AGENDA

COMMITTEE ON THE
MODEL UTAH CRIMINAL JURY INSTRUCTIONS

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

Wednesday, September 2, 2015
12:00 p.m. to 1:30 p.m.
Judicial Council Room

12:00	Welcome and Introductions	Judge James Blanch
12:10	Approval of Minutes (Tab 1)	Judge James Blanch
12:15	Update on CJA 3-418, Website, and Public Comment (Tab 2)	Alison Adams-Perlac
12:25	Sex Offense Definitions (Tab 3)	Committee
1:05	Mens Rea Instructions Amendments (Tab 4)	Committee
1:25	Other Business	
1:30	Adjourn	

Upcoming Meetings (held on the 1st Wednesday of each month unless otherwise noted)

October 7, 2015 – Drug Offense Instructions
November 4, 2015
December 2, 2015

Tab 1

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, June 3, 2015
12:00 p.m. to 1:30 p.m.
Judicial Council Room

PRESENT
Judge James Blanch, Chair
Alison Adams-Perlac, Staff
Jennifer Andrus
Mark Field
Sandi Johnson
Judge Brendon McCullagh
Steve Nelson
Jesse Nix
Nathan Phelps
Judge Michael Westfall (remotely via VIAC)
Scott Young

EXCUSED
Professor Carissa Byrne Hessick
Linda Jones
Karen Klucznik
Thomas Pedersen, Intern
David Perry

1. Welcome, Approval of Minutes **Judge Blanch**

Judge Blanch welcomed everyone to the meeting.

Judge McCullagh moved to approve the minutes from the May 6 meeting. Mr. Field seconded the motion and it passed unanimously.

2. Committee Note for Definitions **Committee**

Judge Blanch stated that the court in *State v. Couch*, 635 P.2d 89 (Utah 1981), ruled that terms of ordinary usage and meaning should not be defined in jury instructions. He stated that the committee should focus on definitions found in the statutes or clearly defined in case law. The committee created a committee note to state, "If the jury requests a definition, practitioners and judges should work together to define these words using their ordinary and accepted meanings. *State v. Couch*, 635 P.2d 89 (Utah 1981)."

Ms. Johnson stated that the committee should use definitions under current statutes and not previous statutes. She suggested using a committee note instructing practitioners to use the applicable statute at the time for the charged crime. Judge Blanch asked if anyone disagreed with creating instructions for current statutes and not creating alternative instructions for prior

versions of the statutes. The committee agreed. Judge McCullaugh stated that the committee should leave previously created instructions on the website to assist practitioners, but it should be in a different place on the website. Ms. Johnson suggested using an archive on the website with outdated instructions. Ms. Phelps asked if the definition of special trust should be deleted. Judge Blanch stated that the definition should be placed in the archive.

Ms. Johnson moved to approve the committee note as amended. Mr. Young seconded the motion and it passed unanimously.

3. Definitions **Committee**

Judge Blanch stated that the committee's definitions should be created using the following factors:

(1) Is the definition accurate?

(2) Should the word be defined or is definition unnecessary?

(3) Are there other definitions that should be included that are not included now?

Ms. Adams-Perlac stated that the committee should also use plain language when creating definitions.

Judge Blanch asked if practitioners could interpret the previously passed committee note to mean that the definitions are the only terms that should be included in jury instructions. He stated he would not want practitioners to interpret the committee note as foreclosing the possibility that other words could appropriately be defined in the instructions. Ms. Adams-Perlac stated that the list of words is comprehensive because she went through every instruction to select words that required a definition and compared the words to the list of words the committee already had. She stated that she then checked for other words and the committee's list is the result of that search.

Judge Westfall asked why the committee is including some definitions and not others defined in statute. Ms. Adams-Perlac stated that these definitions are only for sexual offenses and other defined terms have already been created.

(a) Bodily Injury

Ms. Johnson stated that it should read, "…or any impairment of a physical condition." Professor Andrus suggested, "any physical impairment," because "impairment of a physical condition" implies the physical condition preexisted the bodily injury and the injury was to the person's physical condition. She stated "any physical impairment" is specific and uses plain language.

Mr. Field asked if "any physical impairment" and "any impairment of a physical condition" have the same meaning. Ms. Johnson stated that the statute is distinguishing emotional trauma from a physical condition. Professor Andrus stated that the action must occur to the body. She stated that the two phrases have the same meaning. She stated that "impairment of physical condition" is not correct English because it does not properly use the preposition. Mr. Nelson stated that physical condition does not require pain.

Judge Blanch stated that he preferred the simplicity of "any physical impairment" unless the two phrases have different meanings. Professor Andrus stated that the intended meaning is to cause a new physical condition and this is made clear with

"any physical impairment." She stated that using the preposition in "impairment of a physical condition" makes it unclear which physical condition is being impaired: one that preexisted the injury or one that was the result of the injury. Mr. Phelps said that "any physical condition" is what the Legislature intended. Professor Andrus stated that prepositions should be removed because they lead to confusion.

Mr. Young moved to approve the definition as amended. Mr. Phelps seconded the motion and it passed unanimously.

(b) Buttocks

Mr. Field stated that buttocks should not be defined unless the jury asks for a definition. Ms. Johnson disagreed and stated that there is a difference between anal opening and buttocks. Professor Andrus suggested using a positive definition of what it is rather than a negative definition of what it is not. Mr. Young stated that the instruction is important for the jury's understanding, especially because the court stated that the jury needed a definition of buttocks in *State v. Pullman*. He stated that even with the negative definition, it is helpful and clarifying.

Judge McCullagh stated that the buttocks definition should only be added to instructions that deal with anus or anal opening. Ms. Johnson stated that the definition is important when anal opening is listed but buttocks is not listed. She stated that object rape is the only statute where anus is mentioned but buttocks is not. She stated that the other statutes that mention buttocks are accompanied by anus. She suggested adding the definition to the committee note with a reference to *Pullman*.

Mr. Young moved to remove the definition of buttocks from the definition section and move it to the committee note of instructions. Mr. Field seconded the motion and it passed unanimously.

(c) Dangerous Weapon

Mr. Phelps stated that the definition is the same as the statutory language. Judge McCullagh asked if the definition was limited to the sexual crimes section. The committee agreed.

Mr. Field asked if "actor" should be replaced with "defendant." Judge McCullagh stated that "actor" is better because that describes the person using the weapon. He stated that the defendant may not be person with the dangerous weapon.

Judge Blanch stated that this definition applies to other offenses besides sexual offenses and asked if it should be included separately with those other offenses. Ms. Adams-Perlac stated that each offense section should have a definition section that includes dangerous weapon. Mr. Phelps asked if duplicating instructions in different sections is creating more work when an update is necessary. Judge McCullagh stated that dangerous weapon is not limited to the sexual offenses section. Ms. Adams-Perlac stated that a general definition section could be beneficial, but stated that it may confuse practitioners because they may not use the general definition section.

Mr. Field stated that gender pronouns should be replaced with "actor."

Professor Andrus stated that the language of the statute is confusing and should be simplified. Ms. Johnson suggested organizing the definition in a simple manner by using colons, indentations, and paragraphs.

Mr. Field asked if there was a difference between "apparent intended use" and "intended use." Judge Blanch stated that under part two, if a person uses a facsimile or representation, the victim's state of mind is important as to whether it is a dangerous weapon or not. He stated that under part one, the victim's state of mind does not matter. He stated that he was hesitant to modify the statutory language when many factors are determinative to whether something is a dangerous weapon.

Professor Andrus asked if there was a difference between "actor's use" or actor's "apparent intended use." Judge McCullagh responded that it depends on how the actor is swinging the baseball bat. He stated that a threat of the use of the object means the "apparent intended use." Professor Andrus asked if apparent was necessary. Judge Blanch stated that it is important because the subjective mind of the victim determines whether an object is a dangerous weapon. He stated it is the intended use from the perspective of the victim.

Judge Blanch stated that the definition is divided in three parts: (1) the item is capable of causing death or serious bodily injury; (2) the item's dangerousness is based on the perspective of the victim; and (3) the item is dangerous based on the representation of the actor. He asked if a crowbar or baseball bat, under part one, is a dangerous weapon regardless of anything else. Professor Andrus asked if a person using a crowbar could be using it as a facsimile of something else. Ms. Johnson stated that a recent case outlined factors for determining whether an object is a dangerous weapon. She stated that she did not know how that case factored into this definition. Judge Blanch asked if this definition would apply to a felon in possession of a dangerous weapon. Judge McCullagh stated that 76-10-501 governs felons in possession of dangerous weapons. Judge Blanch stated that because this definition only applies in situations when the dangerous weapon is used as part of a crime, he is not concerned that the definition is too broad. The committee agreed.

Judge Westfall stated that the committee's language changed the meaning of the statute. He stated that the statute is punctuated with a colon, suggesting that "item" refers to both the item capable of causing death or serious bodily injury, and the facsimile/ representation of the item. He stated that the committee removed the intent element if the item is capable of causing death or serious bodily injury. Professor Andrus suggested adding "or facsimile" to the second and third part to preserve the legislative intent.

Ms. Johnson stated that the committee should just use the statutory language for the definition rather than simplify the language. Judge Blanch agreed and stated that practitioners will argue about the meaning of the terms.

(d) Grievous Sexual Offense

Judge Blanch stated that the last definition of grievous sexual offense concerning "an offense in another state" should be determined by the judge based on the standard of the jurisdiction. Ms. Johnson stated that a special verdict form addresses this issue.

She stated that this definition would likely not ever be used because these cases are typically bifurcated. She stated the special verdict form would be used.

(e) Healthcare Professional

The committee did not discuss this definition.

Judge McCullagh moved to approve the definitions for dangerous weapon, grievous sexual offense, and health care professional. Ms. Johnson seconded the motion and it passed unanimously.

Ms. Johnson requested that the sexual offense instructions be published, except definitions. *Mr. Phelps moved to publish the sexual offense instructions, except definitions. Mr. Young seconded the motion and it passed unanimously.*

4. Adjourn Committee

The meeting was adjourned at 1:25 p.m. The next meeting is Wednesday, September 2, 2015.

Tab 2

Rule 3-418. Model Utah Jury Instructions.

Intent:

To develop jury instructions that are an accurate statement of Utah law using simple structure and, where possible, words of ordinary meaning.

Applicability:

This rule applies to the committees on Model Utah Jury Instructions.

Statement of the Rule:

The committees on Model Utah Jury Instructions will develop jury instructions that are accurate statements of Utah law using simple structure and, where possible, words of ordinary meaning. If Utah law is unclear or not yet established, the committees may draft an instruction with two or more alternatives based on differing authority. The order of the alternatives does not imply preference.

Tab 3

CR 1601 Definitions.

“Indecent liberties” means conduct that is as serious as touching the anus, buttocks, or genitals of a person, or the breast of a female. In deciding whether conduct amounts to indecent liberties, use your judgment and common sense. You may consider factors such as:

1. the duration of the conduct,
2. the intrusiveness of the conduct against (VICTIM’S INITIALS)'s person,
3. whether (VICTIM’S INITIALS) requested that the conduct stop,
4. whether the conduct stopped upon request,
5. the relationship between (VICTIM’S INITIALS) and the defendant,
6. (VICTIM’S INITIALS)'s age,
7. whether (VICTIM’S INITIALS) was forced or coerced to participate, and
8. any other factors you consider relevant.

State v. Lewis, 2014 UT App 241, 337 P.3d 1053.

“Position of special trust” means an adoptive parent; an adult athletic manager; an aunt; a babysitter; a coach; an adult cohabitant of a parent; a counselor; a doctor or physician; an employer; a foster parent; a grandparent; a legal guardian; a natural parent; an adult recreational leader; a religious leader; an adult sibling or stepsibling; an adult scout leader; a stepparent; a teacher or any other person employed by or volunteering at a public or private elementary school or secondary school, and who is 18 years of age or older; an uncle; an adult youth leader; any other person in a position of authority that enables the person to exercise undue influence over the child. Utah Code § 76-5-404.1(1).

“Religious counselor” mean a minister, priest, rabbi, bishop, or other recognized member of the clergy. Utah Code § 76-5-406(12)(b).

“Retaliation” means threatening physical force, kidnapping, or extortion. Utah Code § 76-5-406(4)(b).

“Serious bodily injury” means bodily injury that creates or causes serious permanent disfigurement, protracted loss or impairment of the function of any bodily member or organ, or creates a substantial risk of death. Utah Code § 76-1-601.

Committee Notes

Based on the principle of *State v. Couch,* 635 P.2d 89 (Utah 1981), the committee has chosen to provide definitions only for words defined by statute or case law. If the jury requests a definition, practitioners and judges should work together to define these words using their ordinary and accepted meanings. *Id*.

For the definition of "grievous sexual offense," *see* CR 1625, Sexual Offense Prior Convicton.

Tab 4

Mens Rea Instructions

CR303B Knowledge as to Result.

A person acts ["knowingly"] ["with knowledge"] when the person is aware that [his] [her] conduct ~~may~~ is reasonably certain to cause a particular result.

"Conduct" means either an act or an omission.

References
Utah Code § 76-2-103(2).
State v. Graham, 2006 UT 43, ¶20, 143 P.3d 268.
Gardner v. Galetka, 2004 UT 42, ¶3, 94 P.3d 263.

Committee Notes
This instruction should be given for crimes in which the element of the defendant's knowledge goes to the result of his or her conduct. *See*, e.g., Utah Code §§ 76-5-203(2)(a), murder; 76-5-109(2)(a), child abuse; and 76-5-301, kidnapping.

The committee recognizes that this is not verbatim the instruction discussed by the Utah Supreme Court in *Gardner v. Galetka*, 2004 UT 42, 94 P.3d 263, but it feels this instruction adequately and more directly addresses the concept for crimes that require that the defendant knowingly cause a result. THe committee also feels that it is inherent in the concept of knowingly causing a result that a defendant is aware of the nature of his conduct or the existing circumstances.

CR304A Reckless as to Circumstances Surrounding Conduct or as to Result.

A person acts "recklessly" when [he][she] is or should be aware of a substantial and unjustifiable risk that:

1. certain circumstances exist relating to [his] [her] conduct; or
2. [his] [her] conduct will cause a particular result, but [he] [she] consciously disregards the risk, and acts anyway.

The nature and extent of the risk must be of such a magnitude that disregarding it is a gross deviation from what an ordinary person would do in that situation.

"Conduct" means either an act or an omission.

References
Utah Code § 76-2-103(3).

Committee Notes
Some crimes or elements with a mens rea of "recklessly" require that the defendant recklessly engages in conduct, while others require that the defendant recklessly causes a result. Jurors must be specifically instructed as to the definition of "recklessly" which applies to the crime(s) or element(s) they are considering. If the jury is considering more than one count with a mens rea of "recklessly," and if a single definition does not cover all counts, then the jury must be instructed as to which definition applies to each count.

CR304B Reckless as to Result.

A person acts "recklessly" when [he][she] is or should be aware of a substantial and unjustifiable risk that [his] [her] conduct will cause a particular result, but [he] [she] consciously disregards the risk, and acts anyway.

The nature and extent of the risk must be of such a magnitude that disregarding it is a gross deviation from what an ordinary person would do in that situation.

“Conduct” means either an act or an omission.

References
Utah Code § 76-2-103(3).

Committee Notes
This instruction should be given for crimes in which the element of the defendant's recklessness goes to the result of his or her conduct. *See*, e.g., Utah Code §§ 76-5-203(2)(a), murder; 76-5-109(2)(a), child abuse; and 76-5-301, kidnapping.

CR304C Reckless as to Circumstances Surrounding Conduct.

A person acts "recklessly" when [he] [she] is or should be aware of a substantial and unjustifiable risk that certain circumstances exist relating to [his] [her] conduct, consciously disregards the risk, and acts anyway.

The nature and extent of the risk must be of such a magnitude that disregarding it is a gross deviation from what an ordinary person would do in that situation.

"Conduct" means either an act or an omission.

References
Utah Code § 76-2-103(3).

Committee Notes
This instruction should be given for crimes in which the element of recklessness goes to one's conduct or to the circumstances surrounding one's conduct, rather than to the result of one's conduct.

76-2-103. Definitions.

A person engages in conduct:

(1) Intentionally, or with intent or willfully with respect to the nature of his conduct or to a result of his conduct, when it is his conscious objective or desire to engage in the conduct or cause the result.

(2) Knowingly, or with knowledge, with respect to his conduct or to circumstances surrounding his conduct when he is aware of the nature of his conduct or the existing circumstances. A person acts knowingly, or with knowledge, with respect to a result of his conduct when he is aware that his conduct is reasonably certain to cause the result.

(3) Recklessly with respect to circumstances surrounding his conduct or the result of his conduct when he is aware of but consciously disregards a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the actor's standpoint.

(4) With criminal negligence or is criminally negligent with respect to circumstances surrounding his conduct or the result of his conduct when he ought to be aware of a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of a nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that an ordinary person would exercise in all the circumstances as viewed from the actor's standpoint.