Agenda
Advisory Committee on
Model Civil Jury Instructions

January 8, 2018
4:00 to 6:00 p.m.

Administrative Office of the Courts
Scott M. Matheson Courthouse
450 South State Street
Judicial Council Room, Suite N31

Welcome, announcements, and approval of minutes	Tab 1	Judge Andrew Stone, Chair
Subcommittees and subject area timelines	Tab 2	Judge Andrew Stone
Injurious Falsehood	Tab 3	David Reymann
Other business		Judge Andrew Stone

Committee Web Page

Published Instructions

Meeting Schedule: Matheson Courthouse, Judicial Council Room, 4:00 to 6:00 p.m. unless otherwise stated.

February 12, 2018
March 12, 2018
April 9, 2018
May 14, 2018
June 11, 2018
September 10, 2018
October 15, 2018
November 19, 2018
December 10, 2018

Tab 1

MINUTES
Advisory Committee on Model Civil Jury Instructions
November 13, 2017
4:00 p.m.

Present: Juli Blanch (Chair), Nancy Sylvester (staff), Professor Marianna Di Paolo, Joel Ferre, Tracy H. Fowler, Ruth A. Shapiro, Paul Simmons, Honorable Andrew H. Stone, Peter W. Summerill, Christopher M. Von Maack.

Excused: Patricia Keundig

Guests: Ryan Frazier

1. *Welcome, announcements and approval of minutes*. Ms. Blanch welcomed the committee to the meeting. She announced that Professor Di Paolo had received an award at the Bar's Fall Forum regarding her work on the committee. Judge Stone amended the October minutes to reflect that Ms. Blanch had discussed the preamble, not him. On motion of Tracy Fowler, seconded by Judge Stone, the committee approved the minutes of the October 2, 2017 meeting.

Ms. Blanch asked Mr. Von Maack to look at the *Leigh Furniture* case in preparation for discussing CV 1403 to see if there was a discussion about purpose of interfering/intentional interference. Mr. Furniture said the case discusses purpose of injuring with respect to breach of contract.

Ms. Sylvester then spoke about Ms. Blanch's service to the committee and Ms. Blanch thanked the committee for its work.

2. *Economic Interference Instructions*

Instruction CV 1403. "Intentionally Interfered" Defined.

Ms. Blanch said she had a question about whether the committee should include a knowing element with respect to the person having acted with the purpose of interfering. She thought if the person acted with purpose, it must be knowing. The committee observed that the subcommittee got the instruction language from the *Leigh Furniture* case. The committee looked to the *Mumford* and *Eldridge* cases to determine if there was more it should add to clarify the instruction. Ultimately, the committee left the instruction intact.

Judge Stone moved to approve instruction 1403 and Ruth Shapiro seconded the motion. The motion passed unanimously. The approved instruction reads as follows:

CV 1403. "INTENTIONALLY INTERFERED" DEFINED.

You must next determine whether [name of defendant] intentionally interfered with [name of plaintiff]'s [existing] or [potential] economic relationship. For [name of defendant] to have intentionally interfered with an existing or potential economic relationship of [name of plaintiff], [name of defendant] must have

1) acted for the purpose of interfering with that relationship or
2) acted knowing that the interference was substantially certain to occur as a result of [his/her/its] actions.

References:
Leigh Furniture & Carpet Co. v. Isom, 657 P.2d 293 (Utah 1982)
Mumford v. ITT Commercial Fin. Corp., 858 P.2d 1041, 1044 (Utah Ct. App. 1993)
Restatement (Second) of Torts § 8A (the word "intent" denotes that the actor desires to cause the consequences of his act or believes that the consequences are substantially certain to result from it)

MUJI 1st Instruction
19.3

Instruction CV 1404. Definition of "Improper Means."

The committee moved the following from the instruction to the committee note: "Improper means may include such things as acts of violence, threats or other intimidation, bribery, false statements, defamation, a wrongful lien, bringing a lawsuit without any basis, taking money or property to which one was not entitled, or violating a court order." The committee also requested follow up feedback from the subcommittee on paragraph 2 of the note. Some of the committee members felt that the case law read differently that the way it was written. If the committee was right, the last sentence of the instruction would be impacted: "A deliberate breach of contract, even when used to secure economic advantage, is not, by itself, an 'improper means'; nor is an intent to inflict injury, by itself, an 'improper means.'" The committee also asked the subcommittee to explore whether nominal damages are appropriate in these claims and whether a new instruction to that effect should be drafted.

The instruction was left as follows, pending changes from the subcommittee:

CV1404 DEFINITION OF "IMPROPER MEANS."

The second element of [name of plaintiff]'s claim is that [name of defendant] interfered with [name of plaintiff]'s existing or potential economic relations by improper means. "Improper means" is defined as action that was contrary to law or violated an established standard of a trade or profession.

References:

Eldridge v. Johndrow, 2015 UT 21, 345 P.3d 553
Leigh Furniture & Carpet Co. v. Isom, 657 P.2d 293 (Utah 1982)
Sampson v. Richins, 770 P.2d 998 (Utah Ct. App. 1989)

MUJI 1st Instructions
19.5 & 19.6

Subcommittee Note
Improper means may include such things as acts of violence, threats or other intimidation, bribery, false statements, defamation, a wrongful lien, bringing a lawsuit without any basis, taking money or property to which one was not entitled, or violating a court order. The court and parties should tailor examples of improper means to the facts of the case. If there is some question as to whether the defendant violated a statute or rule or committed a separate tort as part of his improper means, the court may have to give separate instructions on the elements of the statute or tort.

Leigh Furniture & Carpet Co. v. Isom, 657 P.2d 293, 309 (Utah 1982), suggested that an intentional breach of contract with the intent to inflict injury may constitute improper means. The subcommittee did not think this part of *Leigh* survived the Utah Supreme Court's abandonment of the "improper purpose" prong of *Leigh* in *Eldridge v. Johndrow*, 2015 UT 21. Arguably, the same considerations that caused the court to abandon the "improper purpose" prong would also counsel against finding liability for tortious interference for even a malicious breach of contract. The court in *Eldridge*, however, did not specifically address the issue but recognized that a defendant's motivation may still be relevant to a tortious interference claim, including "relevant to the improper means prong of the *Leigh Furniture* test." *Id.* ¶ 67. The subcommittee thought that the court was probably referring to improper means that require intent as an element of the tort or crime and not to lawful actions that were taken with a bad motive. To hold otherwise would in effect reinstate the abandoned "improper purpose" alternative.

Instruction 1405. Defenses: Privilege.

The committee discussed the *Eldridge v. Johndrow, 345 P.3d 553,* case and its interplay with the *Leigh Furniture* case. In *Eldridge,* the Supreme Court held that 1) there was no evidence that defendant interfered with plaintiffs' economic relations through an improper means, as required to support a tortious interference claim, and 2) in the absence of any improper means, an improper purpose is not grounds for tortious interference liability, overruling *Pratt v. Prodata*, 885 P.2d 786, and *Leigh Furniture & Carpet Co. v. Isom*, 657 P.2d 293. So although *Eldridge* said improper purpose cannot by itself support a claim for tortious interference, *Leigh Furniture* is still good law for the privilege defense instruction.

Ruth Shapiro moved to approve instruction CV1405 and Joel Ferre seconded the motion. The committee approved the instruction as follows:

CV1405. DEFENSES: PRIVILEGE.

[Name of defendant] claims that [his/her/its] actions in interfering with [name of plaintiff]'s economic relations were privileged [Name of defendant] claims that [his/her/its] conduct was privileged under the [describe the privilege]. [Name of defendant] must prove the following: [Describe the elements of the privilege.] To the extent you find [name of defendant]'s actions were subject to a privilege, you cannot find those actions to be an "improper means."

References:

Mumford v. ITT Commercial Financial Corp., 858 P.2d 1041 (Utah Ct. App. 1993)
Leigh Furniture & Carpet Co. v. Isom, 657 P.2d 293 (Utah 1982)

MUJI 1st Instructions

None

Subcommittee Note

Privilege has been recognized by the Utah Supreme Court and the Utah Court of Appeals as an affirmative defense to an intentional interference with prospective economic relations claim. It does not become an issue unless "'the acts charged would be tortious on the part of an unprivileged defendant.'" *Mumford v. ITT Commercial Financial Corp.*, 858 P.2d 1041, 1043-44 (Utah Ct. App. 1993) (quoting *Leigh Furniture & Carpet Co. v. Isom*, 657 P.2d 293, 304 (Utah 1982)).

The Utah Court of Appeals has explained that "'[e]ven a recognized privilege may be overcome when the means used by defendant are not justified by the reason for recognizing the privilege.'" *Mumford*, 858 P.2d at 1043-44 (quoting *Top Serv. Body Shop, Inc. v. Allstate Ins. Co.*, 582 P.2d 1365, 1371 (Or. 1978) (en banc)). Therefore, a privilege is not an absolute defense. If the plaintiff claims that a recognized privilege should not apply because the reason for recognizing the privilege does not apply under the facts of the case, the court may also need to instruct the jury on the reason for the privilege and the parties' arguments for why it should or should not apply under the circumstances.

If a privilege instruction is given to the jury, an instruction defining and describing the applicable privilege should be given to the jury so that it can properly assess whether the privilege applies. For example, an individual may be able to raise a privilege for statements that would otherwise be defamatory if the statements were made in the course of or incident to juridical or quasi-judicial proceedings. Because of the number and variety of possible privileges, the subcommittee did not think it practicable to provide instructions on each possible privilege. Where a privilege is claimed, the court should instruct the jury as to the nature of the privilege claimed and what the jury must find to conclude that it bars the plaintiff's claim.

Instruction 1406. Damages.

The committee discussed Instruction 1406's interplay with the tort damage instructions the committee has already drafted. The committee modified the subcommittee note to better refer to those instructions.

Paul Simmons moved to approve instruction CV1406 and Joel Ferre seconded the motion. The committee approved the instruction as follows:

CV1406. DAMAGES.

If you find that [name of the defendant] intentionally interfered with [name of plaintiff]'s economic relations, then you should award [name of the plaintiff] damages that will reasonably compensate for any harm [name of the plaintiff] has suffered because of the interference with economic relations.

References:
TruGreen Cos. v. Mower Bros., Inc., 2008 UT 81, 199 P.3d 929
Sampson v. Richins, 770 P.2d 998 (Utah Ct. App. 1989)
Restatement (Second) of Torts § 774A (1979)

MUJI 1st Instructions
19.15 & 19.16

Committee Note
Practitioners should also use the tort damages instructions at CV2001, et. seq., that are applicable. Damages could include lost monetary or other benefits or expectations under a contract, any actual harm to plaintiff's reputation, lost profits, or emotional distress caused by defendant's interference.

Instruction 1407. Damages: Lost Profits.

The committee reviewed CV 1407 and made no changes, but discussed whether a nominal damages instruction would be appropriate. The committee requested that the subcommittee answer that question at the next meeting.

Tracy Fowler moved to approve instruction CV1407 and Ruth Shapiro seconded the motion. The committee approved the instruction as follows:

CV1407. DAMAGES: LOST PROFITS.

To award damages for lost profits, you must have a reasonable basis for calculating them. Although past profits cannot be taken as an exact measure of future or anticipated profits, you may consider the past profits and losses of the plaintiff's business in determining lost future profits. You may also consider any increase or decrease in business that might have been reasonably expected if there had been no interference.

References:
TruGreen Cos. v. Mower Bros., Inc., 2008 UT 81, 199 P.3d 929

MUJI 1st Instructions
19.15 & 19.16

3. *Other business.* There was no other business to discuss at this time.

4. *Next meeting*. The next committee meeting will be held on Monday, December 11th from 4:00 to 6:00 p.m.

The meeting adjourned at 5:49 p.m.

MINUTES

Advisory Committee on Model Civil Jury Instructions
December 11, 2017
4:00 p.m.

Present: Honorable Andrew H. Stone (chair), Tracy H. Fowler, Honorable Keith A. Kelly, Patricia C. Kuendig (by phone), Ruth A. Shapiro, Lauren A. Shurman, Paul M. Simmons, Peter W. Summerill, Nancy Sylvester, Christopher M. Von Maack (by phone). Also present: Ryan Frazier, chair of the Economic Interference subcommittee, and David C. Reymann, chair of the Injurious Falsehood subcommittee

Excused: Marianna Di Paolo, Joel Ferre

1. *New Committee Members.* Judge Stone introduced the new committee members--Judge Keith Kelly (who joined the meeting after his trial concluded) and Lauren Shurman of Stoel Rives.

2. *Schedule.* Judge Stone reviewed the schedule. The first section of Civil Rights instructions has been released for comments. The comment period expires January 11, 2018. The committee should be ready to take up the second set in February 2018.

3. *Minutes.* The committee deferred approval of the November 13, 2017 minutes until the next meeting, to allow more time for committee members to review them.

4. *Economic Interference Instructions.* The committee continued its review of the economic interference instructions.

a. *CV1404, Definition of "Improper Means."* Judge Stone asked whether improper means was a question for the court or the jury. Mr. Frazier said that what happened was a question for the jury, but whether the conduct qualifies as "improper means" would be a question for the judge. Ms. Shapiro added that what is the "established standard of a trade or profession" may also be a fact question, which may have to be determined from competing expert testimony (similar to determining the standard of care in a medical malpractice action). Ms. Shurman noted that the court may need to instruct on the elements of the improper means, such as fraud or violation of a statute. She noted that often both the underlying tort and tortious interference are pleaded in the same complaint, and the court instructs on the elements of both. Judge Stone analogized the instruction to the instruction on violation of a safety law. He suggested adding at the end of the instruction, "In this case, [name of plaintiff] claims that the improper means used were [describe the improper means]," and adding to the committee note, "Depending on the theory, this instruction can be used in conjunction with instructions on the improper means (e.g., fraud)." Mr.

Von Maack noted that, under his reading of *Eldridge v. Johndrow*, 2015 UT 21, 345 P.3d 553, breach of contract alone is not sufficient to constitute improper means. But because the issue was not specifically addressed in *Eldridge*, the committee thought the best way to deal with it was to point out the issue in the committee note without taking a position on it. On motion of Ms. Shapiro, seconded by Mr. Fowler, the committee approved the instruction as revised.

b. *Nominal Damages.* The committee had asked the subcommittee to consider whether there should be an instruction on nominal damages. Earlier in the day, Ms. Sylvester had circulated a memo with the subcommittee's conclusion. Mr. Frazier explained that the subcommittee had not found any cases addressing the issue. Some members thought that a nominal damage instruction was not appropriate because nominal damages are usually awarded to vindicate a right where no actual damage took place, and actual damage is an element of the tort of economic interference. But even if nominal damages can be awarded for intentional interference, the subcommittee did not think there should be a special nominal damage instruction for economic interference but that it should be covered in the general tort damages instructions, and the parties and court can decide whether it should be given in a particular case, whatever the nature of the claims.

Mr. Frazier was excused. Judge Kelly and Mr. Reymann joined the meeting.

5. *Injurious Falsehood Instructions.* Mr. Reymann introduced the injurious falsehood instructions. He noted that they were similar to the defamation instructions, but the two torts protect different interests. Defamation protects a person's interest in his reputation, whereas injurious falsehood, which covers the common-law torts of slander of title and trade libel (now generally referred to as "business disparagement"), protects one's economic interests. Mr. Reymann noted that there is an open question as to whether the constitutional interests applicable to defamation apply to injurious falsehood but noted that the question does not come up much because, for injurious falsehood, the plaintiff must prove actual knowledge of falsity; reckless indifference is not enough, and only economic damages are available. Mr. Reymann noted that there are not a lot of Utah cases on the subject, but Utah law appears to be consistent with the Restatement (Second) of Torts on the subject. Judge Kelly noted that Utah has statutes governing wrongful liens that would not be covered by the instructions on the common-law torts. Mr. Reymann offered to take a look at the statutes and, if appropriate, add a reference to them in the committee notes. Judge Kelly thought that there should be a reference to statutory causes of action in both the introductory note and in the note on the elements of the claim (CV1902). He identified the relevant statutes as sections 38-9-101 through 38-9-205 and sections 38-9a-101 through 38-9a-205 of the Utah Code.

a. *CV1901, Injurious Falsehood--Introductory Notes to Practitioners.* The committee deferred approval of CV1901 until after it reviews the other instructions in this section. Ms. Shapiro questioned whether the instruction should have a number. The committee noted that a similar instruction in the defamation instructions (CV1601) was numbered. The instruction says that it should not be read to the jury, and the instruction numbers in MUJI 2d are not part of the instructions that go to the jury.

b. *CV1902, Elements of an Injurious Falsehood Claim*. Ms. Shapiro asked whether "harmful" in the first sentence needed to be defined. Mr. Reymann thought it could be deleted, that harmfulness is adequately covered in the damage instruction. Judge Kelly asked whether the second sentence should include the burden of proof (e.g., "[name of plaintiff] must prove the following elements by a preponderance of the evidence"). The committee noted that its practice has not been to state the burden of proof in elements instructions unless the burden is something other than a preponderance of the evidence. Mr. Reymann noted that there may be a higher standard for proving falsity and malice, but because it was not clear whether there was, it would be better not to state the standard and let the parties argue for a higher standard if they think it appropriate. At Ms. Shurman's suggestion, "property," "goods," and "services" were bracketed. At Ms. Sylvester's suggestion, the first element was divided into two subsections:

> (1) [name of defendant] published statement(s) that disparaged
> (a) the quality of [name of plaintiff's] [property,] [goods,] [or] [services]; [or]
> (b) [name of plaintiff's] property rights in [land,] [personal property,] [or] [intangible property]

Mr. Reymann noted that "malice" in this context has a special meaning, which is defined in CV1907. Since the definition differs from a layperson's understanding of "malice," Mr. Reymann suggested that the committee might be able to avoid using the term by changing the third element to read "the statements were made with actual knowledge that they were false." Other committee members thought that that did not capture the full definition of CV1907. Mr. Simmons suggested adding a fourth element: "[name of defendant] intended to injure [name of plaintiff] by publishing the statements or reasonably should have expected that the statements would injure [name of plaintiff]." A majority of the committee elected to leave "malice" in CV1902 and include its definition in CV1907. On motion of Mr. Fowler, seconded by Mr. Summerill, the committee approved CV1902 as revised.

c. *CV1903, Definition: Publication.* On motion of Mr. Fowler, seconded by Mr. Simmons, the committee approved the instruction, which tracks CV1603, the definition of "publication" in the defamation instructions.

d. *CV1904: Definition: Disparaging Statement.* Ms. Shurman asked who determines if a statement is capable of more than one meaning. Mr. Reymann said the court does. Similarly, the court decides whether the statement is disparaging (or can be reasonably interpreted as disparaging). Judge Stone asked what "more than one meaning" meant. He gave the example of a statement that a restaurant has the "spiciest food" in town. Some people might consider that a favorable recommendation, and others might not, depending on their preference for spicy food. Mr. Reymann said that at least one of the meanings must be disparaging. Ms. Shapiro noted that the definition of "disparaging statement" was not too helpful. Mr. Reymann thought "cast doubt on" fits well with slander of title but not so well with trade libel. The committee discussed possible definitions of "disparaging." At Judge Kelly's suggestion, it decided to say, "A statement is disparaging when it (a) calls into question in a negative way the quality of [name of plaintiff's] [property,] [goods,] [or] [services], [or] (b) casts doubt on [name of plaintiff's] property rights in [land,] [personal property,] [or] [intangible property]." Mr. Fowler suggested starting the instruction with the second paragraph. Judge Kelly suggested putting the fourth paragraph before the third.

Mr. Summerill was excused.

The committee revised the first paragraph of the committee note to read:

> The element of disparagement has not been extensively addressed by Utah courts in the injurious falsehood context, including the question of the court's role in determining whether a statement is capable of conveying a disparaging meaning. The element is analogous, however, to the element of defamatory meaning for defamation claims, which has been addressed by Utah courts, and with respect to which the court's role is clearly defined. References are therefore included to defamation authority for this instruction. [Citations omitted.] The definition of "disparaging" comes from the Restatement. *See* Restatement (Second) of Torts § 629 (1977). Because the phrase "cast doubt on" may not be as inclusive of the types of statements that would constitute business disparagement, the instruction also uses the phrase "calls into question in a negative way."

The committee deferred further discussion of CV1904 until the next meeting.

6. *Next meeting.* The next meeting is Monday, January 8, 2018, at 4:00 p.m.

The meeting concluded at 6:00 p.m.

Tab 2

Priority	Subject	Sub-C in place?	Sub-C Members	Projected Starting Month	Projected Finalizing Month	Comments Back?
1	Civil Rights: Set 1	Yes	Ferguson, Dennis (D); Mejia, John (P); Guymon, Paxton (P); Stavors, Andrew (P); Burnett, Jodi (D); Plane, Margaret (D); Porter, Karra (P); White, Heather (D)	September-16	September 2017 (wrap up 1/2, then send for comment)	Projected: February 2018 Meeting
2	Economic Interference	Yes	Frazier, Ryan (D) (Chair); Shelton, Ricky (D); Stevenson, David (P); Simmons, Paul (P); Kuendig, Patricia (P)	October-17	December-17	Projected: March 2018 Meeting
3	Injurious Falsehood	Yes	Dryer, Randy; Hoole, Greg; Hoole, Roger; Hunt, Jeff; Reymann, David (Chair); Stevens, Greg	December-17	February-18	
4	Assault/False Arrest	Yes	Rice, Mitch (chair); Carter, Alyson; Wright, Andrew (D); Cutt, David (P)	March-18	May-18	
5	Trespass and Nuisance	Yes (more members needed)	Hancock, Cameron; Figueira, Joshua (researcher); Abbott, Nelson (P); Steve Combe (D)	June-18	October-18	
6	Insurance	Yes	Johnson, Gary (chair); Pritchett, Bruce; Ryan Schriever, Dan Bertch, Andrew Wright, Rick Vazquez; Stewart Harman (D); Ryan Marsh (D)	November-18	January-19	
7	Unjust Enrichment	No (instructions from David Reymann)	David Reymann	February-19	February-19	
8	Abuse of Process	No (instructions from David Reymann)	David Reymann	March-19	March-19	
9	Directors and Officers Liability	Yes	Call, Monica;Von Maack, Christopher (chair); Larsen, Kristine; Talbot, Cory; Love, Perrin; Buck, Adam	April-19	June-19	
10	Wills/Probate	No	Barneck, Matthew (chair); Petersen, Rich; Tippet, Rust; Sabin, Cameron	September-19	November-19	
11	Civil Rights: Set 2	Yes	Ferguson, Dennis (D); Mejia, John (P); Guymon, Paxton (P); Stavors, Andrew (P); Burnett, Jodi (D); Plane, Margaret (D); Porter, Karra (P); White, Heather (D)	December-19	February-20	
12	Sales Contracts and Secured Transactions	Yes	Cox, Matt (chair); Boley, Matthew; Maudsley, Ade	March-20	May-20	

Tab 3

Injurious Falsehood

CV1901 Injurious Falsehood—Introductory Notes to Practitioners (not to be read to the jury).

The tort of injurious falsehood encompasses two related claims known at common law as "slander of title" and "trade libel." "Slander of title has traditionally addressed statements casting doubt upon the fact or the extent of a plaintiff's ownership of property, most often real estate…. More recently, slander of title has been expanded to apply to interests other than title and to property other than land." 2 Robert D. Sack, *Sack on Defamation: Libel, Slander, and Related Problems* § 13:1.1 (4th ed. 2016) (hereinafter, "*Sack on Defamation*"). "The tort of disparagement of quality, or 'trade libel,' developed from slander of title. It provides compensation for false derogatory statements about the quality, rather than the ownership, of property, most often a product or service being sold." *Id*. "In both cases it is the plaintiff's interest in property, real or personal, tangible or intangible, that is protected." *Id*. Because both claims involve essentially the same elements, the only difference being whether the injurious statements concern ownership or quality of property, they are treated together as a claim for injurious falsehood.

The use of "slander" and "libel" is largely anachronistic. Disparagement of property can be either oral (slander) or written (libel), or even non-verbal—and the same is true of trade libel (sometimes called "business disparagement"). Given the confusion associated with these common law terms, these instructions refer to both types of claims as "injurious falsehood."

Injurious falsehood shares a vocabulary with the tort of defamation. "However, despite the similarity in the names of the torts, there is a basic distinction between the two. They protect separate and unrelated interests. The tort of slander of title and the related tort of disparagement of property are based on an intentional interference with economic relations. They are not personal torts; unlike slander of the person, they do not protect a person's reputation." *Bass v. Planned Mgmt. Servs., Inc.*, 761 P.2d 566, 568 (Utah 1988); *see also Sack on Defamation* § 13:1.4[B] ("The law of defamation protects the personal reputation of the defamed party; the law of business or commercial disparagement, or injurious falsehood, protects the economic interests of the injured party."). "[I]njurious falsehood is a far more difficult cause of action than defamation to sustain, because it is an action only for special damages caused by the false statement, and the burden of proving falsity, damages, and 'malice' in its many forms is generally higher than in defamation." *Sack on Defamation* § 13:1.4[A].

Nonetheless, despite the different interests protected by defamation and injurious falsehood, many courts and commentators have recognized that the First Amendment protections incorporated into defamation law should apply with equal force to an injurious falsehood claim, as both torts implicate freedom of speech. As one commentator has put it, "[t]here is no reason to accord lessened protection because the plaintiff's claim is denominated 'disparagement,' 'trade libel,' or 'injurious falsehood' rather than 'libel' or 'slander' or because the injury is to economic interests rather than to personal reputation. Since only economic injury and not injury to reputation and psyche is at issue, perhaps the balance should tip even further to the side of free expression." *Sack on Defamation* § 13:1.8. In Utah, this remains an open question because neither the United States Supreme Court nor the Utah appellate courts have ever addressed

whether the constitutional protections of defamation apply to injurious falsehood. The issue has, however, been addressed by a federal district court in Utah. *See SCO Grp., Inc. v. Novell, Inc.*, 692 F. Supp. 2d 1287, 1293 (D. Utah 2010) ("Having reviewed the relevant authority, the Court finds that slander of title claims are subject to the First Amendment."); *cf. Jefferson Cnty. Sch. Dist. No. R-1 v. Moody's Investor's Servs., Inc.*, 175 F.3d 848 (10th Cir. 1999) (applying First Amendment opinion protection to injurious falsehood claim under Colorado law); *Bose Corp. v. Consumers Union of United States, Inc.*, 508 F. Supp. 1249 (D. Mass 1981) (applying First Amendment actual malice standard to product disparagement claim), *rev'd on other grounds*, 692 F.2d 189 (1st Cir. 1982), *aff'd*, 466 U.S. 485 (1984); *SIRQ, Inc. v. Layton Cos.*, 2016 UT 30, ¶ 50, 379 P.3d 1237 ("[F]alse light claims that arise from defamatory speech raise the same First Amendment concerns as are implicated by defamation claims.").

Because application of the First Amendment to injurious falsehood remains an open question in Utah, the Committee has not drafted these instructions to incorporate the constitutional requirements of defamation law. However, should a party wish to argue for such protections, the modifications to these instructions would not be extensive. This is because, in Utah, the "malice" element of injurious falsehood already requires a plaintiff to prove the defendant published statements with actual knowledge of falsity. *See Dillon v. S. Mgmt. Corp. Ret. Trust*, 2014 UT 14, ¶¶ 35-36, 326 P.3d 656. This is not the rule in all jurisdictions, some of which allow "malice" for injurious falsehood to consist of common law malice, or ill will, at least in private figure cases. *See Sack on Defamation* § 13:1.4[E].

The Utah standard of malice for injurious falsehood, therefore, is already higher than the standard for constitutional "actual malice" set forth in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), which must be met in public official and public figure defamation cases, and which can be satisfied *either* by actual knowledge of falsity *or* reckless disregard for the truth. As a result, in Utah there is no need to distinguish between the types of plaintiffs in injurious falsehood cases, nor to include a separate instruction on punitive damages. In addition, there is no need for an instruction on conditional privilege, as conditional privileges are abused and vitiated by actual malice. *See Ferguson v. Williams & Hunt, Inc.*, 2009 UT 49, ¶ 28, 221 P.3d 205.

Were the full scope of First Amendment protections from defamation law to apply to injurious falsehood claims, the Committee anticipates only two potentially necessary modifications to these instructions. First, under *Sullivan*, actual malice must be proven by clear and convincing evidence in public official and public figure cases. *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342 (1974). Second, although the United States Supreme Court has never explicitly said so, the same heightened standard may apply in public plaintiff cases to the standard for falsity. *See* CV1605 (Definition: False Statement), Committee Notes. The below instructions do not specify a standard of proof other than preponderance of the evidence, but they could be modified in an appropriate case to be consistent with the constitutional standards of proof for defamation claims.

Finally, although Utah courts have not directly addressed the issue, it is generally acknowledged that "the absolute privileges that apply to defamation actions apply also to injurious falsehood suits." *Sack on Defamation* § 13:1.5[A]; *see also* Restatement (Second) of Torts § 635 (1977) ("The circumstances under which there is an absolute privilege to publish an injurious falsehood

are in all respects the same as those under which there is an absolute privilege to publish matter that is personally defamatory"). Examples of absolute privileges include, but are not limited to, the judicial proceedings privilege, *see DeBry v. Godbe*, 1999 UT 111, 992 P.2d 979, and the legislative proceedings privilege, *see Riddle v. Perry*, 2002 UT 10, 40 P.3d 1128. In the injurious falsehood context, other courts have found privileged "the filing of a lis pendens, a mechanic's lien, or a judgment[.]" *Sack on Defamation* § 13:1.5[A] (footnote citations omitted). Whether a statement is privileged, however, is typically a question for the court, not the jury, to decide. *See Russell v. Thomson Newspapers, Inc.*, 842 P.2d 896, 900 (Utah 1992); *see also* CV1608 (Conditional Privilege). Therefore, as with the MUJI 2d instructions for defamation, *see* CV1608 (Conditional Privilege), Committee Notes, the Committee has not included an instruction on absolute privilege. If, during trial, the jury has heard evidence of statements the court has determined are absolutely privileged, and there is some concern the jury may assume those statements are actionable, the parties may wish to request a curative instruction similar to that set forth in CV1609 (Non-actionable Statements).

CV1902 Elements of an Injurious Falsehood Claim. (David will draft new note)

[Name of plaintiff] claims that [name of defendant] injured [him/her] by publishing one or more ~~harmful~~ statements known as "injurious falsehoods." To succeed on this claim, [name of plaintiff] must prove the following elements:

(1) ~~(1)~~ [name of defendant] published statement(s) that disparaged ~~either~~
  a. the quality of [name of plaintiff's] [property, goods, or services]; or
  ~~a.~~b. [name of plaintiff's] property rights in [land, personal property, or intangible property];
(2) the statements were false;
(3) the statements were made with malice; and
(4) the statements caused specific monetary loss to [name of plaintiff].

Some of these words have special meanings, and they will be explained in the following instructions.

References

Rehn v. Christensen, 2017 UT App 21, 392 P.3d 872
Dillon v. S. Mgmt. Corp. Ret. Trust, 2014 UT 14, 326 P.3d 656
Neff v. Neff, 2011 UT 6, 247 P.3d 380
First Sec. Bank of Utah, N.A. v. Banberry Crossing, 780 P.2d 1253 (Utah 1989)
Bass v. Planned Mgmt. Servs., Inc., 761 P.2d 566 (Utah 1988)
Jack B. Parson Cos. v. Nield, 751 P.2d 1131 (Utah 1988)
Direct Import Buyers Assoc. v. KSL, Inc., 572 P.2d 692 (Utah 1977)
Restatement (Second) of Torts §§ 623A, 624, 626 (1977)

MUJI 1st Instruction

19.17, 19.18

Committee Notes

The first element in this instruction is intended to encompass both slander of title and trade libel claims, and is worded generally regarding the specific target of the injurious statements. It could be modified to be more specific if the parties and court so choose.

This instruction is not intended to address statutory causes of action for wrongful liens. See Utah Code sections 38-9-101 to 38-9-305 and 38-9a-101 to 38-9a-205 (2017).

CV1903 Definition: Publication. Approved 12/11/17.

[Name of plaintiff] must prove [name of defendant] "published" the alleged injurious falsehoods. Publication means [name of defendant] communicated the statements to a person other than [name of plaintiff]. Publication can be oral, written, or non-verbal if a person's non-verbal conduct or actions specifically communicate the injurious falsehoods. "Written" statements include statements that are communicated electronically or digitally.

References

Dillon v. S. Mgmt. Corp. Ret. Trust, 2014 UT 14, 326 P.3d 656
First Sec. Bank of Utah, N.A. v. Banberry Crossing, 780 P.2d 1253 (Utah 1989)
Bass v. Planned Mgmt. Servs., Inc., 761 P.2d 566 (Utah 1988)
Restatement (Second) of Torts §§ 623A cmt. e, 630 (1977)

MUJI 1st Instruction

19.19

Committee Notes

Utah cases do not address whether publication of an injurious falsehood must be intentional, or at least negligent, to create liability. The Restatement requires at least negligence. *See* Restatement (Second) of Torts § 630 (1977). In some ways, however, this concept is subsumed within the malice requirement, as a non-negligent, unintentional publication would rarely be published with the requisite degree of malice.

CV1904 ~~Definition:~~ Disparaging Statement.

I have already determined that the following statement(s) is/are capable of conveying a meaning that is disparaging: [insert statements].

You must determine whether the recipient actually understood the statement(s) in [its/their] disparaging sense and as referring to [name of plaintiff's] [interests].

A statement is disparaging when it

(a) calls into question in a negative way the ~~[Name of plaintiff] must prove the statements at issue disparaged, and thus cast doubt on, the~~ quality of [name of plaintiff's] property, goods, or services; or

~~(a)~~(b) casts doubt on [name of plaintiff's] property rights in land, personal property, or intangible property.

~~I have already determined that the following statement(s) is/are capable of conveying a meaning that is disparaging: [insert statements].~~

Some statements may convey more than one meaning. For example, a statement may have one meaning that is disparaging and another meaning that is not. To support an injurious falsehood 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 disparaging sense and as referring to [name of plaintiff's] [interests]. If a recipient did not actually understand a particular statement in its disparaging sense and as referring to [name of plaintiff's] [interests], then that statement cannot support an injurious falsehood claim.

~~You must determine whether the recipient actually understood the statement(s) in [its/their] disparaging sense and as referring to [name of plaintiff's] [interests].~~

References
Bass v. Planned Mgmt. Servs., Inc., 761 P.2d 566 (Utah 1988)
Restatement (Second) of Torts §§ 629, 652 (1977)
Jacob v. Bezzant, 2009 UT 37, 212 P.3d 535
O'Connor v. Burningham, 2007 UT 58, 165 P.3d 1214
West v. Thomson Newspapers, 872 P.2d 999 (Utah 1994)
Allred v. Cook, 590 P.2d 318 (Utah 1979)
Mast v. Overson, 971 P.2d 928 (Utah Ct. App. 1998)
Hogan v. Winder, 762 F.3d 1096 (10th Cir. 2014)
Restatement (Second) of Torts §§ 559, 614 (1977)

MUJI 1st Instruction
19.20

Committee Notes
The element of "disparaging" has not ~~This element has not been~~ been extensively addressed by Utah courts in the injurious falsehood context, including the question of the court's role in determining whether a statement is capable of conveying a disparaging meaning. The ~~element~~element is analogous, however, to the element of defamatory meaning for defamation claims, which has been addressed by Utah courts, and with respect to which the court's role is clearly defined. References are therefore included to defamation authority for this instruction. *See also* CV1607 (Definition: Defamatory); Restatement (Second) of Torts § 652 (1977) ("In an action for injurious falsehood, the court determines … whether the statement is capable of disparaging or other injurious meaning; … the jury determines whether … the statement complained of was understood by the recipient as disparaging or otherwise injurious" and "the statement was understood to be published of and concerning the plaintiff's interest").

The definition of "disparaging" as "casting doubt" on the plaintiff's interests comes from the Restatement. *See* Restatement (Second) of Torts §§ 629 (1977). Because the phrase "casting doubt" may not be as inclusive of the types of statements that would constitute business disparagement, the instruction also uses the phrase, "calls into question in a negative way." ~~This element has not been extensively addressed by Utah courts in the injurious falsehood context,~~

~~including the question of the court's role in determining whether a statement is capable of conveying a disparaging meaning. The element is analogous, however, to the element of defamatory meaning for defamation claims, which has been addressed by Utah courts, and with respect to which the court's role is clearly defined. References are therefore included to defamation authority for this instruction. *See also* CV1607 (Definition: Defamatory); Restatement (Second) of Torts § 652 (1977) ("In an action for injurious falsehood, the court determines … whether the statement is capable of disparaging or other injurious meaning; … the jury determines whether … the statement complained of was understood by the recipient as disparaging or otherwise injurious" and "the statement was understood to be published of and concerning the plaintiff's interest").~~

As with CV1902 (Elements of an Injurious Falsehood Claim), the ~~first~~ third paragraph of this instruction could be narrowed and stated more specifically depending on the types of statements at issue in a particular case. The bracketed word [interests] could be used as a general descriptor, or the parties and court could decide to be more specific about the interests at issue in a particular case, *i.e.*, the plaintiff's title in land, ownership of intangible property, quality of services, etc.

CV1905 Definition: False Statement.
The allegedly injurious statement must state or imply facts which can be proved to be false, and [name of plaintiff] must show the statement to be false.

"False" means that the statement is either directly untrue or that it implies a fact that is untrue. In addition, the 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 an injurious falsehood claim, no matter how annoying, embarrassing, damaging, or insulting it may be. "Truth" does not require that the statement be absolutely, totally, or literally true. 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
Dillon v. S. Mgmt. Corp. Ret. Trust, 2014 UT 14, 326 P.3d 656
First Sec. Bank of Utah, N.A. v. Banberry Crossing, 780 P.2d 1253 (Utah 1989)
Bass v. Planned Mgmt. Servs., Inc., 761 P.2d 566 (Utah 1988)
Air Wis. Airlines Corp. v. Hoeper, __ U.S. __, 134 S. Ct. 852 (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)
Restatement (Second) of Torts § 634 (1977)

MUJI 1st Instruction
19.22

Committee Notes
The issue of falsity has not been extensively discussed in the injurious falsehood context, but it is essentially the same as the requirement of falsity for defamation claims. References are therefore included to defamation authority for this instruction. *See also* CV1605 (Definition: False Statement).

CV1906 Definition: Opinion.
A statement that expresses a mere opinion or belief rather than a verifiable statement of fact is protected by the Utah Constitution and cannot support an injurious falsehood claim. A statement of opinion can be the basis of an injurious falsehood claim only when it implies facts which can be proved to be false, and [name of plaintiff] shows the statement is false and disparaging. I have determined that the following statement(s) are statements of opinion: [insert specific statement(s).]

References
Jacob v. Bezzant, 2009 UT 37, 212 P.3d 535
West v. Thomson Newspapers, 872 P.2d 999 (Utah 1994)
Direct Import Buyers Assoc. v. KSL, Inc., 572 P.2d 692 (Utah 1977)
Utah Const. art. 1, §§ 1, 15
Restatement (Second) of Torts §§ 566 cmt. c, 626 cmt. c, 634 (1977)

MUJI 1st Instruction
19.22

Committee Notes
The issue of protected opinion has not been extensively discussed in the injurious falsehood context, but it is similar to the issue that arises in the defamation context. References are therefore included to defamation authority for this instruction. In *West v. Thomson Newspapers*, 872 P.2d 999, 1015-19 (Utah 1994), the Utah Supreme Court held that the Utah Constitution protects statements of pure opinion. The Committee discerns no reason the same protection would not apply in the injurious falsehood context. *Cf. Jefferson Cnty. Sch. Dist. No. R-1 v. Moody's Investor's Servs., Inc.*, 175 F.3d 848 (10th Cir. 1999) (applying First Amendment opinion protection to injurious falsehood claim). This instruction also assumes that, as in the defamation context, whether a statement constitutes pure opinion is a question for the court to decide. *See West*, 872 P.2d at 1018. *See also* CV1606 (Opinion).

This instruction should be used in the event the court determines as a matter of law that one or more statements are opinion, but the statement(s) may nonetheless be actionable because they reasonably imply verifiable facts capable of sustaining a disparaging meaning. The question for the jury is whether those facts were, in fact, implied, and whether the disparaging meaning was, in fact, conveyed.

CV1907 Definition: Malice.
[Name of plaintiff] must prove [name of defendant] published the injurious statements with "malice." "Malice" in this context does not mean simply ill will or spite, as the word is commonly understood. Rather, to prove [name of defendant] published the injurious statements with malice, [name of plaintiff] must prove:

(1) [name of plaintiff] actually knew the injurious statements were false when [he/she/it] published them; and
(2) [name of plaintiff] either:
    (a) intended to injure [name of plaintiff] by publishing the statements; or
    (b) reasonably should have expected that the statements would injure [name of plaintiff].

Regarding the first requirement—that [name of plaintiff] actually knew the statements were false—the question is not whether a reasonable person would have known that the statements were false, but whether [name of defendant] actually had such knowledge at the time of publication.

References
Rehn v. Christensen, 2017 UT App 21, 392 P.3d 872
Dillon v. S. Mgmt. Corp. Ret. Trust, 2014 UT 14, 326 P.3d 656
Ferguson v. Williams & Hunt, Inc., 2009 UT 49, 221 P.3d 205
First Sec. Bank of Utah, N.A. v. Banberry Crossing, 780 P.2d 1253 (Utah 1989)
Bass v. Planned Mgmt. Servs., Inc., 761 P.2d 566 (Utah 1988)
Direct Import Buyers Assoc. v. KSL, Inc., 572 P.2d 692 (Utah 1977)
Howarth v. Ostergaard, 515 P.2d 442 (Utah 1973)
Restatement (Second) of Torts §§ 623A (1977)

MUJI 1st Instruction
19.23

Committee Notes
The meaning of "malice" in the injurious falsehood context has not always been clear in Utah. Some older cases suggest that malice requires actual knowledge of falsity, while others appear to endorse mere intent to injure or ill will, traditionally known as common law malice. *Compare Direct Import Buyers Assoc. v. KSL, Inc.*, 572 P.2d 692, 696 (Utah 1977) (requiring "actual malice" for disparagement of quality claim) *with First Sec. Bank of Utah, N.A. v. Banberry Crossing*, 780 P.2d 1253, 1257 (Utah 1989) (appearing to allow a showing of malice from proof "that the wrong was done with an intent to injure, vex, or annoy"); *see also Bass v. Planned Mgmt. Servs., Inc.*, 761 P.2d 566, 568 n.1 (Utah 1988) ("We forgo defining the term 'malice' in this opinion. We note, however, that the concept is not altogether clear under Utah law." (collecting cases)). This confusion may have stemmed from some courts' reliance on cases discussing conditional privilege in the defamation context, in which both actual malice and common law malice can constitute abuse of the privilege. In *Dillon v. Southern Management Corporation Retirement Trust*, 2014 UT 14, ¶¶ 34-40, 326 P.3d 656, the Utah Supreme Court resolved this confusion, "clarify[ing] that to show malice in a claim for slander of title, the

plaintiff must prove that the defendant had actual knowledge that the statements at issue were false." *Id*. ¶ 35. This is a subjective, not objective, inquiry. *Id*. The court explained that the "intent to injure" and reasonable foreseeability requirements are alternative ways of showing malice, but that actual knowledge of falsity is required regardless. *Id*. ¶ 36. The latter method of proof (reasonable foreseeability) is sometimes referred to as "implied malice." *Id*. ¶ 38; *see also Rehn v. Christensen*, 2017 UT App 21, ¶ 62, 392 P.3d 872. This holding conformed Utah law to the Restatement position. *See* Restatement (Second) of Torts § 623A (1977). *Dillon* was a slander of title case, but the Committee discerns no reason the same definition of malice would not apply equally to disparagement of quality claims.

Notably, the *Dillon* court did not hold that malice for injurious falsehood can be shown by proof of the defendant's reckless disregard for the truth. The malice standard for injurious falsehood in Utah, therefore, appears to be higher than the actual malice standard mandated by the First Amendment in defamation law, which incorporates the reckless disregard concept. *See New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); *Ferguson v. Williams & Hunt, Inc.*, 2009 UT 49, 221 P.3d 205. *Cf.* CV1608 (Conditional Privilege).

CV1908 Economic Damages.
[Name of plaintiff] must prove that the alleged injurious statements directly caused [him/her/it] economic damages. Economic damages are specific monetary losses. Examples of such loss include, but are not limited to, lost sales of products, sale of an interest in land at a reduced price, or legal expenses reasonably necessary to remove a cloud on [name of plaintiff's] title in property. A mere reduction in estimated value of property that [name of plaintiff] continues to own does not constitute a specific monetary loss.

References
Rehn v. Christensen, 2017 UT App 21, 392 P.3d 872
Neff v. Neff, 2011 UT 6, 247 P.3d 380
Valley Colour, Inc. v. Beuchert Builders, Inc., 944 P.2d 361 (Utah 1997)
First Sec. Bank of Utah, N.A. v. Banberry Crossing, 780 P.2d 1253 (Utah 1989)
Bass v. Planned Mgmt. Servs., Inc., 761 P.2d 566 (Utah 1988)
Farm Bureau Life Ins. Co. v. Am. Nat'l Ins. Co., 505 F. Supp. 2d 1178 (D. Utah 2007)
Watkins v. Gen. Refractories Co., 805 F. Supp. 911 (D. Utah 1992)
Restatement (Second) of Torts § 633 (1977)

MUJI 1st Instruction

Committee Notes
This instruction uses the term "economic damages" to capture the concept of special damages. This concept is similar (though not identical) to the concept of special damages in the defamation context. *See* CV1615 (Damages – Economic Damages). Among the differences, the Utah Supreme Court has held that attorneys' fees directly and necessarily incurred in clearing a cloud on title resulting from disparagement of property can constitute special damages for injurious falsehood. *See Bass v. Planned Mgmt. Servs., Inc.*, 761 P.2d 566, 569 (Utah 1988); *Neff v. Neff*, 2011 UT 6, ¶ 80, 247 P.3d 380; *see also Rehn v. Christensen*, 2017 UT App 21, ¶ 69, 392 P.3d

872. Utah courts have not addressed whether the same rule applies to a disparagement of quality claim.

To constitute special damages, the loss must be liquidated. The last sentence of this instruction is intended to convey that requirement. *See Neff*, 2011 UT 6, ¶ 81 ("[W]here a party's claim for harm to the value of his property has been based on appraisal value instead of sale of the land at a reduced price, we have denied recovery because the damages had not yet been realized."); *Valley Colour, Inc. v. Beuchert Builders, Inc.*, 944 P.2d 361, 364 (Utah 1997) ("Proof of special damages usually involves demonstrating a sale at a reduced price or at greater expense to the seller. It is not sufficient to show that the land's value has dropped on the market, as this is general damage, not a realized or liquidated loss.").
