

## ***MINUTES***

Advisory Committee on Model Civil Jury Instructions

June 12, 2017

4:00 p.m.

Present: Honorable Ryan M. Harris (acting chair), Marianna Di Paolo, Joel Ferre, Ruth A. Shapiro, Paul M. Simmons, Honorable Andrew H. Stone, Nancy Sylvester. Also present: Alyson C. McAllister from the Civil Rights subcommittee

Excused: Juli Blanch (chair), Tracy H. Fowler, Patricia C. Kuendig, Peter W. Summerill, Christopher M. Von Maack

Judge Harris conducted the meeting in Ms. Blanch's absence.

1. *Minutes.* Ms. McAllister noted a correction on page 2 of the May 8, 2017 minutes ("probable cause" for "probably cause"). With that correction, Ms. Shapiro moved to approve the minutes, seconded by Mr. Ferre. The motion passed without opposition.

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

a. *State v. Martinez.* Ms. McAllister said that the Utah Supreme Court's recent decision in *State v. Martinez*, 2017 UT 26, does not change any of the instructions.

b. *CV1311, Search or entry of property, and CV1312, Lawful [entry/search] of real property.* Ms. McAllister said she thought that "entry" could be deleted from CV1311 and CV1312, since an entry is a subcategory of a search. Ms. Sylvester noted that the cases cited in the references all involved searches of residences. Judge Harris asked if the elements are different for a nonresidence. Ms. McAllister did not think the elements were different, but the nature of the real property searched could affect the "reasonableness" analysis. Mr. Simmons noted that "reasonableness" factors in two ways: CV1310 defines "search" of property in terms of whether a person would have a "reasonable" expectation of privacy in the property, and CV1311 requires that the search be "not 'reasonable.'" Ms. McAllister said that Ms. White and Ms. Cepernich of the Civil Rights subcommittee did not think that CV1312 covered all situations and came up with six different ways a search could be valid: (1) a search pursuant to a valid warrant; (2) a search pursuant to consent; (3) a search with probable cause and under exigent circumstances; (4) a "search" of items in plain view; (5) a *Terry* stop frisk; and (6) an auto search. Dr. Di Paolo suggested bracketing the six ways. Mr. Simmons noted that there is already an instruction on *Terry* stops, CV1307A. Judge Harris thought that CV1312 should be limited to searches of real property rather than trying to cover all searches. On motion of

Mr. Simmons, seconded by Judge Stone, the committee approved CV1311 and CV1312 as revised, without the additional three circumstances.

c. *CV1315, Search of residence pursuant to arrest warrant.* The committee changed the title to “Protective security sweep.” At Ms. Shapiro’s suggestion, the committee started a new paragraph after the first sentence. Dr. Di Paolo noted that “cursory” and “pursuant to” were problematic words. The committee replaced “pursuant to” with “based on” and revised the third sentence to say, “It is a limited inspection of just those spaces where a person may be found.” Judge Stone suggested deleting the last sentence. At Judge Harris’s suggestion, the last sentence was revised to read, “An arrest warrant does not authorize any search greater than a protective security sweep,” and it was made its own paragraph. On motion of Judge Stone, seconded by Mr. Simmons, the committee approved CV1315 as revised.

d. *CV1316, [Entry/Search] of residence pursuant to search warrant.* The committee preferred the first version to the alternative. Judge Harris noted that a search warrant can lack probable cause even if it is accurate, but, as Judge Stone noted, if the judicial officer issues the warrant without probable cause, the officer cannot be sued for executing it. Judge Stone noted that the warrant may be valid, but it is only a civil rights violation if an officer lied to obtain the warrant, and only the person who lied is subject to liability. Judge Harris noted that the issue for the jury is not whether the warrant was supported by probable cause. Judge Harris noted that it is a constitutional violation to knowingly include false information in a search warrant application. Mr. Simmons suggested that the question for the jury is the officer’s intent or knowledge in providing information for the warrant application. Ms. Shapiro suggested that the instruction be renamed, “Validity of search warrant application.” The committee rewrote the instruction to read:

In this case, [name of plaintiff] claims that, even though the officer had a search warrant, the search was nonetheless unconstitutional. In order to prevail on this claim, [name of plaintiff] must prove by a preponderance of the evidence that--

1. at the time of the search warrant application, [name of defendant(s)] knowingly, intentionally, or with reckless disregard for the truth, omitted information from or included false statements in the application, and
2. the information, if accurately included, would have changed the magistrate’s decision to issue the warrant.

The committee deleted the committee note. On motion of Mr. Simmons, seconded by Judge Stone, the committee approved the instruction.

e. *CV1317, Consent.* Judge Harris questioned placing the factors for the jury to consider in a committee note rather than in the text of the instruction. He suggested moving them to the text and bracketing them. Judge Stone did not think it was proper to list the factors at all. He noted that they are based on exclusionary rule cases and did not think they applied to a private, civil cause of action for damages. He was uncomfortable saying that a person gets a private right of action for what is essentially a violation of the criminal law's exclusionary rule. Judge Harris did not necessarily agree. He thought the standard was the same and that the factors were just that--things for the jury to consider, none of which is necessarily dispositive. Ms. Shapiro suggested saying that the circumstances the jury could consider "include but are not limited to the following." Judge Stone thought the factors were irrelevant. He thought it was purely a matter of contract. He noted that duress can be a defense to a contract claim. Ms. Shapiro thought it was confusing to put factors for the jury to consider in the body of the instruction. Dr. Di Paolo suggested just saying that it depends on the circumstances and not give examples, allowing the attorneys to argue the circumstances. Dr. Di Paolo thought that the second sentence of the instruction should read "expressed [rather than 'express'] or implied." Judge Harris suggested saying, "expressly stated or implied by conduct." The committee debated who has the burden of proof on the issue of consent. Ms. Sylvester cited *Amato v. City of Richmond*, 875 F. Supp. 1124, 1133 (E.D. Va. 1994), for the proposition that it is the plaintiff's burden to prove involuntary consent. Judge Stone agreed. He thought the burdens of proof are very different depending on whether the case is a criminal case or a civil rights case. The government has the burden of proving voluntary consent in a criminal suppression case, but, he asked, why should an officer be liable for relying on a plaintiff's consent in a civil case if he had no reason to doubt the plaintiff's consent? But Ms. McAllister thought that the government has the burden of proving an exception to the warrant requirement in a civil context, and consent is an exception to the warrant requirement. At Judge Harris's suggestion, the committee sent the instruction back to the subcommittee to answer certain questions: Who has the burden of proof? Is the definition of the voluntariness of consent different in the civil and criminal contexts? Is there civil authority for the factors listed in the committee note? Whose state of mind is relevant? Is the question the voluntariness of the consent or whether a reasonable officer would have thought that the consent was voluntary? Ms. McAllister noted that the considerations could go to the question of qualified immunity, which is a question for the court, not the jury.

3. *Next meeting.* The next meeting is Monday, September 11, 2017, at 4:00 p.m.

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The meeting concluded at 5:50 p.m.