Judicial Council Standing Committee
Model Utah Civil Jury Instructions

Agenda

September 12, 2022
4:00 to 6:00 p.m.
Via Webex

Welcome		Alyson / Lauren
Approval of Minutes	Tab 1	Alyson / Lauren
Implicit Bias Instructions	Tab 2	Alyson McAllister
Public Comments & Instructions	Tab 3	Alyson / Lauren
Progress on Instruction Topics	Tab 4	(Informational)
Updates on upcoming topics • In-person vs. Virtual Meetings • Easement by Necessity (Oct) • Insurance (Dec)		Stacy / Alyson / Lauren

Committee Web Page

Published Instructions

Next meeting: October 10, 2022 at 4:00 p.m.

Tab 1

MINUTES
Advisory Committee on Model Civil Jury Instructions
August 8, 2022
4:00 p.m.

Present: Randy Andrus, Marianna Di Paolo, Joel Ferre, Judge Keith Kelly, Lauren Shurman, Ruth Shapiro, William Eggington, Ricky Shelton, Alyson McAllister, Stacy Haacke (Staff)
Also present: Robert Fuller

Excused: Samantha Slark, Adam Wentz

1. *Welcome.*

Lauren Shurman welcomed everyone to the meeting.

2. *Approval of Minutes.*

Judge Kelly moves to approve the minutes. Ricky Shelton seconds. All approve.
May 2022 meeting minutes approved

3. *Farewell to members and welcome to new members.*

Alyson McAllister thanked Marianna Di Paolo and Joel Ferre for their years of service on the Committee and everyone wished them farewell. Ms. McAllister welcomed Dr. William Eggington to the Committee as the new linguist. Dr. Eggington gave a brief history of his experience and work as a linguist. He is originally from Australia and has worked on civil and criminal cases. Mark Morris was unable to attend as he is on vacation but he will be welcomed at the next meeting.

4. *Implicit Bias Update.*

Ms. McAllister provided an update on the subcommittee's work. The subcommittee met last week and made some good progress. They are hoping to have one or two instructions at next meeting. Ms. Di Paolo crafted some language that she circulated to the subcommittee. They are looking to present one instruction at the beginning and maybe some language to give in closing. Other jurisdictions use a video that they use in the initial gathering of jurors. Judge Kelly notes importance of including Judge Landau who is doing some work with Harvard on implicit bias studies with jurors. Great input from other subcommittee members. Ms. McAllister notes the original discussion in 2019 included concerns about knowing whether these type of instructions are harmful or useful. Ms. Di Paolo states her draft was based largely on what Judge Landau had provided, and there is a lot of material out there.

5. *Discussion of Easement by Necessity Instructions.*

Robert Fuller is present with new easement by necessity instructions. Mr. Fuller reviewed the proposed language along with the caselaw research supporting the instructions. The Committee began the thorough review of the instructions, including making the language more understandable to the lay person. The group ran out of time to finish the review. Mr. Fuller will continue with the review and return in October.

6. *Discussion of Boundary by Acquiesce.*

There is not a reserved set of numbers for the Boundary by Acquiesce instructions. The Committee discusses where these might go and there are some numbers available. Stacy Haacke will find a place to publish these instructions.

7. *In person vs. virtual meetings.*

The Committee discusses having in-person and virtual meetings. Agree that once a quarter in-person with a virtual link available would be a good start. Lauren, Alyson, and Stacy will look at the calendar to find a good time for an in-person meeting and this may depend upon the groups presenting instructions.

8. *Adjournment.*

The meeting concluded at 6:05 PM.

Tab 2

Implicit Bias Instructions:

Our system of justice requires all of us—attorneys, judges, and jurors—to minimize the impact of our biases on our decision making. Researchers have identified several techniques we can use to accomplish this difficult, but necessary task:

> First, reflect carefully and consciously about the evidence presented. Focus on the facts. The law requires that jurors' decision(s) are to be based on the evidence, and not on intuition or a gut reaction.
>
> Second, take the time you need to challenge what might be bias in your own thinking. Don't jump to conclusions that may be influenced by stereotypes about the parties, witnesses, or events.
>
> Third, try taking another perspective. Ask yourself if your opinion of the parties or witnesses would be different if the people participating looked different or if they belonged to a different group or if they had a different accent or if they spoke in a more educated manner.
>
> Fourth, listen to the opinions of the other jurors, who may have different backgrounds and perspectives from your own. Working together with the other jurors will help achieve a fair result. However, keep in mind that your decision(s) must be your own.

I have found these techniques helpful in lessening the impact of my own biases on my decision-making as a judge, and I therefore ask you to use these techniques as you consider the evidence in this case.

The comments raised by subcommittee members are:
Do we need to specifically state "conscious and unconscious" when describing biases in the first sentence (or even just "unconscious")?
Should we include a sentence to caution jurors against being influenced by strongly held views on political and social issues of the day?

Tab 3

Current Instruction	Public Comment
CV1605 Definition: False Statement. The allegedly defamatory statement must state or imply facts which can be proved to be false. [[Name of plaintiff] must show the statement to be false.] [[Name of Defendant] can defeat a defamation claim by showing the statement to be true.] "False" means that the statement is either directly untrue or that it implies a fact that is untrue. In addition, a defamatory 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 a defamation claim, no matter how annoying, embarrassing, damaging, or insulting it may be. To be considered "true" in a defamation case, a statement need not be completely accurate. 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** Air Wis. Airlines Corp. v. Hoeper, 571 U.S. 237 (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) Pipkin v. Acumen, 2020 UT App 111, 472 P.3d 315 Davidson v. Baird, 2019 UT App 8, 438 P.3d 928 **MUJI 1st Instruction** 10.4 **Committee Notes** The first sentence of this instruction includes alternative instructions in brackets because the burden of proof for truth/falsity can vary depending on the nature of the case. See CV1602. The first alternative should be given in cases where the plaintiff is a public official and/or public figure, or where the speech at issue relates to a matter of public concern. The second alternative should be given in cases where the plaintiff is neither a public official nor a public figure, and the speech at issue does not relate to a matter of public concern. Although material falsity is usually a question of fact for the jury, where "the underlying facts as to the gist or sting [of the statements] are undisputed, substantial truth may be determined as a matter of law." Hogan v. Winder, 762 F.3d 1096, 1106 (10th Cir. 2014) (internal quotations omitted). See also Air Wis. Airlines Corp. v. Hoeper, 571 U.S. 237 (2014) ("[U]nder the First Amendment, a court's role is to determine whether '[a] reasonable jury could find a material difference between' the defendant's statement and the truth.") (Scalia, J., concurring and dissenting) (quoting Masson v. New Yorker Magazine, Inc., 501 U.S. 496, 522 (1991)) (second alteration in original). In addition to explaining that "[m]inor inaccuracies" do not make a statement materially false, Masson, 501 U.S. at 517, the United States Supreme Court has further explained the concept of whether an inaccuracy is "material" as follows: "[A] materially false statement is one that "'would have a different effect on the mind of the reader [or listener] from that which the … truth would have produced.'" Air Wis., 571 U.S. at 250 (quoting Masson, 501 U.S. at 517) (further citation omitted) (second alteration and ellipses in original). There is a potentially open question regarding the standard of proof for falsity in some types of defamation cases. In Hart-Hanks Communications, Inc. v. Cannaughton, 491 U.S. 657, 661	Dear Committee- I write to comment on Model Jury Instruction No. CV1605 ("Definition: False Statement"). I suggest the Committee use "reasonably" as a qualifier in the defamation-by-implication instruction. So, the instruction would read "that it ***reasonably*** implies a fact that is true." There is not much guidance from Utah courts on the implied defamation doctrine. The one case from the Utah Supreme Court—*West v. Thomson Newspapers*, 872 P.2d 999 (Utah 1994)—seemed to at least implicitly endorse the doctrine. The Court explained that it was the "implication arising from the statement and the context in which it was made, not the statement itself, which forms the basis of [the plaintiff's] claim." *Id.* at 1011. Which, in turn, made "this is a defamation-by-implication claim." *Id.* Then, in a footnote, the Court cited a leading treatise's explanation of the doctrine. *Id.* at 1011 n. 18. But that was the beginning and the end of the Court's analysis, because the defendant had "not appealed [the] ruling" that the implication of its republished statements was false. *Id.* at 1011. Trial courts in Utah have applied their own gloss to defamation by implication, but they have generally supported using a "reasonable" modifier. In *Mile High Contracting, Inc. v. Deseret News Pub. Co.*, No. 170906024, 2018 WL 7374786, at *8 (Utah Dist.Ct. Mar. 16, 2018), Judge Scott explained that to "state a defamation-by-implication claim, [the plaintiff] must show that the claimed implication could reasonably be drawn from the article itself." The Tenth Circuit, in interpreting Utah law, used the same qualifier. *See, e.g.*, *Hogan v. Winder*, 762 F.3d 1096, 1106 (10th Cir. 2014) ("In this evaluation of context, we should examine . . . the likely effect on the reasonable reader."). And, for whatever its worth, the *West* court cited Professor Smolla's explanation of the false-by-implication doctrine, which explained suggested factfinders consider "the inference that the ordinary reasonable recipient may draw *West*, 872 P.2d at 1011 n.18 (quoting odney A. Smolla, Law of Defamation § 4.05(1) (1994)). Others Utah courts, however, have not imposed a "reasonable" implication requirement. *E.g.*, *Layton Companies, Inc v. SIRQ, Inc.*, No. 070908853, 2014 WL 12661713, at *8 (Utah Dist.Ct. Jan. 11, 2014) (plaintiff's

n.2 (1989), the United States Supreme Court took note of a split of authority as to whether, in a public figure or public official plaintiff case (where actual malice must be proved by clear and convincing evidence), material falsity must also be proved by clear and convincing evidence. At that time, the Court "express[ed] no view on this issue." Id. Since that time, however, the Supreme Court has twice emphasized that the issues of material falsity and actual malice are inextricably related, such that the definition of the latter requires a finding of the former. See Masson, 501 U.S. at 512; Air Wis., 571 U.S. at 246 ("[W]e have long held … that actual malice entails falsity."). As a result, many courts have concluded that in public figure and public official cases, material falsity must also be proved by clear and convincing evidence. See, e.g., Brokers' Choice of Am., Inc. v. NBC Universal, Inc., 757 F.3d 1125, 1136 (10th Cir. 2014) ("If the plaintiff is a public figure or the statement involves a matter of public concern, the plaintiff has the ultimate burden in his case-in-chief of proving the falsity of a challenged statement by 'clear and convincing proof.'" (citation omitted) (applying Colorado law)); DiBella v. Hopkins, 403 F.3d 102, 110-15 (2d Cir. 2005) (collecting cases and noting that only "a minority of jurisdictions require a public figure to prove falsity only by a preponderance of the evidence"); 1 Robert D. Sack, Sack on Defamation: Libel, Slander, and Related Problems § 3:4 (4th ed. 2013) (collecting cases). If a case involves a public figure or public official plaintiff, and the court determines that the higher standard of proof applies to material falsity, the first paragraph of the instruction should be amended to state: "The allegedly defamatory statement must state or imply facts which can be proven to be false. [Name of plaintiff] must show the statement to be false by clear and convincing evidence." **Amended Dates:** 3/12/18	"defamation claim consists of statements or implications the jury properly could have concluded were defamatory"). But putting the (somewhat contradictory) state of Utah law aside, including a reasonability modifier makes doctrinal sense. As one Court put it, "because the Constitution provides a sanctuary for truth, a libel-by-implication plaintiff must make an especially rigorous showing where the expressed facts are literally true." *Chapin v. Knight-Ridder, Inc*., 993 F.2d 1087, 1092–93 (4th Cir. 1993) (imposing an intent requirement). Though a minor change, including a reasonability modifier should make a difference. Borrowing from the commercial speech world, courts and juries have used the reasonability framework to limit out "a mere possibility that the advertisement might conceivably be misunderstood by some few consumers viewing it in an unreasonable manner." *Lavie v. Procter & Gamble Co.*, 129 Cal. Rptr. 2d 486, 495 (2003). Finally, adding a one-word reasonability modifier shouldn't confuse juries. That standard is often used in tort law, and a reasonability requirement is used throughout other defamation instructions. *See* Model Jury Instruction Nos. CV1604A-E; *see also Milkovich v. Lorain J. Co.*, 497 U.S. 1, 20 (1990) (using a reasonability limit for the fact/opinion question). Thank you for your consideration, Kade N. Olsen
CV1206 Nuisance - introductory instruction One person can interfere with the use or enjoyment of another person's property even without entering that other person's property. In some instances, the legal term for this is "nuisance." In this case, [name of plaintiff] claims that [name of defendant], through [describe the conduct, action, or thing], has created a nuisance that has interfered with [name of plaintiff]'s use or enjoyment of [his/her/its] property. [Name of plaintiff] claims that [name of plaintiff] has suffered harm as a result of this nuisance, and seeks to recover damages from [name of defendant] for that harm. **References** Utah Code § 76-10-801 Morgan v. Quailbrook Condominium Co., 704 P.2d 573 (Utah 1985) Branch v. Western Petroleum, Inc., 657 P.2d 267 (Utah 1982) Vincent v. Salt Lake County, 583 P.2d 105 (Utah 1978) Turnbaugh v. Anderson, 793 P.2d 939 (Utah App. 1990)	The White Collar and Commercial Enforcement Division submits the following comments. Our primary concern is that the distinct remedy of nuisance that is available to the State of Utah acting in its sovereign capacity has different elements than the remedy available to subdivisions or private parties. In recent litigation, the Attorney general has employed a nuisance cause of action to address injury to the health and welfare of Utah citizens arising from the opioid epidemic. Our comments address those concerns. We suggest the following revisions: CV1206 NUISANCE – INTRODUCTORY INSTRUCTION. One person can interfere *with a public right, or* the use or

	enjoyment of another person's property, even without entering that other person's property. In some instances, the legal term for this is "nuisance." Since this instruction is the introductory instruction, applicable to both private and public nuisance, as currently drafted, the limitation to property is narrower than the actual cause of action. damages apply only to private nuisance and this instruction doesn't include abatement, the equitable remedy for a public nuisance. We suggest the following insertion: "A nuisance is anything that is injurious to health, indecent, offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property (Utah Code Ann. 78B-6-1101(1). A public nuisance is one that affects an interest common to the general public. Turnbaugh for Benefit of Heirs of turnbaugh v. Anderson, 793 P.2d 939, 942 (Utah Ct. App. 1990); Solar Salt Co. v. Southern Pac. Transp. Co., 555 P.2d 286, 289 (Utah 1976). The instruction continues, with our revision, In this case, [name of plaintiff] claims that [name of defendant], through [describe the conduct, action, or thing], has created a nuisance that has interfered with a public right or [name of plaintiff]'s [use or enjoyment of [his/her/its] property.] [Name of plaintiff] claims that [name of plaintiff] has suffered harm as a result of this nuisance , and seeks to *abate, or end, the nuisance and/or* recover damages from [name of defendant] for that harm. CV1210 appears to be forwarded for a private nuisance suit. We have two concerns: 1. We suggest deleting (2). the statute does not use the term "unreasonable" and it is duplicative. An unlawful act is by definition unreasonable. Similarly, acts which "offend [] public decency" would also be unreasonable as the impetus for specific inclusion in the statute.

	To clarify that this instruction applies to private nuisance suits rather than nuisance suits brought by the State, we suggest the following at theend of the instruction: "These instructions are intended to address claims of private parties, and not to affect the State's authority to proceed on behalf of the public." Thomas Melton
CV155 Foreperson selection and duties and jury deliberations Among the first things you should do when you go to the jury room to deliberate is to appoint someone to serve as the jury foreperson. The foreperson should not dominate the jury's discussion, but rather should facilitate the discussion of the evidence and make sure that all members of the jury get the chance to speak. The foreperson's opinions should be given the same weight as those of other members of the jury. Once the jury has reached a verdict, the foreperson is responsible for filling out and signing the verdict form(s) on behalf of the entire jury. In the jury room, discuss the evidence and speak your minds with each other. Open discussion should help you reach an agreement on a verdict. Listen carefully and respectfully to each other's views and keep an open mind about what others have to say. I recommend that you not commit yourselves to a particular verdict before discussing all the evidence. Try to reach an agreement, but only if you can do so honestly and in good conscience. If there is a difference of opinion about the evidence or the verdict, do not hesitate to change your mind if you become convinced that your position is wrong. On the other hand, do not give up your honestly held views about the evidence simply to agree on a verdict, to give in to pressure from other jurors, or just to get the case over with. In the end, your vote must be your own. In reaching your verdict you may not use methods of chance, such as drawing straws or flipping a coin. Rather, the verdict must reflect your individual, careful, and conscientious judgment **Amended Dates:** 3/2020 **CV156 Do not resort to chance** When you deliberate, do not flip a coin, draw straws, choose opinions at random, or use other methods of chance. Instead you must weigh the evidence carefully and come to a decision that is supported by the evidence. If you decide that a party is entitled to recover damages, you must then agree upon the amount of money to award that party. Each of you should state your own independent judgment on what the amount should be. You must thoughtfully consider the amounts suggested, evaluate them according to these instructions and the evidence, and reach an agreement on the amount. You must not agree in advance to average the estimates. **References** Day v. Panos, 676 P.2d 403 (Utah 1984). **Amended Dates:**	CV155, 4th Clause and CV156, 1st Clause appear redundant. Perhaps the latter should be revised and the former omitted. Bart Kunz

3/2020	
CV131 Spoliation. I have determined that [name of party] intentionally concealed, destroyed, altered, or failed to preserve [describe evidence]. You [may/must] assume that the evidence would have been unfavorable to [name of party]. **References** Hills v. United Parcel Service, Inc., 2010 UT 39, 232 P.3d 1049. Daynight, LLC v. Mobilight, Inc., 2011 UT App 28, 248 P.3d 1010. Burns v. Cannondale Bicycle Co., 876 P.2d 415 (Utah Ct. App. 1994). URCP 37(e). **Committee Notes** Utah appellate courts have not recognized a cause of action for first-party spoliation (a claim against a party to the underlying action – or the party's attorney – who spoliates evidence necessary or relevant to the plaintiff's claims against that party), or a cause of action for third-party spoliation (a stranger to the underlying action or a party not alleged to have committed the underlying tort as to which the loss or destroyed evidence is related). Hills v. United Parcel Serv., Inc., 2010 UT 39, 232 P.3d 1049; Burns v. Cannondale Bicycle Co., 876 P.2d 415 (Utah Ct. App. 1994). Rule 37(b), (e), however, expressly provides authority to trial courts to address spoliation of evidence by a litigant, including instructing the jury regarding an adverse inference. See, URCP 37(b)(7). Instructing the jury to draw an adverse inference is just one of several sanctions the court may impose for spoliation. URCP37(e). There may be circumstances when whether spoliation occurred is a question for the jury. In Daynight, LLC v. Mobilight, Inc., 2011 UT App. 28, 248 P.3d 1010, the Utah Court of Appeals observed that "spoliation under [Rule 37(e)], meaning the destruction and permanent deprivation of evidence, is on a qualitatively different level than a simple discovery abuse under [Rule 37(b)] which typically pertains only to a delay in the production of evidence. . . . [Rule 37(e)] of the Utah Rules of Civil Procedure does not require a finding of 'willfulness, bad faith, fault or persistent dilatory tactics' or the violation of court orders before a court may sanction a party." Id. at ¶ 2. **Amended Dates:** 9/2011, 3/2020	CV131 as written is an incorrect statement of law. "Intent" is not required in order to give a spoliation instruction. See Ockey v. Club Jam, 328 P.3d 880, 883-84 (Utah Ct. App. 2014). The word "intentionally" should be removed from the model instruction. Court's can always add it back in, if that is in fact the case. In my experience most spoliation findings do not involve clear intent. Peter Mifflin
Comment for new instruction	I frequently conduct focus groups and communicate with jurors after trials who ask or comment about "why it took so long to get a case to trial." Certainly there are lots of reasons, procedurally and for court scheduling purposes, why cases take years to get to trial. But this negatively effects plaintiffs more than defendants because jurors think it's the plaintiff's "fault" for taking so long. I believe we need an instruction to ameliorate this problem to be included with the general instructions. Here is my recommendation: Time taken for case to arrive at trial. There are many reasons cases take months or years to arrive at trial. These reasons vary from, among other things,

	procedural requirements and court system scheduling issues. You must not consider the time taken for a case to arrive at trial as a reflection of the strengths or weaknesses of a person's position. Tyler Young

Tab 4

MUJI Civil Upcoming Queue:

Numbers	Subject	Members	Progress	Next Report Date
1000	Products Liability	Tracy Fowler, Paul Simmons, Nelson Abbott, Todd Wahlquist	Appeared on Agenda November 2021. Continuing to work and will report back.	2023
	Implicit Bias	Judge Kelly, Judge Landau, Alyson McAllister, Doug Mortensen, Rachel Griffin, Ruth Shapiro, Marianna Di Paolo, Annie Fukushima	Judge Kelly has scheduled meetings for this group. Alyson will give an update at August meeting.	Sept. 2022
900	Easements and Boundary Lines	Adam Pace, Robert Cummings, Robert Fuller, Doug Farr	Finished Boundary by Acquiescence. Easement by Necessity last on agenda for August 2022.	Oct. 2022
1700	Assault / False Arrest	Mitch Rice, David Cutt, Andrew Wright, Alyson McAllister	Mitch is circulating instructions with the group and will report back.	
2400	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.	Dec. 2022
	Unjust Enrichment	David Reymann	Stacy researching and following up on these instructions.	
1700	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.	
2700	Directors and Officers Liability	Adam Buck	Lauren has been working with Adam to fill this group and has reached out regarding a timeframe.	
2500	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.	
2300	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.	
	Case law updates	TBD	Previous chairs or group leads may have feedback.	

Archived Topics:

Numbers	Subject	Completed
1500	Emotional Distress	December 2016
200 / 1800	Fault / Negligence	October 2017
1300	Civil Rights: Set 1 and 2	September 2017
1400	Economic Interference	December 2017
1900	Injurious Falsehood	February 2018
1200	Trespass and Nuisance	October 2019
100	Uniformity	February 2020
1600	Defamation Update	March 2022