

## ***MINUTES***

Advisory Committee on Model Civil Jury Instructions  
September 11, 2023  
4:00 p.m.

Present: Judge Keith A. Kelly, Lauren A. Shurman, Alyson McAllister, William Eggington, Mark Morris, John Macfarlane, Michael D. Lichfield, Stewart Harman, Jace Willard.

Also present: Clark Cunningham, Jesse Egbert, Scott Jarvis, Robert J. Fuller, Robert B. Cummings

Excused: Judge Kent Holmberg, Douglas G. Mortensen, Ricky Shelton, Adam Wentz

### *1. Welcome*

Alyson McAllister welcomed the Committee.

### *2. Approval of Minutes*

July meeting minutes approved.

### *3. Welcome new Committee member (Stewart Harman)*

Ms. McAllister welcomed Stewart Harman as a new Committee member (effective 8/18/23). Mr. Harman introduced himself to the Committee and Committee members introduced themselves.

### *4. CV107A, CV632, CV632A-CV632D*

Mr. Willard noted that no public comments had been received as to several recently published instructions (CV 107A, CV632, CV632A, CV632B, CV632C, and CV632D). The instructions were thus approved as final.

### *5. Language and Law Research Proposal*

William Eggington introduced his professional linguist colleagues (Clark Cunningham, Jesse Egbert, and Scott Jarvis) to the Committee, with their written proposal to collaborate with the Committee. Mr. Cunningham discussed the linguists' experience and background, and suggested that the Committee could propose certain instructions to be reviewed by the linguists for understandability by lay members of the public. Judge Kelly suggested that the linguists might begin by reviewing the stock instructions in the CV100 series as those are the most frequently used instructions. Ms. McAllister invited volunteers to form a subcommittee. A subcommittee was formed, comprised of Judge Kelly, John Macfarlane, Michael Lichfield, Robert B. Cummings, Bill Eggington, Clark Cunningham, Jesse Egbert, and Scott Jarvis. Mr. Willard will email the CV100 series instructions and a scheduling poll to the Subcommittee.

6. *CV920 “Easement” Defined.*

- Beginning with CV920, Mr. Cummings led a discussion of the draft prescriptive easement instructions, which were partially addressed during a prior meeting. He and Robert J. Fuller suggested that this draft instruction is correct. No Committee member raised any concerns with this instruction.

7. *CV921 Prescriptive Easement. Introduction.*

- This instruction was discussed and revised during a prior meeting. No concerns were raised as to this instruction.

8. *CV922 Easement by Implication. Introduction.*

- The Committee reviewed certain feedback and proposed revisions to this instruction sent via email to Lauren Shurman by Christopher Hogle. Mr. Hogle’s email expressed concern that this instruction does not correctly reflect the law because it omits the “claim of right” requirement mentioned in *Judd v. Bowen*, 2017 UT App 56, ¶ 10, 397 P.3d 686, and *Valcarce v. Fitzgerald*, 961 P.2d 305, 311 (Utah 1998). Mr. Fuller pointed to language in a recent case setting forth prescriptive easement elements in *M.N.V. Holdings LC v. 200 South LLC*, 2021 UT App 76, ¶ 9, 494 P.3d 402, without mention of the “claim of right” requirement. Mr. Lichfield and Mr. Cummings were of the view that the “claim of right” requirement was essentially already included in the requirement that any use be adverse, as indicated in the third element of the instruction.
- Pursuant to a suggestion by Mr. Eggington, the 20-year requirement stated in the fourth element was placed in the phrase immediately preceding the elements in this instruction.

9. *CV923 Prescriptive Easement. “Open and Notorious” Defined.*

- Mr. Eggington suggested that the meaning of the term “notorious” in this instruction is not sufficiently clear, given the negative historical meaning. Pursuant to this suggestion, Mr. Cummings added a quote from the Utah Property Ombudsman website (<https://propertyrights.utah.gov/find-the-law/legal-topics/>). Mr. Eggington said this resolved his concerns.

10. *CV924 Prescriptive Easement. “Adverse” Defined; CV925 Presumptions and Rebuttals.*

- Mr. Cummings suggested that the first paragraph of this instruction was sufficient to define “adverse.” Addressing Mr. Hogle’s concerns regarding the second paragraph, Mr. Cummings suggested it should be made part of a separate instruction dealing with presumptions and rebuttals. Regarding the latter point, Mr. Fuller pointed to language in *Harrison v. SPAH Family Ltd.*, 2020 UT 22, ¶¶ 31 & 32, n.16, 466 P.3d 107, which addresses the issue.
- Mr. Cummings will put together a draft for this separate instruction (CV925) for the Committee to consider next month. Mr. Willard will review the appropriate references for CV924.

11. *CV926 Prescriptive Easement. “Continuous” Defined.*

- Mr. Cummings suggested that the second paragraph of this instruction should use the term “not continuous” rather than “interrupted” for the sake of consistency in terms.
- Ms. McAllister suggested reformatting the itemized list in this instruction for improved readability.

12. *CV132A Prescriptive Easement. “Continuous” Defined.*

- Mr. Macfarlane presented proposed instruction CV132A, addressing the assessment of witness credibility based on where the witness lives and whether the witness appears remotely rather than in person. The Committee discussed the possibility that there may be instances when a witness’s place of origin could affect the witness’s ability to give reliable testimony as to an event occurring in another state. The Committee agreed it would be better to limit this instruction to remote vs. in-person appearances. Mr. Eggington suggested that the phrase “discount the opinions” in this instruction might be confusing since the word “discount” is usually used today to refer to something being offered at a reduced price.

13. *October Meeting Date*

- The Committee agreed that, due to the Columbus Day holiday, the October Committee meeting will be held on the 16th rather than the 9th.

The meeting concluded at approximately 6:10 PM.