

Agenda

Advisory Committee on Model Civil Jury Instructions

March 11, 2019
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 | Judge Andrew Stone, Chair |
| Subcommittees and subject area timelines | Tab 2 | Judge Andrew Stone |
| Trespass and Nuisance Instructions | Tab 3 | Cameron Hancock, Ryan Beckstrom |
| Uniformity | Tab 4 | Judge Keith Kelly, Alyson McAllister, Lauren Shurman |
| Other business | | Judge Andrew Stone |

[Committee Web Page](#)

[Published Instructions](#)

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

April 8, 2019
May 13, 2019
June 10, 2019
September 9, 2019
October 15, 2019 (Tuesday)
November 12, 2019 (Tuesday)
December 9, 2019

Tab 1

MINUTES

Advisory Committee on Model Civil Jury Instructions

February 11, 2019

4:00 p.m.

Present: Honorable Andrew H. Stone (chair), Nancy J. Sylvester (staff), Joel Ferre, Marianna Di Paolo, Honorable Keith A. Kelly, Alyson McAllister, Douglas G. Mortensen, Lauren A. Shurman, Paul M. Simmons. Also present: Cameron M. Hancock of the Trespass and Nuisance subcommittee

Excused: Tracy H. Fowler, Ruth A. Shapiro, Peter W. Summerill

1. *Minutes*. On motion of Ms. McAllister, seconded by Mr. Mortensen, the committee approved the minutes of the January 15, 2019 meeting.

2. *Trespass and Nuisance Instructions*. The committee continued its review of the proposed trespass and nuisance instructions. At the last meeting, the committee had asked Ryan Beckstrom to ask the subcommittee to determine whether common-law claims for nuisance still exist given the nuisance statute. Mr. Hancock reported that Mr. Beckstrom looked into the matter and concluded that the two types of claims (statutory and common law) can co-exist. Mr. Beckstrom's memo, stating his conclusion and the reasons for it, was circulated with the agenda. Mr. Beckstrom found no evidence that the Utah Legislature intended the nuisance statute to preempt common-law nuisance claims. Mr. Beckstrom also proposed a new instruction stating the elements of a statutory nuisance claim, new CV1209.

Dr. Di Paolo joined the meeting

a. *CV1207, Nuisance--Introductory Instruction*. The committee revised the instruction to read:

One person can interfere with the use or enjoyment of another person's property even without entering that other person's property. In some instances, the legal term for this is "nuisance."

In this case, [name of plaintiff] claims that [name of defendant], through [describe the conduct, action, or thing], has created a nuisance that has interfered with [name of plaintiff]'s use or enjoyment of [his/her/its] property.

[Name of plaintiff] claims that [name of plaintiff] has suffered harm as a result of this nuisance, and seeks to recover damages from [name of defendant] for that harm.

At Mr. Mortensen's suggestion, the committee changed "economic injury" in the draft instruction to "harm." Mr. Hancock noted that, under *Turnbaugh v.*

Anderson, 793 P.2d 939 (Utah Ct. App. 1990), a private nuisance requires some interference with the use and enjoyment of land, but a possessor of land is allowed to recover “incidental damages for harms to his person or chattels” if there has been the necessary interference with the use and enjoyment of the plaintiff’s property. *See* 793 P.2d at 942-43. Mr. Hancock offered to do more research on the damages recoverable in an action for private nuisance. On motion of Mr. Simmons, seconded by Ms. McAllister, the committee approved the instruction as revised.

b. *CV1208, Nuisance Per Se*. Mr. Simmons asked whether nuisance per se is defined as clearly as defamation per se, that is, whether there are certain activities that constitute nuisance as a matter of law. Mr. Hancock and Ms. Shurman noted that the activity has to be specifically prohibited by statute. Utah Code sections 78B-6-1101(2) & (3) & -1107 define certain activities as a “nuisance.” But Mr. Hancock thought that there may be others, and the committee note was revised to say so. Dr. Di Paolo noted that the phrase “as a matter of law” is meaningless to lay people. The committee revised the instruction to read:

The court has determined that, under the law, [name of defendant]’s conduct, [describe the conduct, action, or thing], constitutes a nuisance.

On motion of Ms. Shurman, seconded by Mr. Mortensen, the committee approved the instruction as revised.

Judge Kelly joined the meeting.

c. *CV1209, Statutory Nuisance Claim*. Ms. Shurman and Ms. McAllister questioned the phrase “enjoyment of life” in subparagraph 2. Mr. Hancock noted that that language is in the statute (section 78B-6-1101(1)). CV1209 was based on subsection (1) of section 78B-6-1101. The committee debated whether subsection (6) should also be included in the instruction. Subsection (6) states: “An action may be brought by any person whose property is injuriously affected, or whose personal enjoyment is lessened by the nuisance.” Mr. Hancock thought that subsection (6) set forth a standing requirement and that standing was for the court, not the jury, to decide. The issue would necessarily be resolved before the case ever went to the jury. Judge Kelly, on the other hand, thought that if there was a chance that a losing defendant could get the verdict overturned because the jury had not made a specific finding as to the requirements of subsection (6), they should be included in the instruction defining a statutory nuisance claim. He suggested starting the instruction with

subsection (6). Dr. Di Paolo thought the statutory language, such as “injuriously affected,” would be hard for jurors to understand. She thought subsection (6) was vague. Ms. Shurman agreed. She thought that the phrase “whose personal enjoyment is lessened by the nuisance” should be revised to make clear that it is the plaintiff’s personal enjoyment of his property that must be lessened by the nuisance. Dr. Di Paolo also thought that the instruction did not clearly tell the jury what it was supposed to do. She noted that other instructions have been phrased, “You must decide . . . ,” not “[Name of plaintiff] must show” Dr. Di Paolo and other committee members also noted that subsections (1) and (6) were not entirely consistent. Dr. Di Paolo also noted that the instruction should say to whom the activity must be injurious or offensive. Judge Stone noted that a property owner may have a claim for nuisance if, for example, a strip club goes in next door to his property, even though the activity may not be offensive to him personally, as long as it lowers the value of his property. Dr. Di Paolo noted that subsection (1) of the statute does not contain separate elements, joined by “so as to,” but the “so as to” phrase limits the preceding phrase. She also recommended deleting “free” from before “use of property,” noting that jurors will likely misunderstand “free” in that context and think it has to do with the use of property without charge. The committee was reluctant to stray too far from the statutory language and decided to leave it to the attorneys to argue what the statutory language means, absent statutory definitions or case law defining the terms. The committee revised the instruction to read:

You must decide whether [name of plaintiff] has established a statutory claim for nuisance.

To establish a statutory claim of nuisance, [name of plaintiff] must show that [name of defendant]’s [describe the conduct, action, or thing]:

1. Was injurious to health, indecent, offensive to the senses, or an obstruction to the free use of property so as to interfere with the comfortable enjoyment of life or property; and
2. [Name of plaintiff]’s property was injuriously affected or plaintiff’s personal enjoyment was lessened by [describe the conduct, action, or thing].

The committee also added the following paragraph to the beginning of the committee note:

The committee adhered to the statutory language and did not attempt to use plainer language. The Legislature has yet to define it, and an appellate court has yet to interpret it.

Judge Stone noted that the statute has existed for some time in one form or another and suggested that the subcommittee look at cases construing prior versions of the statute to see if they answer some of the questions committee members have raised about the proper interpretation of the statute. He noted, for example, that *Cannon v. Neuberger*, 1 Utah 2d 396, 268 P.2d 425 (1954), appears to superimpose a reasonableness standard on the statutory text. Mr. Hancock agreed to look at this and other cases to see if they clarify the meaning of the statute.

3. *Next meeting.* The next meeting is Monday, March 11, 2019, at 4:00 p.m.

Ms. McAllister moved to adjourn, seconded by Ms. Shurman. The meeting adjourned at 6:00 p.m.

Tab 2

| Priority | Subject | Sub-C in place? | Sub-C Members | Projected Starting Month | Projected Finalizing | Comments Back? |
|----------|--|--------------------------------------|---|--------------------------|----------------------|---|
| 1 | Trespass and Nuisance | Yes | Hancock, Cameron; Abbott, Nelson (P); Steve Combe (D) | November-18 | March-19 | |
| 2 | Uniformity | Yes | Judge Keith Kelly (chair), Alyson McAllister, Lauren Shurman | February-19 | March-19 | |
| 3 | Implicit Bias | TBD | Judge Su Chon (chair) | TBD | TBD | |
| 4 | Products Liability | Yes | Tracy Fowler, Nelson Abbott, and Todd Wahlquist | TBD | TBD | Time to update due to significant changes in case law. |
| 5 | Assault/False Arrest | Yes | Rice, Mitch (chair); Carter, Alyson; Wright, Andrew (D); Cutt, David (P) | TBD | TBD | |
| 6 | Insurance | Yes | Johnson, Gary (chair); Pritchett, Bruce; Ryan Schriever, Dan Bertch, Andrew Wright, Rick Vazquez; Stewart Harman (D); Ryan Marsh (D) | TBD | TBD | |
| 7 | Unjust Enrichment | No (instructions from David Reymann) | David Reymann | TBD | TBD | |
| 8 | Abuse of Process | No (instructions from David Reymann) | David Reymann | TBD | TBD | |
| 9 | Directors and Officers Liability | Yes | Call, Monica; Von Maack, Christopher (chair); Larsen, Kristine; Talbot, Cory; Love, Perrin; Buck, Adam | TBD | TBD | |
| 10 | Wills/Probate | No | Barneck, Matthew (chair); Petersen, Rich; Tippet, Rust; Sabin, Cameron | TBD | TBD | Much of this is codified in statute. There may not be enough instructions to dedicate an entire instruction area. |
| 11 | Civil Rights: Set 2 | Yes | Ferguson, Dennis (D); Mejia, John (P); Guymon, Paxton (P); Stavors, Andrew (P); Burnett, Jodi (D); Plane, Margaret (D); Porter, Karra (P); White, Heather (D) | TBD | TBD | |
| 12 | Sales Contracts and Secured Transactions | Yes | Cox, Matt (chair); Boley, Matthew; Maudsley, Ade | TBD | TBD | |

Tab 3



Nancy Sylvester <nancyjs@utcourts.gov>

MUJI Committee minutes

Ryan Beckstrom <rbeckstrom@kmclaw.com>

Tue, Mar 5, 2019 at 10:51 AM

To: Nancy Sylvester <nancyjs@utcourts.gov>

Cc: "Cameron M. Hancock" <chancock@kmclaw.com>, Diane Olson <dolson@kmclaw.com>

Nancy,

See my analysis and suggestions on the currently pending questions below:

DAMAGES

In *Walker Drug*, the Utah Supreme Court acknowledged implicitly that damages for trespass and nuisance are the same by lumping them together in explaining what damages are available "in trespass and nuisance cases." See *Walker Drug Co. v. La Sal Oil Co.*, 972 P.2d 1238, 1246 (Utah 1998). Accordingly, we recommend including in the nuisance damages instruction a comment/note similar to the one added to the trespass damages instruction, with one addition found in *Turnbaugh* related to "incidental" damages for nuisance. A proposed damages instruction, with a committee note, follows:

CV1211 DAMAGES FOR NUISANCE

Once you have determined that defendant is liable for creating a nuisance, you may consider evidence of the degree of a defendant's interference in the use and enjoyment of [name of plaintiff]'s land and the reasonableness of the interference in the context of wider community interests to determine the amount of damages recoverable once liability is established.

Specifically, if you find that [name of Defendant]'s actions are a nuisance, you may award economic, non-economic, incidental, or nominal damages to [name of plaintiff].

References:

Walker Drug Co. v. La Sal Oil Co., 972 P.2d 1238, 1245 (Utah 1998)

Committee note: For a definition of economic and non-economic damages, see CV2001 et. seq. For instructions on the measure of damages for injury to personal or real property resulting from a nuisance, see CV2004-2011. The damages instructions may be adapted to the circumstances of the case. For example, the noneconomic damages in a nuisance case may include the addition of discomfort and annoyance to CV2004's list of considerations. See *Walker Drug Co. v. La Sal Oil Co.*, 972 P.2d 1238, 1245-1249 (Utah 1998). As noted above, a possessor of land may be allowed to recover "incidental damages for harms to his person or chattels" in an action for nuisance. See *Turnbaugh for Benefit of Heirs of Turnbaugh v. Anderson*, 793 P.2d 939, 942-43 (Utah Ct. App. 1990).

STATUTORY NUISANCE

It is apparent from a survey of cases that Utah courts have required nuisances to be “unreasonable” or “unlawful” to be actionable, even when the case is analyzed under the statute. Notably, it is still unclear if this stems from the historical conflation of common-law and statutory claims, as we have not found any cases that analyze common-law and statutory nuisance as separate and distinct claims. However, Utah law supports reading a “reasonableness” requirement into the statute because the right to be free from annoyance has never been “absolute” and “extreme rights” are not recognized. See *Dahl v. Utah Oil Ref. Co.*, 262 P. 269, 273 (Utah 1927). The plain statutory language, without a reasonableness check, would open property owners to nuisance suits simply because their otherwise lawful actions annoy their neighbors. The following redlines add a “reasonableness” requirement to the statutory elements.

**CV1209 STATUTORY NUISANCE CLAIM**

You must decide whether [name of plaintiff] has established a statutory claim for nuisance.

To establish a statutory claim of nuisance, [name of plaintiff] must show that [name of defendant]’s [describe the conduct, action, or thing]:

- 1) Was injurious to health, indecent, offensive to the senses, or an obstruction to the free use of property so as to interfere with the comfortable enjoyment of life or property;
- 2) [name of defendant]’s conduct was unreasonable or unlawful; and
- 3) [name of plaintiff]’s property was injuriously affected or plaintiff’s personal enjoyment was lessened by [describe the conduct, action, or thing].

To determine if a use is “reasonable” or “unreasonable,” you should consider things such as the specific location where the nuisance is alleged, the nature and value of [name of defendant]’s use of its property, the character of the neighborhood, the extent and frequency of the injury to [name of plaintiff], and the effect on the enjoyment of [name of plaintiff]’s life, health and property.

References:

Utah Code § 78B-6-1101 et al.

Cannon v. Neuberger, 268 P.2d 425, 426 (Utah 1954)

Dahl v. Utah Oil Ref. Co., 262 P. 269, 273 (Utah 1927)

Committee note:

The committee adhered to the statutory language and did not attempt to use plainer language. The Legislature has yet to define it, and an appellate court has yet to interpret it.

The statute provides specific instructions for when tobacco smoke, manufacturing and agricultural operations, and certain types of criminal activity may or may not be considered a nuisance. Those specific statutory causes of action and exceptions to

3/5/2019

Utah State Courts Mail - MUJI Committee minutes

nuisance liability are not included herein, but specially tailored instructions may be warranted in cases involving those statutory provisions.

[Quoted text hidden]

MUJI 2nd Trespass and Nuisance Jury Instructions

| | |
|---|---|
| CV1201 TRESPASS TO REAL PROPERTY. Approved January 15, 2019..... | 1 |
| CV1202 TRESPASS TO PERSONAL PROPERTY. Approved January 15, 2019..... | 2 |
| CV1203 CONSENT. Approved January 15, 2019..... | 2 |
| CV1204 IMPLIED CONSENT - CUSTOM AND USAGE. Approved January 15, 2019.. | 2 |
| CV1205 DAMAGES - NOMINAL DAMAGES. Approved January 15, 2019..... | 3 |
| CV1206 NUISANCE - INTRODUCTORY INSTRUCTION. Approved February 11, 2019..... | 3 |
| CV1207 NUISANCE PER SE. Approved February 11, 2019. | 4 |
| CV1208 STATUTORY NUISANCE CLAIM | 4 |
| CV1209 COMMON LAW PRIVATE NUISANCE CLAIM | 5 |
| CV1210 PUBLIC NUISANCE..... | 6 |
| CV1211 DAMAGES FOR NUISANCE | 6 |

CV1201 TRESPASS TO REAL PROPERTY. Approved January 15, 2019.

In this action, [name of plaintiff] seeks to recover damages from [name of defendant] for a trespass to [name of plaintiff]'s property.

To establish [name of plaintiff]'s claim for trespass against the property involved in this case, you must find that:

1. [name of plaintiff] [owned/lawfully possessed] the property;
2. [name of defendant] interfered with [name of plaintiff]'s exclusive right to possession of the property by physically entering or encroaching upon [or causing some thing to physically enter or encroach upon] [name of plaintiff]'s land;
3. [name of defendant] intended to perform the act that resulted in the unlawful entry or encroachment upon [name of plaintiff]'s property; and
4. [name of defendant] had no right to do the act that constituted the unlawful entry or encroachment upon [name of plaintiff]'s property.

References:

Sycamore Family, L.L.C. v. Vintage on the River Homeowners Ass'n, Inc., 2006 UT App 387, ¶ 4, 145 P.3d 1177
Purkey v. Roberts, 2012 UT App 241, ¶ 17, 285 P.3d 1242
John Price Associates v. Utah State Conference, 615 P.2d 1210 (Utah 1980)
Wood v. Myrup, 681 P.2d 1255 (Utah 1984)

CV1202 TRESPASS TO PERSONAL PROPERTY. Approved January 15, 2019.

In this action, [name of plaintiff] seeks to recover damages from [name of defendant] for a trespass to [name of plaintiff]'s property.

To establish [name of plaintiff]'s claim for trespass against the property involved in this case, you must find that:

1. [name of plaintiff] had [ownership/lawful possession] of the property at the time of the alleged trespass;
2. [name of defendant] interfered with [name of plaintiff]'s exclusive right to possession of the property, by [specify briefly the acts alleged to constitute wrongful interference with [name of plaintiff]'s personal property];
3. [name of defendant] intended to perform the act that amounted to the unlawful interference with the personal property of [name of plaintiff]; and
4. [name of defendant] had no right to do the act that constituted the interference with the personal property of [name of plaintiff].

References:

Purkey v. Roberts, 2012 UT App 241, ¶ 17, 285 P.3d 1242

Peterson v. Petterson, 117 P. 70, 71 (Utah 1911)

CV1203 CONSENT. Approved January 15, 2019.

[Name of defendant] asserts that [he/she/it] was given consent by [name of plaintiff] or [name of plaintiff]'s agent to [use/enter upon] [name of plaintiff]'s property, and that [name of defendant] is thus not liable for trespass.

[Name of defendant] is not liable for trespass if [he/she/it] can establish that [name of plaintiff] consented to the entry or encroachment upon the property, but only to the extent that the entire entry or encroachment was authorized.

Consent means permission to enter or encroach upon property was communicated. Consent can be expressed or implied.

Comment: The MUJI 1 instructions enumerated express and implied consent separately. But the Utah case law speaks only of consent, which may be express or implied.

References:

Lee v. Langley, 2005 UT App 339, ¶ 20 n.3, 121 P.3d 33

Haycraft v. Adams, 24 P.2d 1110, 1115 (Utah 1933)

Restatement (Second) of Torts § 252 (1965)

CV1204 IMPLIED CONSENT - CUSTOM AND USAGE. Approved January 15, 2019.

[name of defendant] asserts that [name of defendant] had the implied consent of [name of plaintiff] or [name of plaintiff]'s agent to [use/enter upon] [name of plaintiff]'s property, and that [name of defendant] is thus not liable for trespass.

Consent is an absolute defense to an action for trespass. Consent for [use of/entry upon] real property need not be expressly given but may be implied from the circumstances. The implied consent may be derived from custom, usage, or conduct. Therefore, [name of defendant] is not liable for trespass if [name of defendant] can show that:

1. [name of defendant] was a member of a category of persons for whom [use of/entry upon] the property would be considered customary or common;
2. [name of defendant]'s [use of/entry upon] [name of plaintiff]'s property was within the fair and reasonable bounds of the implied consent to [use/enter upon] the property; and
3. [name of plaintiff] did not indicate, either verbally or by posted signs on the property, that [name of plaintiff] did not consent to the entry.

References:

Lee v. Langley, 2005 UT App 339, ¶ 20 n.3, 121 P.3d 33
Haycraft v. Adams, 24 P.2d 1110, 1115 (Utah 1933)
Restatement (Second) of Torts § 252 (1965)

CV1205 DAMAGES - NOMINAL DAMAGES. Approved January 15, 2019.

If you found that [name of defendant] trespassed [name of plaintiff]'s [real/personal] property, you may award economic, non-economic, or nominal damages to [name of plaintiff].

Even if you find that no actual damage was suffered by [name of plaintiff] as a result of [name of defendant]'s trespass, you may still award [name of plaintiff] a trivial amount, called "nominal damages," to compensate [name of plaintiff] for the invasion of [name of plaintiff]'s property rights. "Nominal damages" has been defined as a trivial sum such as one dollar.

References:

Haycraft v. Adams, 24 P.2d 1110, 1115 (Utah 1933)
Henderson v. For-Shor Co., 757 P.2d 465 (Utah App. 1988)

Comment: For a definition of economic and non-economic instructions, see CV2001 et. seq. For instructions on the measure of damages for injury to personal or real property resulting from a trespass, see CV2004-2011. The damages instructions may be adapted to the circumstances of the case. For example, the noneconomic damages in trespass may include the addition of discomfort and annoyance to CV2004's list of considerations. See *Walker Drug Co. v. La Sal Oil Co.*, 972 P.2d 1238, 1245-1249 (Utah 1998).

CV1206 NUISANCE - INTRODUCTORY INSTRUCTION. Approved February 11, 2019.

One person can interfere with the use or enjoyment of another person's property even without entering that other person's property. In some instances, the legal term for this is "nuisance."

In this case, [name of plaintiff] claims that [name of defendant], through [describe the conduct, action, or thing], has created a nuisance that has interfered with [name of plaintiff]'s use or enjoyment of [his/her/its] property.

[Name of plaintiff] claims that [name of plaintiff] has suffered harm as a result of this nuisance, and seeks to recover damages from [name of defendant] for that harm.

References:

Utah Code § 76-10-801

Morgan v. Quailbrook Condominium Co., 704 P.2d 573 (Utah 1985)

Branch v. Western Petroleum, Inc., 657 P.2d 267 (Utah 1982)

Vincent v. Salt Lake County, 583 P.2d 105 (Utah 1978)

Turnbaugh v. Anderson, 793 P.2d 939 (Utah Ct-App. 1990)

CV1207 NUISANCE PER SE. Approved February 11, 2019.

The court has determined that, under the law, [name of defendant]'s conduct, [describe the conduct, action, or thing], constitutes a nuisance.

References:

Utah Code § 78B-6-1101 (defining certain nuisances)

Erickson v. Sorensen, 877 P.2d 144, 149 (Utah App. 1994)

Branch v. Western Petroleum, Inc., 657 P.2d 267 (Utah 1982)

Turnbaugh v. Anderson, 793 P.2d 939 (Utah Ct-App. 1990)

Committee note:

This instruction will only be given when the court has already made a determination that the conduct constitutes nuisance per se. Utah Code §§ 78B-6-1101 and 78B-6-1107 list some things that constitute nuisance per se, but there may be others. A nuisance per se exists when the conduct creating the nuisance is specifically prohibited by statute.

CV1208 STATUTORY NUISANCE CLAIM

You must decide whether [name of plaintiff] has established a statutory claim for nuisance.

To establish a statutory claim of nuisance, [name of plaintiff] must show that [name of defendant]'s [describe the conduct, action, or thing]:

- 1) Was injurious to health, indecent, offensive to the senses, or an obstruction to the free use of property so as to interfere with the comfortable enjoyment of life or property;
- 2) [name of defendant]'s conduct was unreasonable or unlawful; and
- 3) [name of plaintiff]'s property was injuriously affected or plaintiff's personal enjoyment was lessened by [describe the conduct, action, or thing].

To determine if a use is "reasonable" or "unreasonable," you should consider things such as the specific location where the nuisance is alleged, the nature and value of [name of defendant]'s use of its property, the character of the neighborhood, the extent and frequency of the injury to [name of plaintiff], and the effect on the enjoyment of [name of plaintiff]'s life, health and property.

References:

Utah Code § 78B-6-1101 et al.

Cannon v. Neuberger, 268 P.2d 425, 426 (Utah 1954)

Dahl v. Utah Oil Ref. Co., 262 P. 269, 273 (Utah 1927)

Committee note:

The committee adhered to the statutory language and did not attempt to use plainer language. The Legislature has yet to define it, and an appellate court has yet to interpret it.

The statute provides specific instructions for when tobacco smoke, manufacturing and agricultural operations, and certain types of criminal activity may or may not be considered a nuisance. Those specific statutory causes of action and exceptions to nuisance liability are not included herein, but specially tailored instructions may be warranted in cases involving those statutory provisions.

CV1209 COMMON LAW PRIVATE NUISANCE CLAIM

A private nuisance is any activity that substantially and unreasonably interferes with the use and enjoyment by another of that person's property, other than by entering upon it.

[Name of plaintiff] claims that [name of defendant] has interfered with [name of plaintiff]'s use and enjoyment of [name of plaintiff]'s property by [specify nature of alleged nuisance].

To establish [name of Plaintiff]'s claim for private nuisance, you must find that:

1. [name of plaintiff] owned or possessed an actual property interest in the real property that is the subject of this action;
2. Defendant caused or was responsible for a substantial interference with [name of plaintiff]'s use and enjoyment of [name of plaintiff]'s property;
3. [name of plaintiff][name of defendant]'s use of the property was either (a) intentional and unreasonable, or (b) unintentional and otherwise actionable.

[Name of defendant]'s use of its property may be "unreasonable" under circumstances where the harm caused by [name of defendant]'s activity outweighs any benefits it produces, and the activity is not suitable to the location.

Comment [NS1]: Is this "and" or "or?"

A "substantial interference" with [name of plaintiff]'s use and enjoyment of the land is typically one that results in substantial annoyance, discomfort, or harm, which is measured by what would be offensive to a reasonable person—or one who has ordinary health and ordinary and reasonable sensitivities.

An unintentional use that is "otherwise actionable" is generally one that negligent or reckless, or that results in abnormally dangerous conditions or activities in an inappropriate place.

Comment [RB2]: Not sure if these should be their own definitional instructions or included here under the elements for the benefit of the jury in interpreting the elements.

References:

- Whaley v. Park City Mun. Corp.*, 2008 UT App 234, 190 P.3d 1
Stanford v. Univ. of Utah, 488 P.2d 741 (Utah 1971)
Johnson v. Mount Ogden Enterprises, Inc., 460 P.2d 333 (Utah 1969)
Turnbaugh v. Anderson, 793 P.2d 939 (Utah Ct. App. 1990)
Walker Drug Co. v. La Sal Oil Co., 972 P.2d 1238, 1245 (Utah 1998)

CV1210 PUBLIC NUISANCE

To establish [name of plaintiff]'s claim that defendant created a public nuisance, you must find:

1. The alleged nuisance consists of unlawfully doing any act or omitting to perform any duty;
2. [name of defendant]'s conduct was unreasonable;
3. The act or omission either
 - a. Annoys, injures, or endangers the comfort, repose, health, or safety of three or more persons;
 - b. Offends public decency;
 - c. Unlawfully interferes with, obstructs, or tends to obstruct, or renders dangerous for passage, any lake, stream, canal, or basin, or any public park, square, street, or highway; or
 - d. In any way renders three or more persons insecure in life or the use of property.
4. Plaintiff has suffered damages different from those of society at large.

An act which affects three or more persons in any of the ways specified in this instruction is still a nuisance regardless of the extent of annoyance and regardless of whether the damage inflicted on individuals is unequal.

References:

Utah Code § 76-10-803 (2009)
Whaley v. Park City Mun. Corp., 2008 UT App 234, 190 P.3d 1
Solar Salt Co. v. Southern Pac. Transp. Co., 555 P.2d (Utah 1976)
Monroe City v. Arnold, 452 P.2d 321 (Utah 1969)
Turnbaugh v. Anderson, 793 P.2d 939 (Utah Ct. App. 1990)
Erickson v. Sorensen, 877 P.2d 144, 148 (Utah App. 1994)

CV1211 DAMAGES FOR NUISANCE

Once you have determined that defendant is liable for creating a nuisance, you may consider evidence of the degree of a defendant's interference in the use and enjoyment of [name of plaintiff]'s land and the reasonableness of the interference in the context of wider community interests to determine the amount of damages recoverable once liability is established.

Specifically, if you find that [name of defendant]'s actions are a nuisance, you may award economic, non-economic, incidental, or nominal damages to [name of plaintiff].

References:

Walker Drug Co. v. La Sal Oil Co., 972 P.2d 1238, 1245 (Utah 1998)

Committee note:

For a definition of economic and non-economic damages, see CV2001 et. seq. For instructions on the measure of damages for injury to personal or real property resulting from a nuisance, see CV2004-2011. The damages instructions may be adapted to the circumstances of the case. For example, the noneconomic damages in a nuisance case may include the addition of

discomfort and annoyance to CV2004's list of considerations. See *Walker Drug Co. v. La Sal Oil Co.*, 972 P.2d 1238, 1245-1249 (Utah 1998). As noted above, a possessor of land may be allowed to recover "incidental damages for harms to his person or chattels" in an action for nuisance. See *Turnbaugh for Benefit of Heirs of Turnbaugh v. Anderson*, 793 P.2d 939, 942-43 (Utah Ct. App. 1990).

Tab 4

Advisory Committee on Model Civil Jury Instructions: Uniformity Subcommittee
Comparison of Civil and Criminal Opening/Closing Instructions

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| <p>CV101 General admonitions.</p> <p>Now that you have been chosen as jurors, you are required to decide this case based only on the evidence that you see and hear in this courtroom and the law that I will instruct you about. For your verdict to be fair, you must not be exposed to any other information about the case. This is very important, and so I need to give you some very detailed explanations about what you should do and not do during your time as jurors.</p> <p>First, you must not try to get information from any source other than what you see and hear in this courtroom. It's natural to want to investigate a case, but you may not use any printed or electronic sources to get information about this case or the issues involved. This includes the internet, reference books or dictionaries, newspapers, magazines, television, radio, computers, Blackberries, iPhones, Smartphones, PDAs, or any social media or electronic device. You may not do any personal investigation. This includes visiting any of the places involved in this case, using Internet maps or Google Earth, talking to possible witnesses, or creating your own experiments or reenactments. Second, you must not communicate with anyone about this case, and you must not allow anyone to communicate with you. This also is a natural thing to want to do, but you may not communicate about the case via emails, text messages, tweets, blogs, chat rooms, comments or other postings, Facebook, MySpace, LinkedIn, or any other social media.</p> <p>You may notify your family and your employer that you have been selected as a juror and you may let them know your schedule. But do not talk with anyone about the case, including your family and employer. You must not even talk with your fellow jurors about the case until I send you to deliberate. If you are asked or approached in any way about your jury service or anything about this case, you must respond that you have been ordered not to discuss the matter. And then please report the contact to the clerk or the bailiff, and they will notify me. Also, do not talk with the lawyers, parties or witnesses about anything, not even to pass the time of day. I know that these restrictions affect activities that you consider to be normal and harmless and very important in your daily lives. However, these restrictions ensure that the parties have a fair trial based only on the evidence and not on outside information. Information from an outside source might be inaccurate or incomplete, or it might simply not apply to this case, and the parties would not have a chance to explain or contradict that information because they wouldn't know about it. That's why it is so important that you base your verdict only on information you receive in this courtroom.</p> <p>Courts used to sequester—or isolate—jurors to keep them away from information that might affect the fairness of the trial, but we seldom do that anymore. But this means that we must rely upon your honor to obey these restrictions, especially during recesses when no one is watching. Any juror who violates these restrictions jeopardizes the fairness of the proceedings, and the entire trial may need to start over. That is a tremendous expense and inconvenience to the parties, the court and the taxpayers. Violations may also result in substantial penalties for the juror. If any of you have any difficulty whatsoever in following these instructions, please let me know now. If any of you becomes aware that one of your fellow jurors has done something that violates these instructions, you are obligated to report that as well. If anyone tries to contact you about the case, either directly or indirectly, or sends you any information about the case, please report this promptly as well. Notify the bailiff or the clerk, who will notify me. These restrictions must remain in effect throughout this trial. Once the trial is over, you may resume your normal activities. At that point, you will be free to read or research anything you wish. You will be able to speak—or choose not to speak—about the trial to anyone you wish. You may write, or post, or tweet about the case if you choose to do so. The only limitation is that you must wait until after the verdict, when you have been discharged from your jury service.</p> <p>So, keep an open mind throughout the trial. The evidence that will form the basis of your verdict can be presented only one piece at a time, and it is only fair that you do not form an opinion until I send you to deliberate.</p> | <p>CR101 Introduction.</p> <p>(Ladies and Gentlemen) (Members of the Jury), you have been selected and sworn as the jury in this case. The defendant is accused of committing one or more crimes. You will decide if the defendant is guilty or not guilty. I will give you some instructions now and some later. You are required to consider and follow all my instructions.</p> <p>Keep an open mind throughout the trial. At the end of the trial you will discuss the evidence and reach a verdict. You took an oath to “well and truly try the issues pending between the parties” and to “render a true and just verdict.” The oath is your promise to do your duty as a member of the jury. Be alert. Pay attention. Follow my instructions.</p> <p>CR109 Conduct of Jurors./CR109A Rules applicable to recesses.</p> <p>From time to time I will call a recess. It may be for a few minutes or longer. During recesses, do not talk about this case with anyone—not family, not friends, not even each other. Until the trial is over, do not mingle or talk with the lawyers, parties, witnesses or anyone else connected with the case. Court clerks or bailiffs can answer general questions, such as the length of breaks or the location of restrooms. But they cannot comment about the case or anyone involved. The goal is to avoid the impression that anyone is trying to influence you improperly. If people involved in the case seem to ignore you outside of court, they are just following this instruction. Until the trial is over, do not read or listen to any news reports about this case. Do not do any research or visit any locations related to this case. If you observe anything that seems to violate this instruction, report it immediately to a clerk or bailiff.</p> <p>CR109B Further admonition about electronic devices.</p> <p>Please understand that the rules of evidence and procedure have developed over hundreds of years in order to ensure the fair resolution of disputes. The fairness of the entire system depends on you reaching your decisions based on evidence presented to you in court, and not on other sources of information.</p> <p>Post-trial investigations are common and can disclose these improper activities. If they are discovered, they will be brought to my attention and the entire case might have to be retried, at substantial cost.</p> |
| <p>CV101A General admonitions. (self-represented litigant version)</p> | |

Advisory Committee on Model Civil Jury Instructions: Uniformity Subcommittee
Comparison of Civil and Criminal Opening/Closing Instructions

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| <p>CV102 Role of the judge, jury and lawyers.</p> <p>You and I and the lawyers play important but different roles in the trial. I supervise the trial and to decide all legal questions, such as deciding objections to evidence and deciding the meaning of the law. I will also explain the meaning of the law. You must follow that law and decide what the facts are. The facts generally relate to who, what, when, where, why, how or how much. The facts must be supported by the evidence. The lawyers present the evidence and try to persuade you to decide the case in favor of his or her client. Television and the movies may not accurately reflect the way real trials should be conducted. Real trials should be conducted with professionalism, courtesy and civility.</p> | <p>CR105 Role of Judge, Jury and Lawyers.</p> <p>All of us, judge, jury and lawyers, are officers of the court and have different roles during the trial:</p> <ul style="list-style-type: none"> • As the judge I will supervise the trial, decide legal issues, and instruct you on the law. • As the jury, you must follow the law as you weigh the evidence and decide the factual issues. Factual issues relate to what did, or did not, happen in this case. • The lawyers will present evidence and try to persuade you to decide the case in one way or the other. Neither the lawyers nor I decide the case. That is your role. Do not be influenced by what you think our opinions might be. <p>Make your decision based on the law given in my instructions and on the evidence presented in court.</p> |
| <p>CV102A Role of the judge, jury, parties, lawyers. (self-represented litigant version)</p> <p>CV103 Nature of the case.</p> <p>In this case [Name of plaintiff] seeks [describe claim]. [Name of defendant] [denies liability, etc.]. [Name of defendant] has filed what is known as a [counterclaim/cross-claim/third-party complaint/etc.] seeking [describe claim].</p> | <p>CR102 Information, Plea and Burden of Proof.</p> <p>The prosecution has filed a document—called an “Information”—that contains the charges against the defendant. The Information is not evidence of anything. It is only a method of accusing a defendant of a crime. The Information will now be read. (Read Information)</p> <p>The defendant has entered a plea of not guilty and denies committing the crime(s). Every crime has component parts called “elements.” The prosecution must prove each element beyond a reasonable doubt. Until then, you must presume that the defendant is not guilty. The defendant does not have to prove anything. (He) (She) does not have to testify, call witnesses, or present evidence.</p> |
| <p>CV104 Order of trial.</p> <p>The trial will proceed as follows:</p> <p>(1) The lawyers will make opening statements, outlining what the case is about and what they think the evidence will show. (2) [Name of plaintiff] will offer evidence first, followed by [name of defendant]. I may allow the parties to later offer more evidence. (3) Throughout the trial and after the evidence has been fully presented, I will instruct you on the law. You must follow the law as I explain it to you, even if you do not agree with it. (4) The lawyers will then summarize and argue the case. They will share with you their views of the evidence, how it relates to the law and how they think you should decide the case. (5) The final step is for you to go to the jury room and discuss the evidence and the instructions among yourselves until you reach a verdict.</p> | <p>CR108 Order of the Trial.</p> <p>I will now explain how the trial will unfold. The prosecution will give its opening statement. An opening statement gives an overview of the case from one point of view, and summarizes what that lawyer thinks the evidence will show. Defense counsel may choose to make an opening statement right after the prosecutor, or wait until after all of the prosecution’s evidence has been presented, or not make one at all. You will then hear the prosecution’s evidence. Evidence is usually presented by calling and questioning witnesses. What they say is called testimony. A witness is questioned first by the lawyer who called that witness and then by the opposing lawyer. [For judges who permit juror questions, add: After the lawyers finish with their questions you will have the opportunity to submit questions. In a moment I will explain how to do this.] Consider all testimony, whether from direct or cross-examination, regardless of who calls the witness. After the prosecution has presented all its evidence, the defendant may present evidence, though the defendant has no duty to do so. If the defendant does present evidence the prosecution may then present additional evidence. After both sides have presented all their evidence, I will give you final instructions on the law you must follow in reaching a verdict. You will then hear closing arguments from the lawyers. The prosecutor will speak first, followed by the defense counsel. Then the prosecutor speaks last, because the government has the burden of proof. Finally, you will deliberate in the jury room. You may take your notes with you. You will discuss the case and reach a verdict.</p> |
| <p>CV105 Sequence of instructions not significant.</p> | |
| <p>CV107 Jurors may not decide based on sympathy, passion and prejudice.</p> <p>You must decide this case based on the facts and the law, without regard to sympathy, passion or prejudice. You must not decide for or against anyone because you feel sorry for or angry at anyone.</p> | <p>CR215 Do Not Consider Punishment.</p> <p>In making your decision, do not consider what punishment could result from a verdict of guilty. Your duty is to decide if the defendant is guilty beyond a reasonable doubt. Punishment is not relevant to whether the defendant is guilty or not guilty.</p> |
| <p>CV108 Note-taking.</p> <p>You may take notes during the trial and have those notes with you when you discuss the case. If you take notes, do not over do it, and do not let your note-taking distract you from following the evidence. Your notes are not evidence, and you should use them only as a tool to aid your personal memory. [I will secure your notes in the jury room during breaks and have them destroyed at the end of the trial.]</p> | <p>CR110 Note-taking.</p> <p>Feel free to take notes during the trial to help you remember the evidence, but do not let note-taking distract you. Your notes are not evidence and may be incomplete.</p> |
| <p>CV111A Definition of “person.”</p> | <p>CR111 Juror Questions. [Optional for judges who permit questions.]</p> <p>During the trial you may ask questions of the witnesses. However, to make sure the questions are legally appropriate, we will use the following procedure: After the lawyers have finished questioning each witness, I will ask if you have any questions. If you do, please do not ask the question out loud. Write it down and hand it to a bailiff. The bailiff will hand me your question. I will review it with the lawyers to make sure it is legally permissible. If the question is appropriate, it will be addressed. If not, I will tell you.</p> |

Advisory Committee on Model Civil Jury Instructions: Uniformity Subcommittee
Comparison of Civil and Criminal Opening/Closing Instructions

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| CV111B All persons equal before the law. | |
| CV112 Multiple parties. | |
| CV113 Multiple plaintiffs. | |
| CV114 Multiple defendants. | |
| CV115 Settling parties. | |
| CV116 Discontinuance as to some defendants. | |
| CV117 Preponderance of the evidence. | |
| CV118 Clear and convincing evidence. | |
| | CR103 Proof Beyond a Reasonable Doubt. |
| | CR104 Presumption of Innocence. |
| CV119 Evidence. | CR106 Evidence. |
| <p>“Evidence” is anything that tends to prove or disprove a disputed fact. It can be the testimony of a witness or documents or objects or photographs or certain qualified opinions or any combination of these things.</p> <p>You must entirely disregard any evidence for which I sustain an objection and any evidence that I order to be struck.</p> <p>Anything you may have seen or heard outside the courtroom is not evidence and you must entirely disregard it.</p> <p>The lawyers might stipulate—or agree—to a fact or I might take judicial notice of a fact. Otherwise, what I say and what the lawyers say usually are not evidence.</p> <p>You are to consider only the evidence in the case, but you are not expected to abandon your common sense. You are permitted to interpret the evidence in light of your experience.</p> | <p>As jurors you will decide whether the defendant is guilty or not guilty. You must base your decision only on the evidence. Evidence usually consists of the testimony and exhibits presented at trial. Testimony is what witnesses say under oath. Exhibits are things like documents, photographs, or other physical objects. The fact that the defendant has been accused of a crime and brought to trial is not evidence. What the lawyers say is not evidence. For example, their opening statements and closing arguments are not evidence.</p> |
| CV119A Evidence. (self-represented litigant version) | |
| CV120 Direct and circumstantial evidence. | CR210 Direct/Circumstantial Evidence. |
| <p>A fact may be proved by direct or circumstantial evidence. Circumstantial evidence consists of facts that allow someone to reasonably infer the truth of the facts to be proved. For example, if the fact to be proved is whether Johnny ate the cherry pie, and a witness testifies that she saw Johnny take a bite of the cherry pie, that is direct evidence of the fact. If the witness testifies that she saw Johnny with cherries smeared on his face and an empty pie plate in his hand, that is circumstantial evidence of the fact.</p> | <p>Facts may be proved by direct or circumstantial evidence. The law does not treat one type of evidence as better than the other.</p> <p>Direct evidence can prove a fact by itself. It usually comes from a witness who perceived firsthand the fact in question. For example, if a witness testified he looked outside and saw it was raining, that would be direct evidence that it had rained. Circumstantial evidence is indirect evidence. It usually comes from a witness who perceived a set of related events, but not the fact in question. However, based on that testimony someone could conclude that the fact in question had occurred. For example, if a witness testified that she looked outside and saw that the ground was wet and people were closing their umbrellas, that would be circumstantial evidence that it had rained.</p> <p>Before you can find the defendant guilty of any charge, there must be enough evidence—direct, circumstantial, or some of both—to convince you of the defendant’s guilt beyond a reasonable doubt. It is up to you to decide.</p> |
| CV121 Believability of witnesses. | CR207 Witness Credibility. |
| <p>Testimony in this case will be given under oath. You must evaluate the believability of that testimony. You may believe all or any part of the testimony of a witness. You may also believe one witness against many witnesses or many against one, in accordance with your honest convictions. In evaluating the testimony of a witness, you may want to consider the following:</p> <p>(1) Personal interest. Do you believe the accuracy of the testimony was affected one way or the other by any personal interest the witness has in the case?</p> <p>(2) Bias. Do you believe the accuracy of the testimony was affected by any bias or prejudice?</p> <p>(3) Demeanor. Is there anything about the witness’s appearance, conduct or actions that causes you to give more or less weight to the testimony?</p> <p>(4) Consistency. How does the testimony tend to support or not support other believable evidence that is offered in the case?</p> <p>(5) Knowledge. Did the witness have a good opportunity to know what [he] is testifying about?</p> <p>(6) Memory. Does the witness’s memory appear to be reliable?</p> <p>(7) Reasonableness. Is the testimony of the witness reasonable in light of human experience?</p> <p>These considerations are not intended to limit how you evaluate testimony. You are the ultimate judges of how to evaluate believability.</p> | <p>In deciding this case you will need to decide how believable each witness was. Use your judgment and common sense. Let me suggest a few things to think about as you weigh each witness’s testimony:</p> <ul style="list-style-type: none"> • How good was the witness’s opportunity to see, hear, or otherwise observe what the witness testified about? • Does the witness have something to gain or lose from this case? • Does the witness have any connection to the people involved in this case? • Does the witness have any reason to lie or slant the testimony? • Was the witness’s testimony consistent over time? If not, is there a good reason for the inconsistency? If the witness was inconsistent, was it about something important or unimportant? • How believable was the witness’s testimony in light of other evidence presented at trial? • How believable was the witness’s testimony in light of human experience? • Was there anything about the way the witness testified that made the testimony more or less believable? <p>In deciding whether or not to believe a witness, you may also consider anything else you think is important. You do not have to believe everything that a witness said. You may believe part and disbelieve the rest. On the other hand, if you are convinced that a witness lied, you may disbelieve anything the witness said. In other words, you may believe all, part, or none of a witness’s testimony. You may believe many witnesses against one or one witness against many.</p> <p>In deciding whether a witness testified truthfully, remember that no one’s memory is perfect. Anyone can make an honest mistake. Honest people may remember the same event differently.</p> |
| CV122 Inconsistent statements. | |
| <p>You may believe that a witness, on another occasion, made a statement inconsistent with that witness’s testimony given here. That doesn’t mean that you are required to disregard the testimony. It is for you to decide whether to believe the witness.</p> | |

Advisory Committee on Model Civil Jury Instructions: Uniformity Subcommittee
Comparison of Civil and Criminal Opening/Closing Instructions

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| CV123 Effect of willfully false testimony. | |
| If you believe any witness has intentionally testified falsely about any important matter, you may disregard the entire testimony of that witness, or you may disregard only the intentionally false testimony. | |
| CV124 Stipulated facts. | |
| CV125 Judicial notice. | |
| CV126 Depositions. | |
| CV127 Limited purpose evidence. | |
| CV128 Objections and rulings on evidence and procedure. | CR107 Objections. (see also CR204 and CR205) |
| From time to time during the trial, I may have to make rulings on objections or motions made by the lawyers. Lawyers on each side of a case have a right to object when the other side offers evidence that the lawyer believes is not admissible. You should not think less of a lawyer or a party because the lawyer makes objections. You should not conclude from any ruling or comment that I make that I have any opinion about the merits of the case or that I favor one side or the other. And if a lawyer objects and I sustain the objection, you should disregard the question and any answer. During the trial I may have to confer with the lawyers out of your hearing about questions of law or procedure. Sometimes you may be excused from the courtroom for that same reason. I will try to limit these interruptions as much as possible, but you should remember the importance of the matter you are here to decide. Please be patient even though the case may seem to go slowly. | Rules govern what evidence may be presented to you. On the basis of these rules, the lawyers may object to proposed evidence. If they do, I will rule in one of two ways. If I sustain the objection, the proposed evidence will not be allowed. If I overrule the objection, the evidence will be allowed. Do not evaluate the evidence on the basis of whether objections are made. |
| CV129 Statement of opinion. | |
| CV130A Charts and summaries as evidence. | |
| CV130B Charts and summaries of evidence. | |
| CV131 Spoliation. | |
| CV135 Out-of-state or out-of-town experts. | |
| CV136 Conflicting testimony of experts. | |
| Proposed Instruction [from CR201] | CR201 Closing Roadmap. |
| Members of the jury, you now have all the evidence. Three things remain to be done: First, I will give you additional instructions that you will follow in deciding this case. Second, the lawyers will give their closing arguments. The Plaintiff(s) will go first, then the Defendant(s). The Plaintiff(s) may give a rebuttal. Finally, you will go to the jury room to discuss and decide the case. | Members of the jury, you now have all the evidence. Three things remain to be done: First, I will give you additional instructions that you will follow in deciding this case. Second, the lawyers will give their closing arguments. The prosecutor will go first, then the defense. Because the prosecution has the burden of proof, the prosecutor may give a rebuttal. Finally, you will go to the jury room to discuss and decide the case. |
| Proposed Instruction [from CR202] | CR202 Juror Duties. |
| You have two main duties as jurors. The first is to decide from the evidence what the facts are. Deciding what the facts are is your job, not mine. The second duty is to take the law I give you in the instructions, apply it to the facts, and reach a verdict. You are bound by your oath to follow the instructions that I give you, even if you personally disagree with them. This includes the instructions I gave you before trial, any instructions I may have given you during the trial, and these instructions. All the instructions are important, and you should consider them as a whole. The order in which the instructions are given does not mean that some instructions are more important than others. Whether any particular instruction applies may depend upon what you decide are the true facts of the case. If an instruction applies only to facts or circumstances you find do not exist, you may disregard that instruction. Perform your duty fairly. Do not let bias, sympathy or prejudice that you may feel toward one side or the other influence your decision in any way. | You have two main duties as jurors. The first is to decide from the evidence what the facts are. Deciding what the facts are is your job, not mine. The second duty is to take the law I give you in the instructions, apply it to the facts, and decide if the prosecution has proved the defendant guilty beyond a reasonable doubt. You are bound by your oath to follow the instructions that I give you, even if you personally disagree with them. This includes the instructions I gave you before trial, any instructions I may have given you during the trial, and these instructions. All the instructions are important, and you should consider them as a whole. The order in which the instructions are given does not mean that some instructions are more important than others. Whether any particular instruction applies may depend upon what you decide are the true facts of the case. If an instruction applies only to facts or circumstances you find do not exist, you may disregard that instruction. Perform your duties fairly. Do not let any bias, sympathy or prejudice that you may feel toward one side or the other influence your decision in any way. [You must also not let yourselves be influenced by public opinion.] |

Advisory Committee on Model Civil Jury Instructions: Uniformity Subcommittee
Comparison of Civil and Criminal Opening/Closing Instructions

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| <p>Proposed Instruction [from CR203]</p> <p>When the lawyers give their closing arguments, keep in mind that they are advocating their views of the case. What they say during their closing arguments is not evidence. If the lawyers say anything about the evidence that conflicts with what you remember, you are to rely on your memory of the evidence. If they say anything about the law that conflicts with these instructions, you are to rely on these instructions.</p> | <p>CR203 Closing Arguments.</p> <p>When the lawyers give their closing arguments, keep in mind that they are advocating their views of the case. What they say during their closing arguments is not evidence. If the lawyers say anything about the evidence that conflicts with what you remember, you are to rely on your memory of the evidence. If they say anything about the law that conflicts with these instructions, you are to rely on these instructions.</p> |
| <p>Proposed Instruction [from CR204] (compare to CV128)</p> <p>During the trial I have made certain rulings. I made those rulings based on the law, and not because I favor one side or the other.</p> <p>However,</p> <ul style="list-style-type: none"> • if I sustained an objection, • if I did not accept evidence offered by one side or the other, or • if I ordered that certain testimony be stricken, <p>then you must not consider those things in reaching your verdict.</p> | <p>CR204 Legal Rulings. (compare to cv128)</p> <p>During the trial I have made certain rulings. I made those rulings based on the law, and not because I favor one side or the other.</p> <p>However,</p> <ul style="list-style-type: none"> •¶ I sustained an objection, •¶ I did not accept evidence offered by one side or the other, or •¶ I ordered that certain testimony be stricken, <p>then you must not consider those things in reaching your verdict.</p> |
| <p>Proposed Instruction [from CR205] (compare to CV128)</p> <p>As the judge, I am neutral. If I have said or done anything that makes you think I favor one side or the other, that was not my intention. Do not interpret anything I have done as indicating that I have any particular view of the evidence or the decision you should reach.</p> | <p>CR205 Judicial Neutrality. (compare to CV128)</p> <p>As the judge, I am neutral. If I have said or done anything that makes you think I favor one side or the other, that was not my intention. Do not interpret anything I have done as indicating that I have any particular view of the evidence or the decision you should reach.</p> |
| <p>Proposed Instruction [from CR206]</p> <p>You must base your decision only on the evidence that you saw and heard here in court. Evidence includes:</p> <ul style="list-style-type: none"> • what the witnesses said while they were testifying under oath; • any exhibits admitted into evidence; and • any facts to which the parties have stipulated, that is to say, facts to which they have agreed. <p>Nothing else is evidence. The lawyer’s statements and arguments are not evidence. Their objections are not evidence. My legal rulings and comments, if any, are not evidence. In reaching a verdict, consider all the evidence as I have defined it here, and nothing else. You may also draw all reasonable inferences from that evidence.</p> | <p>CR206 Evidence-Closing.</p> <p>You must base your decision only on the evidence that you saw and heard here in court.</p> <p>Evidence includes:</p> <ul style="list-style-type: none"> •¶ what the witnesses said while they were testifying under oath; and •¶ any exhibits admitted into evidence. <p>Nothing else is evidence. The lawyers statements and arguments are not evidence. Their objections are not evidence. My legal rulings and comments, if any, are not evidence.</p> <p>In reaching a verdict, consider all the evidence as I have defined it here, and nothing else. You may also draw all reasonable inferences from that evidence.</p> |
| | <p>CR208 Presumption of Innocence-Closing.</p> |
| | <p>CR209 Reasonable Doubt-Closing.</p> |
| | <p>CR211A Defendant Testifying./CR211B Defendant Not Testifying.</p> |
| | <p>CR212 Offense Requires Conduct and Mental State.</p> |
| | <p>CR213 Inferring the Required Mental State.</p> |
| | <p>CR214 Motive.</p> |
| <p>CV137 Selection of jury foreperson and deliberation.</p> <p>When you go into the jury room, your first task is to select a foreperson. The foreperson will preside over your deliberations and sign the verdict form when it’s completed. The foreperson should not dominate the discussions. The foreperson’s opinions should be given the same weight as the opinions of the other jurors.</p> <p>After you select the foreperson you must discuss with one another—that is deliberate—with a view to reaching an agreement. Your attitude and conduct during discussions are very important.</p> | <p>CR217 Foreperson Selection and Duties.</p> <p>Among the first things you should do when you go to the jury room to deliberate is to appoint someone to serve as the jury foreperson. The foreperson should not dominate the jury’s discussion, but rather should facilitate the discussion of the evidence and make sure that all members of the jury get the chance to speak. The foreperson’s opinions should be given the same weight as those of other members of the jury. Once the jury has reached a verdict, the foreperson is responsible for filling out and signing the verdict form(s) on behalf of the entire jury.</p> <p>For each offense, the verdict form will have two blanks—one for “guilty” and the other for “not guilty.” The foreperson will fill in the appropriate blank to reflect the jury’s unanimous decision. In filling out the form, the foreperson needs to make sure that only one blank is marked for each charge.</p> |

Advisory Committee on Model Civil Jury Instructions: Uniformity Subcommittee
Comparison of Civil and Criminal Opening/Closing Instructions

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| <p>As you begin your discussions, it is not helpful to say that your mind is already made up. Do not announce that you are determined to vote a certain way or that your mind cannot be changed. Each of you must decide the case for yourself, but only after discussing the case with your fellow jurors.</p> <p>Do not hesitate to change your opinion when convinced that it is wrong. Likewise, you should not surrender your honest convictions just to end the deliberations or to agree with other jurors.</p> | <p>CR216 Jury Deliberations.</p> <p>In the jury room, discuss the evidence and speak your minds with each other. Open discussion should help you reach a unanimous agreement on a verdict. Listen carefully and respectfully to each other's views and keep an open mind about what others have to say. I recommend that you not commit yourselves to a particular verdict before discussing all the evidence. Try to reach unanimous agreement, but only if you can do so honestly and in good conscience. If there is a difference of opinion about the evidence or the verdict, do not hesitate to change your mind if you become convinced that your position is wrong. On the other hand, do not give up your honestly held views about the evidence simply to agree on a verdict, to give in to pressure from other jurors, or just to get the case over with. In the end, your vote must be your own. Because this is a criminal case, every single juror must agree with the verdict before the defendant can be found "guilty" or "not guilty." In reaching your verdict you may not use methods of chance, such as drawing straws or flipping a coin. Rather, the verdict must reflect your individual, careful, and conscientious judgment as to whether the evidence presented by the prosecutor proved each charge beyond a reasonable doubt.</p> |
| <p>CV138 Do not speculate or resort to chance.</p> <p>When you deliberate, do not flip a coin, speculate or choose one juror's opinions at random. Evaluate the evidence and come to a decision that is supported by the evidence.</p> <p>If you decide that a party is entitled to recover damages, you must then agree upon the amount of money to award that party. Each of you should state your own independent judgment on what the amount should be. You must thoughtfully consider the amounts suggested, evaluate them according to these instructions and the evidence, and reach an agreement on the amount. You must not agree in advance to average the estimates.</p> | <p>CR218 Deadlocked Juries.</p> <p>The verdict must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree. Your verdict must be unanimous.</p> <p>It is your duty to consult with one another and to deliberate. Your goal should be to reach an agreement if you can do so without surrendering your individual judgment. Each of you must decide the case for yourself, but do so only after impartially considering the evidence with your fellow jurors. Do not hesitate to reexamine your own views and change your position if you are convinced it is mistaken. But do not surrender your honest conviction as to the weight or effect of the evidence solely because of the opinion of your fellow jurors, or just to return a verdict.</p> <p>You are judges -- judges of the facts. Your sole interest is to determine the truth from the evidence in the case.</p> |
| <p>CV139 Agreement on special verdict.</p> <p>I am going to give you a form called the Special Verdict that contains several questions and instructions. You must answer the questions based upon the instructions and the evidence you have seen and heard during this trial.</p> <p>Because this is not a criminal case, your verdict does not have to be unanimous. At least six jurors must agree on the answer to each question, but they do not have to be the same six jurors on each question.</p> <p>As soon as six or more of you agree on the answer to all of the required questions, the foreperson should sign and date the verdict form and tell the bailiff you have finished. The bailiff will escort you back to this courtroom; you should bring the completed Special Verdict with you.</p> | <p>CR219 Special Verdict Form.</p> <p>If you determine beyond a reasonable doubt that (DEFENDANT'S NAME) committed (NAME OF RELEVANT OFFENSE), you must complete the special verdict form. Check the box on the form for each factor that you as the jury unanimously find the prosecution has proven beyond a reasonable doubt. Do not check the box for any factor the prosecution has failed to prove beyond a reasonable doubt.</p> <p>Even if you do not check any boxes, the foreperson must sign the special verdict form.</p> |
| <p>CV140 Discussing the case after the trial.</p> <p>Ladies and gentlemen of the jury, this trial is finished. Thank you for your service. The American system of justice relies on your time and your sound judgment, and you have been generous with both. You serve justice by your fair and impartial decision. I hope you found the experience rewarding.</p> <p>You may now talk about this case with anyone you like. You might be contacted by the press or by the lawyers. You do not have to talk with them - or with anyone else, but you may. The choice is yours. I turn now to the lawyers to instruct them to honor your wishes if you say you do not want to talk about the case.</p> <p>If you do talk about the case, please respect the privacy of the other jurors. The confidences they may have shared with you during deliberations are not yours to share with others.</p> <p>Again, thank you for your service.</p> | |
| <p>CV141 No record of testimony.</p> <p>At the end of trial, you must make your decision based on what you recall of the testimony. You will not have a transcript or recording of the witnesses' testimony. I urge you to pay close attention to the testimony as it is given.</p> | |

memo

To: Civil MUJI Committee

From: Subcommittee on Uniformity (Judge Keith A. Kelly, Lauren A. Shurman, and Alyson C. McAllister)

Date: February 4, 2019

Re: Recommendations on Uniformity between General Civil and Criminal Jury Instructions

We have reviewed and compared the general civil and criminal jury instructions. At this time, we have two proposals.

First, we propose adding modified versions of CR 201 to CR 206 to the general civil instructions. These instructions would be useful to give to the jury post-evidence. We recommend numbering these as CV 151-CV 156. Our proposed wording for these instructions is attached.

Second, we propose splitting the general civil instructions between opening instructions and closing instructions, similar to the criminal jury instructions. The opening instructions would be CV 101-150, although we would include a note saying some of these may given with closing instructions, depending on the circumstances of the case. CV 151-199 would be reserved for closing instructions that would typically be given post-evidence. In reviewing the current general instructions, we would recommend moving CV 137 – CV 140 to the closing instructions, and numbering them as CV 157 – CV 160.

There are several additional criminal jury instructions that we believe could replace or supplement the current civil jury instructions. We will shortly submit a memo regarding these changes.

INSTRUCTION NO. CV 151

[from CR201]

Members of the jury, you now have all the evidence. Three things remain to be done:

First, I will give you additional instructions that you will follow in deciding this case.

Second, the lawyers will give their closing arguments. The Plaintiff(s) will go first, then the Defendant(s). The Plaintiff(s) may give a rebuttal.

Finally, you will go to the jury room to discuss and decide the case.

INSTRUCTION NO. CV 152

[from CR202]

You have two main duties as jurors.

The first is to decide from the evidence what the facts are. Deciding what the facts are is your job, not mine.

The second duty is to take the law I give you in the instructions, apply it to the facts, and reach a verdict.

You are bound by your oath to follow the instructions that I give you, even if you personally disagree with them. This includes the instructions I gave you before trial, any instructions I may have given you during the trial, and these instructions. All the instructions are important, and you should consider them as a whole. The order in which the instructions are given does not mean that some instructions are more important than others. Whether any particular instruction applies may depend upon what you decide are the true facts of the case. If an instruction applies only to facts or circumstances you find do not exist, you may disregard that instruction.

Perform your duty fairly. Do not let bias, sympathy or prejudice that you may feel toward one side or the other influence your decision in any way.

INSTRUCTION NO. CV 153

[from CR203]

When the lawyers give their closing arguments, keep in mind that they are advocating their views of the case. What they say during their closing arguments is not evidence. If the lawyers say anything about the evidence that conflicts with what you remember, you are to rely on your memory of the evidence. If they say anything about the law that conflicts with these instructions, you are to rely on these instructions.

INSTRUCTION NO. CV 154

[from CR204]

During the trial I have made certain rulings. I made those rulings based on the law, and not because I favor one side or the other.

However,

- if I sustained an objection,
- if I did not accept evidence offered by one side or the other, or
- if I ordered that certain testimony be stricken,

then you must not consider those things in reaching your verdict.

INSTRUCTION NO. CV 155

[from CR205]

As the judge, I am neutral. If I have said or done anything that makes you think I favor one side or the other, that was not my intention. Do not interpret anything I have done as indicating that I have any particular view of the evidence or the decision you should reach.

INSTRUCTION NO. CV 156

[from CR206]

You must base your decision only on the evidence that you saw and heard here in court. Evidence includes:

- what the witnesses said while they were testifying under oath;
- any exhibits admitted into evidence; and
- any facts to which the parties have stipulated, that is to say, facts to which they have agreed.

Nothing else is evidence. The lawyer's statements and arguments are not evidence. Their objections are not evidence. My legal rulings and comments, if any, are not evidence. In reaching a verdict, consider all the evidence as I have defined it here, and nothing else. You may also draw all reasonable inferences from that evidence.

memo

To: Civil MUJI Committee

From: Subcommittee on Uniformity (Judge Keith A. Kelly, Lauren A. Shurman, and Alyson C. McAllister)

Date: February 5, 2019

Re: (Second) Recommendations on Uniformity between General Civil and Criminal Jury Instructions

In our ongoing review of the current general civil and criminal jury instructions, the subcommittee has identified several additional criminal jury instructions that we believe could replace or supplement certain current general civil jury instructions. We currently would make the following recommendations:

We recommend replacing the following civil instructions with these criminal instructions:

- a. CV 102 with CR 105
- b. CV108 with CR 110
- c. CV120 with CR 210 (modified)
- d. CV 121–CV 123 with CR207
- e. CV 137 with CR 216–CR 217 (modified)

We have attached a side-by-side comparison of the instructions, with our suggested modifications, to this memo.

In addition, we are exploring replacing CV 101 with language from CR 101 and CR 109/109A/109B. If the committee is favorable to the idea, we will make recommendations regarding this instruction at a later meeting.

Advisory Committee on Model Civil Jury Instructions: Uniformity Subcommittee
Comparison of General Civil and Criminal Opening/Closing Instructions

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| <p>CV102 Role of the judge, jury and lawyers.</p> <p>You and I and the lawyers play important but different roles in the trial. I supervise the trial and to decide all legal questions, such as deciding objections to evidence and deciding the meaning of the law. I will also explain the meaning of the law. You must follow that law and decide what the facts are. The facts generally relate to who, what, when, where, why, how or how much. The facts must be supported by the evidence. The lawyers present the evidence and try to persuade you to decide the case in favor of his or her client. Television and the movies may not accurately reflect the way real trials should be conducted. Real trials should be conducted with professionalism, courtesy and civility.</p> | <p>CR105 Role of Judge, Jury and Lawyers.</p> <p>All of us, judge, jury and lawyers, are officers of the court and have different roles during the trial:</p> <ul style="list-style-type: none"> • As the judge I will supervise the trial, decide legal issues, and instruct you on the law. • As the jury, you must follow the law as you weigh the evidence and decide the factual issues. Factual issues relate to what did, or did not, happen in this case. • The lawyers will present evidence and try to persuade you to decide the case in one way or the other. Neither the lawyers nor I decide the case. That is your role. Do not be influenced by what you think our opinions might be. Make your decision based on the law given in my instructions and on the evidence presented in court. |
| <p>CV108 Note-taking.</p> <p>You may take notes during the trial and have those notes with you when you discuss the case. If you take notes, do not over do it, and do not let your note-taking distract you from following the evidence. Your notes are not evidence, and you should use them only as a tool to aid your personal memory. [I will secure your notes in the jury room during breaks and have them destroyed at the end of the trial.]</p> | <p>CR110 Note-taking.</p> <p>Feel free to take notes during the trial to help you remember the evidence, but do not let note-taking distract you. Your notes are not evidence and may be incomplete.</p> |
| <p>CV120 Direct and circumstantial evidence.</p> <p>A fact may be proved by direct or circumstantial evidence. Circumstantial evidence consists of facts that allow someone to reasonably infer the truth of the facts to be proved. For example, if the fact to be proved is whether Johnny ate the cherry pie, and a witness testifies that she saw Johnny take a bite of the cherry pie, that is direct evidence of the fact. If the witness testifies that she saw Johnny with cherries smeared on his face and an empty pie plate in his hand, that is circumstantial evidence of the fact.</p> | <p>CR210 Direct/Circumstantial Evidence.</p> <p>Facts may be proved by direct or circumstantial evidence. The law does not treat one type of evidence as better than the other.</p> <p>Direct evidence can prove a fact by itself. It usually comes from a witness who perceived firsthand the fact in question. For example, if a witness testified he looked outside and saw it was raining, that would be direct evidence that it had rained. Circumstantial evidence is indirect evidence. It usually comes from a witness who perceived a set of related events, but not the fact in question. However, based on that testimony someone could conclude that the fact in question had occurred. For example, if a witness testified that she looked outside and saw that the ground was wet and people were closing their umbrellas, that would be circumstantial evidence that it had rained.</p> <p>Before you can find the defendant guilty of any charge, there must be enough evidence—direct, circumstantial, or some of both—to convince you of the defendant’s guilt beyond a reasonable doubt. It is up to you to decide.</p> |
| <p>CV121 Believability of witnesses.</p> <p>Testimony in this case will be given under oath. You must evaluate the believability of that testimony. You may believe all or any part of the testimony of a witness. You may also believe one witness against many witnesses or many against one, in accordance with your honest convictions. In evaluating the testimony of a witness, you may want to consider the following:</p> <p>(1) Personal interest. Do you believe the accuracy of the testimony was affected one way or the other by any personal interest the witness has in the case?</p> <p>(2) Bias. Do you believe the accuracy of the testimony was affected by any bias or prejudice?</p> <p>(3) Demeanor. Is there anything about the witness’s appearance, conduct or actions that causes you to give more or less weight to the testimony?</p> <p>(4) Consistency. How does the testimony tend to support or not support other believable evidence that is offered in the case?</p> <p>(5) Knowledge. Did the witness have a good opportunity to know what [he] is testifying about?</p> <p>(6) Memory. Does the witness’s memory appear to be reliable?</p> <p>(7) Reasonableness. Is the testimony of the witness reasonable in light of human experience?</p> <p>These considerations are not intended to limit how you evaluate testimony. You are the ultimate judges of how to evaluate believability.</p> | <p>CR207 Witness Credibility.</p> <p>In deciding this case you will need to decide how believable each witness was. Use your judgment and common sense. Let me suggest a few things to think about as you weigh each witness’s testimony:</p> <ul style="list-style-type: none"> • How good was the witness’s opportunity to see, hear, or otherwise observe what the witness testified about? • Does the witness have something to gain or lose from this case? • Does the witness have any connection to the people involved in this case? • Does the witness have any reason to lie or slant the testimony? • Was the witness’s testimony consistent over time? If not, is there a good reason for the inconsistency? If the witness was inconsistent, was it about something important or unimportant? • How believable was the witness’s testimony in light of other evidence presented at trial? • How believable was the witness’s testimony in light of human experience? • Was there anything about the way the witness testified that made the testimony more or less believable? <p>In deciding whether or not to believe a witness, you may also consider anything else you think is important. You do not have to believe everything that a witness said. You may believe part and disbelieve the rest. On the other hand, if you are convinced that a witness lied, you may disbelieve anything the witness said. In other words, you may believe all, part, or none of a witness’s testimony. You may believe many witnesses against one or one witness against many. In deciding whether a witness testified truthfully, remember that no one’s memory is perfect. Anyone can make an honest mistake. Honest people may remember the same event differently.</p> |
| <p>CV122 Inconsistent statements.</p> <p>You may believe that a witness, on another occasion, made a statement inconsistent with that witness’s testimony given here. That doesn’t mean that you are required to disregard the testimony. It is for you to decide whether to believe the witness.</p> | |
| <p>CV123 Effect of willfully false testimony.</p> <p>If you believe any witness has intentionally testified falsely about any important matter, you may disregard the entire testimony of that witness, or you may disregard only the intentionally false testimony.</p> | |

Advisory Committee on Model Civil Jury Instructions: Uniformity Subcommittee
Comparison of General Civil and Criminal Opening/Closing Instructions

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| <p>CV137 Selection of jury foreperson and deliberation.</p> | <p>CR217 Foreperson Selection and Duties.</p> |
| <p>When you go into the jury room, your first task is to select a foreperson. The foreperson will preside over your deliberations and sign the verdict form when it's completed. The foreperson should not dominate the discussions. The foreperson's opinions should be given the same weight as the opinions of the other jurors. After you select the foreperson you must discuss with one another—that is deliberate—with a view to reaching an agreement. Your attitude and conduct during discussions are very important.</p> | <p>Among the first things you should do when you go to the jury room to deliberate is to appoint someone to serve as the jury foreperson. The foreperson should not dominate the jury's discussion, but rather should facilitate the discussion of the evidence and make sure that all members of the jury get the chance to speak. The foreperson's opinions should be given the same weight as those of other members of the jury. Once the jury has reached a verdict, the foreperson is responsible for filling out and signing the verdict form(s) on behalf of the entire jury.</p> |
| <p>As you begin your discussions, it is not helpful to say that your mind is already made up. Do not announce that you are determined to vote a certain way or that your mind cannot be changed. Each of you must decide the case for yourself, but only after discussing the case with your fellow jurors. Do not hesitate to change your opinion when convinced that it is wrong. Likewise, you should not surrender your honest convictions just to end the deliberations or to agree with other jurors.</p> | <p>For each offense, the verdict form will have two blanks—one for "guilty" and the other for "not guilty." The foreperson will fill in the appropriate blank to reflect the jury's unanimous decision. In filling out the form, the foreperson needs to make sure that only one blank is marked for each charge.</p> <p>CR216 Jury Deliberations.</p> <p>In the jury room, discuss the evidence and speak your minds with each other. Open discussion should help you reach a unanimous an agreement on a verdict. Listen carefully and respectfully to each other's views and keep an open mind about what others have to say. I recommend that you not commit yourselves to a particular verdict before discussing all the evidence.</p> <p>Try to reach unanimous an agreement, but only if you can do so honestly and in good conscience. If there is a difference of opinion about the evidence or the verdict, do not hesitate to change your mind if you become convinced that your position is wrong. On the other hand, do not give up your honestly held views about the evidence simply to agree on a verdict, to give in to pressure from other jurors, or just to get the case over with. In the end, your vote must be your own.</p> <p>Because this is a criminal case, every single juror must agree with the verdict before the defendant can be found "guilty" or "not guilty." In reaching your verdict you may not use methods of chance, such as drawing straws or flipping a coin. Rather, the verdict must reflect your individual, careful, and conscientious judgment as to whether the evidence presented by the prosecutor proved each charge beyond a reasonable doubt.</p> |