MINUTES

Advisory Committee on Model Civil Jury Instructions
January 9, 2017
4:00 p.m.

Present: Juli Blanch (chair), Joel Ferre, Tracy H. Fowler, Honorable Ryan M. Harris, Gary L. Johnson, Paul M. Simmons, Honorable Andrew H. Stone (by phone), Peter W. Summerill, Nancy Sylvester, Christopher M. Von Maack. Also present: Karra J. Porter from the Civil Rights subcommittee

Excused: Marianna Di Paolo, Patricia C. Kuendig

1. *Minutes.* On motion of Mr. Ferre, seconded by Mr. Johnson, the committee approved the minutes of the December 12, 2016 meeting.

2. *Emotional Distress Instructions.* The committee reviewed the revised committee note to CV1505. Mr. Simmons pointed out that *Johnson v. Rogers* was a bystander case. The committee added a reference to *Hansen v. Sea Ray Boats, Inc.*, 830 P.2d 236 (Utah 1992), which discusses the distinction between direct and bystander claims, and completed the reference to *Lawson v. Salt Lake Trappers.* The committee also deleted the second reference to *Johnson v. Rogers* in the third paragraph of the note, since the parenthetical did not represent the opinion of the court in that case. On motion of Mr. Simmons, seconded by Mr. Johnson, the committee approved the note as revised. This concluded the committee's review of the Emotional Distress instructions.

3. *Civil Rights Instructions.* The committee continued its review of the Civil Rights instructions:

a. *CV1304, Probable Cause.* Dr. Di Paolo had questioned whether the second sentence of the first paragraph added much. At Judge Harris's suggestion, the firs paragraph was revised to read:

> Probable cause exists when an officer has knowledge of facts and circumstances that are of such weight and persuasiveness as to convince a prudent and reasonable person of ordinary intelligence, judgment, and experience that it is reasonably likely that a crime has been committed and that the person arrested committed the crime.

Ms. Porter expressed her opinion that there is a tendency to include comments in jury instructions that are properly left for argument and thought the instruction should only instruct the jury on what it needs to know to decide the factual issues in the case. Based on that, she suggested deleting the last sentences of the second and third paragraphs. The committee agreed. Ms. Porter also questioned whether there was a difference between "prudent" and "reasonable." She thought that if both terms were used together, jurors would not think they were synonyms

but would mistakenly equate "prudent" with "cautious." Judge Harris and Mr. Fowler agreed that, if they are intended to mean the same thing, "prudent" could be deleted. Judge Stone disagreed and thought that the committee was getting away from its assignment if it strayed too far from the Supreme Court's language ("prudent and reasonable"). (Milo, his dog, concurred.) Mr. Simmons asked what the standard was for probable cause, since the definition in the first paragraph says, "reasonably likely," suggesting more likely than not, but the second paragraph said that it is not a preponderance of the evidence. Judge Harris noted that the standard is less than a preponderance. Mr. Simmons suggested that the concept is that an officer needs a sufficient basis that a reasonable person would feel justified in acting on it, even though it may be less than a preponderance. At Judge Harris's suggestion, the committee deleted all of the second paragraph except the first sentence, revised the first sentence to read, "Probable cause does not require that the officer had proof beyond a reasonable doubt, or even that the officer had proof by a preponderance of the evidence," and moved this sentence to the beginning of the instruction. Mr. Summerill noted that the committee had traditionally not spent time telling the jury what is *not* required and questioned whether this sentence was necessary. The committee (and subcommittee, according to Ms. Porter) thought that it was helpful to draw the distinction between probable cause and other standards of proof that the jury may have heard about, namely, beyond a reasonable doubt and a preponderance of the evidence, and therefore left the sentence in. The committee deleted the last sentence of the instruction and the committee note referring to it. On motion of Mr. Simmons, seconded by Judge Harris and Mr. Summerill, the committee approved the instruction as revised.

b. *CF1305, Unlawful arrest–any crime.* The committee revised the instruction to read:

> It is not necessary that [name of arresting officer] had probable cause to arrest [name of plaintiff] for the offense with which [he/she] was charged so long as [name of arresting officer] had probable cause to arrest [him/her] for some criminal offense.

Mr. Porter noted that on rare occasions the person making the arrest may not be an officer but thought that the instruction as revised would cover the vast majority of situations. In the rare case where the arrest was not made by an officer, the court and parties can modify the instruction to fit the facts. On motion of Mr. Johnson, seconded by Mr. Fowler, the committee approved the instruction as modified.

c. *CV1306, Unlawful arrest–minor crime.* Mr. Johnson questioned whether the last two paragraphs were necessary. Ms. Porter questioned whether

the instruction was necessary. She thought it was more in the nature of a comment that was best left for the attorneys to argue. The committee asked what the genesis of the instruction was. The instruction was tabled to give Ms. Porter a chance to go back to the subcommittee with the committee's questions and concerns.

d. *CV1307, Reasonable suspicion.* Ms. Porter suggested deleting the instruction. Judge Harris thought it was helpful. He suggested substituting "justify" for "warrant" in the first paragraph. Ms. Porter thought that the second paragraph unduly emphasized some factors to the exclusion of others and should be dropped. Mr. Simmons asked how the issue comes up, since none of the prior instructions mention "reasonable suspicion." Ms. Porter explained that it is the standard for detentions that don't amount to an arrest, such as a *Terry* stop. Ms. Sylvester did a word search of the Civil Rights instructions and did not find any other uses of the term. Ms. Porter thought that an instruction on detentions may have been inadvertently dropped. The committee decided to table the instruction and review it in connection with the instruction or instructions it relates to.

e. *CV1311, Searches–property, defined.* Mr. Simmons noted that the instruction defines "search," but the title makes it look like it is a definition of "property." The committee revised the title to "Searches of property." Mr. Simmons also noted that the definition seemed to be at odds with a lay understanding of "search" in that it does not require that the person intruding on the property actually look for anything. Ms. Porter explained that that was because the law does not want the lawfulness of a search to depend on whether the officer entering on property had the subjective intent to look for something; otherwise, a defendant could escape liability for a civil rights violation by simply claiming that the officer wasn't looking for anything when he went on the property. At Judge Harris's suggestion, the instruction was revised to read:

> "Search" has a special meaning under the law. A search of property occurs if a [government actor] intrudes into an area in which a person would have a reasonable expectation of privacy.

The committee debated whether the last clause should read "in which a *reasonable* person would have a reasonable expectation of privacy." The committee thought that the plaintiff did not have to be a reasonable person in other respects; he or she just had to have a reasonable expectation of privacy in his or her property. The committee deleted the committee note as unnecessary. Cases in which it would arise would never get to a jury because they would be decided on summary judgment. Mr. Summerill asked whether the subcommittee had considered Utah law under the Utah Constitution. Ms. Porter said that it had. Utah law was similar to federal law in some respects and more favorable to

the rights of individuals in other respects. The subcommittee did not consider whether Utah law required a higher standard because most of the cases plead both federal and state law since federal law provides for an award of attorney fees to a prevailing plaintiff, whereas Utah law does not clearly do so; therefore, most civil rights cases get removed to federal court and decided under federal law. Mr. Summerill and others questioned why the committee was preparing instructions for use in federal court. Ms. Blanch and Ms. Porter explained that the federal district court in Utah looks to the Model Utah Jury Instructions for guidance. On motion of Judge Harris, seconded by Mr. Johnson, the committee approved the instruction as revised.

f. *CV1312, Seizures–property defined.* Consistent with its treatment of CV1311, the committee changed the title of the instruction to "Seizures of property" and inserted an introductory sentence: "'Seizure' has a special meaning in the law." The committee deleted the committee note, which referred to the deleted note to CV1311. Ms. Porter said she did not know why the subcommittee included the alternatives "[takes/removes]"; she thought "removes" was broad enough to cover all situations. The committee decided to leave the alternatives in. Messrs. Fowler and Simmons questioned whether a seizure could involve interference with a person's right to use the property without interfering with his right to possess it. Mr. Summerill offered the example of putting a boot on a car; the owner remains in possession of the car but cannot drive it. Mr. Simmons suggested substituting "[possess/use]" for "possess." Ms. Porter thought that "possess" was broad enough to cover use. She noted that the Supreme Court had recently decided in *Shaw v. United States,* No. 15-5991 (U.S. Dec. 12, 2016), that a bailee had a sufficient property interest in bailed property to have been deprived of the property by a scheme to defraud. She thought a court would have no trouble finding that a meaningful interference with a person's right to use property also meaningfully interferes with his right to possess the property. Mr. Von Maack did not disagree with the idea that interference with use of property can amount to a civil rights violation but said that he could not find "use" in the case law. The committee decided to stay with "possess" and not add "use." On motion of Mr. Von Maack, seconded by Mr. Summerill, the committee approved the instruction.

g. *CV1313, [Entry/Search] of a Residence.* Judge Harris questioned the use of "[enter/search]." He noted that the definition of "search" in CV1311 is broad enough to cover entries on property. All entries are searches (by CV1311's definition), but not all searches are entries. He thought if they are separate concepts, they should be treated separately, by changing the definition of "search" or adding a committee note to CV1311 saying that it is broad enough to cover entries, which a lay person may not consider a "search"; adding a committee note to CV1313 explaining the addition of the term "enter"; using

"[enter/search]" throughout the instructions (including CV1311); adding an instruction on the right to be free from unconstitutional "entries"; or some other way. Ms. Porter thought that they were separate concepts (that is, that you could have an entry that was not a search) but that they were governed by the same standard. The committee sent the issue back to the subcommittee to consider the best way to deal with it.

4. *Next meeting.* Because Ms. Blanch will be in trial on the next regularly scheduled meeting date (February 13), the next meeting was changed to Monday, February 27, 2017, at 4:00 p.m.

The meeting concluded at 6:00 p.m.