

MINUTES

Advisory Committee on Model Civil Jury Instructions
February 13, 2023
4:00 p.m.

Present: Judge Keith A. Kelly, Judge Kent Holmberg, Lauren A. Shurman, Alyson McAllister, William Eggington, Ruth A. Shapiro, Douglas G. Mortensen, Samantha Slark, Jace Willard (staff).

Also present: Robert Fuller, Robert Cummings, Adam Pace

Excused: Ricky Shelton, Adam D. Wentz, Mark Morris.

1. *Welcome.*

Alyson McAllister welcomed the Committee.

2. *Approval of Minutes.*

Lauren Shurman moved to approve the January 9, 2023 meeting minutes. Judge Keith A. Kelly seconded the motion.

3. *Public Comments to CV135 (pretrial delay) and CV1607 (defamation)*

The Committee reviewed a public comment received following publication of CV135 (pretrial delay). Judge Kelly moved to add clarifying language to the Committee Note, providing examples of cases in which the instruction might not be appropriate. Ruth A. Shapiro seconded the motion. Unanimously approved.

The Committee noted the absence of any public comments to CV1607 (defamation), which will therefore remain unchanged.

4. *CV950 Easement Defined.*

- Robert Fuller, Robert Cummings, and Adam Pace joined the meeting to discuss the proposed instruction. Mr. Farr, who presented on the instruction in January, was unable to join due to travel obligations.
- The Committee discussed language to simplify the proposed definition of an easement, drawn from Black's Law Dictionary (abridged 7th ed.) (Bryan Garner editor), as well as numbering of the proposed instructions.
- Judge Kelly moved that the simplified definition of an easement be adopted. Doug Mortensen seconded. The Committee unanimously approved.
- The Committee suggested further definitions be added for terms such as "express easement," "easement by implication," "prescriptive easement," "easement by necessity," and possibly others.

- Mr. Pace indicated that, following the meeting, he would add proposed definitions for these other terms and email them to the Committee for approval.

5. *CV951 Prescriptive Easement. Elements of a claim.*

- The Committee reviewed language in this instruction regarding the elements of a prescriptive easement claim.
- The conclusion paragraph has been reworded to state that if the plaintiff proves each element by clear and convincing evidence, then the plaintiff is entitled to a prescriptive easement to continue using the defendant's property for a particular use.
- Judge Kelly moved to approve CV951. Mr. Mortensen seconded. The Committee unanimously approved.

6. *CV952 Prescriptive Easement. "Open and Notorious" Defined.*

- The Committee reviewed this proposed instruction and discussed placing certain supporting cases, with pinpoint citations, in a reference section.
- Ms. Shurman moved to approve CV952. Ms. Shapiro seconded. The Committee unanimously approved.

7. *CV953 Prescriptive Easement. "Adverse" Defined.*

- Mr. Pace explained this proposed instruction, including what makes a use adverse, and that twenty years of continuous open and notorious use gives rise to a presumption of adverseness. Ms. Shurman proposed rewording the second paragraph to make it easier to understand.
- Dr. Eggington expressed concern regarding laypersons' ability to understand the meaning of the term "presume." Alternatives such as "conclude" and "determine" were considered. After further discussion, he felt that "presume" was sufficiently clear.
- A reference section was added to this instruction with cases presented by Mr. Pace.
- Ms. Shurman moved to approve CV953. Mr. Mortensen seconded. The Committee unanimously approved.

8. *CV954 Prescriptive Easement. "Continuous" Defined.*

- Mr. Pace explained the first paragraph of this proposed instruction as to what makes a use "continuous." Certain language was deleted from this paragraph based on Ms. McAllister's proposal to simplify it.

- The second paragraph was restructured to enumerate clearly ways that a prescriptive use may be interrupted.

9. *Avoiding Bias - update*

Judge Kelly provided an update regarding the proposed Avoiding Bias instruction, and indicated he is currently coordinating to present to the Board of District Court Judges, which he anticipates will happen in the next month or so.

10. *CV632 Threshold.*

Due to time constraints, Ms. McAllister and Samantha Slark will present their draft revisions to this instruction at the next meeting.

11. *Adjournment.*

The meeting concluded at 6:07 PM.