

MINUTES

Advisory Committee on Model Utah Civil Jury Instructions
September 9, 2024
4:00-6:00 pm

Present: Alyson McAllister, Ben Lusty, Bill Eggington, Douglas G. Mortensen, John Macfarlane, Mark Morris, Michael D. Lichfield, Ricky Shelton, Stewart Harmon, Jace Willard (staff), Kara H. North (staff).

Excused: Judge Brian D. Bolinder.

1. Welcome and Approval of Minutes

Ms. McAllister welcomed the Committee. The Minutes from the May meeting were approved.

2. Progress on Instruction Topics

Ms. McAllister informed the Committee that Mr. Mitch Rice and his group who are working on some additional research regarding instructions for Assault, False Imprisonment, and Malicious Prosecution will plan to come back before the Committee in December.

With respect to the Product Liability Instructions, the subcommittee agrees that changes are needed (due to *Bylsma v. R.C. Willey*, 2017 UT 85), but is struggling to come to a consensus, so additional members will likely be added to the subcommittee to assist in making the needed amendments.

3. CV2015: Survival Claim Statute

Ms. McAllister noted that the Committee Notes to this MUJI instruction needed to be corrected to reflect the statutory removal of a damage cap (Utah Code § 78B-3-107). The Committee unanimously agreed to this change.

4. CV301C: Committee Notes and Defense Letter

Mr. Willard reviewed the recent public comments (previously reviewed by the Committee at its meeting in May) and questioned whether the Committee had fully addressed the concerns raised regarding the jury's task to assess credibility of expert witnesses. The Committee discussed the appropriateness of this language when only one party has an expert witness and noted that the jury is still tasked with assessing credibility. Mr. Macfarlane suggested that CV133 likely resolved those concerns. The Committee reviewed the language of CV301C, and unanimously agreed to change the final sentence to: "It will be your responsibility to determine the credibility of the experts and to resolve any dispute."

The Committee also reviewed the CV301C Committee Notes regarding CV129, and discussed whether this instruction may or may not be used to supplement CV301C. Following discussion, including review of the Committee Notes to CV326, and the reasoning in *Lyon* in relation to

expert testimony being disregarded by the jury, the Committee agreed the statement regarding CV129 should be left unchanged.

5. Public Comments re: Removal of CV324 and Related Committee Note

The Committee reviewed the correspondence from Mr. James Driessen, which seemed to be directed at holistic medicine or alternative medicine. The Committee found that it did not appear to be relevant to the current instruction.

The Committee then discussed the correspondence sent by Mr. Miller and numerous defense counsel, submitted on June 28, 2024. The Committee noted that the correspondence was sent without the benefit of the minutes from the May 13, 2024, committee meeting where this was addressed in greater detail.

Ms. McAllister disagreed with the correspondence that there was any procedural error in the decision to remove the instruction prior to receiving public comment, as once the Committee votes on an instruction change, it is always immediately implemented. Ms. McAllister invited discussion of the other concerns raised by Mr. Miller. Mr. Macfarlane noted that Mr. Miller didn't address the underlying concern which precipitated the removal of CV324, which was confusing the jury. Rather, the argument of the letter was that CV324 or a similar instruction would be appropriate under certain circumstances, but not all. Mr. Macfarlane felt that the mere fact of applicability in some cases does not justify a required MUJI instruction, particularly without amendments to give courts and counsel guidance on when it is reasonably applicable.

Mr. Macfarlane and Mr. Lusty discussed the arguments on both sides of the issue. Mr. Macfarlane emphasized the lack of existing case law guidance and contradictory rulings in the district courts. The majority of the Committee agreed that there may be times when such an instruction would be appropriate, but it was not every time, and so it shouldn't be set as a standard instruction, which seemed to result in courts or counsel believing it was appropriate all the time.

Mr. Mortensen noted that while the correspondence cited 18 states that have a rule similar to CV324, that is a minority of the states, and that the majority of states apparently do not have such an instruction. Ms. McAllister noted that one or more of those states used instructions with language that was similar to the language previously rejected by the Court in Utah.

The Committee discussed various options about how to proceed. The options discussed included inviting others to come speak about their concerns to the committee, having the committee members themselves come up with an amendment to the original language and/or significant guidance in the notes. The committee agreed that the opinions of those on both sides of the issue had already been presented at length and there was no need for further public comments. Mr. Shelton pointed out that the need to come up with hypotheticals for when the instruction is appropriate or get into fact specific scenarios was evidence that the instruction should be left to the Courts and parties to propose appropriate language on a case by case basis. This is essentially what the committee previously did when coming up with and approving the note language that is currently in MUJI. The majority voted to affirm the Committee's prior decision to remove CV324, but keep the committee note language that acknowledged the inclusion of a more neutral

instruction regarding alternate treatment methods may be appropriate on a case by case basis upon a request by one of the parties. Mr. Harman and Mr. Lusty dissented and Mr. Lichfield abstained. The Committee did unanimously agree to remove the reference to CV324 in the CV301C Committee Notes given that the instruction is no longer included in MUJI.

6. *Next Committee Meeting*

Due to the lack of outstanding issues for the Committee to consider and the holiday in November, the Committee will reconvene on December 9th.