

MINUTES

Advisory Committee on Model Civil Jury Instructions

March 13, 2017

4:00 p.m.

Present: Juli Blanch (chair), Joel Ferre, Honorable Ryan M. Harris, Patricia C. Kuendig, Ruth A. Shapiro, Paul M. Simmons, Honorable Andrew H. Stone, Nancy Sylvester. Also present: Heather S. White and Karra J. Porter from the Civil Rights subcommittee

Excused: Marianna Di Paolo, Tracy H. Fowler, Peter W. Summerill, Christopher M. Von Maack

1. *Minutes.* On motion of Ms. Shapiro, seconded by Ms. Kuendig, the committee approved the minutes of the February 27, 2017 meeting.

2. *Civil Rights Instructions.* The committee continued its review of the Civil Rights instructions.

a. *CV1306. Unlawful arrest--minor crime.* At Ms. Blanch's suggestion, the committee dropped the second sentence of the first paragraph and the last two paragraphs. At Judge Harris's suggestion, the first sentence was revised to read, "If a police officer has probable cause to believe a person has committed any criminal offense, however minor, in his presence, he may arrest the person without violating the Constitution." Ms. Porter thought that any reference to the seriousness of the offense was commentary and that the instruction could just refer to any offense, but Judge Stone thought it was appropriate to include "however minor" because the instruction is used most often with allegedly pretextual arrests. Judge Harris questioned whether the offense has to be committed in the officer's presence if he otherwise has probable cause. Ms. Kuendig pointed out that CV1303 on warrantless arrests does not require that the offense be committed in the officer's presence. Ms. White suggested deleting "in his presence" and adding a committee note that some offenses, such as infractions, have to be committed in the officer's presence. Ms. Porter also thought that the second paragraph, telling the jury what it could and could not consider, was best saved for argument. Judge Harris and others thought it was appropriate here, to avoid having the jurors judge the officer based on what they would have done under the circumstances. The committee then questioned the phrase "either of the offenses I just described to you" and noted that there is no prior instruction describing the offenses at issue. The committee debated whether to add a description of the offenses and, if so, where. It ultimately decided to add an instruction after CV1304, *Probable cause* (provisionally numbered 1304A and titled "Offenses") that says: "You are to determine whether [name of defendant] had probable cause to believe that [name of plaintiff] committed any of the following offenses:" The instruction will have a committee note to the effect that the court and counsel will need to add the

specific offenses at issue and their elements. (If there are multiple offenses, there should be separate instructions on the elements of each.) On motion of Judge Stone, seconded by Mr. Ferre, the committee approved new CV1304A. It then returned to CV1306.

The committee rewrote the second paragraph of CV1306 to read:

You are not to consider whether you think [name of defendant] should have arrested [name of plaintiff]. Instead, you must decide whether [name of defendant] had probable cause to believe that [name of plaintiff] committed any offense for which [name of plaintiff] was arrested.

On motion of Mr. Ferre, seconded by Judge Stone, the committee approved CV1306 as modified.

b. *CV1307A. Investigative stop.* Ms. Porter proposed a new instruction on investigative (so-called *Terry*) stops, to go before CV1307, *Reasonable suspicion*. The instruction originally read:

Some temporary seizures are less intrusive than an arrest. The Constitution permits a law-enforcement officer to temporarily detain a person without a warrant if two requirements are met:

First, the officer must have a reasonable suspicion that the person detained is engaged in criminal activity. Whether an officer has a reasonable suspicion to subject a person to a temporary detention is evaluated objectively according to the totality of the circumstances.

Second, the officer's actions must be reasonably related in scope to the circumstances that justified the interference in the first place.

[Name of officer] has the burden of establishing that these elements were present.

Ms. Porter noted that the wording of the second requirement was taken straight out of *Terry v. Ohio*, 392 U.S. 1, 20 (1968). Judge Stone noted, however, that the justification for the stop may change during the course of the investigation, and when it does it may require a new reasonableness determination. The committee decided that it was too hard to explain such "rolling" detentions in a simple jury instruction and that it was best left to the attorneys to argue that a new stop

began when the initial justification for the stop changed. Ms. White and Ms. Porter thought that the attorneys could argue to the jury when the detention became unreasonable and that no note explaining “rolling” stops was necessary. The committee revised the instruction to read:

The Constitution permits a law-enforcement officer to temporarily detain a person without arresting [him/her] if two requirements are met:

First, the officer must have a reasonable suspicion that the person detained has committed a crime.

Second, the officer’s actions must be reasonably limited in time and scope to the investigation of the suspected crime.

On motion of Judge Harris, seconded by Judge Stone, the committee approved the instruction.

The committee also added the following sentence to the end of CV1307: “Whether an officer has a reasonable suspicion to subject a person to a temporary detention is evaluated objectively according to all the circumstances known to the officer.”

3. *Next meeting.* The next meeting is Monday, April 10, 2017, at 4:00 p.m.

The meeting concluded at 6:00 p.m.