

# 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, November 6, 2013  
12:00 p.m. to 2:00 p.m.  
Judicial Council Room

---

### **PRESENT**

Judge Denise Lindberg, Chair  
Alison Adams-Perlac, Staff  
Professor Jennifer Andrus  
Judge James Blanch  
Mark Field  
Sandi Johnson  
Karen Klucznik  
Judge Brendan McCullagh  
John West  
Judge Michael Westfall  
Scott Young  
Thomas Pedersen, Intern

### **EXCUSED**

Professor Jensie Anderon  
Linda Jones

### **1. Welcome and Approval of Minutes**

**Alison Adams-Perlac**

Ms. Adams-Perlac welcomed the committee to the meeting. She introduced Tommy Pedersen, a student from the law school who will be assisting the committee with research and drafting.

*Judge Blanch moved to approve the minutes from the previous meeting. Mr. West seconded the motion and it passed unanimously.*

### **2. Mens Rea Instructions Revised**

**Judge Denise Lindberg**

This item was tabled for discussion at the next meeting.

### **3. Introductory Committee Note**

**Alison Adams-Perlac**

Ms. Adams-Perlac discussed the introductory committee note she and Judge Lindberg drafted. She stated that the idea is to provide some principles of drafting so that practitioners and judges understand how the instructions have been drafted. She stated that more principles can be added as necessary.

Ms. Klucznik recommended edits to the plain language paragraph. She recommended changing the last sentence, since it suggests that juries cannot understand. Judge Westfall suggested removing the

middle sentence. Ms. Johnson suggested changing the word “restating” to “stating” in the same paragraph.

The committee recommended further edits to the proposed committee note. The proposed committee note was amended as follows:

The Advisory Committee on the Model Utah Jury Instructions – Criminal has drafted instructions with the following principles in mind:

1. Plain Language – While the committee recognizes the reticence of practitioners and judges to depart from statutory language, the Committee has been charged with using plain language drafting principles so that statements of the law will be clear to non-lawyers. Therefore, the Committee has attempted to draft instructions using simple structure and words of ordinary meaning.
2. Template – Where possible, the Committee has used the pattern elements instruction found in CR 301 as a template for other instructions. This instruction shifts the language away from that used in older instructions to more appropriately maintain the presumption of innocence. The Committee strongly encourages practitioners and judges to apply this pattern in drafting elements instructions for other crimes.
3. Brackets and Parentheses – Brackets [ ] are placed around an element or language that is optional, or when more than one language option is available, e.g. [him] [her]. Parentheses ( ) are used when information must be entered, e.g. (DEFENDANT’S NAME).
4. Use of Initials – The Committee has drafted the instructions so that only a victim’s initials are used when the victim is a minor. If the victim is an adult, the Committee recommends that the victim’s name be used unless the court makes a specific finding that use of the victim’s name is inappropriate in a particular case.

Where available, the Committee urges practitioners to use jury instructions from the Second Edition of the Model Utah Jury Instructions to the exclusion of other instructions. When an approved instruction is not available, practitioners should focus on substance, as well as format, in drafting proposed instructions.

*Mr. Field moved to approve the committee note as amended. Judge Blanch seconded the motion and it passed unanimously.*

4. CR 301 (Tab 4)

Alison Adams-Perlac

Ms. Adams-Perlac discussed the revised version of instruction 301. She stated that the revisions are based on the committee’s suggestions at the previous meeting. The committee suggested edits to the instruction. Judge Westfall stated that “one or more elements” is confusing. He stated that instruction 1604 uses “each and every element” and that language is less confusing. Ms. Johnson agreed that “each and every element” is clearer. Judge Blanch agreed.

Judge McCullagh stated that this language was discussed at length by the committee previously. He stated that the language expert at the time suggested “each and every”. Judge Blanch stated that “one or more” suggests that if you find one of the elements you can convict. Ms. Klucznik stated her agreement that “each and every” is the better language.

Mr. Field stated that he remembered that Ms. Jones had an opinion on this issue. Ms. Andrus stated that “each and every” means “all” and “one or more” means “one.” The committee recommended further edits.

The proposed instruction was amended as follows:

**CR301 Elements. Revised.**

The defendant, \_\_\_\_\_ (DEFENDANT’S NAME) is charged [in Count \_\_\_\_] with committing ~~{(CRIME)}~~ [on or about {DATE}]. You cannot convict ~~{(him)}~~ ~~{(her)}~~ of this offense unless, based on the evidence, you find beyond a reasonable doubt each of the following elements:

1. ~~That the defendant~~ \_\_\_\_\_ (DEFENDANT’S NAME);
2. ELEMENT ONE . . .;
3. ELEMENT TWO . . .;
4. [That the defense of \_\_\_\_\_ does not apply.]

After you carefully consider all the evidence in this case, if you are convinced that each and every element has been proven beyond a reasonable doubt, then you must find the defendant GUILTY. On the other hand, if you are not convinced that ~~each and every one or more of these~~ elements has been proven beyond a reasonable doubt, then you must find the defendant NOT GUILTY.

**Committee Notes**

This is a pattern elements instruction that can apply in most cases. If the date or the location of a crime could be considered an element of the offense, those should be included within the list of elements. In some circumstances, identifying the specific counts might help the jury sort through offenses with similar elements. In those circumstances, the specific counts should be identified in the first paragraph.

With respect to the bracketed defense element, unless the statute directs otherwise, the trial court ~~shall~~must instruct the jury that the State ~~has the burden to~~must disprove an affirmative, a partial, or a justification defense beyond a reasonable doubt.

*This instruction was tabled for further discussion regarding “each and every” versus “one or more” until Ms. Jones could participate in the discussion.*

## 5. Sexual Offense Instructions (Tab 5)

## Committee

The committee discussed instruction 1603, Sexual Abuse of a Minor. Ms. Johnson suggested putting in “(MINOR’S INITIALS)” in the place of “a person”. The committee suggested adding an age element. Judge Blanch suggested adding an age element as number 4. Ms. Klucznik suggested combining the mens rea with “defendant” as one element. Ms. Johnson suggested not making that change. Judge Westfall stated the “one or more” language is an issue in this instruction as well.

The instruction was revised as follows:

(DEFENDANT’S NAME) is charged [in Count \_\_\_] with committing Sexual Abuse of a Minor [on or about DATE]. You cannot convict [him] [her] of this offense unless you find beyond a reasonable doubt, based on the evidence, each of the following elements:

1. (DEFENDANT’S NAME);
2. Intentionally, knowingly, or recklessly:
  - a. [touched the anus, buttocks, or any part of the genitals of (MINOR’S INITIALS)];
  - b. [touched the breast of (MINOR’S INITIALS), a female];
  - c. [otherwise took indecent liberties with (MINOR’S INITIALS)]; or
  - d. [caused (MINOR’S INITIALS) to take indecent liberties with any person];
3. With the intent [to arouse or gratify the sexual desire of any person] [to cause substantial emotional or bodily pain to any person];
4. (MINOR’S INITIALS) was 14 or 15 years old at the time of the offense; and
5. (DEFENDANT’S NAME) was seven or more years older than (MINOR’S INITIALS).

After you carefully consider all the evidence in this case, if you are convinced that each and every element has been proven beyond a reasonable doubt, then you must find the defendant GUILTY. On the other hand, if you are not convinced that one or more of these elements has been proven beyond a reasonable doubt, then you must find the defendant NOT GUILTY.

*Ms. Klucznik moved to approve the instruction subject to changes based on final approval of the revised elements instruction. Judge Blanch seconded the motion and it passed unanimously.*

The committee discussed instruction 1604, Unlawful Sexual Activity with a Minor. Ms. Johnson recommended minor edits to the instruction. She suggested that on variation 3 should be changed so that 3 states “intentionally, knowingly, or recklessly caused the penetration...” Ms. Klucznik suggested deleting the committee note.

The committee note was deleted and the instruction was edited as follows:

(DEFENDANT’S NAME) is charged [in Count \_\_\_\_\_] with committing Unlawful Sexual Activity with a Minor [on or about DATE]. You cannot convict [him] [her] of this offense unless, based on the evidence, you find beyond a reasonable doubt all of the elements in one or more of the following variations:

VARIATION A:

1. (DEFENDANT’S NAME);
2. Intentionally, knowingly, or recklessly had sexual intercourse;
3. With (MINOR’S INITIALS); and
4. (MINOR’S INITIALS) was 14 or 15 years old at the time of the act.

[OR]

VARIATION B:

1. (DEFENDANT’S NAME);
2. Intentionally, knowingly, or recklessly engaged in any sexual act with (MINOR’S INITIALS) involving the genitals of one person and the mouth or anus of another; and
3. (MINOR’S INITIALS) was 14 or 15 years old at the time of the act.

[OR]

VARIATION C:

1. (DEFENDANT’S NAME);
2. Intentionally, knowingly, or recklessly caused the penetration, however slight, of the genital or anal opening of (MINOR’S INITIALS) by any foreign object, substance, instrument, or device, including a part of the human body;
3. With the intent [to arouse or gratify the sexual desire of any person] [to cause substantial emotional or bodily pain to any person]; and
4. (MINOR’S INITIALS) was 14 or 15 years old at the time of the act.

After you carefully consider all the evidence in this case, if you are convinced that each and every element [of one or more of the above variations] has been proven beyond a reasonable doubt, then you must find the defendant GUILTY. On the other hand, if you are not convinced that each and every element [of at least one of the above variations] has been proven beyond a reasonable doubt, then you must find the defendant NOT GUILTY.

*Judge Blanch moved to approve the instruction subject to changes based on final approval of the revised elements instruction. Mr. Field seconded the motion and it passed unanimously.*

The committee discussed instruction 1605, Unlawful Sexual Activity with a Minor. Ms. Johnson suggested bracketing paragraph 2a, 2b, 2c, and 2d, and bracketing the subparagraphs within them. These paragraphs were bracketed.

Mr. West suggested changing the age language in paragraph 4. Paragraph 4 was amended as follows:

At the time of the sexual conduct, (DEFENDANT'S NAME) was [seven ~~or more to nine~~ but less than ten years older than (MINOR'S INITIALS), and (DEFENDANT'S NAME) knew or reasonably should have known (MINOR'S INITIALS)'s age] [ten or more years older than (MINOR'S INITIALS)].

*Mr. West moved to approve the instruction subject to changes based on final approval of the revised elements instruction. Ms. Johnson seconded the motion and it passed unanimously.*

The committee discussed where the special verdict forms should be published in relation to the instructions. *The committee agreed that the special verdict forms should be published in their own special section, and that there should be a link in the committee note to the special verdict form, in lieu of publishing them within a specific section.*

Judge Lindberg joined the meeting.

The committee discussed the Unlawful Sexual Activity with a 16 or 17 year old special verdict form. Ms. Johnson recommended minor edits. Mr. Field recommended minor edits. Ms. Johnson recommended moving "with the intent" to the end of the sentence in all the bullet points. Judge McCullagh stated that it should remain as is, because the jury would read the intent first. Judge Westfall questioned whether we should identify the defendant, by name, and then we can refer to "the defendant" throughout.

The committee amended the special verdict form as follows:

We, the jury, having found the defendant, (DEFENDANT'S NAME), guilty of Unlawful Sexual Conduct with a 16 or 17 Year Old, [is charged in Count \_\_\_\_ ~~of the Information~~], unanimously find beyond a reasonable doubt ~~that the defendant engaged in the following "sexual conduct"~~ (check all that apply):

The defendant had sexual intercourse with (MINOR'S INITIALS); ~~or~~

\_\_\_\_\_The defendant engaged in any sexual act with (MINOR'S INITIALS) involving the genitals of one person and the mouth or anus of another person;~~or~~

With the intent to arouse or gratify the sexual desire of any person, or with the intent to cause substantial emotional or bodily pain to any person, the defendant ~~The defendant~~ caused the penetration, however slight, of (MINOR'S INITIALS)'s genital or anal opening by any foreign object, substance, instrument, or device, including a part of the human body ~~With the intent to arouse or gratify the sexual desire of any person, or with the intent to cause substantial emotional or bodily pain to any person, the defendant; or~~

With the intent to arouse or gratify the sexual desire of any person, or with the intent to cause substantial emotional or bodily pain to any person, the defendant touched the anus, buttocks, or any part of (MINOR'S INITIALS) genitals, or touched (MINOR'S INITIALS)'s breast, or otherwise took indecent liberties with (MINOR'S INITIALS), or caused (MINOR'S INITIALS) to take indecent liberties with the defendant or another person, regardless of the sex of any participant.

*Judge McCullagh moved to approve the special verdict form. Ms. Klucznik seconded the motion and it passed unanimously.*

The committee discussed instruction 1606, Rape. Ms. Johnson suggested changing “with another person” and “that person” to (VICTIM'S NAME). Ms. Klucznik suggested minor edits to the instruction.

The instruction was edited as follows:

(DEFENDANT'S NAME); is charged [in Count\_\_] with committing Rape [on or about DATE]. You cannot convict [him] [her] of this offense unless, based on the evidence, you find beyond a reasonable doubt each of the following elements:

1. ~~That~~ (DEFENDANT'S NAME);
2. Intentionally, knowingly, or recklessly;
3. Had sexual intercourse with ~~another person~~ (VICTIM'S NAME);
4. Without ~~that person's~~ (VICTIM'S NAME)'s consent.

After you carefully consider all the evidence in this case, if you are convinced that each and every element has been proven beyond a reasonable doubt, then you must find the defendant GUILTY. On the other hand, if you are not convinced that one or more of these elements has been proven beyond a reasonable doubt, then you must find the defendant, NOT GUILTY.

*Ms. Johnson moved to approve the instruction subject to changes based on final approval of the revised elements instruction. Mr. Field seconded the motion and it passed unanimously.*

**6. Definitions (Tab 6)**

**Sandi Johnson**

This item was tabled for discussion at the next meeting.

**7. Other Business**

There was no other business.

**8. Adjourn**

The meeting was adjourned.