

Judicial Council Standing Committee on  
Model Utah Civil Jury Instructions

# Agenda

February 12, 2024

4:00 to 6:00 p.m.

Via [Webex](#)

Welcome and Approval of January Minutes	Tab 1	Alyson
Recording Secretary Vacancy		Alyson
Review drafts for approval: CV920-CV926 prescriptive easement; CV930-CV931 easement by necessity; CV940-CV941 easement by implication	Tab 2	Robert Cummings
Progress on Instruction Topics	Tab 3	(Informational)

[Committee Web Page](#)

[Published Instructions](#)

**Meeting Schedule:** Monthly on the 2<sup>nd</sup> Monday at 4 pm

**Next meeting:** March 11, 2024

# TAB 1

***MINUTES***

Advisory Committee on Model Civil Jury Instructions

January 8, 2024

4:00 p.m.

Present: William Eggington, John Macfarlane, Stewart Harman, Ricky Shelton, Michael D. Lichfield, Benjamin Lusty, Jace Willard (staff)

Excused: Alyson McAllister, Douglas G. Mortensen, Mark Morris

Guests: Robert C. Cummings

1. *Welcome*

Jace Willard welcomed the Committee.

2. *Approval of Minutes*

November meeting minutes approved.

3. *Welcome to Benjamin Lusty*

The Committee welcomed new member, Benjamin Lusty. Committee members introduced themselves and Mr. Lusty introduced himself.

4. *Recording Secretary Vacancy*

Mr. Willard noted that the Committee has a vacancy for a recording secretary to keep meeting minutes and invited Committee members to advise if they are aware of parties interested in filling that role.

5. *CV132A Remote Testimony - Public Comments*

Mr. Willard noted that no public comments were received regarding the recently published new instruction, CV132A (Remote Testimony). The Committee voted to formally adopt CV132A.

6. *CV2021 Present Cash Value – Public Comments*

Mr. Willard presented a public comment received regarding the recent amendment to the Committee Notes for CV2021 (Present Cash Value). After consideration of the comment, the Committee determined that no further change to this instruction or the Committee Notes is warranted at this time and voted to formally adopt the amendment as published.

7. *CV925A (Adverse Presumption) and CV925B (Overcoming Adverse Presumption)*

Robert Cummings presented CV925, a draft instruction regarding how a presumption of adverse use may be established in prescriptive easement cases, and ways such a presumption may be rebutted. Some members of the Committee were concerned as to whether language regarding how to “rebut” the presumption, and shifting of the burden, would be confusing to a jury. The Committee discussed potential ways to simplify the language of the instruction. Ultimately, the Committee agreed that the instruction should be divided into two separate instructions, CV925A (Adverse Presumption) and CV925B (Overcoming Adverse Presumption). The term “rebut” in the latter instruction was changed to “overcome,” and the two different ways the presumption may be overcome were set forth in bullet points. The Committee tentatively approved this instruction with a more definitive vote to be held when other members of the Committee are present at the next meeting. If approved, this will conclude the pending draft real property easement instructions.

#### 8. *Adjournment*

Without further business, the meeting concluded at approximately 5:25 PM.

# TAB 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.

### **CV925A Adverse Presumption.**

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.

### **CV925B Overcoming Adverse Presumption.**

[Defendant] may overcome the adverse presumption in one of two ways.

- First, [Defendant] can prove that [Plaintiff] used the property with [Defendant's] permission when [Plaintiff] first began using the property; or,
- Second, [Defendant] can prove that within the twenty-year period [Defendant] gave permission to [Plaintiff] to use the property and [Plaintiff's] use thereafter was within the scope of [Defendant's] permission.

If [Defendant] successfully proves **by a preponderance of the evidence** either of the above, then the burden shifts back to [Plaintiff] to prove that [Plaintiff's] use became adverse at some point thereafter for the twenty-year period.

### **References**

*Harrison v. SPAH Family Ltd.*, 2020 UT 22, ¶¶31-32 n.16, 51, 466 P.3d 107, 118.  
*Valcarce v. Fitzgerald*, 961 P.2d 305, 311-12 (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.

### **CV930 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 road]. [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.

### **Committee Notes**

The term “public road” is meant to be illustrative only and it may be appropriate to replace it with a more specific description in a given case.

### **CV931 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) 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).

*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 an easement by necessity. Other easement claims will require proof of additional elements. *Tschaggeny v. Union Pac. Land Res. Corp.*, 555 P.2d 277, 280 (Utah 1976).

### **CV940 Easement by Implication. Introduction.**

An easement by implication is an easement that can arise when a landowner divides property into two or more pieces ([Parcel A] and [Parcel B]) and transfers [Parcel B] away. The transfer of [Parcel B] to the new owner may include by implication all those apparent or visible easements over [Parcel A] which were used by the original landowner for the benefit of [Parcel B] before it was transferred to the new owner.

### **References**

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

### **Committee Notes**

The Committee notes that the Utah Supreme Court (in *Tschaggeny v. Union Pac. Land Resources Corp.*, 555 P.2d 277, 280 (Utah 1976)) used both “apparent or visible easements” and “apparent, obvious, and visible” in defining an implied easement.

### **CV941 Easement by Implication. Elements.**

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;
- (2) At the time the property was divided, the use giving rise to the easement across the [retained/transferred] parcel for the benefit of the [transferred/retained] parcel was apparent, obvious, and visible;
- (3) The easement is reasonably necessary to the enjoyment of the [transferred/retained] property; and
- (4) The use giving rise to the easement was continuous rather than sporadic.

### **References**

*Bridge BLOQ NAC LLC v. Sorf*, 2019 UT App 132, ¶ 24, 447 P.3d 1278, 1282.

### **Committee Notes**

The Committee uses the terms “transferred” and “retained” in place of “dominant” and “servient.” In most cases, the easement would be across the retained parcel for the benefit of the transferred parcel, but it is conceivable that there are circumstances when the reverse could be true. Thus, those terms are placed in brackets. The meaning of the term “continuous” may depend on the factual circumstances of the case. The Committee therefore determined not to draft a separate definitional instruction. The

parties may need to modify the fourth element depending on the factual circumstances of the case to elaborate on the meaning of the term “continuous.”

Regarding element (2), *see* CV940 Committee Notes.

# TAB 3

**MUJI Civil Upcoming Queue:**

<b>Numbers</b>	<b>Subject</b>	<b>Members</b>	<b>Progress</b>	<b>Next Report Date</b>
1000	Products Liability	Tracy Fowler, Paul Simmons, Nelson Abbott, Todd Wahlquist	Appeared on Agenda November 2021. Continuing to work and will report back.	2024
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 presented re new CV925A and CV925B at Jan. 2024 meeting. Draft CV920, CV930, and CV940 series instructions to be reviewed at Feb. meeting.	Feb. 2024
1700	Assault / False Arrest	Mitch Rice, David Cutt, Andrew Wright, Alyson McAllister	Mitch is circulating instructions with the group and will report back.	Mar. 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	

**Archived Topics:**

<b>Numbers</b>	<b>Subject</b>	<b>Completed</b>
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