruction

2.15.

Committee Notes

Use this instruction if the charts and summaries used at trial are used only as demonstrative aids.

Amended Dates:

9/2011.

CV131 SPOLIATION.

I have determined that [name of party] intentionally concealed, destroyed, altered, or failed to preserve [describe evidence]. You may assume that the evidence would have been unfavorable to [name of party].

References

Hills v. United Parcel Service, Inc., 2010 UT 39, 232 P.3d 1049.

Daynight, LLC v. Mobilight, Inc., 2011 UT App 28, 248 P.3d 1010.

Burns v. Cannondale Bicycle Co., 876 P.2d 415 (Utah Ct. App. 1994).

URCP 37(~~g~~e).

Committee Notes

Utah appellate courts have not recognized a cause of action for first-party spoliation (a claim against a party to the underlying action – or the party's attorney – who spoliates evidence necessary or relevant to the plaintiff's claims against that party), or a cause of action for third-party spoliation (a stranger to the underlying action or a party not alleged to have committed the underlying tort as to which the loss or destroyed evidence is related). *Hills v. United Parcel Serv., Inc.*, 2010 UT 39, 232 P.3d 1049; *Burns v. Cannondale Bicycle Co.*, 876 P.2d 415 (Utah Ct. App. 1994). Rule 37(~~g~~b), (e), however, expressly provides authority to trial courts to address spoliation of evidence by a litigant, including instructing the jury regarding an adverse inference. See, URCP 37(b)(7).~~2)(F).~~l

In *Daynight, LLC v. Mobilight, Inc.*, 2011 UT App. 28, 248 P.3d 1010, the Utah Court of Appeals observed that "spoliation under [Rule 37(~~e~~g)], meaning the destruction and permanent deprivation of evidence, is on a qualitatively different level than a simple discovery abuse under [Rule 37(b)~~(2)~~] which typically pertains only to a delay in the production of evidence. . . . [~~r~~R~~u~~ule 37(~~e~~g)] of the Utah Rules of Civil Procedure does not require a finding of 'willfulness, bad faith, fault or persistent dilatory tactics' or the violation of court orders before a court may sanction a party." Id. at ¶ 2.

The standard announced by the *Daynight* court differs from that employed by the United States Court of Appeals for the Tenth Circuit. Spoliation sanctions are proper in federal court when (1) a party has a duty to preserve evidence because it knew, or should have known the litigation was imminent, and (2) the adverse party was prejudiced by the destruction of the evidence. If the aggrieved party seeks an adverse inference to remedy the spoliation, it must also prove bad faith. Mere negligence in losing or destroying records is not enough because it does not support an inference of consciousness of a weak case. Without a showing of bad faith, a district court may only impose lesser sanctions. *Turner v. Public Serv. Co.*, 563 F.3d 1136, 1149 (10th Cir. 2009). In addition, it is appropriate for a federal trial court to consider "the degree of culpability of the party who lost or destroyed the evidence." *North v. Ford Motor Co.*, 505 F. Supp. 2d 1113, 1116 (D.Utah 2007).

The discussion by the Utah Court of Appeals in *Daynight* appears to indicate that even the negligent destruction of evidence will be sufficient to trigger a spoliation instruction without a finding of willfulness or bad faith.

Amended Dates:

9/2011.

~~CV135~~ CV132 OUT-OF-STATE OR OUT-OF-TOWN EXPERTS.

You may not discount the opinions of [name of expert] merely because of where [he] lives or practices.

References

Swan v. Lamb, 584 P.2d 814, 819 (Utah 1978).

MUJI 1st Instruction

6.30

Committee Notes

The committee was not unanimous in its approval of this instruction. Use it with caution.

~~CV136~~ CV133 CONFLICTING TESTIMONY OF EXPERTS.

In resolving any conflict that may exist in the testimony of [names of experts], you may compare and weigh the opinion of one against that of another. In doing this, you may consider the qualifications and credibility of each, as well as the reasons for each opinion and the facts on which the opinions are based.

MUJI 1st Instruction

6.31

~~**CV137 Selection of jury foreperson and deliberation.**~~

~~When you go into the jury room, your first task is to select a foreperson. The foreperson will preside over your deliberations and sign the verdict form when it's completed. The foreperson should not dominate the discussions. The foreperson's opinions should be given the same weight as the opinions of the other jurors.~~

~~After you select the foreperson you must discuss with one another – that is deliberate – with a view to reaching an agreement. Your attitude and conduct during discussions are very important.~~

~~As you begin your discussions, it is not helpful to say that your mind is already made up. Do not announce that you are determined to vote a certain way or that your mind cannot be changed. Each of you must decide the case for yourself, but only after discussing the case with your fellow jurors.~~

~~Do not hesitate to change your opinion when convinced that it is wrong. Likewise, you should not surrender your honest convictions just to end the deliberations or to agree with other jurors.~~

~~Amended Dates:~~

~~9/2011.~~

~~**CV138 Do not speculate or resort to chance.**~~

~~When you deliberate, do not flip a coin, speculate or choose one juror's opinions at random. Evaluate the evidence and come to a decision that is supported by the evidence.~~

~~If you decide that a party is entitled to recover damages, you must then agree upon the amount of money to award that party. Each of you should state your own independent judgment on what the amount should be. You must thoughtfully consider the amounts suggested, evaluate them according to these instructions and the evidence, and reach an agreement on the amount. You must not agree in advance to average the estimates.~~

~~References~~

~~Day v. Panos, 676 P.2d 403 (Utah 1984).~~

~~**CV139 Agreement on special verdict.**~~

~~I am going to give you a form called the Special Verdict that contains several questions and instructions. You must answer the questions based upon the instructions and the evidence you have seen and heard during this trial.~~

~~Because this is not a criminal case, your verdict does not have to be unanimous. At least six jurors must agree on the answer to each question, but they do not have to be the same six jurors on each question.~~

~~As soon as six or more of you agree on the answer to all of the required questions, the foreperson should sign and date the verdict form and tell the bailiff you have finished. The bailiff will escort you back to this courtroom; you should bring the completed Special Verdict with you.~~

~~**Amended Dates:**~~

~~9/2011.~~

~~**CV140 Discussing the case after the trial.**~~

~~Ladies and gentlemen of the jury, this trial is finished. Thank you for your service. The American system of justice relies on your time and your sound judgment, and you have been generous with both. You serve justice by your fair and impartial decision. I hope you found the experience rewarding.~~

~~You may now talk about this case with anyone you like. You might be contacted by the press or by the lawyers. You do not have to talk with them – or with anyone else, but you may. The choice is yours. I turn now to the lawyers to instruct them to honor your wishes if you say you do not want to talk about the case.~~

~~If you do talk about the case, please respect the privacy of the other jurors. The confidences they may have shared with you during deliberations are not yours to share with others.~~

~~Again, thank you for your service.~~

~~CV141~~ CV134 NO RECORD OF TESTIMONY.

At the end of trial, you must make your decision based on what you recall of the testimony. You will not have a transcript or recording of the witnesses' testimony. I urge you to pay close attention to the testimony as it is given.

Amended Dates:

~~Added 9/2011.~~

CLOSING INSTRUCTIONS

CV-151. CLOSING ROADMAP.

[from CR201, CR202]

Members of the jury, you now have all the evidence. Three things remain to be done:

First, I will give you additional instructions that you will follow in deciding this case.

Second, the lawyers will give their closing arguments. The Plaintiff(s) will go first, then the Defendant(s). The Plaintiff(s) may give a rebuttal.

Finally, you will go to the jury room to ~~discuss the evidence and the instructions and~~ decide the case.

~~INSTRUCTION NO. CV 152~~

~~[from CR202]~~

In the jury room you will ~~You~~ have two main duties as jurors.

First, you will decide from the evidence ~~The first is to decide from the evidence~~ what the facts are. You may draw all reasonable inferences from that evidence. ~~Deciding what the facts are is your job, not mine.~~

Second, you will ~~The second duty is to~~ take the law I give you in the instructions, apply it to the facts, and reach a verdict.

CV-152~~3~~. CLOSING ARGUMENTS.

[from CR203]

When the lawyers give their closing arguments, keep in mind that they are advocating their views of the case. What they say during their closing arguments is not evidence. If the lawyers say anything about the evidence that conflicts with what you remember, you are to rely on your memory of the evidence. If they say anything about the law that conflicts with these instructions, you are to rely on these instructions.

CV-154~~3~~. LEGAL RULINGS.

[from CR204]

During the trial I have made certain rulings. I made those rulings based on the law, and not because I favor one side or the other.

However,

• if I sustained an objection,

• if I did not accept evidence offered by one side or the other, or

• if I ordered that certain testimony be stricken,

then you must not consider those things in reaching your verdict.

CV-~~155~~154. JUDICIAL NEUTRALITY.

[from CR205]

As the judge, I am neutral. If I have said or done anything that makes you think I favor one side or the other, that was not my intention. Do not interpret anything I have done as indicating that I have any particular view of the evidence or the decision you should reach.

~~CV137~~ CV155. FOREPERSON SELECTION AND DUTIES AND JURY DELIBERATIONS.~~SELECTION OF JURY FOREPERSON AND DELIBERATION~~.

CV 137 replaced with CR 216-217 (modified) and renumbered

Among the first things you should do when you go to the jury room to deliberate is to appoint someone to serve as the jury foreperson. The foreperson should not dominate the jury's discussion, but rather should facilitate the discussion of the evidence and make sure that all members of the jury get the chance to speak. The foreperson's opinions should be given the same weight as those of other members of the jury. Once the jury has reached a verdict, the foreperson is responsible for filling out and signing the verdict form(s) on behalf of the entire jury.

In the jury room, discuss the evidence and speak your minds with each other. Open discussion should help you reach an agreement on a verdict. Listen carefully and respectfully to each other's

views and keep an open mind about what others have to say. I recommend that you not commit yourselves to a particular verdict before discussing all the evidence.

Try to reach an agreement, but only if you can do so honestly and in good conscience. If there is a difference of opinion about the evidence or the verdict, do not hesitate to change your mind if you become convinced that your position is wrong. On the other hand, do not give up your honestly held views about the evidence simply to agree on a verdict, to give in to pressure from other jurors, or just to get the case over with. In the end, your vote must be your own.

In reaching your verdict you may not use methods of chance, such as drawing straws or flipping a coin. Rather, the verdict must reflect your individual, careful, and conscientious judgment.

~~In reaching your verdict you may not use methods of chance, such as drawing straws or flipping a coin. Rather, the verdict must reflect your individual, careful, and conscientious judgment~~

~~When you go into the jury room, your first task is to select a foreperson. The foreperson will preside over your deliberations and sign the verdict form when it's completed. The foreperson should not dominate the discussions. The foreperson's opinions should be given the same weight as the opinions of the other jurors.~~

~~After you select the foreperson you must discuss with one another – that is deliberate – with a view to reaching an agreement. Your attitude and conduct during discussions are very important.~~

~~As you begin your discussions, it is not helpful to say that your mind is already made up. Do not announce that you are determined to vote a certain way or that your mind cannot be changed. Each of you must decide the case for yourself, but only after discussing the case with your fellow jurors.~~

~~Do not hesitate to change your opinion when convinced that it is wrong. Likewise, you should not surrender your honest convictions just to end the deliberations or to agree with other jurors.~~

~~CV138~~ CV156. DO NOT SPECULATE OR RESORT TO CHANCE.

When you deliberate, do not flip a coin, speculate or choose one juror's opinions at random. Evaluate the evidence and come to a decision that is supported by the evidence.

If you decide that a party is entitled to recover damages, you must then agree upon the amount of money to award that party. Each of you should state your own independent judgment on what the amount should be. You must thoughtfully consider the amounts suggested, evaluate them according to these instructions and the evidence, and reach an agreement on the amount. You must not agree in advance to average the estimates.

References

Day v. Panos, 676 P.2d 403 (Utah 1984).

~~CV139~~ CV157. AGREEMENT ON SPECIAL VERDICT.

I am going to give you a form called the Special Verdict that contains several questions and instructions. You must answer the questions based upon the instructions and the evidence you have seen and heard during this trial.

Because this is not a criminal case, your verdict does not have to be unanimous. At least six jurors must agree on the answer to each question, but they do not have to be the same six jurors on each question.

As soon as six or more of you agree on the answer to all of the required questions, the foreperson should sign and date the verdict form and tell the bailiff you have finished. The bailiff will escort you back to this courtroom; you should bring the completed Special Verdict with you.

~~CV140~~CV158. DISCUSSING THE CASE AFTER THE TRIAL.

Ladies and gentlemen of the jury, this trial is finished. Thank you for your service. The American system of justice relies on your time and your sound judgment, and you have been generous with both. You serve justice by your fair and impartial decision. I hope you found the experience rewarding.

You may now talk about this case with anyone you like. You might be contacted by the press or by the lawyers. You do not have to talk with them - or with anyone else, but you may. The choice is yours. I turn now to the lawyers to instruct them to honor your wishes if you say you do not want to talk about the case.

If you do talk about the case, please respect the privacy of the other jurors. The confidences they may have shared with you during deliberations are not yours to share with others.

Again, thank you for your service.

Tab 6

Date of Printing: August 12, 2019 09:02:18 AM CDT
Last Run: August 05, 2019 09:03:38 AM CDT

KEYCITE ALERT

§ 31A-22-309. Limitations, exclusions, and conditions to personal injury protection, UT ST § 31A-22-309

Results Narrowed by:

History References
Detail Level: Most Detail

Citing References
Detail Level: Most Detail

History

No references satisfied your KeyCite Alert History request.

Citing References

Citing References (1)

Title	Date	NOD Topics	Type
1. 59 Am. Jur. Trials 347, Litigating the No-Fault Serious-Injury Threshold Am. Jur. Trials "No-fault" automobile insurance systems are statutory schemes to provide automobile accident victims with compensation for certain expenses arising out of personal injuries... ... her life, that the herniated disc would not go away on its own, and that motorist would not be able to regain all bodily function. Utah Code Ann. § 31A-22-309(1)(a)(iii)Pinney v. Carrera, 2019 UT App 12, 438 P.3d 902 (Utah Ct. App. 2019) [Top ...	2019	—	Other Secondary Source

Motorist who suffered a herniated disc in her back following car accident met the tort threshold injury requirement of permanent impairment under no-fault statute, and, thus, could seek general damages for her personal injuries in action brought against other driver who allegedly failed to stop at a stop sign and struck injured motorist's car; treating chiropractor testified that based on the examinations, treatment, and MRI, that injured motorist had suffered a permanent impairment, and chiropractor further testified that motorist would be plagued by the injury for the rest of her life, that the herniated disc would not go away on its own, and that motorist would not be able to regain all bodily function. Utah Code Ann. § 31A-22-309(1)(a)(iii). *Pinney v. Carrera*, 2019 UT App 12, 438 P.3d 902 (Utah Ct. App. 2019).

59 Am. Jur. Trials 347 (Originally published in 1996)

CV632 Threshold.

[Name of defendant] claims that [name of plaintiff] has not met the threshold injury requirements and therefore cannot recover non-economic damages.

A person may recover non-economic damages resulting from an automobile accident only if [he] has:

[(1) permanent disability or permanent impairment based on objective findings.] or

[(2) permanent disfigurement.] or

[(3) reasonable and necessary medical expenses in excess of $3,000.]

References

Utah Code Section 31A-22-309(1)(a).

Committee Notes

Neither the statute nor case law has provided clear boundaries on the definitions of disability and impairment. It is also undecided whether the plaintiff or the defendant who asserts the defense carries the burden of proof or burden of moving forward.

