

AGENDA  
ADVISORY COMMITTEE  
ON MODEL CIVIL JURY INSTRUCTIONS

Administrative Office of the Courts  
Scott M. Matheson Courthouse  
450 South State Street  
Council Room, Suite N31

February 9, 2004  
4:00 to 6:00 p.m.

Welcome and approval of minutes	John Young
Drafting guidelines	Paul Simmons
Negligence Instructions	Frank Carney
Preliminary and General Instructions	Phil Ferguson
Damages Instructions	Rich Humpherys
Future Subcommittee Reports	John Young

**Meeting Schedule: Matheson Courthouse, 4:00 to 6:00, Judicial Council Room**

March 8  
April 12  
May 10  
June 14  
July 12  
August 9  
September 13  
October 18 (3<sup>rd</sup> Wednesday)  
November 8  
December 13

## ***MINUTES***

Advisory Committee on Model Civil Jury Instructions

January 12, 2004

4:15 p.m.

Present: John L. Young (chair), Timothy M. Shea, Honorable William W. Barrett, Jr., Paul M. Belnap, Juli Blanch, Francis J. Carney, Phillip S. Ferguson, L. Rich Humpherys, Paul M. Simmons

1. *Minutes.* Judge Barrett moved that the minutes of the October 8 and December 8, 2003, meetings be approved. The motion passed without opposition.

2. *Drafting Guidelines.* The committee discussed a draft of Guidelines for Drafting Plain-Language Jury Instructions, which Mr. Simmons had prepared from the materials Mr. Shea had circulated earlier. Mr. Young suggested that the committee refine the guidelines before the next meeting and come to the next meeting prepared to approve them, so that they can be circulated to all the subcommittees.

**If committee members have other suggestions or examples for the drafting guidelines, they should get them to Mr. Shea, who will circulate them to all committee members before the next meeting.**

3. *Charge.* Mr. Young reviewed the committee's charge, which is to propose a set of plain-language jury instructions. Subcommittees should reach a consensus if at all possible. The court would like to avoid alternative instructions.

4. *Preliminary Instructions.* Mr. Carney suggested that the instructions include a recommendation that instructions be given at different points during the trial. For example, an instruction on expert testimony and the weight it deserves could be given before the first expert witness testifies in the case. Mr. Young suggested that such suggestions be included in the introductory materials.

5. *California Jury Instructions.* Mr. Carney reviewed the new California plain-language jury instructions and noted that the instructions themselves are not copyrighted. Mr. Shea loaned a set of the California instructions to Messrs. Ferguson and Humpherys, who will see that Mr. Belnap gets a set of the damage instructions. Mr. Shea will also see if he can obtain additional complimentary copies of the California instructions.

6. *Negligence Instructions.* The committee reviewed a draft of the instructions prepared by Mr. Carney's Negligence Subcommittee. The committee reviewed and made additional changes to the instructions that were approved at the last committee meeting:

In the third line of instruction 2, "person" was added after the word "careful."

The second paragraph of instruction 2 was revised to read, “One can be negligent in doing something or in not doing something.” Mr. Belnap asked whether the examples in that paragraph were necessary. Mr. Humpherys noted that they could lead to disputes in the instruction conference over the examples the court uses.

In the third paragraph, the phrase “an average person” was replaced with “an ordinarily careful person.”

Mr. Simmons suggested deleting the first sentence of instruction 4 (regarding the amount of caution required when children are present). Mr. Carney reviewed the corresponding California instruction and decided it was better and will use it instead.

The committee debated whether special instructions were necessary for the standard of care involved in ultrahazardous activities and controlling electricity. Mr. Carney reviewed the corresponding California instruction and noted that some activities may be considered ultrahazardous in California but not in Utah. The committee agreed that more research was needed on the standard of care for ultrahazardous activities in Utah. Mr. Humpherys suggested adding a comment to the effect that the instruction should not be given unless the court has first determined that the activity in question meets the legal criteria for an ultrahazardous activity.

The committee renumbered the instruction on electricity number 7 (and renumbered the following instructions accordingly). Mr. Carney reviewed the corresponding California instruction. Ms. Blanch suggested adding a requirement that it be foreseeable that the plaintiff would come in contact with the power line or other source of electricity. The committee tabled the instruction for further discussion.

**Mr. Carney will ask Rick Rose and a plaintiff’s attorney who deals with electricity cases to review proposed instruction 7 and its California counterpart.**

The committee also considered the following new instructions:

Definition of “Legal Cause.” The committee debated whether foreseeability is an element of both duty and proximate causation. Mr. Humpherys asked whether foreseeability was a legal question or a question for the jury to decide. Mr. Belnap expressed his opinion that current MUJI 3.13 accurately expresses the law and should be used. Other committee members thought the current instruction was a good example of the type of instruction that needs to be rewritten to be more comprehensible. The committee tabled the instruction to allow further review of the law on proximate (or legal) causation.

Definition of “Fault.” Mr. Young suggested rewriting the instruction to read: “You must determine if any of the following were at fault in causing harm to the plaintiff,” and then listing all persons or entities who will be listed on the special verdict form. Mr. Humpherys recommended that the definition of “fault” (“any breach of duty”)

be tied to the instructions on each of the plaintiff's claims, so that the latter either be stated in terms of a breach of duty or specifically say that negligence, intentional misconduct, breach of warranty, products liability and so forth are "fault." Alternatively, Mr. Humpherys suggested revising the instruction to read: "In deciding this case, you must decide whether any party was at fault. 'Fault' means negligence [or whatever other legal theories of fault the plaintiff may have alleged] that legally caused harm to the plaintiff." The committee deferred further discussion of this instruction and the remaining instructions until the next meeting.

7. *Next Meeting.* The next meeting will be Monday, February 9, 2004, at 4:00 p.m. All committee members are encouraged to be there. After the negligence instructions are approved, the committee will discuss the preliminary and damage instructions.

The meeting concluded at 6:00 p.m.

## Guidelines for Drafting Plain-Language Jury Instructions

### Basic Principles

1. Be clear.
2. Be brief.
3. Remember who your audience is (lay people, with varying degrees of education and language skills).
4. Be conversational. (Prefer spoken English over written English.)
5. Address the jurors directly. *E.g.*:  
“You must . . .” rather than “The jury must . . .” or “Members of the jury must . . .”
6. Use first person for the judge. *E.g.*:  
“I ruled that . . .” rather than “The court ruled that . . .”
7. Order points in a logical sequence (*e.g.*, more important before less; general before specific).
8. Use questions. *E.g.*:  
“To find for the plaintiff, you must answer ‘yes’ to two questions. First, . . .? And second, . . .?”
9. Use case-specific language. *E.g.*:  
“[Name] has admitted lying under oath. You should consider his testimony with caution and great care.” instead of, “The testimony of an admitted perjurer should be considered with caution and great care.”  
  
“You have heard the testimony of [name], who is described as an expert in . . .” instead of, “The testimony of an expert witness . . .”
10. Use concrete examples. *E.g.*:

“If someone walked into the courtroom wearing a raincoat covered with drops of water and carrying a wet umbrella, that would be circumstantial evidence from which you could conclude that it was raining.”

(But be careful not to use examples that would imply that the court favors one side over the other or is suggesting what result the jury should reach.)

11. Use transitions, signposts and signals. *E.g.:*

“Now I want to explain to you about . . .”

“So, to summarize, you must decide whether . . .”

“What all this means is that . . .”

12. Use controlled repetition. *E.g.:*

“In other words, . . .”

“This means . . .”

13. State things in alternative ways. *E.g.:*

“A person must take some affirmative steps to renounce or defeat the purpose of the conspiracy. This could include things like . . . . But some affirmative step is required. Just doing nothing is not enough.”

14. Use parallel structures for parallel ideas. *E.g.:*

“To prove a claim of false advertising, [the plaintiff] must show that [the defendant] made a statement that (1) was false or misleading, (2) actually deceived or was likely to deceive a substantial segment of the advertisement’s audience, and (3) resulted in injury to [the plaintiff].” instead of, “To prove a claim of false advertising, the plaintiff must show that the defendant (1) made a false or misleading statement, (2) that actually deceived or was likely to deceive a substantial segment of the advertisement’s audience, and (3) that resulted in injury to the plaintiff.”

15. Use lists or tabulations for complex items, such as multiple conditions or rules.

16. Don’t instruct the jury about things they don’t need to know, such as evidentiary rules.

17. Test your instructions on a lay audience.

## Sentences

18. Use short sentences (generally no more than 25 words on average).

19. Use simple sentence patterns:

subject (S) - verb (V)

subject (S) - verb (V) - object (O)

20. Put the subject near the beginning and the verb near the subject.

21. Put the action in strong verbs, not in abstract nouns.

22. Avoid impersonal phrases. *E.g.:*

“You must . . .” instead of “It is your duty to . . .” or “It is necessary for you . . .”

23. Generally use the active voice rather than the passive voice, especially in subordinate clauses. *E.g.:*

“If I have stated any rule in different ways . . .” instead of, “If any rule has been stated in varying ways . . .”

“You should consider an owner’s testimony about the value of his property . . .” instead of “The testimony of an owner as to value is to be considered by you . . .”

*Exceptions:*

Where the agent is unknown or unimportant.

To focus attention on the object.

24. Limit the use of subordinate clauses and phrases, and particularly avoid placing them before or within the main clause. (In other words, don’t combine several simple sentences into one complex sentence.) *E.g.:*

“The attorneys’ questions are not evidence. You must not draw conclusions from the questions alone.” instead of “You must never speculate to be true any insinuation suggested by a question asked a witness.”

“The defendant claims the plaintiff was also negligent,” instead of, “In addition to denying that any negligence of the defendant proximately caused any injury or damage to the plaintiff, the defendant alleges, as a further defense, that some contributory negligence on the part of the plaintiff, himself, was a proximate cause of any injuries and consequent damages plaintiff may have sustained.”

25. Put modifiers next to what they modify. *E.g.:*

“If any rule in these instructions is repeated . . .” or “If any rule is repeated in these instructions . . .” instead of, “If, in these instructions, any rule is repeated . . .”

26. Put conditions (especially lengthy conditions) at the end of the sentence, preceded by “if.” *E.g.:*

“You may disregard the opinion of an expert entirely if you decide that the opinion is not based on sufficient education or experience, that the reasons for the opinion are not sound or that the opinion is outweighed by other evidence” instead of, “Should you should decide that the opinion of an expert witness is not based on sufficient education and experience, or should you conclude that the reasons given in support of the opinion are not sound, or that the opinion is outweighed by other evidence, then you may disregard the opinion entirely.”

27. Do not omit relative pronouns (*e.g.*, “that,” “which,” “who”) and the following verb (some form of “be”). *E.g.:*

“questions of fact that are submitted to you,” instead of “questions of fact submitted to you”

Note: This guideline seems counterintuitive if the goal is to make instructions short and simple. However, empirical research has shown that jurors have a harder time processing instructions when relative pronouns are left out.

28. Avoid multiple negatives (including words starting with “un-” or “mis-”). *E.g.:*

“You must understand . . .” instead of, “You must not misunderstand . . .”  
“The plaintiff only claims that the defendant sold a defective product. He does not claim that the defendant was negligent.” instead of, “The plaintiff does not claim that the defendant did anything wrong other than selling a defective product.”

## Words

29. Use familiar words. *E.g.:*

“begin” instead of “initiate”  
“sworn statement” instead of “affidavit”  
“helps or encourages” for “aids, facilitates, promotes or instigates”  
“helps or hides” for “aids, harbors or conceals”

30. Avoid legal jargon. *E.g.:*

“tortfeasor”  
“estopped”

31. If you must use legal terms, define them.

32. Avoid arcane words. *E.g.:*

“said” used as an adjective (*e.g.*, “said vehicle”)  
“aforesaid”  
“herein”  
“thereunder”

33. Avoid homonyms (words with more than one meaning). *E.g.:*

“in camera”

34. Don’t use familiar words to convey uncommon meanings. *E.g.:*

“admit” to refer to a judge’s evidentiary ruling  
“court” to refer to the judge  
“incompetent” to refer to a witness who has not been allowed to testify  
“impeached” to refer to a witness whose testimony has been called into question

35. Prefer short, Anglo-Saxon words. *E.g.:*

“use” for “utilize”

36. Prefer concrete words to abstract words. *E.g.:*

“the Pinto” instead of “a motor vehicle”  
“his knee surgery” instead of “a medical procedure”

37. Avoid nominalizations (*i.e.*, nouns derived from verbs). *E.g.:*

“People often forget,” instead of, “Failure of recollection is common.”

38. Omit unnecessary words. *E.g.:*

“whether” instead of “the question as to whether”  
“although” instead of “despite the fact that”  
“sometimes” instead of “in some instances”

39. Replace wordy phrases with simpler ones. *E.g.:*

“before” for “prior to”  
“if” for “in the event that”  
“because” or “since” instead of “owing to the fact that”

40. Use “must.” *E.g.*:

“You must . . .” instead of, “It is necessary for you . . .” or “It is your duty to . . .”  
or “You are required to . . .”

41. Avoid “as to.” *E.g.*:

“If I sustained an objection to a question, don’t speculate about the reason for the objection or about what the answer might have been” instead of, “As to any question to which an objection was sustained, you must not speculate as to what the answer might have been or as to the reason for the objection.”

42. Use words consistently.

43. Avoid doublets and triplets. *E.g.*:

“any and all”  
“gives, devises and bequeaths”

44. Use (but don’t overuse) contractions.

#### Sources:

Kimble, Joseph. *How to Mangle Court Rules and Jury Instructions*. 8 SCRIBES J. OF LEGAL WRITING 39 (2001-02).

\_\_\_\_\_. *Plain English: A Charter for Clear Writing, Part II*. 71 MICH. B.J. 1190 (Nov. 1992).

\_\_\_\_\_. “The Route to Clear Jury Instructions.” 78 MICH. B.J. 1406 (Dec. 1999), available online at [www.michbar.org/committees/penglish/columns/159.html](http://www.michbar.org/committees/penglish/columns/159.html).

Lind, Allan, and Anthony Partridge. “Suggestions for Improving Juror Understanding of Instructions,” in COMMITTEE ON THE OPERATION OF THE JURY SYSTEM, JUDICIAL CONFERENCE OF THE UNITED STATES, REPORT OF THE SUBCOMMITTEE ON PATTERN JURY INSTRUCTIONS, Appendix A.

Tiersma, Peter Meijes, *Reforming the Language of Jury Instructions*. 22 HOFSTRA L. REV. 37 (1993).

JURY INSTRUCTION \_\_\_\_\_

(FAULT DEFINED)

You will need to determine whether any party in this case was at Fault. The word “Fault” as used in these instructions and in the special verdict form, has special meaning. To give Fault to any party you must find two things:

First, you must find that the conduct of that party was [negligence, defamation, a violation of implied duties of good faith and fair dealing, fraud, etc.]; and

Second, you must find that the party's conduct was the “Legal Cause” of plaintiff's damages.

I will now explain what these terms mean.

COMMENT -

The court should insert the applicable causes of action in the case. The instructions regarding each cause of action and Legal Cause should then follow this instruction.

### Subcommittee Priority List

Chair		Subcommittee	Priority	First Draft Due
Carney	Francis J.	Negligence	1	Dec-03
Humpherys	L. Rich	Damages	1	Feb-04
Ferguson	Phillip S.	Preliminary and General Instructions	1	Feb-04
Sullivan	Alan	Contracts (Commercial)	1	Mar-04
Janove	Jathan W.	Employment	2	Apr-04
Morton	Robert C.	Premises Liability	2	May-04
Fowler	Tracy H.	Product Liability	3	
Mariger	Craig R.	Professional Liability: Architects, Engineers	3	
Gilchrist	Robert G.	Professional Liability: Lawyers, Accountants	3	
Dewsnup	Ralph L.	Professional Liability: Medical Negligence	3	
Scott	Kent	Contracts (Construction)	4	
Haley	George M.	Fraud & Deceit	4	
Belnap	Paul	Insurance Company Obligations	4	
Gurmankin	Jay D.	Officers, Directors, Partners, Insiders Liability	4	
Wallace	Robert R.	Civil Rights	5	
Anderson	Robert M.	Intentional Torts	5	
Bennett	Charles M.	Probate, Guardianship, Wills	5	