

# Agenda

## Advisory Committee on Model Civil Jury Instructions

March 12, 2012  
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

Welcome and approval of minutes	Tab 1	John Young
Vicarious liability instructions	Tab 2	John Lund
CV1005. Industry standard.	Tab 3	Paul Simmons

[Committee Web Page](#)

[Published Instructions](#)

**Meeting Schedule:** Matheson Courthouse, Judicial Council Room, 4:00 to 6:00 unless otherwise stated.

April 9, 2012  
May 14, 2012  
June 11, 2012  
September 10, 2012  
October 9, 2012 (Tuesday)  
November 13, 2012 (Tuesday)  
December 10, 2012

# Tab 1

## MINUTES

### Advisory Committee on Model Civil Jury Instructions

February 13, 2012

4:00 p.m.

**Present:** Juli Blanch, Frank Carney, Professor Marianna Di Paolo, Phillip S. Ferguson, Tracy H. Fowler, Judge Deno Himonas, Ryan M. Springer, Peter W. Summerill, Judge Kate Toomey, David E. West, Timothy M. Shea

**Excused:** John L. Young, Chair, Judge William W. Barrett, L. Rich Humpherys, Gary L. Johnson, John R. Lund, Paul M. Simmons,

Mr. Carney chaired the meeting in Mr. Young's absence.

**CV 2803. Apparent authority.** Mr. West said that the instruction should include a statement that nothing the purported agent says can bind the principal. The plaintiff has a duty to inquire about the agent's authority independent of the agent's representations. Judge Himonas said that the first paragraph is sufficient because it focuses exclusively on the principal's conduct.

Mr. Ferguson said that the references cited includes the requirement that the plaintiff rely on the agent's apparent authority, but that there is nothing in the instruction to that effect. Mr. Shea included "and [name of plaintiff] relied on that authority" at the end of paragraph (3). The committee discussed the draft further but decided to wait until Mr. Lund, who provided the original draft, could attend.

**CV2805. Scope of employment.** Mr. Carney said that although scope of authority and scope of employment are similar concepts in the law of agency and vicarious liability, the courts have developed more detailed tests for the latter and limited them to traditional employment relationships.

Prof. Di Paola observed that the phrase "scope of employment" is used in several of the subsequent instructions, but that it is used only on the title of this instruction. The committee decided to rework the instruction into a definition of "scope of employment." In the introductory paragraph the last sentence was redrafted: To succeed on this claim, [name of plaintiff] must prove that [name of employee]'s conduct "was within the scope of employment. 'Scope of employment' means that the conduct: ...."

The committee discussed the last phrase of paragraph (1) "...in other words, [he] was doing [name of employers]'s work rather than being wholly involved in a personal matter." Prof. Di Paola thought that "completely" would be better understood than "wholly." Mr. Springer said that the case from which the case comes uses "entirely." He suggested that the "in other words" clause, as written in the case, appeared to summarize all three of the requirements for something to be within the scope of employment.

Mr. Shea said that the concept of being wholly involved in a personal matter is contrary to the later instructions, which include several qualifiers. After discussion, the committee deleted the phrase, but decided to wait until Mr. Simmons, who provided the original draft, could attend.

**CV 2806. Deviation from scope of employment.** The committee approved the instruction as drafted.

**CV 2807. Scope of employment; travel to and from work.** Several members suggested that the instruction should be presented as an exception to the general rule that the employer is not liable for the employee's conduct while the employee is commuting. Mr. Shea added to the beginning of the introductory paragraph "Usually, traveling to and from work is not within the scope of employment. [Name of plaintiff] claims that..."

The committee added references and a committee note directing lawyers and judges to *Ahlstrom v. Salt Lake City Corp.*, 2003 UT 4, 73 P.3d 315 for examples of the several circumstances that are exceptions to the "coming and going" rule. The committee discussed the rule further, but decided to wait until Mr. Simmons, who provided the original draft, could attend.

The meeting ended at 6:00 p.m.

# Tab 2

## Vicarious Liability Instructions

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(11) CV 2811. Liability of [partnership/joint venture] for acts of [partner/joint venturer. 7	
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### **(1) CV 2801. An organization acts through its agents. (Approved)**

[Name of party] is a [corporation, partnership, joint venture, etc.] and acts or fails to act when [name of party]'s officers, employees, or agents act or fail to act within the scope of their duties or authority.

### **References**

Zions First Nat. Bank v. Clark Clinic Corp., 762 P.2d 1090, 1094-95 (Utah 1988).

Orlob v. Wasatch Management, 2001 UT App 28, ¶ 18, 33 P.3d 1078.

### **MUJI 1st Instruction**

25.1.

#### **Committee Notes**

If the jury must decide whether the defendant is a corporation, partnership, or joint venture, then this instruction should not be given. Or phrased as “If you find that [name of defendant] is ....”

#### **(2) CV 2802. Actual authority. (Approved)**

[Name of plaintiff] claims that [name of principal] is liable for [describe act or omission] by [name of officer/employee/agent]. To succeed on this claim, [name of plaintiff] must prove that:

(1) [name of principal] granted [name of officer/employee/agent] the authority to [describe actual authority]; or

(2) [name of officer/employee/agent]’s conduct was necessary, usual, proper or incidental to the conduct that [name of principal] actually authorized.

#### **References**

Zions First Nat. Bank v. Clark Clinic Corp., 762 P.2d 1090 (Utah 1988)

Bowen v. Olsen, 576 P.2d 862 (Utah 1978)

B & R Supply Co. v. Bringhurst, 28 Utah 2d 442, 503 P.2d 1216 (1972)

Restatement (Third) of Agency Section 3.01

### **MUJI 1st Instruction**

25.2; 25.4.

#### **Committee Notes**

The courts have adopted a more specific test in cases involving scope of employment. If the relationship between principal and agent is a traditional employment relationship, the court should use [http://www.utcourts.gov/resources/muji/inc\\_list.asp?action=showRule&id=28#2805](http://www.utcourts.gov/resources/muji/inc_list.asp?action=showRule&id=28#2805) Instruction CV2805. Scope of employment. If the relationship is a traditional principal and agent relationship, the court should use this instruction.

#### **(3) CV 2803. Apparent authority.**

[Name of plaintiff] claims that [name of principal] is liable for [describe act or omission] by [name of officer/employee/agent]. To succeed on this claim, [name of plaintiff] must prove all of the following:

(1) [name of principal] acted in a way that would cause a reasonable person to believe that [name of principal] consented to or knowingly permitted [name of officer/employee/agent]'s conduct; and

(2) at the time of [name of officer/employee/agent]'s conduct, [name of plaintiff] knew of [name of principal]'s acts; and

(3) [name of plaintiff] did in fact believe that [name of officer/employee/agent] had the authority to [describe act or omission].

However, if [name of plaintiff] knew of the real scope of [name of officer/employee/agents]'s authority in time to avoid the harm, then [name of principal] is not liable for [name of officer/employee/agent]'s conduct.

### References

City Elec. v. Dean Evans Chrysler-Plymouth, 672 P.2d 89 (Utah 1983).

Bank of Salt Lake v. Corporation of the President of the Church, 534 P.2d 887 (Utah 1975).

Sutton v. Byer Excavating, Inc., 2012 UT App 28.

Restatement (Third) of Agency, Section 2.03, Comment (e). "To establish that an agent acted with apparent authority, it is not necessary for the plaintiff to establish that the principal's manifestation induced the plaintiff to make a detrimental change in position, in contrast to the showing required by the estoppel doctrines.... Establishing that a plaintiff took an action as a result of the principal's manifestation may also help to establish that the person to whom the manifestation was made believed it to be true. Moreover, the underlying substantive cause of action on which the third party sues the principal may require proof that the plaintiff took a specific type of action. For example, if the underlying cause of action is fraud, it is necessary for the plaintiff to establish that the defendant's misrepresentation led to a detrimental change in position."

### MUJI 1st Instruction

25.3.

### Committee Notes

#### (4) CV 2804. Approval of conduct. (Approved)

[Name of plaintiff] claims that [name of principal] is liable for [describe act or omission] by [name of third party] because [name of principal] approved of [name of third party]'s conduct after the fact. To succeed on this claim, [name of plaintiff] must prove that [name of principal] knew of [name of third party]'s conduct; and approved of it.

[Name of plaintiff] may prove that [name of principal] approved of [name of third party]'s conduct by any acts, words, or conduct, including silence, which, under the circumstances, indicate approval.

### References

Bradshaw v. McBride, 649 P.2d 74 (Utah 1982).

Bullock v. Utah, Dep't of Transp., 966 P.2d 1215 (Utah Ct.App.1998).

Franklin Credit Mgmt. Corp. v. Hanney, 2011 UT App 213.

### MUJI 1st Instruction

25.5.

### Committee Notes

#### (5) CV2805. "Scope of employment" defined.

[Name of plaintiff] claims that [name of employer] is liable for [describe act or omission] by [name of employee]. To succeed on this claim, [name of plaintiff] must prove that [name of employee]'s conduct was within the scope of employment. "Scope of employment" means that the conduct:

- (1) was of the general kind [name of employee] was [employed/authorized] to do; and
- (2) occurred substantially within working hours and within the normal work area; and
- (3) was motivated, at least in part, by the purpose of serving [name of employers]'s interest.

### References

Helf v. Chevron U.S.A., Inc., 2009 UT 11, ¶ 48, 203 P.3d 962.

Clover v. Snowbird Ski Resort, 808 P.2d 1037 (Utah 1991).

Birkner v. Salt Lake County, 771 P.2d 1053 (Utah 1989).

Sutton v. Byer Excavating, Inc., 2012 UT App 28.

### MUJI 1st Instruction

25.6.

### Committee Notes

The courts have adopted a more specific test in cases involving scope of employment. If the relationship between principal and agent is a traditional employment relationship, the court should use this instruction. If the relationship is a traditional principal and agent relationship, the court should use <a href=http://www.utcourts.gov/resources/muji/inc\_list.asp?action=showRule&id=28#2802>Instruction CV2802</a>. Actual authority.

**(6) CV 2806. Deviation from scope of employment. (Approved)**

If [name of employee] deviates from carrying out [his] employment duties for personal reasons, whether [he] was still acting within the scope of employment depends on the extent of the deviation.

If it was a slight deviation to attend to business other than [name of employer]'s, then the acts are still within the scope of employment.

However, if [name of employee]'s deviation was so substantial that it had no relation to [his] employment or to [name of employer]'s business, then [name of employee]'s acts are not within the scope of employment.

**References**

Clover v. Snowbird Ski Resort, 808 P.2d 1037, 1042 (Utah 1991).

Carter v. Bessey, 97 Utah 427, 93 P.2d 490, 492 (1939).

Restatement (Third) of Agency. Section 7.07.

**MUJI 1st Instruction**

25.7.

**Committee Notes**

**(7) CV 2807. Scope of employment; travel to and from work.**

Traveling to and from work is usually not within the scope of employment. [Name of plaintiff] claims that, [name of employee]'s [describe act or omission] while traveling to or from work is within the scope of employment. To succeed on this claim, [name of plaintiff] must prove that:

(1) [name of employer] benefited from the travel other than just in [name of employee]'s presence at work; or

(2) [name of employer] had control over [name of employee]'s conduct during [his] travel.

**References**

Ahlstrom v. Salt Lake City Corp., 2003 UT 4, ¶ 6, 73 P.3d 315.

Christensen v Swenson, 874 pd 125 (Utah 1994).

Whitehead v. Variable Annuity Life Ins. Co., 801 P.2d 934 (Utah 1989).

Windsor Ins. Co. v. American States Ins. Co., 22 P.3d 1246, (Utah App.,2001).

27 ALR 5th 174. Employer's liability for negligence of employee in driving his or her own automobile.

## **MUJI 1st Instruction**

25.8.

### **Committee Notes**

Ahlstrom v. Salt Lake City Corp., 2003 UT 4, 73 P.3d 315, includes a thorough discussion of the scope of employment doctrine and of several exceptions to it.

#### **(8) CV 2808. Scope of employment; dual purpose.**

If [name of employee]'s [describe act or omission] was motivated to benefit [name of employer], then the conduct was within the scope of employment even though [name of employee] was also pursuing some personal interest.

However, if [name of employee]'s primary motivation was personal, then [his] conduct was not within the scope of employment, even though [he] may have also transacted some business or performed some duty related to [his] employment.

[Where [name of employee] is involved in an accident while traveling for [name of employer], you should ask whether the trip was one for which [name of employer] would have had to send another employee over the same route or to perform the same task if the trip had not been made.]

### **References**

Ahlstrom v. Salt Lake City Corp., 2003 UT 4, ¶ 14, 73 P.3d 315.

Clover v. Snowbird Ski Resort, 808 P.2d 1037, 1041 (Utah 1991).

Whitehead v. Variable Annuity Life Ins. Co., 801 P.2d 934 (Utah 1989).

## **MUJI 1st Instruction**

### **Committee Notes**

Use the bracketed paragraph only if the case involves the employee's travel.

#### **(9) CV 2809. Scope of employment; intentional act.**

[Name of employee]'s intentional [describe act or omission] is within the scope of employment if [name of employee]'s conduct:

- (1) is of the type that [he] was hired to perform; and
- (2) occurred during [his] work hours; and
- (3) occurred within the boundaries of employment; and
- (4) was partially motivated to serve [name of employer]'s interest.

However, if [name of employee]'s conduct served a personal interest or was unprovoked, highly unusual, and outrageous, then [name of employee]'s conduct was not within the scope of employment.

## References

Clark v. Pangan, 2000 UT 37, 998 P.2d 268.

Birkner v. Salt Lake County, 771 P.2d 1053 (Utah 1989).

## MUJI 1st Instruction

25.13.

## Committee Notes

### (10) CV 2810. Joint venture defined.

A joint venture is a relationship voluntarily agreed to by two or more people in which all of the following are true:

- (1) the parties combine their property, money, skill, labor or knowledge;
- (2) there is a community of interest in performing a common purpose;
- (3) there is a joint proprietary interest in the subject matter;
- (4) there is a mutual right to control;
- (5) there is a right to share in the profits; and
- (6) there is a duty to share in any losses, unless there is an agreement to the contrary.

## References

Ellsworth Paulsen Const. Co. v. 51-SPR-L.L.C., 2008 UT 28, 183 P.3d 248 (must be evidence to support each element, 183 P.3d 253, n. 2; “loss-sharing” discussed).

Rogers v. M.O. Bitner Co., 738 P.2d 1029 (Utah 1987) (elements of joint venture).

Basset v. Baker, 530 P.2d 1 (Utah 1974).

## MUJI 1st Instruction

25.16.

## Committee Notes

### (11) CV 2811. Liability of [partnership/joint venture] for acts of [partner/joint venturer].

[Name of plaintiff] claims that [name of partnership/joint venture] is liable for [describe act or omission] by [name of partner/joint venturer]. To succeed on this claim, [name of plaintiff] must prove that:

- (1) [name of partner/joint venturer]’s conduct was within the ordinary course of [name of partnership/joint venture]’s business; or

(2) [name of partner/joint venturer] acted under the authority of the [partnership/joint/venture].

### References

Utah Code Section 48-1-10 (repealed effective July 1, 2012).

Utah Code Section 48-1b-305.

### MUJI 1st Instruction

25.14.

### Committee Notes

#### ~~CV 2812. Liability of partnership for misapplication of property or money.~~

~~[Name of plaintiff] claims that [name of defendant] is liable for [name of plaintiff]'s loss of [money or property]. [Name of defendant] is liable if:~~

~~(1) [name of partner], while acting within the scope of [name of partner]'s [apparent] authority, received [name of plaintiff]'s [money or property] and misapplied it, and~~

~~(2) [name of defendant], in the course of its business, received [name of plaintiff]'s [money or property] and [name of partner] misapplied the [money or property] while it was in [name of defendant]'s custody.~~

### References

~~Utah Code Section 48-1-11 (repealed effective July 1, 2012).~~

~~Utah Code Section 48-1b-305.~~

~~Hoth v. White, 799 P.2d 213, 218 (Utah Ct. App 1990).~~

### MUJI 1st Instruction

~~25.15.~~

### Committee Notes

~~The old rule stated “or” instead of “and” because the Committee felt it better reflected the Legislature’s intent. The instruction above mirrors the language from Utah Code Section 48-1-11.~~

#### **(12) CV 2812. Liability of parents or legal guardians for property damage caused by a minor.**

[Name of defendant] is the [parent] [legal guardian] of [name of minor]. [Name of defendant] is liable for damage to [name of plaintiff]'s property if you find that:

[(1) [Name of minor] intentionally [damaged, defaced, destroyed, or took] [name of plaintiff]'s property;]

[(2) [Name of minor] recklessly or willfully shot or propelled an object at [name of plaintiff]'s [car, truck, bus, airplane, boat, locomotive, train, railway car, or caboose];] or

[(3) [Name of minor] intentionally and unlawfully tampered with [name of plaintiff]'s property and thereby [recklessly endangered human life] [recklessly caused or threatened a substantial interruption or impairment of any public utility service.]

However, if you find that [name of defendant]:

(1) [made a reasonable effort to supervise and direct [name of minor]]

(2) [made a reasonable effort to restrain [name of minor] if [name of defendant] knew of [name of minor]'s intended acts in advance]

then [name of defendant] is not liable for any damages.

### References

Utah Code Section 78A-6-1113.

### MUJI 1st Instruction

25.10.

### Committee Notes

#### ~~CV-2814. Liability of one signing minor's application for a learner permit or provisional license.~~

If you find that [name of defendant] signed [name of minor]'s application for [a learner permit or provisional driver's license], then [name of defendant] is liable ~~with [name of minor]~~ for damages ~~[name of minor]~~ caused ~~while operating a motor vehicle by the negligence of [name of minor] in driving the vehicle~~ on a highway, up to \$25,000 for [injury to] [the death of] any one person, \$65,000 for [injury to] [death of] two or more persons, and \$15,000 for property damage.

~~If, h~~However, ~~if~~ you find that ~~there was [name of minor]'s operation of the vehicle was covered by~~ automobile liability insurance ~~in effect~~ in at least these amounts, then [name of defendant] is not liable for ~~[name of minor]'s actions~~ any damages.

### References

Utah Code Section 53-3-211.

### MUJI 1st Instruction

25.21.

### Committee Notes

The liability imposed by Sections 53-3-211 and 53-3-212 are cumulative. A defendant may be liable under either or both sections.

**(13) CV 2813. Liability of an owner who gives a minor permission to drive his vehicle.**

If you find that [name of defendant]

[(1) was the owner of the motor vehicle involved in the accident and knowingly permitted [name of minor] to drive the vehicle on a highway],

[(2) furnished the motor vehicle to [name of minor],

then [name of defendant] is liable for damages caused by the negligence of [name of minor] in driving the vehicle on a highway.

**References**

Utah Code Section 53-3-212.

**MUJI 1st Instruction**

25.22 & 25.23.

**Committee Notes**

The liability imposed by Sections 53-3-211 and 53-3-212 are cumulative. A defendant may be liable under either or both sections. Judge may reduce the amount of damages against the owner to the limits in effect at the time. Give the instruction only if there is no insurance.

**(14) CV 2814. Independent contractor defined.**

An independent contractor is one who ~~is engaged to do~~ does some particular project or piece of work, ~~usually for a set total sum, who may do the job~~ in his or her own way, subject to only minimal restrictions or controls. ~~and~~ An independent contractor is responsible only for the job's satisfactory completion. ~~Factors which you could consider as bearing on the relationship are~~ In deciding whether a party is an independent contractor you may consider:

- (1) ~~whatever~~ agreements ~~exist~~ between the parties concerning the right of direction or control, whether the contract was express or implied;
- (2) the right to hire and fire;
- (3) the method of payment; and
- (4) who furnished the equipment.

## References

Utah Home Fire Ins. Co. v. Manning, 1999 UT 77, ¶11, 985 P.2d 243

Harry L. Young & Sons v. Ashton, 538 P.2d 316, 318 (Utah 1975)

## MUJI 1st Instruction

### Committee Notes

#### (15) CV 2815. Liability of employer for acts of independent contractor.

~~To find that an employer of an independent contractor is liable for physical harm caused to another by an act or omission of the contractor or the contractor's employees, you must find [Name of plaintiff] claims that [name of defendant] is liable for [describe act or omission] by [name of contractor]. To succeed on this claim, [name of plaintiff] must prove that the employer [name of defendant] participated in or controlled the manner in which the contractor's work that caused the harm was performed.~~

~~For an employer to be liable for the acts of an independent contractor, it It is not enough that the employer [name of defendant] has a general right to order the work stopped or resumed, to inspect its progress or to receive reports, or to make suggestions or recommendations which need not necessarily be followed, or to suggest changes.~~

~~Specifically, the employer [Name of defendant] must exert sufficient control over the independent contractor such that [name of contractor] could not carry out the injury-causing aspect of the work that caused the injury in his or her own way. The portion of the contractor's work constitutes an injury-causing aspect when that portion of the work is the cause of plaintiff's injuries.~~

## References

Magana v. Dave Roth Constr., 2009 UT 45, ¶27, 215 P.3d 143

Begaye v. Big D Constr. Corp., 2008 UT 4, ¶¶ 9-10, 178 P.3d 343

## MUJI 1st Instruction

### Committee Notes

**(16) CV. 2816. Liability of employer for physical harm caused by independent contract when non-delegable duty is present.**

One who employs an independent contractor is usually not liable to others for the acts or omissions of the contractor. However, where the Court determines that a duty exists on the part of the employer to third parties, by reason of the terms of [statute] [ordinance][assumption in a contract][\_\_\_\_\_], then the employer is liable for physical harm caused to others by the failure or omission of the independent contractor to [put in here the relevant requirements from the statute, ordinance, contract or other provision imposing the non-delegable duty].

**References**

Gleason v. Salt Lake City, 94 Utah 1, 74 P.2d 1225 (1937)

Yazd v. Woodside Home Corp., 2006 UT 47, ¶14, 143 P.3d 283

**MUJI 1st Instruction**

25.11.

**Committee Notes**

If the court makes the determination, what is there left for the jury?

**(17) CV 2817. Liability of employer for ~~physical~~ harm caused by independent contractor if work is inherently dangerous.**

~~One who employs an independent contractor is usually not liable to others for the acts or omissions of the independent contractor.~~

~~However, one who employs an independent contractor to do work involving a special danger to others which the employer knows or has [Name of plaintiff] claims that [name of defendant] is liable for [describe act or omission] by [name of contractor]. To succeed on this claim, [name of plaintiff] must prove that [name of defendant]:~~

~~(1) employed [name of contractor] to do work involving a special danger to others; and~~

~~[(2) knew or had reason to know ~~to be inherent in or normal to the work~~ that the danger to others was unavoidable, or ~~which [he] understands or has-~~~~

~~[(3) understood or had reason to understand when making the contract, ~~is subject to liability that [he] would be liable~~ for ~~physical~~ harm caused ~~to others~~ by ~~the~~ [name of contractor]'s failure to take reasonable precautions against ~~such the~~ danger.]~~

[This rule does not apply to employees of the independent contractor.]

**References**

**MUJI 1st Instruction**

**Committee Notes**

**(18) CV 2818 Vicarious punitive damages liability)**

(OLD????)

You may decide [employer or principal] is liable to the plaintiff for punitive damages only if you find one of the following to be true:

- 1.[Employer or principal] or a managerial agent of [employer or principal] authorized the conduct that caused the injury and the manner in which that conduct was carried out; or
- 2.[Employee or agent] was unfit and [employer or principal] or a managerial agent of [employer or principal] was reckless in employing or retaining [employee or agent]; or
- 3.[Employee or agent] was employed in a managerial capacity and was acting within the scope of employment; or
- 4.[Employer or principal] or a managerial agent of [employer or principal] ratified or approved the conduct by [employee or agent] that caused the injury.

**References**

Johnson v. Rogers, 763 P.2d 771 (Utah 1988).

Restatement (Second) of Torts § 909 (1977).

Restatement (Second) of Agency § 217C (1957).

**MUJI 1st Instruction**

25.20.

**Committee Notes**

# Tab 3

**(1) CV1005 Industry standard.**

In deciding whether the [product] is defective, you may consider the evidence presented concerning the design, testing, manufacture and type of warning for similar products.

References

Tafoya v. Sears Roebuck & Co., 884 F.2d 1330, 1332 (10th Cir. 1989).

Restatement (Third) of Torts, Product Liability §4.