

Judicial Council Standing Committee
Model Utah Civil Jury Instructions

Agenda

May 9, 2022
4:00 to 6:00 p.m.
Via Webex

Welcome and approval of minutes	Tab 1	Alyson / Lauren
Boundary by Acquiescence	Tab 2	Robert Cummings
Easement by Necessity	Tab 3	Robert Fuller
Topics / Groups Discussion	Tab 4	Alyson / Lauren
Updates on upcoming topics <ul style="list-style-type: none">• In-person vs. Virtual Meetings• Products Liability• New appointments		Stacy / Alyson / Lauren

[Committee Web Page](#)

[Published Instructions](#)

Next meeting: June 13, 2022 at 4:00 p.m.

Tab 1

MINUTES

Advisory Committee on Model Civil Jury Instructions

March 14, 2022

4:00 p.m.

Present: Ruth A. Shapiro, Stacy Haacke (staff), Douglas G. Mortensen, Randy Andrus, Lauren A. Shurman, Judge Kent Holmberg, Judge Keith A. Kelly, Alyson McAllister, Adam D. Wentz
Also present: Stewart Harman, David Reymann, Marianna Di Paolo

Excused: Samantha Slark, Ricky Shelton

1. *Welcome.*

Lauren Shurman welcomed and thanked the Committee.

2. *Approval of Minutes.*

February 2022 meeting minutes approved.

3. *Discussion of Defamation Instructions.*

- CV1602 Elements of a Defamation Claim
 - David Reymann was present on behalf of the subcommittee. He explained revisions he made to the instruction, including the burden of change language for public figure vs. private plaintiff, as well as changes in the case law.
 - The Committee discussed the effectiveness of using brackets when providing alternatives.
 - Corrected typo in the Committee Notes to include the decision date for *Snyder v. Phelps*.
 - The Committee formally approved this instruction with Douglas Mortensen abstaining from the vote.
- CV1605 Definition: False Statement
 - David Reymann explained the revisions to this instruction.
 - Lauren Shurman suggested providing an explanation in the Committee Notes of when to use the various alternatives bracketed in the instruction. David Reymann provided language for this explanation and it was incorporated into the Committee Notes.
 - The Committee formally approved this instruction with Douglas Mortensen abstaining from the vote.

4. *Discussion of Insurance Litigation Subcommittee*

- Stewart Harman was present on behalf of the Insurance Litigation subcommittee. He asked the Committee for guidance as to what specifically it would like the subcommittee to address.
 - Mr. Harman suggested starting with bad faith claims and the “fairly debatable” standard.
 - Douglas Mortensen suggested addressing breach of contract issues.
 - Alyson McAllister suggested that the subcommittee look at California’s Insurance Litigation jury instructions as potentially helpful templates.
- The subcommittee currently has three defense counsel and two plaintiffs counsel. There is no subcommittee chair appointed.
- Alyson McAllister noted that the MUJI directives are that all subcommittees be made up of an equal amount of plaintiff and defense counsel. Judge Kelly also voiced his preference to have an equally-balanced subcommittee. Mr. Harman agreed to discuss additional candidates the next time he meets with the subcommittee and report back.
- The subcommittee will plan to have proposed instructions within six months’ time.

5. Wills and Probate Subcommittee

- There does not appear to be a full subcommittee for the Wills and Probate instructions.
- Judge Kelly recommended reaching out to the Elder Law section and Judge Scott to seek referrals of potential candidates for the subcommittee.
- Douglas Mortensen suggested Charles Bennett, Tom Christensen, or any of Mr. Christensen’s law partners as potential candidates.
- Stacy Haacke will reach out to these referrals.

6. Assault and False Arrest Subcommittee

- Alyson McAllister was formally on this subcommittee and believes that it will likely have revised instructions prepared within the next few months.

7. Implicit Bias Subcommittee

- Stacy Haacke mentioned the courts’ interest in having implicit bias instructions.
- No subcommittee currently exists. Various members of the Committee noted that implicit bias remains a hotly contested issue, which may explain the lack of instructions to date.
- Judge Kelly suggested using the Office of Fairness and Accountability as a reference point.
- Stacy Haacke will reach out to Judge Chon, the Office of Fairness and Accountability, and others to discuss the possibility of staffing a subcommittee. Alyson McAllister agreed to assist.

8. Directors and Officers Liability, Agency, Fiduciary Responsibility

- Judge Holmberg noted difficulties dealing with these topics during two of his recent trials and questioned whether it may be helpful to set up a subcommittee or subcommittees to address possible instructions. The Committee was open to identifying potential candidates.
- The Committee suggested splitting these various topics into multiple subcommittees.
- Lauren Shurman and Stacy Haacke agreed to assist in recruiting subcommittee members.

9. *Case Law Updates*

- Allyson McAllister suggested reaching out to subcommittee chairs and requesting case law updates to their respective instructions.

10. *Adjournment.*

The meeting concluded at 5:33 PM.

Tab 2

CV__ Boundary by Acquiescence

[Plaintiff] and [Defendant] are adjoining landowners. There is a dispute over where the legal property line is between the adjoining pieces of property. [Plaintiff] claims that a visible [fence, monument, building, or natural features treated as a boundary] between [Plaintiff's] property and [Defendant's] property is a "boundary by acquiescence," that should be recognized as the legal boundary between the properties.

For you to find that [Plaintiff] has established the boundary by acquiescence that [he or she] claims, you must be satisfied that [Plaintiff] has proved each of the following elements by clear and convincing evidence:

1. There is a visible line between [Plaintiff's] property and [Defendant's] property that is marked by a [fence, monument, building, or natural features treated as a boundary;]
2. The past or present owners of [Plaintiff's] property occupied [Plaintiff's] property up to the visible line in a manner that would give a reasonable landowner notice that the past or present owners of [Plaintiff's] property were using the line as a boundary;
3. The past or present owners of [Plaintiff] and [Defendant's] properties mutually acquiesced in the line as a boundary between the properties; and
4. For a continuous period of at least 20 years without interruption.

I will now explain to you what some of the words in this instruction mean.

NEED A REFERENCE TO MUTUAL ACQUIESCENCE BEING DEFINED.

NEED A VISIBLE LINE DEFINITION

THINK ABOUT FROM AN OBJECTIVE LAYPERSON'S PERSPECTIVE

DEFINE OCCUPATION – OR USE A BETTER WORD

NEED SILENCE AS ACCEPTANCE INSTRUCTION

NEED

References:

Anderson v. Fautin, 2016 UT 22, ¶ 8, 379 P.3d 1186
RHN Corp. v. Veibell, 2004 UT 60, ¶ 23, 96 P.3d 935
Martin v. Lauder, 2010 UT App 216, ¶ 5, 239 P.3d 519
Q-2, LLC v. Hughes, 2014 UT App 19, ¶ 8, 319 P.3d 732
Ault v. Holden, 2002 UT 33, ¶ 18, 44 P.3d 781

CV118 Clear and convincing evidence.

Some facts in this case must be proved by a higher level of proof called “clear and convincing evidence.” When I tell you that a party must prove something by clear and convincing evidence, I mean that the party must persuade you, by the evidence, to the point that there remains no serious or substantial doubt as to the truth of the fact. Proof by clear and convincing evidence requires a greater degree of persuasion than proof by a preponderance of the evidence but less than proof beyond a reasonable doubt.

I will tell you specifically which of the facts must be proved by clear and convincing evidence.

References

Essential Botanical Farms, LC v. Kay, 2011 UT 71.

Jardine v. Archibald, 279 P.2d 454 (Utah 1955).

Greener v. Greener, 212 P.2d 194 (Utah 1949).

See also, Kirchgastner v. Denver & R.G.W.R. Co., 233 P.2d 699 (Utah 1951).

CV___ Mutual Acquiescence

Mutual acquiescence as used in the third requirement of Boundary by Acquiescence means that adjoining land owners have acted in a manner that shows they have treated a line as the boundary of their properties. The defendant's acquiescence can be shown by action, inaction, despite notice, or consent by or silence, or acceptance without protest. Direct evidence of a landowner's subjective belief concerning the boundary is not required to show acquiescence. Rather, you should base your decision on whether the defendant's objective behavior shows the defendant recognized the line as the property line. Acquiescence may be inferred from the evidence.

~~You may consider the landowner's actions, or lack of actions, as evidence that the landowner impliedly consented, or acquiesced, in the visible line as the boundary between the properties.~~

~~[NOTE: Lindbaugh, citing Essential Botanical, uses the contrary point that: "Nonacquiescence in a boundary would be signaled where a landowner notifies the adjoining landowner of her disagreement over the boundary, or otherwise takes action inconsistent with recognition of a given line as the boundary." Don't know if that would be helpful to a jury to use the contrapositive example]~~

References:

Linebaugh v. Gibson, 2020 UT App 108, ¶¶ 26-27, 471 P.3d 835
Anderson v. Fautin, 2016 UT 22, ¶¶ 24, 30, 379 P.3d 1186
Essential Botanical Farms, LC v. Kay, 2011 UT 71, ¶¶ 27, 34, 270 P.3d 430
RHN Corp. v. Veibell, 2004 UT 60, ¶ 23, 96 P.3d 935
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Points for Discussion

- 1) Should we include a more specific instruction of "visible line" or "occupation"?
- 2) Should we include an instruction about a defendant's silence not being evidence of acquiescence where the defendant could not access the property?

Commented [1]: I added this (the sentence beginning with "Rather,") based on Linebaugh v. Gibson from 2020, noted below. There, the district court found that because the fence was built to fence in animals, it could not be mutually acquiesced to. In reversing, the COA found that it's the objective conduct of the parties, not their subjective belief.

Commented [SP2R1]:

CV ___ Visible Line

“Visible line,” as used in the first requirement of boundary by acquiescence, is an observable line created by a fence, building, monument, hedge, or similar visible items, either both human made or and natural, ~~that create an observable line sufficient to give a reasonable landowner notice that the owner of the adjoining property is using the line as a boundary.~~

References:

Linbaugh v. Gibson, 2020 UT App 108, ¶ 25, 471 P.3d 835
Bahr v. Imus, 2011 UT 19, ¶ 36, 250 P.3d 56
Gillmor v. Cummings, 904 P.2d 703, 707 (Utah Ct. App. 1995)
Fuoco v. Williams, 421 P.2d 944, 946 (Utah 1966)

CV___ Occupy Defined

“Occupy,” as used in the second element of boundary by acquiescence, means that [the name of plaintiff] has used his/her property up to the visible line in a way that would put a reasonable person on notice that [the name of plaintiff] treats the visible line as the boundary between the adjoining properties. Examples of activities that ~~would~~ could constitute occupation are farming the property, placing homes or other structures on the property, improving the property, irrigating the property, using it to raise livestock, or similar uses.

References:

Anderson v. Fautin, 2016 UT 22, ¶ 26, 379 P.3d 1186

Bahr v. Imus, 2011 UT 19, ¶ 36, 250 P.3d 56

Staker v. Ainsworth, 785 P.2d 417, 420 (Utah 1990)

CV ____ Exception to Silence Equaling Acquiescence

[Defendant] asserts that s/he did not acquiesce to the boundary on the basis that s/he could not access her/his property. *This is an affirmative defense [not sure; ease law is unclear, but seems that it would be] meaning [defendant] has the burden of proving by a preponderance of the evidence that s/he could not access his/her property. If [defendant] has made a sufficient showing shows by a preponderance of the evidence that s/he could not access her/his property, then you can-must find that the parties [defendant] did not acquiesce to the boundary.*

References:

Anderson v. Fautin, 2016 UT 22, ¶ 24, 379 P.3d 1186

Carter v. Hanrath, 925 P.2d 960, 962 (Utah 1996)

[NOTE: Appears to be only exception to silence amounting to acquiescence; *Carter* involved an entirely landlocked parcel so extremely rare exception]

NOTE: The burden of proof for this defense is not entirely clear from the case law; however, a preponderance of the evidence standard would apply in absence of authority to suggest the higher clear and convincing standard would be applicable. If this instruction is provided, then you may also provide the preponderance of the evidence instruction. (MUJI 117)

CV__ Boundary by Acquiescence

[Name of plaintiff] and [name of defendant] are adjoining landowners. There is a dispute over where the legal property line is between the adjoining pieces of property. [Name of plaintiff] claims that a visible [fence, monument, building, or natural features treated as a boundary] between [name of plaintiff]'s property and [name of defendant]'s property is a "boundary by acquiescence," that should be recognized as the legal boundary between the properties.

For you to find that [name of plaintiff] has established the boundary by acquiescence that [he or she] claims, you must be satisfied that [name of plaintiff] has proved each of the following elements by clear and convincing evidence:

1. There is a visible line between [name of plaintiff's] property and [name of defendant's] property that is marked by a [fence, monument, building, or natural features treated as a boundary];
2. The past or present owners of [name of plaintiff]'s property occupied [name of plaintiff]'s property up to the visible line in a manner that would give a reasonable landowner notice that the past or present owners of [name of plaintiff]'s property were using the line as a boundary;
3. The past or present owners of [name of plaintiff] and [name of defendant]'s properties mutually acquiesced in the line as a boundary between the properties; and
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Mutual acquiescence as used in the third requirement of boundary by acquiescence means that adjoining landowners have acted in a manner that shows they have treated a line as the boundary of their properties. The [name of defendant]'s acquiescence can be shown by action, inaction, or silence. Direct evidence of a landowner's subjective belief concerning the boundary is not required to show acquiescence. Rather, you should base your decision on whether [name of defendant]'s objective behavior shows [name of defendant] recognized the line as the property line. Acquiescence may be inferred from the evidence.

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Ault v. Holden, 2002 UT 33, ¶ 18, 44 P.3d 781

CV___ Exception to Silence Equaling Acquiescence

[Name of defendant] asserts that s/he did not acquiesce to the boundary on the basis that s/he could not access her/his property. If [name of defendant] shows by a preponderance of the evidence that s/he could not access her/his property, then you must find that [name of defendant] did not acquiesce to the boundary.

References:

Anderson v. Fautin, 2016 UT 22, ¶ 24, 379 P.3d 1186

Carter v. Hanrath, 925 P.2d 960, 962 (Utah 1996)

NOTE: The burden of proof for this defense is not entirely clear from the case law; however, a preponderance of the evidence standard would apply in absence of authority to suggest the higher clear and convincing standard would be applicable. If this instruction is provided, then you may also provide the preponderance of the evidence instruction. (MUJI 117)

Tab 3

Tab 4

MUJI Civil Upcoming Queue:

Subject	Members	Progress	Report Date
Products Liability	Tracy Fowler, Paul Simmons, Nelson Abbott, Todd Wahlquist	Appeared on Agenda November 2021. Continuing to work and will report back.	
Implicit Bias	TBD	Marianna Di Paolo interested. Stacy needs to do some reaching out. Could go in various directions	
Easements and Boundary Lines	Adam Pace, Robert Cummings, Robert Fuller, Doug Farr	Appeared on Agenda February 2021. Waiting for final review on Boundaries and new instructions.	
Assault / False Arrest	Mitch Rice, David Cutt, Andrew Wright, Alyson McAllister	Mitch is circulating instructions with the group and will report back.	
Insurance	Andrew Wright, Richard Vazquez, Stewart Harman, Kigan Martinaeu	Appeared on Agenda March 2022. Currently 5 members – 3 defense, 2 plaintiffs. Will work on one more plaintiffs attorney.	Sept. 2022
Unjust Enrichment	David Reymann	Instructions were shared in the past, where these completed?	
Abuse of Process	David Reymann	Instructions were shared in the past, where these completed? Marianna could only find notes as to intention to form this subcommittee.	
Directors and Officers Liability	Adam Buck	Adam is willing to work on this topic and would like more feedback from the Committee. Connected Adam with Lauren and Judge Holmberg.	
Wills / Probate	Matthew Barneck; Rustin Diehl	Matthew and Rustin have met to discuss direction and have started reaching out to various recommendations – Elder law section, Probate Subcommittee, WINGS, recommended individuals.	
Sales Contracts and Secured Transactions	Matthew Boley, Ade Maudsley	Matthew and Addie are willing to work on this topic and would like more feedback from the Committee.	
Defamation	David Reymann	Appeared on Agenda March 2022 with redline of instructions. Committee approved amendments.	Completed
Case law updates	TBD	Previous chairs or group leads may have feedback.	

Archived Topics:

Subject	Completed
Emotional Distress	December 2016
Fault / Negligence	October 2017
Civil Rights: Set 1 and 2	September 2017
Economic Interference	December 2017

Injurious Falsehood	February 2018
Trespass and Nuisance	October 2019
Uniformity	February 2020