

Judicial Council Standing Committee on
Model Utah Civil Jury Instructions

Agenda

April 10, 2023
4:00 to 6:00 p.m.
[Via Webex](#)

Welcome and Approval of Minutes (Jan. and Feb.; no quorum in March)	Tab 1	Alyson/Lauren
CV950 Easement Defined draft instruction	Tab 2	Adam Pace
Easement by Necessity draft instruction	Tab 3	Robert Cummings
CV632 Threshold and CV632A – draft revisions for caselaw and legislative update	Tab 4	Alyson/Samantha
Progress on Instruction Topics	Tab 5	(Informational)

[Committee Web Page](#)

[Published Instructions](#)

Meeting Schedule: Monthly on the 2nd Monday at 4 pm

Next meeting: May 8, 2023

TAB 1

MINUTES

Advisory Committee on Model Civil Jury Instructions

January 9, 2023

4:00 p.m.

Present: Judge Keith A. Kelly, Lauren A. Shurman, Alyson McAllister, William Eggington, Ruth A. Shapiro, Douglas G. Mortensen, Samantha Slark, Ricky Shelton, Adam D. Wentz, Jace Willard (staff).

Also present: Robert Fuller, Doug Farr

Excused: Judge Kent Holmberg, Mark Morris, Stacy Haacke (staff).

1. *Welcome.*

Lauren Shurman welcomed the Committee.

Samantha Slack has given her notice and will be leaving the Committee following the appointment of her replacement. The Committee now has two vacancies to fill.

2. *Approval of Minutes.*

December 12, 2022 meeting minutes approved.

Judge Kelly expressed his willingness to speak to the Board of District Court Judges regarding the Avoiding Bias Instructions to see if they have substantive input and to determine whether there is a consensus that these instructions will be useful. Judge Kelly may prepare a memorandum to provide to the Board as well.

3. *CV___ Prescriptive Easement. Introduction.*

- Doug Farr and Robert Fuller joined the meeting to discuss the proposed instruction.
- Mr. Farr explained the growing importance of easement law and outlined generally the organization of the proposed instructions.
- The Committee considered whether the introductory instruction is even necessary or consistent with previous instructions. Multiple members of the Committee opined that it was duplicative and did not add substantive material not found in later instructions.
- The Committee agreed to strike this instruction altogether.

4. *CV___ Prescriptive Easement. Elements of a claim.*

- Introductory sentences were suggested and added to account for some of the language previously found in the introductory instruction.

- Judge Kelly suggested edits to account for the specific easement claims being made in the subject lawsuit, and not simply general concepts. These edits were incorporated into the draft.
- The Committee agreed that legalese in the instruction should be simplified. The Committee made multiple such edits and clarifications.
- A conclusory statement was suggested to include clarification that if the plaintiff can establish all elements of a prescriptive easement, plaintiff may continue to use the property *in a similar manner*. The Committee later concluded that this addition may be duplicative. The Committee discussed whether this language should be used in a separate instruction, as well as what precisely the jury must decide in an easement action versus what the judge must determine. These questions were reserved for a later meeting.

5. *CV___ Prescriptive Easement. "Open and Notorious" Defined.*

- Members of the Committee pointed out that these terms are previously defined in the adverse possession and boundary by acquiescence instructions.
- The language was edited to simplify and clarify.
- Doug Farr had to leave the meeting early but agreed to make additional changes to the defined terms and return for the next meeting.

6. *Evolving Meaning of "Reasonable"*

- Bill Eggington presented on Corpus Linguistics, the evolution of language, and, specifically, evolution of the term "reasonable."

7. *CV632 Threshold.*

Alyson McAllister posed the question to the Committee whether a subcommittee should be assigned to draft this instruction, or if an individual could take on the responsibility. Judge Kelly suggested having specialist from both sides of the bar contribute. Alyson McAllister and Samantha Slark agreed to prepare a draft for the next meeting.

8. *Adjournment.*

The meeting concluded at 6:03 PM.

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.

TAB 2

CV950 Easement Defined.

An easement is a right to use or control land owned by another person for a specific limited purpose (such as to cross it for access [or insert other example]). An easement prohibits the landowner from interfering with the uses authorized by the easement.

[An express easement is [an easement that the landowner grants to someone else in writing, such as in a contract or a deed.](#)—.]

[An easement by implication is —.]

[A prescriptive easement is a legal right to continue to use property of another based on longstanding use.]

[An easement by necessity [or implication](#) is [an easement that can arise when a landowner divides property into two or more pieces \(i.e., Parcel A and Parcel B\) and conveys one of the pieces away. If the new owner of Parcel B cannot access Parcel B without crossing Parcel A, then an easement by necessity may arise that allows the owner of Parcel B to cross over Parcel A in order to access Parcel B.](#)—.]

References

Black's Law Dictionary (Abridged 7th ed.).

[Abraham & Assocs. Trust v. Park, 2012 UT App 173, ¶ 12, 282 P.3d 1027.](#)

Committee Notes

The parties may include in the parenthetical a description of additional or other particular uses more specific to the facts of the case. Depending on the easement at issue, the easement may include an area above or below the surface of the land.

If there are additional types of easements, the jury may be instructed according to the particular easement.

CV951 Prescriptive Easement. Elements of a claim.

[Plaintiff] claims a prescriptive easement to continue to use [Defendant's] property in the following manner: [describe the particular use]. To establish this prescriptive easement, [Plaintiff] must prove by clear and convincing evidence each of the following elements:

1. That [Plaintiff] has been using [Defendant's] property for [describe the particular use];

2. That [Plaintiff's] use of [Defendant's] property in this manner was open and notorious;
3. That [Plaintiff's] use of [Defendant's] property in this manner was adverse; and
4. That [Plaintiff] continuously used [Defendant's] property in this manner for at least 20 years.

If you find that [Plaintiff] has proved each of these elements by clear and convincing evidence, then [Plaintiff] is entitled to a prescriptive easement to continue using [Defendant's] property for [describe the particular use].

References

Judd v. Bowen, 2017 UT App 56, ¶ 10, 397 P.3d 686, 692.
Valcarce v. Fitzgerald, 961 P.2d 305, 311 (Utah 1998).

CV952 Prescriptive Easement. "Open and Notorious" Defined.

[Plaintiff's] use of [Defendant's] property was "open and notorious" if [Defendant] knew about the use, or if [Defendant] could have learned about the use through the exercise of reasonable diligence.

References

Judd v. Bowen, 2017 UT App 56, ¶ 22, 397 P.3d 686, 694.
Lunt v. Kitchens, 260 P.2d 535, 537 (Utah 1953).
Jensen v. Gerrard, 39 P.2d 1070, 1072 (1935).

CV953 Prescriptive Easement. "Adverse" Defined.

[Plaintiff's] use of [Defendant's] property was "adverse" if [Plaintiff] did not obtain permission for the use.

If you find [Plaintiff's] open and notorious use of [Defendant's] property continued for a period of twenty years, then you must presume that the use was adverse unless [Defendant] proves that [Defendant] [or a previous owner of [Defendant's] property] gave permission to [Plaintiff] for the use when it first began.

References

Harrison v. SPAH Family Ltd., 2020 UT 22, ¶ 51, 466 P.3d 107, 118.
Valcarce v. Fitzgerald, 961 P.2d 305, 311 (Utah 1998).
Zollinger v. Frank, 175 P.2d 714, 716 (Utah 1946).

Jacob v. Bate, 2015 UT App 206, ¶¶ 18-19, 358 P.3d 346, 353.

CV954 Prescriptive Easement. “Continuous” Defined.

[Plaintiff’s] use of [Defendant’s] property was continuous if [Plaintiff] used [Defendant’s] property as often as required by the nature of the use and [Plaintiff’s] needs, for an uninterrupted period of at least twenty years.

A prescriptive use is interrupted where, sometime during the twenty-year period: (1) [Plaintiff] stops using [Defendant’s] property; (2) [Defendant] [or a previous owner of [Defendant’s] property] prevents [Plaintiff] from using the property; or (3) [Plaintiff] accepts permission from [Defendant] [or a previous owner of [Defendant’s] property] to continue using the property.

References

Harrison v. SPAH Family Ltd., 2020 UT 22, ¶¶ 41-43, 466 P.3d 107, 116-17.

Judd v. Bowen, 2017 UT App 56, ¶ 16, 397 P.3d 686, 693.

Valcarce v. Fitzgerald, 961 P.2d 305, 311 (Utah 1998).

Marchant v. Park City, 788 P.2d 520, 524 (Utah 1990).

SRB Inv. Co., Ltd v. Spencer, 2020 UT 23, 463 P.3d 654.

Lunt v. Kitchens, 260 P.2d 535, 537 (Utah 1953).

Jacob v. Bate, 2015 UT App 206, ¶ 27, 358 P.3d 346, 355.

Jensen v. Gerrard, 39 P.2d 1070, 1073 (Utah 1935).

Zollinger v. Frank, 175 P.2d 714, 716 (Utah 1946).

Committee Notes

For the definition of clear and convincing, *see* CV118.

TAB 3

CV ____ Easement by Necessity. Introduction.

An easement by necessity arises when there is a transfer of property from one owner to another that results in a tract of land becoming landlocked.

[Plaintiff] and [Defendant] are adjoining landowners. [Plaintiff] asserts that because [his/her/its] property is completely landlocked, [he/she/it] should be granted an "easement by necessity" across [Defendant's] property so that [Plaintiff] can get to or from [his/her/its] property from the [public highway]. [Defendant] asserts that [Plaintiff] has no right to enter or use [Defendant's] property to access [Plaintiff's] property.

References

Tschaggeny v. Union Pac. Land Res. Corp., 555 P.2d 277, 280 (Utah 1976).

Abraham & Assocs. Trust v. Park, 2012 UT App 173, ¶ 12, 282 P.3d 1027, 1030–31.

CV _____ Easement by Necessity. Elements of a claim for access to landlocked property.

To succeed on this claim, [Plaintiff] must prove by clear and convincing evidence each of the following elements:

- (1) All of the property was once owned by a single person who then divided the land and transferred away one tract of land, creating a landlocked property; and
- (2) That the easement is reasonably necessary to the enjoyment of the landlocked property.

References

Morris v. Blunt, 49 Utah 243, 161 P. 1127, 1132 (1916).

Savage v. Nielsen, 114 Utah 22, 31–33, 197 P.2d 117, 121–22 (1948).

Tschaggeny v. Union Pac. Land Res. Corp., 555 P.2d 277, 280 (Utah 1976).

Abraham & Assocs. Trust v. Park, 2012 UT App 173, ¶ 15, 282 P.3d 1027, 1031.

Potter v. Chadaz, 1999 UT App 95, ¶ 18, 977 P.2d 533, 538.

David A. Thomas & James H. Backman on Utah Real Property Law, Easement by Necessity, § 12.02(b)(2)(ii), at 341 (ed. 2021).

Committee Notes

This instruction applies to cases based solely upon a claim of a way of necessity. Other easement claims will require proof of additional elements.

CV ___ Dominant Estate defined.

The "dominant estate" is an estate that benefits from an easement.

References

Black's Law Dictionary (7th ed.).

Metro. Water Dist. of Salt Lake & Sandy v. SHCH Alaska Trust, 2019 UT 62, ¶ 23, 452 P.3d 1158, 1165.

TAB 4

CV632 Threshold.

[Name of defendant] claims that [name of plaintiff] has not met the threshold injury requirements and therefore cannot recover non-economic damages.

~~In order to A person may~~ recover non-economic damages resulting from an automobile accident ~~[name of Plaintiff] must prove only if~~ [he/she] has ~~suffered one of the following:~~

~~[(1) death.] or~~

~~[(2) dismemberment.] or~~

~~[(3) permanent disability or permanent impairment based on objective findings.] or~~

~~[(24) permanent disfigurement.] or~~

~~[(5) a bone fracture.] or~~

~~[(36) reasonable and necessary medical expenses in excess of \$3,000.]~~

References

Utah Code Section 31A-22-309(1)(a).

Pinney v Carrera, 2020 UT 43, 469 P.3d 970

Committee Notes

~~Neither Both the statute nor and case law has have provided clear boundaries examples and on the definitions of for disability and impairment. For example, a herniated disc and permanent scar tissue restricting range of motion have both been held to constitute permanent injury. It is also undecided whether the plaintiff or the defendant who asserts the defense carries the burden of proof or burden of moving forward.~~

Here is the case law and statutory law that I used to update the instruction:

First, it relied on one of our earlier cases to conclude that a disability or impairment is “permanent” “whenever it is founded upon conditions which render it reasonably certain that it will continue throughout the life of the person suffering from it.”¹⁴ Then it interpreted the term “disability” to mean “the inability to work” and the term “impairment” to mean “the loss of bodily function.”¹⁵ Finally, the court interpreted the phrase “objective finding.”¹⁶ The court of appeals interpreted the phrase “objective findings” in two steps. First, it cited Black’s Law Dictionary, which defines “objective” as “[o]f, relating to, or based on externally verifiable phenomena, as opposed to an individual’s perceptions, feelings, or intentions.”¹⁷ And second, it cited one of its previous cases, in which it held that a plaintiff had failed to provide “objective findings” of a permanent injury where the plaintiff did not support his claim “with something more than his say so.”¹⁸ After considering these sources, the court concluded that, to be considered “objective,” “a finding need only be demonstrated through evidence other than the plaintiff’s own subjective testimony.”¹⁹

Pinney v. Carrera, 2020 UT 43, ¶¶ 19-20, 469 P.3d 970, 977

Commented [SS1]: I think there is a danger of interpreting this as saying these injuries are a disability as a matter of law. I think the case law says it is sufficient evidence for a jury to conclude . . . , which is a little different. I am not sure this note is helpful anymore so just removing it seems the better option.

Commented [AM2R1]: I think having the examples in there are helpful, but we should word it in such a way to make it clear those are not per se disability.

¶24 The statute imposes a burden on the plaintiff to prove that one of the circumstances enumerated in the statute exists.²

Pinney v. Carrera, 2020 UT 43, ¶ 24, 469 P.3d 970, 978

a permanent herniated disc in her back. And he specifically testified that the herniated disc constituted “a permanent injury.” He also testified that scar tissue, stemming from injuries sustained in the crash, inhibited Ms. Pinney's range of motion, and that treatment failed to restore her range of motion back to “100 percent.” He further testified that “the scar tissue is permanent.”

Pinney v. Carrera, 2020 UT 43, ¶ 28, 469 P.3d 970, 979

(1)(a) A person who has or is required to have direct benefit coverage under a policy which includes personal injury protection may not maintain a cause of action for general damages arising out of personal injuries alleged to have been caused by an automobile accident, except where the person has sustained one or more of the following:

- (i) death;
- (ii) dismemberment;
- (iii) permanent disability or permanent impairment based upon objective findings;
- (iv) permanent disfigurement;
- (v) a bone fracture; or
- (vi) medical expenses to a person in excess of \$3,000.

Utah Code Ann. § 31A-22-309 (West)

CV 632A – Threshold - Definitions

A “permanent disability” is ~~the an~~ inability to work ~~where it that~~ is reasonably certain to continue throughout the life of the person suffering from it.

A “permanent impairment” is the loss of a bodily function that is reasonably certain to continue throughout the life of the person suffering from it.

~~You cannot make a finding that [plaintiff] is “permanently disabled” or “permanently impaired” based on [plaintiff’s] testimony that they believe they are permanently disabled or permanently impaired. A finding that [plaintiff] is permanently disabled or permanently impaired must be based demonstrated by externally verifiable evidence, which means something other than [plaintiff’s] own testimony. on externally verifiable evidence of a permanent disability or permanent impairment.~~ Testimony of an expert or [plaintiff’s] treating physician are examples of externally verifiable evidence.

A “permanent disfigurement” is a disfigurement that is reasonably certain to continue throughout the life of the person suffering from it.

References

Utah Code Section 31A-22-309(1)(a).

Pinney v. Carrera, 2019 UT App 12, ¶¶ 23-25, 438 P.3d 902 aff’d, 2020 UT 43, ¶ 24, 469 P.3d 970, *Pinney v Carrera*, 2020 UT 43, 469 P.3d 970

Committee Notes

~~Unlike disability and impairment, what is meant by “disfigurement” under this statute does not appear to have been defined so this definition just focusses on the “permanent” aspect. (In fact, the Supreme court specifically declined to reach the issue of disfigurement in *Sheppard v. Geneva Rock*, 2021 UT 31, n. 8 because it resolved the case on other grounds.)~~ Only provide the jury with these definitions if applicable to the threshold or thresholds the plaintiff claims to meet.

TAB 5

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
	Avoiding Bias	Judge Kelly, Judge Landau, Alyson McAllister, Doug Mortensen, Rachel Griffin, Ruth Shapiro, Marianna Di Paolo, Annie Fukushima	Approved in October 2022. Presented to Judicial Council November 2022. Discussed at December meeting. Going to Board of District Court Judges.	April 2023
900	Easements and Boundary Lines	Adam Pace, Robert Cummings, Robert Fuller, Doug Farr	Finished Boundary by Acquiescence. Prescriptive Easement draft presented at January 2023 meeting and continued to February 2023. Easement by Necessity last addressed at October 2022 meeting. Prescriptive Easement instructions presented and mostly approved at February 2023 meeting. Final versions to be addressed at April meeting.	April 2023
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.	?
	Unjust Enrichment	David Reymann	Stacy researching and following up on these instructions.	
1700	Abuse of Process	David Reymann	Instructions were shared in the past, were 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