

Judicial Council Standing Committee on
Model Utah Civil Jury Instructions

Agenda

November 13, 2023

4:00 to 6:00 p.m.

[Via Webex](#)

Welcome and Approval of October Minutes	Tab 1	Alyson/Lauren
Preview new MUJI website		Jace Willard
Linguistics and Law Subcommittee (update)		Bill Eggington
CV920-CV925 draft prescriptive easement instructions	Tab 2	Robert Cummings
Progress on Instruction Topics	Tab 3	(Informational)

[Committee Web Page](#)

[Published Instructions](#)

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

Next meeting: December 11, 2023?

EXHIBIT 1

MINUTES

Advisory Committee on Model Civil Jury Instructions

October 11, 2023

4:00 p.m.

Present: Judge Keith A. Kelly, Judge Kent Holmberg, Lauren A. Shurman, Alyson McAllister, William Eggington, Mark Morris, John Macfarlane, Michael D. Lichfield, Stewart Harman, Douglas G. Mortensen, Ricky Shelton, Jace Willard.

Excused: Adam Wentz

1. Welcome

Alyson McAllister welcomed the Committee.

2. Approval of Minutes

September meeting minutes approved.

3. Public Comment to CV632, CV632A-CV632D

Mr. Willard noted that one public comment had previously been received but not presented to the Committee as to several published instructions (CV632, CV632A, CV632B, CV632C, and CV632D) that were approved as final at the September 11, 2023 Committee meeting. The Committee viewed the public comment as expressing a desire for a change to the relevant law rather than to bring the instructions at issue into conformity with the law as it presently exists. Accordingly, no action was taken as a result of the comment.

4. CV132A Remote Testimony.

Mr. Macfarlane presented proposed instruction CV132A, addressing the assessment of witness credibility based on whether the witness appears remotely rather than in person. When it was first presented to the Committee in September, the draft instruction was combined with existing CV132, concerning out-of-state or out-of-town witnesses. It is now an entirely separate instruction with a more limited focus. Mr. Shelton moved to approve the instruction. Judge Kelly seconded the motion. Unanimously approved.

5. CV2021 Present Cash Value, Committee Notes.

The Committee addressed the need to update the Committee Notes for CV2021 in light of a footnote in a recent Utah Court of Appeals decision indicating that “while having an expert testify about [the present value] calculation is usually preferred, such expert testimony is not required when a party like [the plaintiff] claims future damages.”

Brinkerhoff v. Fleming, 2023 UT App 92, ¶ 19 n.4. Ms. McAllister reviewed the case and concluded that the plaintiff referenced in the footnote was an ordinary plaintiff in a typical tort action arising from an automobile accident, so the footnote does not appear to be limited to a plaintiff with special qualifications. Ms. McAllister also reviewed *Schlatter v. McCarthy*, 113 Utah 543, 196 P.2d 968, referenced in the existing Committee Notes. Ms. McAllister proposed inserting a summary of the *Brinkerhoff* footnote as the second to last paragraph of the Committee Notes, and adding “without expert testimony” to the sentence summarizing the holding from *Schlatter*. Mr. Mortensen moved to so update the Committee Notes. Mr. Harman seconded the motion. Unanimously approved.

6. *Other Projects*

- The Committee reviewed the assignments in the queue. Ms. McAllister will see about finding some new members for the CV2400 Insurance subcommittee. Mr. Willard to add the Jury Instruction Linguistic Review Subcommittee to the queue, which will include Professor Eggington’s ongoing research re the meaning of “reasonable.”

The meeting concluded at approximately 5:00 PM.

EXHIBIT 2

CV920 “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.]

References

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

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. By including these instructions, the Committee does not intend to take a position on the question of whether a right to a jury trial exists for any particular easement claim.

CV921 Prescriptive Easement. Introduction.

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

References

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

CV922 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 that for at least 20 years:

1. That [Plaintiff] has continuously used [Defendant’s] property for [describe the particular use];
2. That [Plaintiff’s] use of [Defendant’s] property in this manner was open and notorious; and
3. That [Plaintiff’s] use of [Defendant’s] property in this manner was adverse.

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

M.N.V. Holdings LC v. 200 South LLC, 2021 UT App 76, ¶9, 494 P.3d 402.

Judd v. Bowen, 2017 UT App 56, ¶ 10, 397 P.3d 686, 692.

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

CV923 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.

"Notorious" in this context does not mean a criminal act or some wrongdoing, but only that the use of the easement was carried out openly (that is, with notoriety) so that any person familiar with the property would be aware that the easement is being used.

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).

<https://propertyrights.utah.gov/find-the-law/legal-topics/easements/>

CV924 Prescriptive Easement. "Adverse" Defined.

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

References

[*Zollinger v. Frank*, 175 P.2d 714, 716 \(Utah 1946\).](#)

[*Judd v. Bowen*, 2017 UT App 56, ¶ 25, 397 P.3d 686, 695.](#)

[*Jacob v. Bate*, 2015 UT App 206, ¶ 18, 358 P.3d 346, 353.](#)

CV925 Presumptions and Rebuttals. 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] [rebutts this presumption, such as by proving that the use was permissive when the use first began or became permissive at some time during the twenty-year period.](#) ~~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, ¶¶31, 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.

CV926 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 not continuous 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

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

Harrison v. SPAH Family Ltd., 2020 UT 22, ¶¶ 31, 41-43, 466 P.3d 107, 116-17.

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

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

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

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

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

M.N.V. Holdings LC v. 200 South LLC, 2021 UT App 76, ¶¶ 14-15, 494 P.3d 402, 407-08.

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

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

Committee Notes

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

EXHIBIT 3

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
900	Easements and Boundary Lines	Adam Pace, Robert Cummings, Robert Fuller, Doug Farr	Finished Boundary by Acquiescence. Prescriptive Easement draft CV920-925 addressed at January, February, April, and May 2023 meetings. Easement by Necessity draft CV930-931 addressed at April 2023 meeting. Easement by Implication CV940-941 addressed at April and May 2023 meetings. Easement by necessity and implication were approved at the July meeting. Robert Fuller and Robert Cummings addressed Chris Hogle feedback re prescriptive easement CV922 and 924 at Sept. meeting. Robert Cummings will draft and circulate to his group new CV925 instruction to be presented at Nov. meeting.	Nov. 2023
1700	Assault / False Arrest	Mitch Rice, David Cutt, Andrew Wright, Alyson McAllister	Mitch is circulating instructions with the group and will report back.	Jan. 2024?
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 was 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.	
	Linguistics and Law	Bill Eggington, Judge Kelly, John Macfarlane, Michael Lichfield, Robert Cummings, Clark Cunningham, Jesse Egbert, Scott Jarvis	Identifying instructions in need of plain-language adjustments	Nov. 2023

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, December 2022
135	Pretrial Delay	December 2022, February 2023
107A	Avoiding Bias	May 2023
632, 632A-632D	Minimum Injury Requirements Update and New	October 2023
132A	Remote Testimony	October 2023
2021	Present Cash Value Update	October 2023