

MINUTES

Advisory Committee on Model Civil Jury Instructions

September 11, 2017

4:00 p.m.

Present: Juli Blanch (chair), Marianna Di Paolo, Joel Ferre, Tracy H. Fowler, Honorable Ryan M. Harris, Ruth A. Shapiro, Paul M. Simmons, Honorable Andrew H. Stone, Peter W. Summerill, Nancy Sylvester, Christopher M. Von Maack. Also present: Heather White from the Civil Rights subcommittee

Excused: Patricia C. Kuendig

1. *Judge Harris.* The committee congratulated Judge Harris on his appointment to the Utah Court of Appeals and thanked him for his five years of service on the committee. Judge Harris was then excused. His parting words of wisdom echoed those of Frank Carney: “Don’t let the perfect be the enemy of the good.”

2. *Committee Chair.* Ms. Blanch announced that she would be leaving the committee and stepping down as the chair in November 2017. Judge Stone will be the new chair.

3. *Minutes.* On motion of Ms. Shapiro, seconded by Judge Stone, the committee approved the minutes of the June 12, 2017 meeting.

4. *Schedule.* Ms. Blanch reported that the first hour of the October meeting will be devoted to Judge Lawrence’s comments on the negligence instructions. Ms. Sylvester will re-circulate them before the next meeting. The second hour will be devoted to the Economic Interference instructions.

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

a. *CV1317, Consent.* At the last meeting, the committee had questioned who had the burden of proof and whether there was a difference in the definition of voluntariness between civil and criminal cases. Ms. White said that the plaintiff has the burden to prove all elements of the claim, but the defendant has the burden of proving that consent was freely given, by a preponderance of the evidence, based on the totality of the circumstances. The definition of voluntariness is the same in both the civil and criminal contexts. The committee decided against listing, in either the instruction or the committee note, factors for the jury to consider in determining the voluntariness of the consent but instead to leave it to the attorneys to argue what factors they think are relevant in a particular case. At Judge Stone’s suggestion, the committee changed “voluntary” to “freely given.” The committee revised the instruction to read:

Consent is permission for something to happen, or an agreement to do something. Consent must be freely given, but it may be either expressly stated or implied by the circumstances. [Name of defendant] has the burden to prove by a preponderance of the evidence that [he/she] reasonably believed based on all the circumstances that [name of plaintiff] consented to the search and to prove that the consent was freely given.

Dr. Di Paolo joined the meeting.

The committee revised the committee note to say that the instruction should be used only when consent is at issue, such as in the case of a warrantless search or when a warrant is claimed to be invalid. Ms. Blanch suggested also adding citations to some of the cases that discuss factors relevant to the issue of consent. On motion of Ms. Shapiro, seconded by Judge Stone, the committee approved the instruction as revised.

b. *CV1318, Probable cause--search of a residence.* At the suggestion of Ms. Blanch and Ms. White, the committee note was deleted. It was thought that examples of what is *not* probable cause were not appropriate and better left for argument. Judge Stone asked how CV1318 differed from CV1314, "Entry of residence pursuant to arrest warrant." Ms. White explained that CV1314 applied when someone was entering a residence to arrest someone, whereas CV1318 applied to warrantless entries of a residence to search for evidence. Judge Stone suggested adding a committee note to the effect that the instruction should only be used in conjunction with CV1319 on exigent circumstances. Dr. Di Paolo thought that CV1318 and CV1319 speak to different things and thought how they were supposed to fit together was confusing. Ms. Blanch noted that CV1312(3) lists as an exception to the warrant requirement cases where the officer has both probable cause to search real property *and* exigent circumstances exist. Mr. Von Maack suggested adding a definition of probable cause to CV1312 and found a definition in *State v. Moreno*, 2009 UT 15, ¶ 37, 203 P.3d 1000. Based in part on that definition, the committee revised CV1318 to read:

Probable cause to search exists when the facts and circumstances known to the officer, based on reasonably trustworthy information, are such that a reasonable officer would believe that [contraband] [evidence of a crime] [or] [the subject of an arrest warrant] will be found in the residence [or] [there is a substantial chance that criminal activity is occurring in the residence].

Judge Stone and Dr. Di Paolo thought that an instruction on the permissible scope of the search was needed. The committee added a reference to CV1315, on

protective sweeps, to the committee note and added a reference to *Illinois v. Gates*, 462 U.S. 213 (1983).

Messrs. Ferre and Summerill were excused.

On motion of Ms. Shapiro, seconded by Ms. Blanch, the committee approved the instruction as revised.

c. *CV1319, Exigent circumstances.* At Ms. Blanch's suggestion, the committee revised the instruction to read:

Exigent circumstances exist when an officer, acting on probable cause and in good faith, reasonably believes, based on all the circumstances known to the officer at the time, that the delay in getting a search warrant will result in:

[(1) evidence or contraband being immediately destroyed; or]

[(2) an officer or another person being placed in immediate danger; or]

[(3) a suspect potentially escaping.]

The committee added a note to the effect that there may be other circumstances that might be considered "exigent," citing *State v. Yoder*, 935 P.2d 534 (Utah Ct. App. 1997). The committee also added *Yoder* and *Brigham City v. Stuart*, 547 U.S. 398 (2006) to the references. On motion of Mr. Simmons, seconded by Ms. Blanch, the committee approved the instruction as revised.

At the suggestion of Ms. Blanch, instructions CV1317-19 were moved to follow CV1312. The remainder of the Civil Rights instructions will be discussed at later meetings.

6. *Next meeting.* The next meeting is Monday, October 2, 2017, at 4:00 p.m. (the second Monday of the month being Columbus Day). Mr. Simmons asked to be excused from the October meeting.

The meeting concluded at 6:00 p.m.