

# Agenda

## Advisory Committee on Model Civil Jury Instructions

September 8, 2008  
4:00 to 6:00 p.m.

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

Approval of minutes	Tab 1	John Young
Motor Vehicle Instructions	Tab 2	Rich Humpherys Lynn Davies

**Committee Web Page:** <http://www.utcourts.gov/committees/muji/>

**Published Instructions:** <http://www.utcourts.gov/resources/muji/>

**Meeting Schedule:** Matheson Courthouse, 4:00 to 6:00 p.m.

September 22, 2008	Motor Vehicles
October 14, 2008	Premises Liability
October 27, 2008	Insurance Obligations
November 10, 2008	Construction Contracts
December 8, 2008	Intentional Torts / Fraud and Deceit
January 12, 2009	Eminent Domain
February 9, 2009	Probate
March 9, 2009	Professional Liability
April 13, 2009	Employment
May 11, 2009	
June 8, 2009	

# Tab 1

**MINUTES**

Advisory Committee on Model Civil Jury Instructions

September 8, 2008

4:00 p.m.

Present: John L. Young (chair), Francis J. Carney, Dr. Marianna Di Paolo, Phillip S. Ferguson, Tracy H. Fowler, Gary L. Johnson, Stephen B. Nebeker, Timothy M. Shea, Paul M. Simmons, Peter W. Summerill. Also present: P. Bruce Badger, Todd Shaughnessy

1. *Contract Instructions.* The committee continued its review of the contract instructions.

a. *CV2103. Creation of a contract.* Ms. Blanch thought that the instruction should make explicit that if there is no meeting of the minds, there is no contract. The following sentence was added to the end of the subcommittee's recommended instruction: "If you cannot tell what the parties have promised to do for each other, there is no contract." Mr. Badger noted that the instruction should probably be rewritten in each case to make it case specific. At Mr. Fowler's suggestion, the word "valid" was struck from the first line of the advisory committee note. The committee approved the instruction as modified.

b. *CV2107. Consideration.* The committee approved the proposed advisory committee note, explaining that the instruction applies only to bilateral contracts.

c. *CV2121. Anticipatory breach.* At Mr. Humpherys's suggestion, "Also" was deleted from the start of the second paragraph. The committee revised the last paragraph to read:

[Name of defendant] breached the contract if you find that [he] (1) made statements that could be reasonably interpreted to mean that he positively and unequivocally refused to perform his contract obligations, and (2) did not change his mind and notify [name of plaintiff] before [name of plaintiff] either filed a lawsuit or otherwise relied on the statements and significantly changed his position.

Mr. Jemming asked whether one could repudiate a contract by indicating to a third person that he would not perform. Mr. Badger suggested deleting the phrase "to the other party" in the first sentence of the instruction. Mr. Young suggested bracketing the phrase and adding a committee note noting the issue. The subcommittee was given additional time to try to resolve the issue. The committee approved the instruction, subject to any further recommendations by the subcommittee.

Mr. King joined the meeting.

d. *CV2122. Implied covenant of good faith and fair dealing.* Mr. Young asked whether the instruction should be made more case specific, e.g., “[Name of plaintiff] is claiming that [name of defendant] did [specify conduct] and that [name of defendant’s] conduct breached the implied covenant of good faith and fair dealing,” or, as Mr. Shaughnessy suggested, “[Name of plaintiff] claims that [name of defendant] breached the implied covenant of good faith and fair dealing by . . .”

At Mr. King’s suggestion, “consistent” in the last sentence of the first paragraph was replaced with “inconsistent.”

Mr. Humpherys asked whether “justified expectations” (as used in the first paragraph) needed to be defined. He also asked whether the justification for a party’s expectations is to be determined by a subjective or objective standard and whether it was for the court or the jury to determine whether a party’s expectations were justified. Mr. Carney suggested that these issues be raised in a committee note. Mr. Fowler suggested substituting “reasonable expectations” for “justified expectations.” Mr. Shaughnessy noted that the issue would likely be decided on summary judgment; if the court decides that the expectations were justified, it would not need to instruct the jury on justification; if the court decides they were not justified, then the issue would not go to the jury; or the court could conclude that the issue was for the jury to decide on disputed facts.

Dr. Di Paolo joined the meeting.

Mr. Jemming suggested deleting the modifier “justified.” Dr. Di Paolo noted that “justified expectations” is hard to understand: how are “justified expectations” different from “expectations”? She thought that “reasonable expectations” was easier to process. But Mr. Johnson noted that the Utah Supreme Court has rejected the “reasonable expectations” doctrine in the context of insurance contracts. Mr. King suggested a committee note saying that the committee favored “reasonable expectations” but that the case law uses the phrase “justified expectations.” Dr. Di Paolo suggested replacing “justified expectations” with “expectations that are justified.” She also suggested breaking the last sentence of the first paragraph into subparts. Mr. Shaughnessy, however, thought the issue did not lend itself to subparts but depended on the totality of the circumstances. He suggested revising the last sentence of the first paragraph to read:

You should consider, in light of the contract language and the dealings between and conduct of the parties, whether [name of defendant’s] actions were inconsistent with (1) the agreed common purpose and (2) the justified expectations of the parties.

The fifth paragraph was revised to read:

Third, this unwritten promise does not require either party to use a contract right in a way that would be harmful to themselves simply to benefit the other party.

At Ms. Blanch's suggestion, "may not" was replaced with "cannot" in the next paragraph.

Mr. King moved to approve the instruction as proposed by the subcommittee, with the committee's proposed changes to the fifth and sixth paragraphs. Mr. Johnson seconded the motion. The motion passed. A committee note will be added stating that there are no judicial decisions on what "justified expectations" means.

e. *CV2125. Duress.* Mr. Badger noted that the subcommittee separated the instructions on duress and improper threat. Mr. Badger also noted that the subcommittee had not found any cases dealing with economic duress, so the instruction does not mention economic duress. Mr. Shea asked whether the last sentence of the duress instruction modifies just the third element or all three elements. At Mr. Ferguson's suggestion, the first element was revised to read "[he] was physically forced to enter into the contract by [name of plaintiff or plaintiff's agent]." The committee approved the instruction as modified.

f. *CV2126, Improper threat.* The committee thought that subparagraph (1) was too technical and confusing for jurors. Mr. Humpherys suggested replacing "tort" with "civil liability." Mr. Shaughnessy noted that, if subparagraph (1) is an issue, the court and parties will have to modify the instruction to specify the alleged tort or crime involved. The committee approved the instruction.

g. *CV2127. Fraudulent inducement.* Mr. Humpherys suggested changing "claim" to "defense" in the second sentence. Mr. Shaughnessy suggested changing "To succeed on this claim" to "To prevail," consistent with prior usage. Mr. Shea asked whether "presently existing fact" was redundant. Mr. Simmons suggested deleting "presently." Dr. Di Paolo suggested replacing the phrase with "an important fact that presently exists." The committee approved the instruction as drafted by the subcommittee, with Dr. Di Paolo dissenting.

h. *CV2130. Substantive unconscionability.* The committee approved the revised instruction proposed by the subcommittee.

i. *CV2131. Procedural unconscionability.* Ms. Blanch suggested reversing the order of CV2130 and CV2131. Mr. Shaughnessy, however, noted that substantive unconscionability is the more important concept and that contracts are rarely voided for procedural unconscionability. Mr. Nebeker asked whether the jury must find all of the factors listed or any one of them. Mr. Badger said that the jury does not have to find them all. Mr. Humpherys therefore suggested revising the last sentence of the first paragraph to say, “You may consider any [for “all”] of the following circumstances . . . .” At Mr. Shea’s suggestion, the phrase “all of” was deleted. The committee approved the instruction as revised.

j. *CV2132. Mutual mistake.* Mr. Young asked what a “vital” fact was. Mr. Humpherys thought it meant more than important or material. Mr. Carney thought it meant one without which there would be no contract. Dr. Di Paolo noted that “vital” has an everyday meaning. Mr. Ferguson noted that its everyday meaning pertains to life, as in “vital statistics.” At Mr. Shaughnessy’s suggestion, the second sentence was revised to read, “For [name of defendant] to succeed on this claim, . . . .” Messrs. Badger and Shaughnessy questioned whether the instruction would ever be given to the jury. They noted that the usual remedies for a mutual mistake are equitable--reformation or rescission of the contract. They suggested adding a committee note to that effect. The committee approved the instruction with these changes.

k. *CV2133. Unilateral mistake.* The second paragraph was revised to read, “For [name of defendant] to succeed on this claim, . . . .” The committee questioned what type of unconscionability was required under subparagraph (2). Mr. Badger noted that the cases seem to allow procedural as well as substantive unconscionability. Mr. Simmons suggested revising subparagraph (2) to say that “to enforce the contract would be [substantively/procedurally] unconscionable,” so that the jury could refer to the proper instruction on unconscionability, depending on the claims of the parties. Mr. Johnson thought that inequitable conduct was an element of a claim of unilateral mistake. At Mr. Shea’s suggestion, the periods after each subparagraph were replaced with semicolons, and “and” was inserted before the last subparagraph, (5). The committee approved the instruction with Mr. Shea’s changes.

l. *CV2134. Third-party beneficiary.* The committee approved the instruction as revised by the subcommittee. (The second sentence was corrected to read, “To be a third-party beneficiary of a contract, [name of plaintiff] must prove:”)

m. *CV2135. Assignment.* Dr. Di Paolo thought the first sentence was confusing. Mr. Simmons noted that there was an 's missing after "[assignor's name]" in the second line. Mr. Shea will revise the phrases "assignor's name" and "assignee's name" to "name of assignor" and "name of assignee" to make them less confusing. The word "proven" was replaced with "proved" in the last paragraph. The committee approved the instruction as modified.

n. *CV2136. Delegation.* The committee agreed with the subcommittee's recommendation to delete this instruction, since the issue only arises in the context of a novation, and there is a separate instruction on novation.

o. *[New] CV2136. Modification.* The committee approved the advisory committee's recommended note. Mr. Badger noted that certiorari has been granted in the case cited in the note, so the committee may need to revise the note depending on what the Utah Supreme Court holds.

p. *CV2138 [now CV2137?]. Abandonment.* At Mr. Humpherys's suggestion, the second sentence was revised to read, "To succeed on this claim, [name of party] must prove by clear and convincing evidence . . . ." The committee approved the instruction as revised.

q. *CV2139. Damages related to expected benefits.* Ms. Blanch questioned what the phrase "flow naturally from the breach" means and whether it is sufficiently plain English. Mr. Badger thought it needed to be part of the instruction. It defines general damages for breach of contract (as opposed to special or consequential damages). The first paragraph was revised to read:

If [name of party] is damaged by a breach of a contract, then [he] has a right to recover damages that flow naturally from the breach. These damages are calculated as follows:

At Mr. Badger's suggestion, the title was changed to "Expectation damages--general." The committee approved the instruction as modified.

r. *CV2142. Damages--foreseeability.* The committee adopted the subcommittee's recommendation to delete this instruction. It does not apply to general damages and is covered in the consequential damage instruction.

s. *CV2143. Mitigation and avoidance.* Mr. Badger noted that the case previously cited as authority for this instruction, *Mahmood v. Ross*, 1999 UT 104, is not a complete statement of the law. The subcommittee revised the

instruction to include language from *Alexander v. Brown*, 646 P.2d 692 (Utah 1982). Messrs. Young and Humpherys questioned whether that was the law. Ms. Blanch thought the additional language gutted the duty to mitigate. The last clause was revised to read, “[name of defendant] cannot succeed on his claim [instead of “cannot complain”] . . . .” The committee approved the instruction as modified.

2. *Next Meeting.* The next meeting will be Monday, September 22, 2008, to discuss the motor vehicle accident instructions.

The meeting concluded at 6:00 p.m.

# Tab 2

## Motor Vehicle Instructions

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**(1) CV601. Introduction.**

Under the law, a driver has various duties that [he] must comply with while driving. I will now explain these duties that apply to this case.

**(2) CV602. Driver's general duty.**

A driver has the duty to use reasonable care at all times.

References

MUJI 1ST Instruction

5.1

**(3) CV603. Duty. Control of automobile.**

A driver has a duty to keep the vehicle under reasonable control. A vehicle is under reasonable control when the driver has the ability to guide and direct the course of the automobile so as to avoid danger.

References:

MUJI 5.3

Jorgensen v. Issa, 739 P.2d 80 (Utah Ct. App. 1987)

**(4) CV604. Lookout.**

A driver has a duty to maintain a proper lookout for other traffic and hazards reasonably to be anticipated.

References

Henderson v. Meyer, 533 P.2d 290 (Utah 1975).

Wardell v. Jerman, 18 Utah 2d 359, 423 P.2d 485 (1967).

MUJI 1st Instruction

5.14.

**(5) CV605. Following at a safe distance.**

A driver has a duty not to follow another vehicle more closely than is reasonable and prudent under all existing conditions and circumstances.

References

Utah Code Section 41-6a-711.

**(6) CV606. Duty of maintenance.**

A driver [an owner] has a duty not to [drive/move] [allow a vehicle to be driven/moved] on a roadway in an unsafe condition.

References

Utah Code Section 41 6a 1601.

MUJI 1st Instruction

5.6.

Committee Notes

If there is an alleged violation of a particular statute regarding required equipment (e.g., Utah Code Section 41-6A-1601) Instruction CV625 should be used.

**(7) CV607. Speed.**

A driver has a duty to drive at a speed that is safe under the circumstances, with proper regard for existing and potential hazards.

The posted speed limit at the place of this accident was [\_\_\_\_\_] miles per hour. Driving at a speed in excess of the posted limit may be evidence of negligence. Regardless of the speed limit, all drivers must drive at an appropriate speed in light of all of the existing conditions and circumstances.

References

Utah Code Section 41-6a-601.

Anderson v. Bradley, 590 P.2d 339 (Utah 1979).

MUJI 1st Instruction

5.15.

**(8) CV608. Minimum speed.**

A person may not operate a motor vehicle at a speed so slow as to impede or block the normal and reasonable movement of traffic except when a reduced speed is necessary for safe operation given the existing circumstances.

References

Utah Code Section 41-6a-605

**(9) CV609. Duty. Turning/lane change.**

A driver has a duty to not turn a vehicle right or left or change lanes only when the movement can be made with reasonable safety and after an appropriate signal has been given.

References

Utah Code Section 41-6A-804.

Batty v. Mitchell, 575 P.2d 1040 (Utah 1978).

MUJI 1st Instruction

5.16.

**(10) CV610. Duty. Right of way. Left turns.**

A driver turning left has a duty to yield the right of way to any vehicle approaching from the opposite direction that is so close it is an immediate hazard.

References

Utah Code Section 41-6A-903.

MUJI 1st Instruction

5.17.

**(11) CV611. Duty. Right of way. Unregulated intersection.**

A driver approaching an intersection not regulated by a traffic control device [or stop signs] has a duty to yield the right of way to any vehicle that is already in the intersection.

The driver of a vehicle on the left has a duty to yield the right of way to the vehicle on [his] right when more than one vehicle enters or approaches the intersection at approximately the same time. However, a driver may not speed up to enter an intersection first. In order for a driver approaching from the left to have the right-of-way, that driver must enter the intersection clearly ahead of the driver approaching from the right.

References

Utah Code Section 41-6a-901.

MUJI 1st Instruction

5.5.

Committee Notes

This instruction would also apply to an intersection regulated from all directions by stop signs.

**(12) CV612. Duty. Right of way. Traffic signals.**

A driver who approaches an intersection with a red light has a duty to yield the right of way to traffic entering the intersection on a green light. The driver with the green light has the right to assume that traffic will not enter the intersection against a red light, and may continue to rely on this assumption unless that driver sees, or in the exercise of reasonable care should see, that another vehicle is going to proceed against the red light. In such a situation, the driver with the green light has a duty to use reasonable care to avoid a collision.

References

MUJI 1st Instruction

5.8.

**(13) CV613. Duty. Intoxicated driver.**

A driver may not operate a vehicle if [he] is under the influence of [alcohol, any drug, or the combined influence of alcohol and any drug] to a degree that the person cannot operate the vehicle safely, [if a person has a blood or breath alcohol concentration of .08 grams or greater at the time of operation of the vehicle].

References

Utah Code Section 41-6a-502.

MUJI 1st Instruction

5.12.

**(14) CV614. Duty. Young drivers.**

A minor driving a motor vehicle is held to the same standard of care required of an adult driver.

References

Summerhill v. Shipley, 890 P.2d 1042 (Utah App. 1995).

**(15) CV615. Duty. Drivers approached by emergency vehicle.**

When immediately approached by an emergency vehicle using audible or visual signals, a driver has a duty to:

- (1) yield the right-of-way to the emergency vehicle;
- (2) immediately move parallel to, and as close as possible to, the right edge or curb of the roadway, clear of any intersection; and
- (3) stop and remain stopped until the emergency vehicle has passed.

In complying with these duties, a driver must always use reasonable care given all of the circumstances.

References

See Utah Code Section 41-6a-904.

MUJI 1st Instruction

5.20.

Committee Notes

This instruction assumes that the emergency vehicle is authorized by law in its emergency travel. If authorization is not stipulated to, the court should address this issue as a matter of law or, if a question of fact exists, by additional instructions relating thereto.

**(16) CV616. Duty. Emergency vehicles.**

[Name of party] claims that [name of other party] is subject to the following duty(ies): [describe the duties] at issue

[Name of other party] claims that [he] was excused from complying with these duties.

Under certain conditions, the law may allow the driver of an emergency vehicle to disregard certain duties if each of the following is true:

(1) if the driver of an emergency vehicle sounds an audible signal or uses emergency lights which are visible from the front of the emergency vehicle, and

(2) the driver was

[responding to, but not returning from, an emergency call];

[in pursuit of an actual or suspected violator of the law];

[responding to, but not returning from, a fire alarm.]

If you decide that both of these conditions are true, then [name of the other party] may

[park or stand in the roadway]

[drive through a stop signal or stop sign, but only slowing down as needed for safety]

[exceed the posted speed limit]

[disregard the duties concerning direction of travel, lane change, or turning]

[describe any other applicable duty]

The right to disregard this duty, however, does not relieve the driver of the duty to operate the emergency vehicle with reasonable care, considering the emergency situation and all other circumstances.

#### References

See Utah Code Section 41-6a-212. (41-6-14 was amended to 41-6a-212).

MUJI 1st Instruction

5.18; 5.19.

#### Committee Note

See comment note to CV615 regarding the definition of “authorized” emergency vehicle if the issue is relevant.

### **(17) CV617. Duty. Pedestrians.**

A pedestrian must use reasonable care at all times to avoid harm to [himself] and others and to avoid causing an accident.

#### References

MUJI 1st Instruction

5.21.

### **(18) CV618. Duty. Pedestrian crossing a roadway.**

To determine if a pedestrian used reasonable care, you may consider the following:

[(1) A pedestrian crossing a road at any point other than within a marked crosswalk [or within an unmarked crosswalk at an intersection (If this alternative is used, a definition of unmarked crosswalk should be given, see Utah Code Section 41-6a-102(a)) shall yield right-of-way to all vehicles on the road.]

[(2) A pedestrian may not suddenly leave a curb or other place of safety and walk or run into the path of a vehicle which is so close as to be an immediate hazard. An “immediate hazard” exists whenever a reasonably careful person in the position of a pedestrian would realize that [he] would be in danger.]

References

See Utah Code Section 41-6a-1002 and Section 41-6a-1003. (formerly Section 41-6-78 and Section 41-6-79).

MUJI 1st Instruction

5.22.

**(19) CV619. Duty. Drivers toward pedestrians.**

When traffic signals are not in place or not in operation, a driver shall yield the right-of-way by slowing down or stopping, if necessary:

(1) to a pedestrian crossing the road within a crosswalk when the pedestrian is on the half of the road where the driver is traveling, or

(2) when the pedestrian is approaching so closely from the opposite half of the road as to be in danger.

Both a driver and a pedestrian have a continuing duty at all times to use reasonable care for the safety of others and themselves, even when one has the right-of-way over the other.

References

See Utah Code Section 41-6a-1002(1)(a).

**(20) CV620. Duty. Pedestrian signals.**

When pedestrian traffic control signals exist, a pedestrian has the following rights and duties:

(1) A pedestrian facing a steady “Walk” or “Walking Person” signal has the right-of-way and may cross the road in the direction of the signal.

(2) A pedestrian facing a flashing [or steady] “Don’t Walk” or “Upraised Hand” signal may not start to cross the road in the direction of the signal, but a pedestrian who has partially completed crossing on the walk signal keeps the right-of-way while continuing to a sidewalk or safety island.

Both a driver and a pedestrian have a continuing duty at all times to use reasonable care for the safety of others and themselves, even when [he] has the right-of-way over the other.

References

See Utah Code Section 41-6a-306.

MUJI 1st Instruction

5.24.

**Question**

Do the exceptions to a violation of a statute as described in Instruction CV625 apply?

**(21) CV621. Duty. Driving near children.**

A person has a duty to drive more carefully around a child than a mature person.

References

Woodward v. Spring Canyon Coal Co. 90 Utah 578, 63 P.2d 267 (Utah 1936).

Rivas v. Pacific Finance Co. 16 Utah 2d 183, 397 P.2d 990 (1964).

Kilpack v. Wignall 604 P2d 462, 1979 Utah Lexis 953 (Utah 1979).

**(22) CV622. Duty. Bicyclist.**

A bicyclist has a duty to operate [his] bicycle safely under the circumstances, both for [his] own safety and for the safety of others. Drivers must also consider the nature of bicycles when driving near a bicyclist.

Bicyclists are usually more exposed to injury than drivers of motor vehicles, and therefore drivers should exercise appropriate caution when they know or should know bicyclists to be riding in the vicinity. Similarly, bicyclists should exercise reasonable care for their own safety, given the issues and risks applicable to bicycles.

References

Utah Code Sections 41-6a-1101 to -1114, 41-6a-706.5.

Utah Code Sections 41-6a-102(4), (34), (42).

**(23) CV623. Duty. Bicycles. Three-foot rule.**

A driver may not drive a motor vehicle within three feet of a moving bicycle, unless conditions are such that it is necessary to drive closer than that distance and it can be done reasonably and safely.

References

Utah Code Section 41-6a-706.5.

Committee Note

Instruction CV625 may apply, in which case this instruction should be incorporated into CV625.

**(24) CV624. Duty. Real property owner to remove obstruction impairing view.**

The owner of real property has a duty to remove from [his] property any part of a tree, plant, shrub or other obstruction, that creates a traffic hazard by obstructing the view of a driver on a roadway.

References

Utah Code Section 41-6a-216.

Committee Notes

The exception to a violation of a statute as described in Instruction CV625 may apply and should be used as appropriate.

**(25) CV625. Violation of statute, ordinance or safety law.**

A violation of a safety law is evidence of fault unless the violation is excused. [Name of plaintiff] claims that [name of defendant] violated a safety law that says:

[Quote or summarize in plain language the statute, ordinance or rule.]

If you decide that [name of defendant] violated this safety law, you must decide whether the violation is excused.

A violation is excused if:

[Obeying the law would have created an even greater risk of harm.]

[[he] could not obey the law because [he] faced an emergency that [he] did not create.]

[[he] was unable to obey the law despite a reasonable effort to do so.

[[he] was incapable of obeying the law.]

[[he] was incapable of understanding what the law required.]

Even if a driver complies with a safety law, or is excused from complying with the safety law, a driver must still comply with all other duties that I have explained to you.

References

Child v. Gonda, 972 P.2d 425 (Utah 1998).

Hall v. Warren, 692 P.2d 737 (Utah 1984).

Intermountain Farmers Ass'n v. Fitzgerald, 574 P.2d 1162 (Utah 1978).

Thompson v. Ford Motor Co., 16 Utah 2d 30; 395 P.2d 62 (1964).

Gaw v. State ex rel. Dep't of Transp., 798 P.2d 1130 (Utah App. 1990).

Jorgensen v. Issa, 739 P.2d 80 (Utah App. 1987).

MUJI 1st Instruction

3.11.

COMMITTEE NOTES

The safety law applies if:







