Judicial Council Standing Committee on Model Utah Civil Jury Instructions

Agenda

December 12, 2022
4:00 to 6:00 p.m.
Via Webex

Welcome and Approval of Minutes	Tab 1	Alyson/Lauren
CV1605 Defamation, Definition: False Statement – further explanation as to public comment (possible revision of CV1607 instead)	Tab 2	Kade Olsen
Avoiding Bias Instructions – Update regarding 11/21/22 Judicial Council feedback; next steps	Tab 3	Alyson/Lauren
New General Instruction—Pretrial Delay	Tab 4	Alyson McAllister
CV632 Threshold – subcommittee or draft		Alyson McAllister
Progress on Instruction Topics	Tab 5	(Informational)

Committee Web Page

Published Instructions

Meeting Schedule: Monthly on the 2nd Monday at 4pm

Next meeting: January 9, 2023

TAB 1

MINUTES
Advisory Committee on Model Civil Jury Instructions
October 3, 2022
4:00 p.m.

Present: Judge Kent Holmberg, Judge Keith A. Kelly, Lauren A. Shurman, Alyson McAllister, Ruth A. Shapiro, William Eggington, Randy Andrus, Mark Morris, Samantha Slark, Adam D. Wentz, Stacy Haacke (staff), Jace Willard (staff).

Also present: Robert Cummings, Robert Fuller, Marianna Di Paolo

Excused: Douglas G. Mortensen, Ricky Shelton.

1. *Welcome.*

Alyson McAllister welcomed the Committee.

2. *Approval of Minutes.*

September 2022 meeting minutes approved.

3. *Easement by Necessity Instruction.*

- The Committee continued making edits to Easement by Necessity Instruction.
- Debated whether laymen terms within the language of the instruction should be used as opposed to the legal terminology followed by a definition of the term. The Committee determined to use the legal terminology with definitions.
- Debated whether the second and fourth elements as drafted by the subcommittee are proper for this instruction and, if not, should be removed. Determined that they should be removed with a cautionary comment.
- The Committee deleted unnecessary definitions.

4. *Introduction of Mark Morris, new Committee member.*

5. *Implicit Bias Instruction.*

- The Committee reviewed and discussed the latest version of the instruction, titled "Avoiding Bias."
- The subcommittee removed any reference to "implicit bias" and replaced it with "bias." The Committee discussed and approved this change.
- The Committee approved the instruction as drafted, which will be published for public comment.

- Discussed where within the MUJI index of instructions this new instruction should be located.
- Lauren Shurman moved to number the instruction CV135; Randy Andrus opposed and suggested that it be given to the jury earlier, even prior to voir dire. The Committee agreed to request guidance from the judicial council as to the timing of this instruction before making a final decision.

6. *Proposed Pretrial Delay Instruction.*

- Judge Kelly's externship clerk, Chandler Blount, provided the Committee with a memorandum addressing whether there exist specific pretrial delay instructions in other jurisdictions. The memorandum concluded that are not. However, Alyson McAllister noted that similar instructions in other jurisdictions may be consistent with the concerns the proposed instruction seeks to address. Armed with this information, the Committee discussed whether this instruction would be helpful or necessary.
- Discussed whether including the instruction with a cautionary comment on its relevancy in some but not all circumstances may be a good compromise.
- Alyson McAllister agreed to make the suggested edits from the Committee and return next month to finalize.

7. *Discussion of Future Instructions.*

Committee addressed upcoming queue.

8. *Adjournment.*

The meeting concluded at 5:44 PM.

TAB 2

Comment re: Defamation – False Statement

Dear Committee-

I write to comment on Model Jury Instruction No. CV1605 ("Definition: False Statement").

I suggest the Committee use "reasonably" as a qualifier in the defamation-by-implication instruction. So, the instruction would read "that it ***reasonably*** implies a fact that is true."

There is not much guidance from Utah courts on the implied defamation doctrine. The one case from the Utah Supreme Court—*West v. Thomson Newspapers*, 872 P.2d 999 (Utah 1994)—seemed to at least implicitly endorse the doctrine. The Court explained that it was the "implication arising from the statement and the context in which it was made, not the statement itself, which forms the basis of [the plaintiff's] claim." *Id.* at 1011. Which, in turn, made "this is a defamation-by-implication claim." *Id.* Then, in a footnote, the Court cited a leading treatise's explanation of the doctrine. *Id.* at 1011 n. 18.

But that was the beginning and the end of the Court's analysis, because the defendant had "not appealed [the] ruling" that the implication of its republished statements was false. *Id.* at 1011.

Trial courts in Utah have applied their own gloss to defamation by implication, but they have generally supported using a "reasonable" modifier. In *Mile High Contracting, Inc. v. Deseret News Pub. Co.*, No. 170906024, 2018 WL 7374786, at *8 (Utah Dist.Ct. Mar. 16, 2018), Judge Scott explained that to "state a defamation-by-implication claim, [the plaintiff] must show that the claimed implication could reasonably be drawn from the article itself." The Tenth Circuit, in interpreting Utah law, used the same qualifier. *See, e.g.*, *Hogan v. Winder*, 762 F.3d 1096, 1106 (10th Cir. 2014) ("In this evaluation of context, we should examine . . . the likely effect on the reasonable reader."). And, for whatever its worth, the *West* court cited Professor Smolla's explanation of the false-by-implication doctrine, which explained suggested factfinders consider "the inference that the ordinary reasonable recipient may draw *West*, 872 P.2d at 1011 n.18 (quoting odney A. Smolla, Law of Defamation § 4.05(1) (1994)).

Others Utah courts, however, have not imposed a "reasonable" implication requirement. *E.g.*, *Layton Companies, Inc v. SIRQ, Inc.*, No. 070908853, 2014 WL 12661713, at *8 (Utah Dist.Ct. Jan. 11, 2014) (plaintiff's "defamation claim consists of statements or implications the jury properly could have concluded were defamatory").

But putting the (somewhat contradictory) state of Utah law aside, including a reasonability modifier makes doctrinal sense. As one Court put it, "because the Constitution provides a sanctuary for truth, a libel-by-implication plaintiff must make an especially rigorous showing where the expressed facts are literally true." *Chapin v. Knight-Ridder, Inc*., 993 F.2d 1087, 1092–93 (4th Cir. 1993) (imposing an intent requirement).

Though a minor change, including a reasonability modifier should make a difference. Borrowing from the commercial speech world, courts and juries have used the reasonability framework to limit out "a mere possibility that the advertisement might

conceivably be misunderstood by some few consumers viewing it in an unreasonable manner." *Lavie v. Procter & Gamble Co.*, 129 Cal. Rptr. 2d 486, 495 (2003).

Finally, adding a one-word reasonability modifier shouldn't confuse juries. That standard is often used in tort law, and a reasonability requirement is used throughout other defamation instructions. *See* Model Jury Instruction Nos. CV1604A-E; *see also Milkovich v. Lorain J. Co.*, 497 U.S. 1, 20 (1990) (using a reasonability limit for the fact/opinion question).

Thank you for your consideration,
Kade N. Olsen

Instruction:

CV1605 Definition: False Statement.

The allegedly defamatory statement must state or reasonably imply facts which can be proved to be false. [[Name of plaintiff] must show the statement to be false.] [[Name of Defendant] can defeat a defamation claim by showing the statement to be true.]

"False" means that the statement is either directly untrue or that it reasonably implies a fact that is untrue. In addition, a defamatory statement must be materially false. A statement is "materially false" if it is false in a way that matters; that is, if it has more than minor or irrelevant inaccuracies.

A true statement cannot be the basis of a defamation claim, no matter how annoying, embarrassing, damaging, or insulting it may be. To be considered "true" in a defamation case, a statement need not be completely accurate. The statement need only be substantially true, which means the gist of the statement is true.

You should determine the truth or falsity of the statement according to the facts as they existed at the time [name of defendant] published the statement.

References

Air Wis. Airlines Corp. v. Hoeper, 571 U.S. 237 (2014)
Masson v. New Yorker Magazine, Inc., 501 U.S. 496 (1991)
Jacob v. Bezzant, 2009 UT 37, 212 P.3d 535
Oman v. Davis Sch. Dist., 2008 UT 70, 194 P.3d 956
Jensen v. Sawyers, 2005 UT 81, 130 P.3d 325
West v. Thomson Newspapers, 872 P.2d 999 (Utah 1994)
Brehany v. Nordstrom, Inc., 812 P.2d 49 (Utah 1991)
Auto West, Inc. v. Baggs, 678 P.2d 286 (Utah 1984)
Pipkin v. Acumen, 2020 UT App 111, 472 P.3d 315
Davidson v. Baird, 2019 UT App 8, 438 P.3d 928

MUJI 1st Instruction

10.4

Committee Notes

The first sentence of this instruction includes alternative instructions in brackets because the burden of proof for truth/falsity can vary depending on the nature of the case. See CV1602. The first alternative should be given in cases where the plaintiff is a public official and/or public figure, or where the speech at issue relates to a matter of public concern. The second alternative should be given in cases where the plaintiff is neither a public official nor a public figure, and the speech at issue does not relate to a matter of public concern.

Although material falsity is usually a question of fact for the jury, where "the underlying facts as to the gist or sting [of the statements] are undisputed, substantial truth may be determined as a matter of law." Hogan v. Winder, 762 F.3d 1096, 1106 (10th Cir. 2014) (internal quotations omitted). See also Air Wis. Airlines Corp. v. Hoeper, 571 U.S. 237 (2014) ("[U]nder the First Amendment, a court's role is to determine whether '[a] reasonable jury could find a material difference between' the defendant's statement and the truth.") (Scalia, J., concurring and dissenting) (quoting Masson v. New Yorker Magazine, Inc., 501 U.S. 496, 522 (1991)) (second alteration in original).

In addition to explaining that "[m]inor inaccuracies" do not make a statement materially false, Masson, 501 U.S. at 517, the United States Supreme Court has further explained the concept of whether an inaccuracy is "material" as follows: "[A] materially false statement is one that "'would have a different effect on the mind of the reader [or listener] from that which the … truth would have produced.'" Air Wis., 571 U.S. at 250 (quoting Masson, 501 U.S. at 517) (further citation omitted) (second alteration and ellipses in original).

There is a potentially open question regarding the standard of proof for falsity in some types of defamation cases. In Hart-Hanks Communications, Inc. v. Cannaughton, 491 U.S. 657, 661 n.2 (1989), the United States Supreme Court took note of a split of authority as to whether, in a public figure or public official plaintiff case (where actual malice must be proved by clear and convincing evidence), material falsity must also be proved by clear and convincing evidence. At that time, the Court "express[ed] no view on this issue." Id. Since that time, however, the Supreme Court has twice emphasized that the issues of material falsity and actual malice are inextricably related, such that the definition of the latter requires a finding of the former. See Masson, 501 U.S. at 512; Air Wis., 571 U.S. at 246 ("[W]e have long held … that actual malice entails falsity."). As a result, many courts have concluded that in public figure and public official cases, material falsity must also be proved by clear and convincing evidence. See, e.g., Brokers' Choice of Am., Inc. v. NBC Universal, Inc., 757 F.3d 1125, 1136 (10th Cir. 2014) ("If the plaintiff is a public figure or the statement involves a matter of public concern, the plaintiff has the ultimate burden in his case-in-chief of proving the falsity of a challenged statement by 'clear and convincing proof.'" (citation omitted) (applying Colorado law)); DiBella v. Hopkins, 403 F.3d 102, 110-15 (2d Cir. 2005) (collecting cases and noting that only "a minority of jurisdictions require a public figure to prove falsity only by a preponderance of the evidence"); 1 Robert D. Sack, Sack on Defamation: Libel, Slander, and Related Problems § 3:4 (4th ed. 2013) (collecting cases).

If a case involves a public figure or public official plaintiff, and the court determines that the higher standard of proof applies to material falsity, the first paragraph of the instruction should be amended to state: “The allegedly defamatory statement must state or imply facts which can be proven to be false. [Name of plaintiff] must show the statement to be false by clear and convincing evidence.”

Amended Dates:

3/12/18

Follow-up information from Kade Olsen 11/7/22:

I spoke with David Reymann (who I understand helped draft these instructions) and did more research, which I've provided below. I'm happy, if you think it helpful, to also speak at the Committee meeting.

The Utah Supreme Court endorsed the Second Restatement on Tort's approach to the judge/jury division in defamation actions. *See, e.g.*, *West v. Thomson Newspapers*, 872 P.2d 999, 1008 (Utah 1994) (citing with approval *Restatement (Second) of Torts* § 614); *see also Cox v. Hatch*, 761 P.2d 556, 561 (Utah 1988) (same). The Second Restatement provides the following:

> 1. The court determines
>
> (a) whether a communication is capable of bearing a particular meaning, and
> (b) whether that meaning is defamatory.
>
> 2. The jury determines whether a communication, capable of a defamatory meaning, was so understood by its recipient.

Restatement (Second) of Torts § 614

As a threshold matter, the court will first determine whether a statement is "capable of bearing a particular meaning." Model Instruction No. 1607 follows that approach. And this inquiry, courts are uniform in holding, is always legal matter for the judge to decide. *E.g.*, Rodney A. Smolla, 1 *Law of Defamation* § 4:38 (2d ed.) (collecting cases); Robert D. Sack, 1 *Sack on Defamation* § 2:4.16 (5th ed.) (same). When resolving that first "capable of bearing a particular meaning" standard, courts look at how a reasonable observer might interpret the dispute statement. *E.g.*, *see, e.g.*, *Hogan v. Winder*, 762 F.3d 1096, 1106 (10th Cir. 2014) ("In this evaluation of context, we should examine . . . the likely effect on the reasonable reader."); *see also* Sack, *supra*, § 2:4.16 n. 343 (collecting cases on this issue).

Accordingly, by the time the case reaches the jury, there will be a legal conclusion that the at-issue statement is reasonably capable of a defamatory meaning. Given that prior judicial finding, the question is what instruction juries should be given when asked to determine whether "a communication, capable of a defamatory meaning, was so understood by its recipient."

On the one hand, the court will have already found that a communication is reasonably "capable of the" defamatory meaning that plaintiff alleges. So, the logic might go, there is no need to ask the jury to find that a recipient's "understanding" of the "communication" was reasonable. And in one-on-one communications, after a finding of

reasonability by the Court, the only remaining questions will be how the single recipient interpreted the defendant's statement.

That said, the jury's role becomes more complicated in cases of mass communications. There may be countless potential viewers/readers, a small minority of whom could have an idiosyncratic interpretation of a statement. In such cases, some instruction should be given to the jury on whether a recipient's understanding of a message was reasonable. For example, the New York Model Jury Instructions provide that "[b]ecause language often has different meanings, the law imposes upon the plaintiff the burden of proving that the statement about which plaintiff complains would in fact be understood by the average person as defamatory." N.Y. Pattern Jury Instr.--Civil 3:24. The reasonability language, too, is common in decisions from various courts. *E.g.*, *Moldea v. New York Times Co*., 15 F.3d 1137, 1142–43 (D.C. Cir. 1994) (requiring "the recipient of the communication reasonably could understand" the statement as defamatory).

The New York instruction works well for truly mass communications. A more refined instruction would consider the community that receives the communication. Judge Sack explained it succinctly: "A statement published in a scientific journal ought not to be read in the same way as the same statement appearing in a comic book if the readers of each would be likely to understand the words differently." Sack, *supra*, § 2:4.4. The First Circuit put the standard best: "Allegedly defamatory language must be "construed in the light of what might reasonably have been understood therefrom by the persons who [heard] it." *Veilleux v. Nat'l Broad. Co*., 206 F.3d 92, 108 (1st Cir. 2000)

Upon some reflection, the instruction that you might consider modifying would be 1607 (rather than 1605, as I first suggested):

> Some statements may convey more than one meaning. For example, a statement may have one meaning that is defamatory and another meaning that is not. To support a defamation claim, [name of plaintiff] must prove, for each of these statements, that one or more of the recipients of the statement actually understood it in its defamatory sense—the sense that would expose [name of plaintiff] to public hatred, contempt, or ridicule. **When determining how a statement was "actually understood," you should consider how the statement would have been reasonably understood by the persons who heard or read it.** If a recipient did not actually understand a particular statement in its defamatory sense, then that statement cannot support a defamation claim.

TAB 3

Avoiding Bias

Our system of justice requires all of us—attorneys, judges, and jurors—to minimize the impact of our biases, whether conscious or subconscious, on our decision making. Researchers have identified several techniques we can use to accomplish this difficult, but necessary task:

> First, reflect carefully and consciously about the evidence presented. Focus on the facts and on the evidence you hear and see. The law requires that jurors' decision(s) are to be based on the evidence, and not simply on intuition or a gut reaction.
>
> Second, take the time you need to challenge what might be bias in your own thinking. Don't jump to conclusions that may be influenced by stereotypes about the parties, witnesses, or events.
>
> Third, try taking another perspective. Ask yourself if your opinion of the parties or witnesses would be different if the people participating looked different or if they belonged to a different group or if they had a different accent or if they spoke in a more educated manner.
>
> Fourth, listen to the opinions of the other jurors, who may have different backgrounds and perspectives from your own. Working together with the other jurors will help achieve a fair result. However, keep in mind that your decision(s) must be your own.

I have found these techniques helpful in lessening the impact of my own biases on my decision-making as a judge, and I therefore ask you to use these techniques as you consider the evidence in this case.

11/22/22 and 11/23/22 email correspondence between Stacy Haacke, Judge Pettit, and Judge Kelly:

From: **Judge Keith Kelly** <kakelly@utcourts.gov>
Date: Wed, Nov 23, 2022 at 12:45 PM
Subject: Re: Civil Jury Instruction - Implicit Bias
To: Judge Kara Pettit <kpettit@utcourts.gov>
Cc: Stacy Haacke <stacyh@utcourts.gov>, Judge Kent Holmberg <kholmberg@utcourts.gov>

Kara:

Our goal with the current proposed instruction was to produce an "avoiding bias" instruction that would not be controversial. We sought to create an instruction that would help jurors avoid invidious stereotypes, snap judgments, and implicit bias -- much like similar instructions about witness credibility and prohibitions against averaging or flipping a coin during deliberations.

Before the pandemic, the Civil MUJI Committee considered and rejected proposed implicit bias jury instructions suggested by the American College of Trial Lawyers ("ACTL"). Among the concerns expressed were that the proposed instructions were too intrusive in suggesting how the jurors should deliberate -- such as by suggesting they should consider the evidence as a "devil's advocate." Also, the members of the plaintiffs' and defense bars were at odds about language that should be used.

Earlier this year, several of us on the MUJI Civil Committee believed that we should revisit the issue. In particular, my thought was that we should be able to come up with a consensus instruction to encourage jurors to avoid bias -- one that both plaintiffs' and defendants' attorneys would approve.

The proposed "avoiding bias" instruction hopefully accomplishes this. In contrast to the proposed ACTL instructions, the current "avoiding bias" instruction discusses general principles for avoiding bias when weighting witness testimony and finding facts. It expressly avoids using the term "implicit bias." Rather it encourages jurors to carefully weigh the facts with four key non-controversial suggestions: a. reflect carefully on the evidence; b. don't jump to conclusions; c. consider other perspectives; and d. listen to other jurors who may have different backgrounds or perspectives. The closest it comes to raising the issue of implicit bias is by stating the importance of minimizing "the impact of our biases, whether conscious or subconscious, on our decision making." We expressly wanted to avoid the controversy over implicit bias issues.

While there may be controversy in the academic community about the existence and impact of implicit bias, the proposed "avoiding bias" instruction avoids those issues by generally addressing the issue of bias, and suggesting ways for jurors to avoid it.

Hopefully this provides helpful background to the Judicial Council. All proposed new jury instructions are sent out for comment to Utah State Bar members. I am reluctant to conclude that this particular instruction should be specially sent to the Board of District Court Judges. All judges are members of the Bar and will receive notice of the proposed instruction. I suggest that, if they have concerns about this instruction, they can provide comments though the normal process.

That being said, I recognize that the Judicial Council governs the Civil MUJI Committee. If the Council has concerns, it can decide to set aside the normal review process. I don't have concerns about giving any of our proposed jury instructions additional scrutiny. My sense is that the Civil MUJI Committee is always open to input and suggestions.

Best wishes, Keith

---------- Forwarded message ---------
From: **Stacy Haacke** <stacyh@utcourts.gov>
Date: Tue, Nov 22, 2022 at 10:04 AM
Subject: Re: Civil Jury Instruction - Implicit Bias
To: Judge Kara Pettit <kpettit@utcourts.gov>
Cc: Judge Keith Kelly <kakelly@utcourts.gov>

Judge,

I really appreciate your feedback and thoughts. Last year the judicial council expressed particular interest in this instruction, which is why it was brought up in more detail than others. Also, as you noted, it is unique. Judge Holmberg will have more information as to the research that went into these discussions, but I know various readings were shared with the group, and that Judge Landau, who helped the subcommittee with drafting, has been participating in a study by Harvard regarding these types of instructions. We can take the recommendation to include references back to the committee and subcommittee as well.

In terms of presenting these instructions to the Board of District Court Judges, I am not sure whether we have done this in the past. I am open to suggestions but would like to make sure our Committee Chair and Vice Chair are included once we get to that point. I will also ask Keisa whether we have done this in the past or if there are any reservations about doing so.

Thank you again for your attention to this instruction.

Hope you have a great holiday :)

On Tue, Nov 22, 2022 at 9:40 AM Judge Kara Pettit <kpettit@utcourts.gov> wrote:

Hi Stacy and Keith. Following up on a draft instruction on implicit bias that was brought to the Judicial Council's attention yesterday at our meeting during the update from the MUJI Civil JI committee. I have a vague recollection of an older study that found an

instruction could do harm instead of good, and was curious on the state of the social science and empirical studies on the issue so I did a very quick search last night, and saw a 2014 NCSC study and article from 2015 on NCSC website that recommended obtaining more empirical data. But that's about as far as I got--do either of you have more recent studies or data on the issue?

Also, at our meeting yesterday I asked about running this draft instruction by the District Board. As I said yesterday, I am not advocating the Board be involved in all jury instructions out of the committees, but this one seems a little bit different to me--as demonstrated by the fact that the Committee brought it specifically to the Council's attention which is not normally done--it is not a recitation of the law from cases/statutes--and I am not sure if there is consensus from the experts in this field on what an instruction like this should say in order to be effective and do no harm, but if this is presented to the District Board it might be helpful to cite those studies. On the draft presented to the Council yesterday, there were no citations for support--not sure if you have one that has those citations, but seems to me we'll have better buy in if one is prepared with citations.

Thanks for all the work you do on this committee--it is so important!

Kara

TAB 4

Comment for new instruction re: Pretrial Delay

I frequently conduct focus groups and communicate with jurors after trials who ask or comment about "why it took so long to get a case to trial." Certainly there are lots of reasons, procedurally and for court scheduling purposes, why cases take years to get to trial. But this negatively effects plaintiffs more than defendants because jurors think it's the plaintiff's "fault" for taking so long. I believe we need an instruction to ameliorate this problem to be included with the general instructions. Here is my recommendation:
Time taken for case to arrive at trial.
There are many reasons cases take months or years to arrive at trial. These reasons vary from, among other things, procedural requirements and court system scheduling issues. You must not consider the time taken for a case to arrive at trial as a reflection of the strengths or weaknesses of a person's position.
Tyler Young

Proposed Instruction:

CV-- **Time taken for case to arrive at trial.**
There are many reasons cases take months or years to arrive at trial. These reasons vary from, among other things, procedural requirements and court system scheduling issues. You must not consider the time taken for a case to arrive at trial as a reflection of the strengths or weaknesses of a person's position.

Committee Note:
This instruction may not be appropriate in every case.

MEMORANDUM

TO: CIVIL MUJI Committee
FROM: Chandler Blount, Judicial Extern & Judge Keith Kelly
DATE: September 22, 2022
RE: Proposed Model Utah Jury Instruction on Pretrial Delays

Dear Civil MUJI Committee Members:

I attach below a memo drafted by Chandler Blount, a U of U law student who is working with me this fall as an Extern. Based upon his research, there does *not* appear to be a standard model jury instruction on the issue of delay in getting a case to trial.

I look forward to discussing this issue with you at our next Civil MUJI Committee meeting.

Best wishes, Keith Kelly

Chandler Blount's Memo:

In this Memo, I have analyzed the following proposed model jury instruction and attached comment for originality among other jurisdictions:

> I frequently conduct focus groups and communicate with jurors after trials who ask or comment about "why it took so long to get a case to trial." Certainly[sic] there are a lot of reasons, procedurally and for court scheduling purposes, why cases take years to get to trial. But this negatively affects plaintiffs more than defendants because jurors think it's the plaintiff's 'fault' for taking so long. I believe we need an instruction to ameliorate this problem to be included with the general instructions. Here is my recommendation:
>
> **Time taken for the case to arrive at trial.**
>
> **There are many reasons cases take months or years to arrive at trial. These reasons vary from, among other things, procedural requirements and court system scheduling issues. You must not consider the time taken for a case to arrive at trial as a reflection of the strengths or weaknesses of a person's position.**

This Memo is broken down into three sections that address the issue; beginning with a Short Answer section, continuing with a Discussion section, and concluding with an Analysis section.

Issue 1: <u>Is the proposed Model Jury Instruction utilized in a similar fashion in other jurisdictions?</u>

(1) Short Answer

No.

Other jurisdictions have adopted model jury instructions that touch on delays regarding prosecutorial discretion, court scheduling, and judicial procedure. *See* instructions cited *infra* pp. 25. But none have model instructions that outright recite the language of Mr. Young's proposed MUJI. So, in considering whether or not to adopt such a MUJI, the committee should try to come to a consensus on whether or not the current instructions implicitly instill a sense of 'strength of a case ≠ how quickly a complaint was filed.' This can be done by deciding whether the framework of Utah's Model Jury Instructions sufficiently advises juries of the dangers of prejudicially ascertaining liability based on durational issues. And if it does not, what kind of language would be best suited to accomplish this goal.

(2) Discussion

I began my search through a series of Boolean inquiries on Westlaw, LexisNexis, and Bloomberg Law under each database's respective "Secondary Sources" & "Jury Instructions" compilations. Some common phrases and search terms that I included in these searches included; "time elapsed between incident and trial", "time to arrive at trial", and "long period between incident and trial." These phrases where also frequently modified with connectors (such as; "AND", "NOT", "OR", "!", and "/s") to ensure the order and/or syntax of these phrases did not preclude potential Model Jury Instructions from presenting themselves. Further, these inquiries were modified with various 'catch-all' phrases like; "must/may not consider", "end of statute of limitations", "court schedul!", and "procedur! requirement". And to be comprehensive, similar searches were conducted through Google to ensure that jurisdictionally-specific jury instructions were not missed because they may only be posted on a state-specific database.

The following section will present and analyze the most significant results of these searches and compare them to the proposed Model Jury Instruction listed above in order to ascertain the proposed MUJI's relative originality.

(3) Analysis

Model Utah Jury Instruction CV102 states that a jury "must follow the law as [it] weigh[s] the evidence and decide[s] the factual issues. Factual issues relate to what did, or did not happen in this case." MUJI 2d CV102. And while CV107 dictates that juries "must decide [a] case based on the facts and the law, without regard to . . . prejudice . . . ," the jury instructions do not explicitly proscribe the jury from correlating a delay in bringing a case with argument weakness. MUJI 2d CV107. Some jurisdictions seem to deal with this by adding a clarifying sentence to this instruction that is something to the effect of "[t]hat means that you must decide the case *solely* on the evidence before you." *See, e.g.*, Manual of Model Civ. Jury Instructions For the D. Cts. of the Ninth Cir., 1.4 Duty of Jury (emphasis added); *See also* MUJI 2d CV101 ("[Y]ou must not try to get information from any source other than what you see and hear in this courtroom."). So, clearly, while there were no Model Jury Instructions in other jurisdictions that were exactly on point for this issue, there were several that impliedly disallowed the jury from considering external, prejudicial factors (such as the time elapsed before a trial begins). Another such Model Jury Instruction reads as follows:

> Any party to a crime who did not directly commit the crime may be prosecuted for commission of the crime upon proof that the crime was committed and that the person was a party to it, *even though the person alleged to have directly committed the crime has not been prosecuted* or convicted, has been convicted of a different crime or degree of crime, is not amenable to justice, or has been acquitted.

1.42.11 Principal, Failure to Prosecute; Other Involved Persons, Georgia Suggested Pattern Jury Instructions – Criminal 1.42.11 (emphasis added). This model jury instruction hints at a very similar concept to the one at issue. It suggests that even though a case has or has not been levied against a specified criminal defendant, the strength of the case does not falter due to mere prosecutorial discretion. It is conceivable for a prosecutor to take an extended amount of time to prepare for a difficult or very important case. And it is almost universally agreed upon that this does not affect the strength of that case. So, it should be considered unreasonable for a jury members to rely on variations in the prosecutorial timelines of certain defendants when they are making decisions of guilt. And a similar strand of logic is ascertainable in the civil context. Civil plaintiffs may seek to settle their cases through various methods of alternate dispute resolution (arbitration, mediation, etc.) before actually bringing a case to the attention of the court. Therefore, just as there are extraneous prosecutorial decisions that may delay a case being brought, the same is true of civil plaintiffs' discretionary choices. And it is reasonable to assume that a Model Jury

Instruction standing for the proposition that the 'strength of a case should not be measured by the time elapsed before trial' can be gleaned in the above criminal instruction—and subsequently, can be applied in a civil context.

Next, a Mississippi Model Jury Instructions includes a sentence that reads "It may be necessary that I conduct some of the hearings . . . outside your presence. I will try to estimate the time needed for the hearing and for recesses, but frequently they last longer than we estimate because new issues arise." Miss. Prac. Model Jury. Instr. Civil § 1:13 (2d ed.). And while this sentence is a very tangential issue, it does touch on very important components found in the proposed MUJI mentioned above—court scheduling and procedural requirements. It notes that the court must remain temporally flexible in order to most efficiently facilitate its docket. So, it stands to reason that informing the jury of the issues surrounding scheduling and procedure, just as in the proposed MUJI, is not ground-breaking in and of itself.

Similarly Model Utah Jury Instruction CV 101 informs the jury that "you must not try to get information from any source other than what you see and hear in this courtroom. . . [t]his includes visiting any of the places involved in this case . . . ." MUJI 2d 101. In *Egbert v. Nissan*, the District Court of Utah expanded on this issue by stating that "In view of the time that elapses before a case comes to trial, substantial changes may have occurred at the location after the event that gives rise to this lawsuit." *See, e.g., Egbert v. Nissan*, 2006 Jury Instr. LEXIS 1465; *See also Egbert v. Nissan*, Case NO. 2:04-CV-00551 PGC, 2006 U.S. Dist. LEXIS 28730 (D. Utah, Mar. 1, 2006) (unpublished) (providing background knowledge about the case undergirding the pertinent jury instruction). In clarifying this issue, the Federal court seems to imply that the reasoning behind disallowing jurors to investigate the scene of an incident is because the long periods of time elapsed may give rise to prejudicial inferences in jury members—probably because the scene has likely changed in some regards. *Egbert v. Nissan*, 2006 Jury Instr. LEXIS 1465. But this implicitly demonstrates to the jury that it is commonplace for cases to be brought after extended periods of time. So, *explicitly* informing jurors of the often, extended periods of delay before litigation is brought is something that the jurors have already been *implicitly* told.

And finally, the most glaringly similar jury instruction propounded to further the desired result in the proposed MUJI was an instruction set forth in *Tamburo v. Ross/West View Emergency med. Servs. Auth.*, 2:04-cv-1237, 2007 WL 1175633 (W.D. Pa., Feb. 22, 2007) (unpublished). The instruction reads in part as follows:

> You may not draw any adverse inferences against any party based on the lapse of time between the time of the alleged discriminatory acts which

> culminated in the termination of Ms. Tamburo's employment in 2004 and the date of this trial in 2007. The timing of that, between the time of the termination and this trial have nothing to do with the parties but rather court schedules and the like.

TAMBURO v. ROSS/WEST VIEW EMERGENCY MED. SERVS. AUTH., 2007 JURY INSTR. LEXIS 238; *See also id.* (providing background knowledge about Tamburo's case, which supports the pertinent jury instruction). It is clear from the language of this case-specific instruction that the proposed MUJI and Tamburo's instruction get at the same idea. However, it does employ some differing language and is not a 'Model' instruction. Both of these considerations should be noted by the committee if/when the committee chooses to adopt a MUJI with similar content.

Summarily, it is clear that other jurisdictions have adopted model jury instructions that touch on delays regarding prosecutorial discretion, court scheduling, and judicial procedure. *See* instructions cited *supra* pp. 25. But none have model instructions that outright recite the language of Mr. Young's proposed MUJI. So, in considering whether or not to adopt such a MUJI, the committee should try to come to a consensus on whether or not the current instructions implicitly instill a sense of 'strength of a case ≠ how quickly a complaint was filed.' This can be done by deciding whether the framework of Utah's Model Jury Instructions sufficiently advises juries of the dangers of prejudicially ascertaining liability based on durational issues. And if it does not, what kind of language would be best suited to accomplish this goal.

TAB 5

MUJI Civil Upcoming Queue:

Numbers	Subject	Members	Progress	Next Report Date
1000	Products Liability	Tracy Fowler, Paul Simmons, Nelson Abbott, Todd Wahlquist	Appeared on Agenda November 2021. Continuing to work and will report back.	2023
	Avoiding Bias	Judge Kelly, Judge Landau, Alyson McAllister, Doug Mortensen, Rachel Griffin, Ruth Shapiro, Marianna Di Paolo, Annie Fukushima	Approved in October 2022. Presented to Judicial Council November 2022. Alyson will give an update at December meeting.	Dec. 2022
900	Easements and Boundary Lines	Adam Pace, Robert Cummings, Robert Fuller, Doug Farr	Finished Boundary by Acquiescence. Easement by Necessity last on agenda October 2022. Nearing completion and will report back.	?
1700	Assault / False Arrest	Mitch Rice, David Cutt, Andrew Wright, Alyson McAllister	Mitch is circulating instructions with the group and will report back.	
2400	Insurance	Andrew Wright, Richard Vazquez, Stewart Harman, Kigan Martinaeu	Appeared on Agenda March 2022. Currently 5 members – 3 defense, 2 plaintiffs. Will work on one more plaintiffs attorney.	?
	Unjust Enrichment	David Reymann	Stacy researching and following up on these instructions.	
1700	Abuse of Process	David Reymann	Instructions were shared in the past, where these completed? Marianna could only find notes as to intention to form this subcommittee.	
2700	Directors and Officers Liability	Adam Buck	Lauren has been working with Adam to fill this group and has reached out regarding a timeframe.	
2500	Wills / Probate	Matthew Barneck; Rustin Diehl	Matthew and Rustin have met to discuss direction and have started reaching out to various recommendations – Elder law section, Probate Subcommittee, WINGS, recommended individuals.	
2300	Sales Contracts and Secured Transactions	Matthew Boley, Ade Maudsley	Matthew and Addie are willing to work on this topic and would like more feedback from the Committee.	
	Case law updates	TBD	Previous chairs or group leads may have feedback.	

Archived Topics:

Numbers	Subject	Completed
1500	Emotional Distress	December 2016
200 / 1800	Fault / Negligence	October 2017
1300	Civil Rights: Set 1 and 2	September 2017
1400	Economic Interference	December 2017
1900	Injurious Falsehood	February 2018
1200	Trespass and Nuisance	October 2019
100	Uniformity	February 2020
1600	Defamation Update	March 2022