

MINUTES

Advisory Committee on Model Civil Jury Instructions

June 10, 2019

4:00 p.m.

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

Judge Stone was excused for the first part of the meeting because he was in a jury trial. Ms. Sylvester conducted until Judge Stone could join the meeting.

1. *Minutes.* On motion of Mr. Simmons, seconded by Mr. Fowler, the committee approved the minutes of the May 13, 2019 meeting.
2. *Schedule.* The committee will take July and August off. The anticipated schedule for September and October is to finish the Trespass and Nuisance instructions and the revised General Instructions and to start on the Products Liability instruction updates.
3. *Trespass and Nuisance Instructions.* The committee continued its review of the Trespass and Nuisance Instructions. Ms. Sylvester distributed with the agenda a memorandum from Ryan Beckstrom of the subcommittee addressing the questions that the committee raised at the last meeting.
 - a. *CV1209, Common Law Private Nuisance Claim.* Mr. Hancock said that the subcommittee thought that the current instruction accurately states the law with respect to the definition of “unreasonable.” He noted, however, as noted in the memorandum, that Utah courts appear to be conflicted on the applicable considerations, with some addressing “unreasonableness” from the standpoint of the actor, and some addressing it from the standpoint of the injured party. The committee added Mr. Beckstrom’s discussion of this issue in his memorandum to the committee note to CV1209.

Mr. Ferre and Judge Kelly joined the meeting.

The subcommittee also recommended keeping “otherwise” in the phrase “otherwise actionable” and noted that it is defined in Restatement (Second) of Torts § 822 as “reckless, negligent or abnormally dangerous.” Mr. Hancock also recommended adding to the references citations to *Cannon v. Neuberger*, 268 P.2d 425 (Utah 1954), and *Dahl v. Utah Oil Ref. Co.*, 71 Utah 1, 262 P. 269 (1927). He recommended that *Branch v. Western Petroleum, Inc.*, 657 P.2d 267 (Utah 1982), not be cited, since that decision’s discussion of nuisance was dicta; a nuisance theory was not presented to the trial court in that case.

Mr. Fowler noted that CV1208 (“Statutory Nuisance Claim”) and CV1209 (“Common Law Private Nuisance Claim”) have different definitions of “unreasonableness” and questioned whether they should be the same. Ms. Shurman noted that CV1208 does not purport to define “unreasonable” but just sets out factors the jury should consider in determining unreasonableness. And Mr. Summerill noted that the statute refers to the unreasonableness of the conduct, whereas the case law refers to the unreasonableness of the injury to the property.

Judge Stone joined the meeting.

The committee thought that the two instructions should probably have a consistent definition of unreasonableness unless there is some reason not to. Mr. Hancock offered to have the subcommittee look at the issue and to propose a separate instruction defining unreasonableness if it thought one was necessary.

Dr. Di Paolo joined the meeting.

The committee discussed whether a definition of unreasonableness should be included in each instruction (CV1208 & CV1209) or whether it should be its own instruction. The committee thought it best to include it in each instruction. Judge Kelly noted that otherwise the jury might think that the separate instruction also applies to other claims where unreasonableness might be relevant, such as negligence. Judge Stone suggested adding to the committee note that the committee relied on the statute and case law in defining unreasonableness, that there is no case saying that the test is different for each form of private nuisance, and that counsel should have some leeway to argue reasonableness or unreasonableness under the circumstances.

b. *CV1210, Public Nuisance.* The committee had asked the subcommittee if there was a common-law public nuisance claim as well as the statutory claim. The subcommittee thought that there was but that the elements for such a claim were not clearly set forth in Utah law. At Mr. Simmons’s suggestion, the committee added a committee note that says: “This instruction cites the elements for a statutory public nuisance claim. There may also be a common law claim. *See Riggins v. Dist. Court of Salt Lake Cty.*, 51 P.2d 645, 662 (1935).”

Ms. McAllister and Mr. Hancock were excused.

4. *General Instructions.* Judge Kelly gave some background on the committee’s decision to revisit the general instructions. It started out as an attempt to

make the general civil and general criminal instructions consistent. That attempt was not successful, but in the process, Judge Kelly and his subcommittee thought that some of the general criminal instructions were better than their civil counterparts and that they should be adopted or adapted for the civil instructions. The subcommittee also tried to define more clearly which general instructions should be given at the beginning of trial and which should be given after the presentation of evidence. The general instructions numbered CV151 et seq. have been renumbered and are meant to be given post-evidence. Finally, the subcommittee also edited and updated some of the instructions.

a. *CV109, Juror Questions.* Judge Stone asked if there was an instruction on juror questions. There was not a separate instruction on juror questions in the model civil instructions. Judge Stone suggested adapting CR111, “Juror Questions,” for the general civil instructions. He thought that the instruction should make it clear that jurors were not required to ask questions. Dr. Di Paolo thought CR111 was problematic to the extent it told the jury that the court would allow the question only if “it is legally permissible” and “appropriate.” The committee thought it better to just say that some questions may not be allowed. They may be relevant and appropriate questions, for example, but just not for the particular witness or may be covered in other, future testimony. The committee adopted the following instruction as new CV109:

During the trial you may submit questions to be asked of the witnesses, but you are not required to do so. You should write your questions down as they occur to you. Please do not ask your questions out loud. 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. You should hand your questions to the bailiff when I ask for them. I will review them with the lawyers to make sure they are allowed. I will tell you if your questions are allowed or not.

Ms. Shurman asked whether the instruction should address other issues covered in Utah Rule of Civil Procedure 47(j), such as that the court may rephrase the question or discontinue questioning altogether. The committee did not think it needed to say so. On motion of Ms. Shapiro, seconded by Judge Kelly, the committee approved new CV109.

b. *CV101, General Admonitions.* Dr. Di Paolo suggested restructuring the second and fourth paragraphs of CV101, to start by saying “although it may seem natural,” and then to say why it is not allowed. The committee also approved dropping outdated references to Blackberries, PDAs, Facebook,

MySpace, and LinkedIn and to refer generically to “social media,” since social media platforms can change so quickly. On motion of Judge Kelly, seconded by Mr. Summerill, the committee adopted CV101 and approved revising CV101A to conform to the changes to CV101.

c. *CV102, Role of Judge, Jury, and Lawyers, and CV102A, Role of the Judge, Jury, Parties, Lawyers (Self-Represented Litigant Version)*. Judge Kelly noted that the subcommittee preferred the general criminal instruction on the role of the participants in the trial to the general civil instruction. Dr. Di Paolo thought that jurors would not understand the phrase “legal issues.” Judge Stone suggested “questions of law.” Judge Kelly noted that the only legal issue the jurors are usually concerned with (other than the law as stated in the instructions) is the admissibility of evidence. At his suggestion, the committee revised the second paragraph to read, “As the judge I will supervise the trial, decide what evidence is admissible, and instruct you on the law.” Dr. Di Paolo suggested stating in the last paragraph, “Do not try to guess what I or the lawyers may think.” The committee declined to adopt the change. The committee also agreed to revise CV102A to conform to the new CV102, adding references to “[name of self-represented [party]].”

d. *CV128A, Objections and Rulings on Evidence and Procedure: Self-Represented Parties*. The committee decided to add an instruction addressing objections and rulings on evidence where a party represents himself or herself. Judge Stone noted the special problems that may arise when a party is self-represented. Ordinarily, the jury is instructed to ignore the opinions of the attorneys, but a self-represented party serves two roles--a lawyer and a witness--and as a witness a self-represented party may offer opinions that the jury may consider evidence.

5. *Next meeting*. The next meeting is Monday, September 9, 2019, at 4:00 p.m.

The meeting concluded at 6:05 p.m.