

MINUTES

SUPREME COURT'S ADVISORY COMMITTEE ON THE MODEL UTAH JURY INSTRUCTIONS – CRIMINAL

Administrative Office of the Courts
450 South State Street
Salt Lake City, Utah 84114

Wednesday, February 5, 2014
12:00 p.m. to 2:00 p.m.
Judicial Council Room

PRESENT

Judge Denise Lindberg, Chair
Alison Adams-Perlac, Staff
Judge James Blanch
Mark Field
Sandi Johnson
Linda Jones
Karen Klucznik
Judge Brendan McCullagh
John West
Scott Young

EXCUSED

Professor Jensie Anderson
Professor Jenny Andrus
Thomas Pedersen, Intern
Judge Michael Westfall

1. Welcome and Approval of Minutes

Judge Denise Lindberg

Judge Lindberg welcomed everyone to the meeting.

Judge Blanch moved to approve the minutes from the previous meeting. Ms. Jones seconded the motion and it passed unanimously.

Judge Lindberg read a letter she received from Supreme Court Chief Justice Durrant recommending that the committee appoint a recording secretary to attend the meeting as a non-voting member to take minutes. Appoint a recording secretary would allow the staff attorney to give more attention to researching points of law and assisting with drafting.

The committee discussed the pros and cons of appointing a recording secretary and decided to appoint a recording secretary. Judge Blanch mentioned that the committee could advertise the position as providing an opportunity to become a voting member when there is a vacancy on the committee, which might create an incentive to accept the appointment. Ms. Jones recommended Brittany Enniss from LDA, and Scott Young recommended Nathan Crane from Snow, Christensen & Martineau to serve as recording secretary.

Judge Lindberg and Ms. Adams-Perlac will explore the committee's recommendations and Judge Lindberg will appoint a recording secretary.

2. Sexual Offense Instructions from CR 1613

Committee

The committee reviewed the sexual offense instructions. With regard to CR 1611, Sodomy on a Child, Ms. Adams-Perlac stated that Ms. Johnson sent an email suggesting that subsections a. and b. be reversed, so that the mens rea comes first. The committee discussed reorganizing the instruction so that it has elements numbered 1 through 4, instead of 1a, 1b, 2, and 3. The committee discussed reorganizing some of the other instructions, but determined that they were previously organized this way since the mens rea should apply only to the act, with the minor's age being a strict liability element.

Ms. Jones stated that "offense" should be changed to "act" in the elements of instructions 1603, 1607, and 1611. Judge Blanch and Ms. Klucznik agreed.

Judge Blanch moved to substitute "conduct" for "offense" in the elements of the sexual offense instructions. Ms. Klucznik seconded the motion, and it passed unanimously. Ms. Adams-Perlac will review all of the sexual offense instructions and will substitute "conduct" for "offense" in the elements.

Mr. Field suggested that the other instructions be reviewed to remove "offense" where it is listed in an element. The committee agreed and will consider this issue at a later date.

The committee discussed CR 1613, Sexual Abuse of a Child. Ms. Klucznik stated that she would recommend having a separate aggravated sexual abuse of a child instruction, as well as an aggravated sexual abuse of a child special verdict form. Judge Blanch stated that Ms. Johnson felt strongly that the aggravating factors should be placed in a special verdict form only. Judge Lindberg stated she thinks having both is best practice. Ms. Jones said that the jury has to find at least one aggravator beyond a reasonable doubt under *Saunders*.

Ms. Jones stated that she thinks aggravated sexual abuse of a child is an aggravator, rather than an enhancement. An enhancement enhances the lower part of the sentence, but it still stays at the top, e.g. from 1-15 years to 3-15 years. If it is an aggravator, the whole thing shifts, because it is a completely different crime, e.g., it goes from a 2nd degree felony to a 3rd degree felony. Judge Blanch stated that some of the statutes will have the aggravated offense set forth as a separate statute, but that is not the case with aggravated sexual abuse of a child, e.g. aggravated murder.

Judge Blanch stated that if sexual abuse of a child is a lesser included offense of aggravated sexual abuse, then it ought to be set out in a separate instruction and the parties should argue about it. Ms. Jones stated that in cases where the aggravating circumstance is the defendant's prior conduct, case law says that you do bifurcate. Ms. Klucznik stated you bifurcate those for the defendant's benefit. Judge Lindberg said that this would not truly be a bifurcation, because the jury would have all of the information at the same time. Ms. Klucznik stated that this is not true bifurcation, it is simply separate consideration.

The committee agreed that they would like to have Ms. Johnson's input before making a decision on Aggravated Sexual Abuse of a Child.

Ms. Klucznik moved to approve CR 1613, Sexual Abuse of a Child, changing "offense" to "conduct" in subsection 4. Judge McCullagh seconded the motion, and it passed unanimously.

Mr. Field asked whether there is an instruction that says the jury must reach a unanimous verdict before reaching a special verdict form. Judge Lindberg stated that the closing instructions state this requirement. Ms. Jones stated that we will need a separate instruction stating that the jury must unanimously agree on the aggravating factor they check. She suggested the following, "Now that you have determined defendant committed (CRIME), consider the aggravating factors. Before checking any of the boxes, you must unanimously agree on any aggravating factors that you think apply."

Judge Lindberg said that there is a stock instruction that explains how the jury should use the special verdict form. The committee will review this instruction at the next meeting to determine if it can be made clearer.

Ms. Jones stated that the Court has ruled on her case involving consent. The committee will consider a consent instruction at the next meeting.

The committee considered CR 1617, Penetration or Touching Sufficient to Constitute Offense. Ms. Klucznik stated that object rape needs to be added to the second paragraph. She stated that CR 1617 should include all of the offenses listed in the statute.

Ms. Adams-Perlac will review the instruction and will make sure all offenses in Utah Code section 76-5-407 are included.

3. Sexual Offense Definitions

Committee

Ms. Jones stated that she believes the definition of penetration has been superseded by Utah Code section 76-5-407.

Ms. Klucznik recommended that someone look at the defining statute and at section 76-5-407 with regard to the crime specific definitions. *Ms. Adams-Perlac will review these definitions.*

Judge Blanch stated that *Couch* stands for the proposition that ordinarily, terms of common usage should not be defined for the jury, but when they ask for a definition, in which case they should receive a definition. Ms. Klucznik stated that she thinks the definitions should be limited to legal definitions. Judge McCullagh stated that we may want to hold on to the common usage definitions for judges to use if they are in trial and the jury requests a definition on a common term. The committee agreed that the common usage definitions should be separated from the legal definitions, but should be retained. *Ms. Adams-Perlac will separate the definitions into legal and non-legal categories.*

4. Other Business

There was no other business discussed.

5. Adjourn

The meeting was adjourned at 1:10 p.m. The next meeting will be held on Wednesday, March 5, 2014 at 12:00 p.m.