

Judicial Council Standing Committee
Model Utah Civil Jury Instructions

Agenda

January 10, 2022
4:00 to 6:00 p.m.
Via Webex

Welcome and approval of minutes	Tab 1	Ruth Shapiro, Chair
Easements and Boundaries <ul style="list-style-type: none">• The working group has proposed instructions for Boundary by Acquiescence, Clear and Convincing Evidence, Mutual Acquiescence, Visible Line, Occupy Defined, and Exception to Silence Equaling Acquiescence	Tab 2	Robert Cummings
Other business		Ruth Shapiro
Timeline for subject matter working groups: <ul style="list-style-type: none">• Implicit Bias• Pandemic• Assault / False Arrest	Tab 3	Stacy Haacke

[Committee Web Page](#)

[Published Instructions](#)

Meeting Schedule: Second Monday of each month.

Next meeting: February 14, 2022 at 4:00 p.m.

Tab 1

MINUTES
Advisory Committee on Model Civil Jury Instructions
November 8, 2021
4:00 p.m.

Present: Ruth A. Shapiro (chair), Stacy Haacke (staff), Marianna Di Paolo, Douglas G. Mortensen, Randy Andrus, Joel Ferre, Alyson McAllister, Lauren A. Shurman, Judge Kent Holmberg, Adam D. Wentz
Also present: Tracy Fowler, Paul Simmons, Robert Cummings

Excused: Samantha Slark, Ricky Shelton, Judge Keith A. Kelly

1. *Welcome.*

Ruth Shapiro welcomed everyone to the meeting.

2. *Approval of Minutes.*

Ruth Shapiro asked for a motion on the October 2021 meeting minutes. Minutes approved.

3. *Timeline.*

Timeline discussed.

4. *Discussion of Product Liability Instructions.*

- CV10__ (Implied Indemnity - Introduction)
 - Tracy Fowler and Paul Simmons outlined arguments as to whether or not the implied indemnity introduction instructions—and specifically the precedent set by the *Bylsma v. R.C. Willey* decision—are appropriate for inclusion in MUJI. The committee debated the same.
 - The committee agreed to send these instructions back to the subcommittee for additional work.
- CV____ (Boundary by Acquiescence)
 - The committee discussed whether the language “visible line” between the properties would make sense to the layperson jury. Committee members suggested including a separate definition. The subcommittee agreed to prepare the same.
 - Marianna Di Paolo suggested providing further definition of the term “occupation” as it is not immediately clear.

- The committee debated whether to clarify the meaning of the phrase “continuous period”. Committee agreed that adding the phrase “without interruption” solved the concern.
 - Continued to the next meeting.
- **CV118 (Clear and convincing evidence)**
 - The committee suggested re-wording the language of the “mutual acquiescence” definition as it is difficult to understand to the layperson as currently constructed. The committee made significant changes to the same.
 - Continued to the next meeting.

5. *Adjournment.*

The meeting concluded at 6:02 PM.

Tab 2

CV__ Boundary by Acquiescence

[Plaintiff] and [Defendant] are adjoining landowners. There is a dispute over where the legal property line is between the adjoining pieces of property. [Plaintiff] claims that a visible [fence, monument, building, or natural features treated as a boundary] between [Plaintiff's] property and [Defendant's] property is a "boundary by acquiescence," that should be recognized as the legal boundary between the properties.

For you to find that [Plaintiff] has established the boundary by acquiescence that [he or she] claims, you must be satisfied that [Plaintiff] has proved each of the following elements by clear and convincing evidence:

1. There is a visible line between [Plaintiff's] property and [Defendant's] property that is marked by a [fence, monument, building, or natural features treated as a boundary];
2. The past or present owners of [Plaintiff's] property occupied [Plaintiff's] property up to the visible line in a manner that would give a reasonable landowner notice that the past or present owners of [Plaintiff's] property were using the line as a boundary;
3. The past or present owners of [Plaintiff] and [Defendant's] properties mutually acquiesced in the line as a boundary between the properties; and
4. For a continuous period of at least 20 years without interruption.

I will now explain to you what some of the words in this instruction mean.

NEED A REFERENCE TO MUTUAL ACQUIESCE BEING DEFINED.

NEED A VISIBLE LINE DEFINITION

THINK ABOUT FROM AN OBJECTIVE LAYPERSON'S PERSPECTIVE

DEFINE OCCUPATION – OR USE A BETTER WORD

NEED SILENCE AS ACCEPTANCE INSTRUCTION

NEED

References:

Anderson v. Fautin, 2016 UT 22, ¶ 8, 379 P.3d 1186
RHN Corp. v. Veibell, 2004 UT 60, ¶ 23, 96 P.3d 935
Martin v. Lauder, 2010 UT App 216, ¶ 5, 239 P.3d 519
Q-2, LLC v. Hughes, 2014 UT App 19, ¶ 8, 319 P.3d 732
Ault v. Holden, 2002 UT 33, ¶ 18, 44 P.3d 781

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).

CV Mutual Acquiescence

Mutual ~~Acquiescence means that both parties, and adjoining land owners of both properties acted in a manner that shows they the parties treated a the line as the boundary of their properties. The defendant's Acquiescence can also mean~~ the same thing as ~~indolence, acceptance without protest, inaction despite notice, or consent by silence, or acceptance without protest.~~ Direct evidence of a landowner's subjective belief concerning the boundary is not required to show acquiescence. Rather, you should base your decision on whether the defendant's objective behavior shows the defendant recognized the line as the property line. Acquiescence may be inferred from the evidence.

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You may consider the landowner's actions, or lack of actions, as evidence that the landowner impliedly consented, or acquiesced, in the visible line as the boundary between the properties.

[NOTE: *Lindbaugh*, citing *Essential Botanical*, uses the contrary point that: "Nonacquiescence in a boundary would be signaled where a landowner notifies the adjoining landowner of her disagreement over the boundary, or otherwise takes action inconsistent with recognition of a given line as the boundary." Don't know if that would be helpful to a jury to use the contrapositive example]

Commented [1]: I added this (the sentence beginning with "Rather,") based on *Linebaugh v. Gibson* from 2020, noted below. There, the district court found that because the fence was built to fence in animals, it could not be mutually acquiesced to. In reversing, the COA found that it's the objective conduct of the parties, not their subjective belief.

References:

- Linbaugh v. Gibson*, 2020 UT App 108, ¶¶ 26-27, 471 P.3d 835
- Anderson v. Fautin*, 2016 UT 22, ¶¶ 24, 30, 379 P.3d 1186
- Essential Botanical Farms, LC v. Kay*, 2011 UT 71, ¶¶ 27, 34, 270 P.3d 430
- RHN Corp. v. Veibell*, 2004 UT 60, ¶ 23, 96 P.3d 935
- Martin v. Lauder*, 2010 UT App 216, ¶ 5, 239 P.3d 519
- Q-2, LLC v. Hughes*, 2014 UT App 19, ¶ 8, 319 P.3d 732
- Ault v. Holden*, 2002 UT 33, ¶ 18, 44 P.3d 781

Points for Discussion

- 1) Should we include a more specific instruction of "visible line" or "occupation"?
- 2) Should we include an instruction about a defendant's silence not being evidence of acquiescence where the defendant could not access the property?

CV____Visible Line

“Visible line,” as used in the first requirement of boundary by acquiescence, is a line created by a fence, building, monument, hedge, or similar visible items, both human made and natural, that create an observable line sufficient to give a reasonable landowner notice that the owner of the adjoining property is using the line as a boundary.

References:

- Linbaugh v. Gibson, 2020 UT App 108, ¶ 25, 471 P.3d 835
- Bahr v. Imus, 2011 UT 19, ¶ 36, 250 P.3d 56
- Gillmor v. Cummings, 904 P.2d 703, 707 (Utah Ct. App. 1995)
- Fuoco v. Williams, 421 P.2d 944, 946 (Utah 1966)

CV ____ Occupy Defined

“Occupy,” as used in the second element of boundary by acquiescence, means that the plaintiff has used his/her property up to the visible line in a way that would put a reasonable person on notice that the plaintiff treats the visible line as the boundary between the adjoining properties. Examples of activities that would constitute occupation are farming the property, placing homes or other structures on the property, improving the property, irrigating the property, using it to raise livestock, or similar uses.

References:

Anderson v. Fautin, 2016 UT 22, ¶ 26, 379 P.3d 1186

Bahr v. Imus, 2011 UT 19, ¶ 36, 250 P.3d 56

Staker v. Ainsworth, 785 P.2d 417, 420 (Utah 1990)

CV____ Exception to Silence Equaling Acquiescence

[Defendant] asserts that s/he did not acquiesce to the boundary on the basis that s/he could not access her/his property. This is an affirmative defense [*not sure; case law is unclear, but seems that it would be*] meaning [defendant] has the burden of proving by a preponderance of the evidence that s/he could not access his/her property. If [defendant] has made a sufficient showing that s/he could not access her/his property, then you can find that the parties did not acquiesce to the boundary.

References:

Anderson v. Fautin, 2016 UT 22, ¶ 24, 379 P.3d 1186
Carter v. Hanrath, 925 P.2d 960, 962 (Utah 1996)

[NOTE: Appears to be only exception to silence amounting to acquiescence; *Carter* involved an entirely landlocked parcel so extremely rare exception]

Tab 3

MUJI Civil Upcoming Queue:

Subject	Members
Products Liability	Tracy Fowler, Paul Simmons, Nelson Abbott, Todd Wahlquist
Implicit Bias	Judge Su Chon
Easements and Boundary Lines	Adam Pace, Robert Cummings, Robert Fuller, Doug Farr
Pandemic	Judge Samuel Chiara
Assault / False Arrest	Mitch Rice, Alyson Carter, Andrew Wright, David Cutt
Insurance	Gary Johnson, Bruce Pritchett, Ryan Schriever, Dan Bertch, Andrew Wright, Rick Vazquez, Stewart Harman, Ryan Marsh
Unjust Enrichment	David Reymann
Abuse of Process	David Reymann
Directors and Officers Liability	Monica Call, Christopher Von Maack, Kristine Larsen, Cory Talbot, Perrin Love, Adam Buck
Wills / Probate	Matthew Barneck, Rich Petersen, Rust Tippet, Cameron Sabin
Civil Rights: Set 2	Dennis Ferguson, John Mejia, Paxton Guymon, Andrew Stavors, Jodi Burnett, Margaret Plane, Karra Porter, Heather White
Sales Contracts and Secured Transactions	Matt Cox, Matthew Boley, Ade Maudsley
Case law updates	TBD

Archived Topics:

Subject	Completed
Emotional Distress	December 2016
Fault / Negligence	October 2017
Civil Rights: Set 1	September 2017
Economic Interference	December 2017
Injurious Falsehood	February 2018
Trespass and Nuisance	October 2019
Uniformity	February 2020