Civil Jury Instructions in Utah

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- **By Francis J. Carney (Updated 13 February 2014)**

- **The Purposes for Instructions**

  - First, and obviously, to tell the jury what the law is.

  - Second, but equally important, to make your record; that is, to give you grounds for an appeal if the jury's verdict goes against you.

- **Utah Rule of Civil Procedure 51**

  - **(a) Preliminary instructions**. After the jury is sworn and before opening statements, the court may instruct the jury concerning the jurors' duties and conduct, the order of proceedings, the elements and burden of proof for the cause of action, and the definition of terms. The court may instruct the jury concerning any matter stipulated to by the parties and agreed to by the court and any matter the court in its discretion believes will assist the jurors in comprehending the case.

  - **(b) Interim instructions.** During the course of the trial, the court may instruct the jury on the law if the instruction will assist the jurors in comprehending the case. A party may request an interim instruction.

  - **(c) Final instructions**. The court shall instruct the jury at the conclusion of the evidence as may be needed.

  - **(d) Request for instructions**. Parties shall file requested jury instructions at the final pretrial conference or at any other time directed by the court. If a party relies on a statute, rule or case to support or object to a requested instruction, the party shall provide a citation to or a copy of the statute, rule or case. The court shall provide the parties with a copy of the approved instructions, unless the parties waive this requirement.

  - **(e) Written instructions**. Whenever practical, jury instructions should be in writing. At least one written copy shall provided to the jury. The court shall provide a written copy to any juror who requests one.

  - **(f) Objections to instructions**. Objections to written instructions shall be made before the instructions are given to the jury. Objections to oral instructions may be made after they are given to the jury, but before the jury retires to consider its verdict. The court shall provide an opportunity to make objections outside the hearing of the jury. Unless a party objects to an instruction or the failure to give an instruction, the instruction may not be assigned as error except to avoid a manifest injustice. In objecting to the giving of an instruction, a party shall identify the matter to which the objection is made and the grounds for the objection.

  - **(g) Arguments.** Arguments for the respective parties shall be made after the court has given the jury its final instructions. The court shall not comment on the evidence in the case, and if the court states any of the evidence, it must instruct the jurors that they are the exclusive judges of all questions of fact.

- **The Instructions That You *Must* Request**

  - You must propose instructions on every material theory you asserted, and have adduced evidence for

  - The trial judge has no duty to do so- in a civil case, a court will typically use its own stock or MUJI instructions and then rely on counsel for the "key" instructions

- So, for example, if you are a defendant claiming that a comparative fault allocation must be made, it is your obvious duty to proposed an instruction on point (such as 2 MUJI CV 211) *and* a special verdict form including an allocation grid, or you waive the point for purposes of both the post-trial motions and the appeal
  - It gets tricky if the legal issue was decided on a pretrial motion, such as a motion in limine or an MSJ: do you need to renew at the time of trial?
  - Evidence Rule 103(b) addresses the problem of the need to renew pretrial objections to the admission of evidence:
    - *(b) Not Needing to Renew an Objection or Offer of Proof. Once the court rules definitively on the record — either before or at trial — a party need not renew an objection or offer of proof to preserve a claim of error for appeal.*
    - Note that the amended rule requires a definitive ruling from the trial court on the record that admits or excludes evidence. So ask for a definitive ruling; that is, make sure the specific evidence is addressed and the judge states that her ruling is final. Then confirm it in a written order. If that's not possible, you must renew your objection and, if needed, make an offer of proof at trial.
    - Compare State v. Mitchell, 779 P.2d 1116, 1119 n.4 (Utah 1989) (a pretrial motion to suppress adequately preserves an issue for appeal, if the trial judge is the same judge who ruled on the motion and a hearing was held on the motion), with State v. Hansen, 2002 UT 114, ¶¶ 12-21, 61 P.3d 1062 (where an issue has been raised but the court defers ruling on it and plainly instructs the objecting party to re-raise the issue at trial, failure to re-raise the issue waives it for appeal); Erickson v. Wasatch Manor, Inc., 802 P.2d 1323, 1325-26 (Utah Ct. App. 1990) (the trial court did not err in admitting evidence precluded by its earlier ruling on a motion in limine where that ruling was conditional).
    - See State v. Dominguez, 72 P 4 .3d 127, 2003 Utah Ct.App. 158 (under Rule 103, a party was not required to object during trial to evidence offered in accordance with the court's pretrial ruling); State v. Saunders, 992 P.2d 951, 1999 UT 59 (because defendant objected to court's pretrial ruling, he wasn't required to make a further objection at trial to preserve issue for appeal).
  - A continued area of concern is always pretrial rulings. For example, if the trial judge grants your opponent's motion in limine excluding some aspect of your case, don't assume that you've preserved the point for appeal. If the court makes it clear in definitive terms that the evidence is never coming in, then you're probably safe in assuming that you need not re-raise the point at trial. But if the ruling is anyway tentative or conditional, wise practice is to raise the point again at trial, and make a proffer.
  - As to motions for summary judgment, generally you do not need to renew a denied motion, IF it was denied on "solely legal" and not factual basis
  - Read these cases and be careful.
    - Normandeau v. Hanson Equipment, Inc., 215 P.3d 152, 2009 UT 44
    - Blosch v. Natixis, 2013 UT App 214, ¶20, ____ P3d _____
    - ASC Utah, Inc. v. Wolf Mountain Resorts, LC, 2013 UT 24, ____ P.3d _____
    - Wayment v. Howard, 2006 UT 56, ¶ 19, 144 P.3d 1147

- When in doubt, make a record at trial. For example, in our hypothetical of a defendant wanting a comparative fault allocation, if evidence adduced at trial indicates that a fault allocation might be justified, do NOT assume that your fighting and losing the issue on a pretrial partial MSJ preserves the issue for appeal: propose an instruction, propose a special verdict form that includes a fault allocation, and object to the special verdict form that does not include comparative fault.

- You are entitled to an instruction on anything on which you have a theory of the case, and as to which evidence has been introduced

- **Sources for Instructions**

  - MUJI 2d: www.utcourts.gov/resources/muji/

  - MUJI 1st (where not covered by MUJI 2d)

  - State Model Jury Instructions Online: www.llrx.com/columns/reference53.htm

  - Formbooks

    - Modern Federal Jury Instructions (Lexis-Nexis)

    - Lexis-Nexis

      - R. W. Eades, Jury Instructions on Medical Issues (6th Ed.,Lexis-Nexis 2006)
      - R.W. Eades, Jury Instructions in Automobile Actions
      - R.W. Eades and G. Douthwaite, Jury Instructions For Personal Injury and Tort Cases
      - Many others

    - American Bar Association

      - Model Jury Instructions in Criminal Antitrust Cases
      - Model Jury Instructions : Copyright, Trademark and Trade Dress Litigation
      - Model Jury Instructions : Patent Litigation
      - Model Jury Instructions : Business Torts Litigation
      - Model Jury Instructions in Civil Antitrust Cases
      - Model Jury Instructions: Employment Litigation
      - Many others

    - Lexis and Westlaw

      - Lexis (Legal > Area of Law - By Topic > Litigation > Jury Instructions)
      - Westlaw (Directory > Litigation > Jury Instructions)

    - Model Civil Jury Instructions by Federal Circuit

      - http://federalevidence.com/evidence-resources/federal-jury-instructions#circuit
      - Check the particular circuit's web site
      - There are no pattern civil instructions for the Tenth Circuit

  - Your Own Brain and Utah case law

    - Keep in mind that opinions of appellate courts are *not* designed to be jury instructions. *See* Hunsaker v Bozeman Deaconess Found., 588 P.2d 493 (Mont. 1978)

- JIFU (should rarely be used)

- **When Jury Instructions Are Given**

  - Traditionally, "substantive" jury instructions were never given until the very end of the trial, after all the evidence.

  - Think how odd it is that we ask a group of eight people to decide significant issues without telling them in advance what those issues are, and how they are to decide them. Research confirms that this is a poor way of doing things.

  - So MUJI 2 Recommends that judges change procedure and give instructions at the start of the trial, during the trial, and repeat them as necessary at the end:

    - "Judges should instruct the jurors at times during the trial when the instruction will most help the jurors. Many instructions historically given at the end of the trial may be given at the beginning or during the trial so that jurors know what to expect. The fact that an instruction is not organized here among the opening instructions does not mean that it cannot be given at the beginning of the trial. Instructions relevant to a particular part of the trial should be given just before that part. A judge might repeat an instruction during or at the end of the trial to help protect the integrity of the process or to help the jurors understand the case and their responsibilities." From "Introduction to MUJI 2d," www.utcourts.gov/resources/muji/index.asp

  - Rule 51 now specifically allows "interim" instructions:

    - (a) Preliminary instructions. After the jury is sworn and before opening statements, the court may instruct the jury concerning the jurors' duties and conduct, the order of proceedings, the elements and burden of proof for the cause of action, and the definition of terms. The court may instruct the jury concerning any matter stipulated to by the parties and agreed to by the court and any matter the court in its discretion believes will assist the jurors in comprehending the case.

    - (b) Interim instructions. During the course of the trial, the court may instruct the jury on the law if the instruction will assist the jurors in comprehending the case. A party may request an interim instruction.

    - (c) Final instructions. The court shall instruct the jury at the conclusion of the evidence as may be needed.

- **MUJI**

  - Form Utah jury instructions have been around since 1957 with the Jury Instruction Forms for Utah (JIFU). JIFU was replaced by the Model Utah Jury Instructions- Civil (MUJI 1st) in 1993. MUJI 1st, in turn, has been *partially* replaced beginning in 2003 by the Model Utah Jury Instructions- Civil 2d (MUJI 2d) (http://www.utcourts.gov/resources/muji)

  - The Model Utah Jury Instructions are an ongoing project of the Utah Supreme Court's "Advisory Committee on Model Utah Jury Instructions- Civil 2d"

    - http://www.utcourts.gov/committees/muji/

    - They are designed to be Plain-English, neutral, statements of the law.

    - Present members of the committee:

      - John L. Young (Chair)
      - Judge William W. Barrett

- Judge Deno Himonas
- Judge Ryan Harris
- Juli Blanch
- Francis J. Carney
- Professor Marianna Di Paolo
- Phillip S. Ferguson
- Tracy H. Fowler
- John Lund
- Ryan M. Springer
- Peter W. Summerill
- David West
- Timothy M. Shea (Staff)
- Alison A. Adams-Perlac (Staff)

- As of February 2014, ten years of work have produced a total of nine (of a total of about fifteen) completed subject areas. Needless, to say, the work is tedious, laborious, and generally thankless.

- **MUJI 2 Is Preferred**

  - MUJI, although persuasive, is not binding

    - From the introduction to MUJI:

      - "The Utah Supreme Court approves this Second Edition of the Model Utah Jury Instructions (MUJI 2d) for use in jury trials. An accurate statement of the law is critical to instructing the jury, but accuracy is meaningless if the statement is not understood - or is misunderstood - by jurors. MUJI 2d is intended to be an accurate statement of the law using simple structure and, where possible, words of ordinary meaning. Using a model instruction, however, is not a guarantee of legal sufficiency. MUJI 2d is a summary statement of Utah law but is not the final expression of the law. In the context of any particular case, the Supreme Court or Court of Appeals may review a model instruction."

    - Sometimes we on the Committee have it wrong. Please understand that the Supreme Court does not "pre-approve" model instructions, and only reviews them when they come before it on an appeal.

    - The courts have made this point many times:

      - Jones v. Cyprus Plateau Mining Corp., 944 P.2d 357, 359 (Utah 1997) ("[W]e explicitly distinguish Utah law from the MUJI. That is, the MUJI are merely advisory and do not necessarily represent correct statements of Utah law.")

      - Harris v. Shopko Stores, 263 P.3d 1184, 1189, n4 2011 UT App 329; *aff'd and remanded,* 2013 UT 34.

      - Clayton v. Ford Motor Co., 214 P.3d 865, 873, 2009 UT App 154.

      - Brown v. Sears, Roebuck & Co., 328 F.3d 1274, 1281 (10th Cir. 2003) (citing Jones).

      - Florez v Schindler Elevator, 240 P.3d 107, 118, 2010 UT App 254

      - Hadley v. Wood, 1959, 9 Utah 2d 366, 345 P.2d 197.

    - For examples of model instructions that do *not* accurately state the law or are improper to give, see:

- 2 MUJI CV324- Medical malpractice "alternative methods" instruction called into question by Turner v. University Hospital, 2013 UT 52.
- 1 MUJI 3.3- fault/negligence not implied from injury alone, rejected in Green v. Louder, 2001 UT 62, ¶¶ 15-18, 29 P.3d 638
- 1 MUJI 3.4- unavoidable accident instruction, rejected in Randle v. Allen, 862 P.2d 1329, 1336 (Utah 1993)
- 1 MUJI 3.18- effect of comparative negligence on recovery for intentional tort, effectively overruled by Field v. Boyer Co., 952 P.2d 1078 (Utah 1998))

- Although MUJI is not "binding," it should **always** be used by the trial court in preference to MUJI 1, JIFU, and certainly any "form book" instructions
  - Then-Chief Justice Christine Durham makes this clear in her letter to all state trial judges, found in the introduction to MUJI 2d:
    - ". . . MUJI 2d is a summary statement of Utah law but is not, of course, the final expression of the law. In the context of any particular case, this Court or the Court of Appeals may review a model instruction. **Nevertheless, the Supreme Court urges trial judges to use the MUJI 2d instructions to the exclusion of other instructions, if MUJI 2d contains an instruction applicable to the subject, the MUJI 2d instruction accurately states the law on that subject, and a party requests the MUJI 2d instruction.** Obviously, the trial court may edit the MUJI 2d instructions to fit the circumstances of the trial." (Emphasis added)
    - http://www.utcourts.gov/resources/muji/letter.html
  - And this is from the Introduction to MUJI 2d: "For civil instructions, MUJI 2d eventually will replace the original MUJI published by the Utah State Bar. MUJI 2d represents the first published compilation of criminal instructions in Utah. This will be a gradual process, and **when a revised version appears in MUJI 2d, it replaces the same instructions in MUJI 1st**." (Emphasis added)
- MUJI 2 is **not** intended to be a "buffet lunch" with MUJI 1st- if MUJI 2d covers the subject area (as in medical malpractice and torts) then MUJI 1st instructions should **never** be used
  - MUJI 1st is NOT an "alternative" to MUJI 2nd, to be used as desired. It has been superseded wherever MUJI 2d covers the subject area, and should never be used in those circumstances.
  - MUJI 2d is not as "defense-oriented" as some of the MUJI 1st instructions were, and certainly not as much so as JIFU. For that reason, you will still find defense counsel attempting to push archaic and improper instructions from the MUJI 1st or JIFU eras, sometimes under the guise of "it's not in MUJI 2d, so we can ask for it."
  - If the requested instruction is in a subject area covered by MUJI 2d, then any instruction from MUJI 1 that is not in MUJI 2 was **intentionally** deleted. These deletions are not a matter of oversight, but of careful deliberation and discussion by the Advisory Committee.
  - Please read any "introductory notes" to a subject section. For example, in medical malpractice, 2 MUJI CV301 says:
    - "The Advisory Committee intentionally omitted several of the MUJI 1st medical malpractice instructions.

- MUJI 1st 6.27 (Physician Not Guarantor of Results) was deleted in view of the decisions in Green v. Louder, 2001 UT 62, 29 P.3d 638 (trial courts directed not to instruct juries that the “mere fact” of an accident does not mean that anyone was negligent), and Randle v. Allen, 863 P.2d 1329 (trial courts directed not to instruct juries on "unavoidable accidents").

- MUJI 1st 6.34 and 6.35 (causation instructions) have been replaced by a single instruction. The Advisory Committee considered but did not include instructions on the role of custom in determining the standard of care, loss-of-chance causation, and apparent agency claims against hospitals. There is no clear appellate authority on whether those claims exist in this state.

- **As with all MUJI 2d instructions, these are intended to replace the earlier versions found in MUJI 1st.** For a comparison of MUJI 1st and MUJI 2d medical malpractice instructions, and for further information on the deletion or revision of certain MUJI 1st instructions, see the advisory committee’s Correlation Table."

- Some sections (only medical malpractice so far) have "Correlation Tables" that correlate MUJI 2d and MUJI 1st, and explain why certain instructions were deleted:

  - For example, as to old "Physician Not a Guarantor" instruction from MUJI 1 that was removed in MUJI 2, the Committee makes this comment:

    - "Deleted. See, Green v. Louder, 2001 UT 62, 29 P.3d 638 ("The mere fact that an accident or injury occurred does not support a conclusion that the defendant or any other party was at fault or negligent" was an inappropriate instruction) and Randle v. Allen, 863 P.2d 1329 ("Even if such an accident could have been avoided by the exercise of exceptional foresight, skill or caution, still no one may be held liable for injuries resulting from it" also inappropriate.) Randle noted that these types of instructions divert the jury from the primary issue of negligence and create the impression of "extra hurdles" to be overcome in order to prevail. It also noted that such instructions reemphasize a defendant's theory of the case and may constitute improper judicial comment on the evidence. 862 P.2d 1335-6."

- **Objections**

  - Unless the proposition is in a proposed instruction that **wasn't** given, or is in an objectionable instruction that **was** given, it is nearly always waived on appeal.

  - Utah Rule of Civil Procedure 51(f): "Unless a party objects to an instruction or the failure to give an instruction, the instruction may not be assigned as error except to avoid a manifest injustice. In objecting to the giving of an instruction, a party shall identify the matter to which the objection is made and the grounds for the objection."

  - You must object on the record **both** to instructions that were offered by your opponent and to be given by the judge, and instructions that you requested that are refused.

  - Failure to object is almost always a waiver of the issue for appeal

    - Diversified Holdings, L.C. v. Turner, 63 P.3d 686, 2002 UT 129.

    - R.T. Nielson Co. v. Cook, 40 P.3d 1119, 2002 UT 11. (To appeal the giving or the refusal of a jury instruction, a party must properly object to the instructions in the trial court and explain its grounds, with specificity, for challenging the instructions.)

- McGinn v. Utah Power & Light Co., 1974, 529 P.2d 423 (Failure to object to jury instruction on comparative negligence, which instruction did not state the relationship between percentage findings and damages, was a waiver.)
- Hart v. Salt Lake County Com'n, 945 P.2d 125 (Utah 1997) (If objection is not made regarding failure to give jury instruction, issue is deemed waived on appeal.)
- McCorvey v. UDOT, 868 P.2d 41 (Utah 1993). (Failure to raise objection at trial concerning sudden-peril instruction's continued viability under comparative fault system resulted in waiver of issue on appeal.)
- Crookston v. Fire Ins. Exchange, 817 P.2d 789 (Utah 1991) (Supreme Court would not exercise discretionary review, in interest of justice, to determine whether jury instruction, to which no objection was raised at trial, omitted or misstated elements of fraud in action brought by insureds against property insurer.)
- Anderson v. Sharp, 899 P.2d 1245 (Utah 1995)(Asking for instruction in first trial does not preserve point in retrial.)
- Telford v. Newell J. Olsen & Sons Const. Co., 480 P.2d 462 (Utah 1971)
- State v. Kazda, 545 P.2d 190 (Utah 1976) (Rule requiring that objections be made to the instructions gives opportunity for the court to correct the instruction or to fill in any inadequacy so that the jury may consider the case on a proper basis.)

- The only exceptions are for plain error and the "interests of justice," a standard rarely met in civil cases
  - Rule 51 allows a court some discretion to review issues despite the failure to object at trial to an instruction: "Unless a party objects to an instruction or the failure to give an instruction, the instruction may not be assigned as error **except to avoid a manifest injustice**." (Emphasis added.)
  - The "manifest injustice" standard is hardly ever met in a civil case. See, e.g.:
    - Crookston v. Fire Ins. Exchange, 817 P.2d 789 (Utah 1991) (Supreme Court would not exercise discretionary review- "*Here, there was simple failure of trial counsel to preserve a narrow technical objection to an instruction. See Hansen v. Stewart, 761 P.2d at 17. Therefore, we decline to consider its challenge to the fraud instruction*.")
    - R.T. Nielson Co. v. Cook, 40 P.3d 1119, 2002 UT 11 (No likelihood of injustice existed so as to require appellate court to review propriety of jury instruction regarding oral modification of agreement.)
    - Diversified Holdings, L.C. v. Turner, 63 P.3d 686, 2002 UT 129.
    - Billings v. Union Bankers Ins. Co., 918 P.2d 461 (Utah 1996)
- You must, of course, be careful to object both to instructions given that you oppose, but also instructions that you submitted, but were refused
- A trial court is obliged to give instructions on all of your claims for relief, or defenses, if they are supported by evidence of record, and are not covered in other instructions or otherwise objectionable
  - Paulos v. Covenant Transport, Inc., 86 P.3d 752 (Utah. App. 2004)

- Kilpatrick v. Wiley, Rein & Fielding, 37 P.3d 1130 (Utah 2001) (party is entitled to have his theory of the case submitted to the jury, and where there is evidence to support a party's theory of the case, it is error for the court to refuse to instruct).
- Newsom v. Gold Cross Service, Inc., 779 P.2d 692 (Utah. App.1989)
- Powers v. Gene's Bldg. Materials, Inc., 567 P.2d 174 (Utah 1977) (parties are entitled to have their theories of the case presented to the jury in the form of instructions, if they are supported by the evidence).
- Biswell v. Duncan, 742 P.2d 80 (Utah. App. 1987)
- Ames v. Maas, 846 P.2d 468, 471 (Utah App. 1993) (unavoidable accident)

- **Reasons to Object**
  - Must-read decisions prior to any trial-- not matter what the subject matter-- are Randle v Allen, 862 P.2d 1329 (Utah 1993) and Green v. Louder 29 P.3d 638, 2001 UT 62. These two decisions capture the essence of cumulative, argumentative, and objectionable instructions. ("Unavoidable accident" and "negligence not implied from accident alone, respectively.)
  - 1. Not an accurate statement of the law.
    - Obviously, your first grounds for objection to a jury instruction is that it is an inaccurate statement of the law.
    - Sometimes this is easy to determine, but sometimes not: see the discussion on the "alternative methods" instruction
  - 2. Proposition not in issue
    - Sometimes instructions taken out of formbooks (including MUJI) contain statements of the law that are not relevant to the case. MUJI 2d strives to require counsel and the court to eliminate irrelevant language, but form instructions can only go so far. Therefore, make sure that each part of the instruction is relevant to an issue in the case
    - Example: Requested instruction on aggravation of preexisting condition, where no evidence to support a preexisting condition.
    - It is not the function of court to recite to jury propositions of law in the abstract, however accurate or even interesting they may be, and the fewer instructions given the better, and no instruction should be given unless it is both necessary and applicable to fact situation involved. Hadley v. Wood, 345 P.2d 197 (Utah 1959)
  - 3. Proposition was at issue, but no evidence adduced at trial
    - You may sometimes find that an issue is raised by the pleadings but for which no evidence was adduced at trial.
    - In that case, you should move for partial directed verdict on the legal issue and object to any instruction for which there is no basis in the trial evidence.
  - 4. Cumulative, repetitive, and unnecessary

- Many "deadwood" instructions from 1 MUJI or JIFU are duplicative or cumulative. A party is entitled to have the jury instructed on the law and its theories **once**, not multiple times with different phrasing.
- Anything that tells the jury what the law is **not,** rather than what it **is**, should raise red flags.
- Oft-times problem instructions of this variety merely restate the flip side, or the inverse, of the standard negligence instructions
- For example, the concept of negligence needs to be plainly set forth for the jury. However, it is cumulative and unnecessary for the jury to be told by the judge of the various things that may **not** be negligent, such as unavoidable accidents, "mere" accidents not equating to negligence, and so on.
- Ames v Maas, 846 P.2d 468 (Utah Ct. App. 1993): "In Woodhouse v. Johnson, 436 P.2d 442 (1968), as well as in several other cases, the Utah Supreme Court has recognized that the more basic reason for criticizing such an instruction [on unavoidable accident] is that it is a duplication. Inasmuch as the jury is elsewhere advised that the defendant's negligence must be proved, and that in the absence of such proof of negligence he is not liable, it is unnecessary to state again that if the accident was unavoidable because not caused by negligence, he is not liable."

- 5. Undue emphasis
  - Closely related to the cumulative objection is the "undue emphasis" objection.
  - Randle v Allen, 862 P.2d 1329, 1335-36 (Utah 1993): Apart from the inherent confusion in an unavoidable accident instruction, the instruction tends to reemphasize the defendant's theory of the case, that the defendant was not negligent. To that extent, the instruction constitutes an inappropriate judicial comment on the evidence and could be viewed by the jury as a "you-should-find-for-the-defendant" type of instruction." (citations omitted)

- 6. Argumentative- jury instructions are not the place for final arguments; they should be a fair and neutral statement of the law.
  - A classic example is the old JIFU 50.3, "Limitations Upon Duty Owed by Physician to Patient"
    - "To aid you in finding on the issue whether defendant was **guilty** of **malpractice** there are few distinctions that you should have in mind." [Guilty? That sounds like a criminal charge.]
    - "The law does not require of a physician and surgeon perfection, nor prophetic insight, nor in fallible judgment; nor does it condemn him simply because his efforts proved unsuccessful." [Who said it did? Why is this necessary? The jury should be instructed on simply that a physician has the duty to follow reasonable practice used by other physicians, nothing more. All the rest is argument.]
    - "In short, it is quite possible for a physician and surgeon to err in judgment, or to be unsuccessful in his treatment, or to disagree with others of his profession, without being negligent." [Why is this necessary? True, it is an accurate statement of the law, but it also overemphasizes the defense case and apparently creates extra burdens for the plaintiff. This is something that should be left to argument by the defense counsel.]
  - Somewhat surprisingly, I have heard of defense counsel as recently as 2013 asking for JIFU 50.3, *20 years after MUJI 1st eliminated it*, and *10 years after* MUJI 2d substantially revised the entire area

- 7. Comments on the evidence

- In American practice, the court does not comment on the evidence. This is codified in Rule 51(g): "The court shall not comment on the evidence in the case, and if the court states any of the evidence, it must instruct the jurors that they are the exclusive judges of all questions of fact."

- You will rarely see this rule being broken in an obvious manner. However, some instructions may border on evidence commentary. See Randle v Allen, 862 P.2d 1329 (Utah 1993) and Green v. Louder 29 P.3d 638, 2001 UT 62.

- **Common Problem Areas**

  - "The law is NOT this . . ." In general, instructions should tell the jury what the law **IS**, instead of what the law is **NOT**. It is often the sign of a problem instruction if it states what the law is not, for example, a physician is not a guarantor of success, or that an accident does not mean that someone was negligent.

    - Example: 1 MUJI 6.1: "The law does **not** require that a physician exercise the highest degree of care." (Who said it did?) See Eades, Jury Instructions on Medical Issues, #3-29.

    - Example: "The mere fact of an accident does **not** mean that anybody was negligent." (Who said it was?)

    - Example: "The fact that the doctor did his best does not excuse him if he did **not** follow the standard of care." (Who said it did?)

  - Problem words: "mere" or "solely" or the like

    - Be on guard anytime an instruction contains these words-- they are often indicators of an instruction that is objectionable

    - The word "mere" implies that some errors, which fall below the standard of care, are not serious enough to be actionable. This could lead the jury to conclude incorrectly that a defendant is not liable for malpractice even if he is negligent.

  - "If Any"

    - Watch out for special verdicts using "if any" language. These have now been removed from MUJI 2d, but they may still be proposed by your opponents, or be in the courts stock instructions or special verdict.

    - The standard MUJI 1st instruction stated that the jury may award such damages, "if any," that will adequately compensate plaintiff. This might **waive your right to object** when the jury refuses to award general damages. Pruneda v Columbia Steel Casting, 2007 UT App 371 (unpublished decision). See Langton v. Int'l Transp., Inc., 491 P.2d 1211, 1214 (1971) (Jury must award general damages if it awards specials.)

    - "If any" eliminates this concept of entitlement to generals/non-economic upon a finding of special damages in tort cases.

  - "Alternative Methods"

    - Turner v University Hospital, 2013 UT 52, cast the accuracy of 2 MUJI CV324 into doubt. As of February 2014, the MUJI Committee is in the process of revising (or eliminating) this instruction, so stay tuned.

- The Advisory Committee note to 2 MUJI CV324 sets forth the reasons for objecting to this instruction, even though it is included in MUJI 2d.

- "Physician Not a Guarantor"
  - 1 MUJI 6.27: "A physician who undertakes to treat a patient does not guarantee that no complications will occur or that no adverse results will be experienced because of the treatment. The fact that a complication or adverse result occurs does not, by itself, imply or prove that the physician was negligent."
  - This instruction was intentionally deleted from MUJI 2d. As the Correlation Table notes:
    - See, Green v. Louder, 2001 UT 62, 29 P.3d 638 (“The mere fact that an accident or injury occurred does not support a conclusion that the defendant or any other party was at fault or negligent” was an inappropriate instruction) and Randle v. Allen, 863 P.2d 1329 (“Even if such an accident could have been avoided by the exercise of exceptional foresight, skill or caution, still no one may be held liable for injuries resulting from it” also inappropriate.) Randle noted that these types of instructions divert the jury from the primary issue of negligence and create the impression of "extra hurdles" to be overcome in order to prevail. It also noted that such instructions reemphasize a defendant's theory of the case and may constitute improper judicial comment on the evidence. 862 P.2d 1335-6.
  - Nevertheless, you'll still find counsel asking for this instruction, without thinking that they are setting themselves up for reversal on appeal.
  - See Eades, Jury Instructions on Medical Issues, #3-30 and 3-31.
  - Peters by Peters v. Vander Kooi, 494 N.W.2d 708, 712-14 (Iowa l993)

- "Accident Does Not Necessarily Mean Negligence"/Bad result does not mean Negligence
  - Green v. Louder 29 P.3d 638, 2001 UT 62 forbad the use of this instruction, formerly found at 1 MUJI 3.3. Party had admitted *some* fault; therefore it was inappropriate to give an instruction to the effect that fault could not be inferred from the fact of an accident alone. However, the Supreme Court went on to instruct the trial courts to cease using this instruction as it is unnecessary and confusing, like the "unavoidable accident" instruction in Randle v. Allen.
  - See Eades, Jury Instructions on Medical Issues, #3-32, 33, and 34.

- "Unavoidable Accident"
  - This instruction, 1 MUJI 3.4, should never be given and it is not found in MUJI 2d.
  - Randle v Allen, 862 P.2d 1329 (Utah 1993): "An unavoidable accident instruction creates a substantial potential for confusing and misleading the jury. The descriptive terms used in the instruction, “unavoidable” and “accident,” can be misleading because of their commonly understood meanings. Webster defines “accident” as “a usually sudden event or change occurring without intent or volition through carelessness, unawareness, ignorance, or a combination of causes and producing an unfortunate result (a traffic accident in which several persons are injured). . . A jury could rely on the general understanding that the term “accident” is simply an unfortunate and unavoidable injury-causing event for which there is no responsibility, even though under traditional tort concepts the accident was caused by negligence."

- "Mere error in judgment"

- See Eades, Jury Instructions on Medical Issues, #3-37
- This type of instruction is confusing and generally disfavored. See comment 3 to Eades, Jury Instructions on Medical Issues, #3-37 (6th Ed.)
- The central issue in a medical malpractice case is whether the doctor deviated from the standard of care, not what his mental state was. This introduces an element of "good faith," and implies that errors in judgment are not malpractice as long as they are not accompanied by something else, perhaps bad faith, or *gross* errors in judgment.
- Expert testimony which attempts to justify conduct by sweeping approval of some generalized, subjective "clinical judgment," offers neither facts susceptible of proof, nor objective standards consistent with evidentiary requirements for expert testimony. All experts, all parties, are held to the objective standard.
- The word "mere" implies that some errors, which fall below the standard of care, are not serious enough to be actionable. This could lead the jury to conclude incorrectly that a defendant is not liable for malpractice even if he is negligent. We all exercise judgment everyday. However we are required to exercise reasonable judgment. Someone who runs a red light exercises judgment but not reasonable judgment. This is negligence. The judgment that a doctor is required to exercise is reasonable medical judgment not just judgment. Failure to do so is negligence.
- There are many, many out-of-state cases discouraging the use of this instruction. Examples:
  - Parodi v Washoe Medical Center, 892 P.2d 588 (NV 1995)
  - Creasy v Hogan, 292 Or 154, 165-167, 637 P2d 114 (1981)
  - Bickham v. Grant, 861 So.2d 299 (Miss.2003)

- "Honest Mistake"
  - See discussion under "Error in Judgment"
  - The issue is not whether the defendant acted dishonestly or in bad faith; it is whether he met the standard of care-- regardless of his state of mind
- "Hindsight"
  - You will sometimes see defense counsel offering an instruction like this: "A doctor cannot be negligent merely because in hindsight he made a choice that turned out to be incorrect, as long as the initial choice was made in compliance with reasonable care."
  - This is an objectionable instruction, as it is both cumulative and argumentative. The concept of negligence already includes what a reasonable person would have foreseen before the injury occurred. There is no negligence when later hindsight shows that a better course might have been taken. See Eades, Jury Instructions on Medical Issues, #3-38.1 and Smith v Finch, 681 SE 2d 147, 149 (Ga. 2009).
- "Presumption of Due Care"
  - Occasionally you will see defense counsel offering this instruction:

- "Physicians are presumed to possess the degree of skill and learning which is possessed by the average member of the medical profession in good standing, practicing in the specialty of orthopedics and they are presumed to apply that skill and learning with ordinary and reasonable care in the treatment. If they did not possess the requisite skill and learning or if he or they did not apply it, the or they would be guilty of malpractice."

- This is objectionable for several reasons.

  - First, it presents the appearance of an "increased burden" that a plaintiff must surmount in order to prove negligence and serves to confuse the jury.

  - Second, there is no such "presumption" in the law, nor is this a "presumption" in the correct legal sense

  - Third, and most importantly, it is cumulative and unnecessary- it merely states the flip side of plaintiff's burden of proof: The burden of proving the non-existence of the presumed fact (due care) is the same as proving defendant's negligence by a preponderance of the evidence.

- Mathany v. Fairmount General Hospital, 575 S.E.2d 350, 358 (W.Va. 2002) ("Accordingly, we hold that when the jury charge in a negligence action includes an instruction stating the plaintiff's burden of proof, it is reversible error for the court to also include in the charge an instruction informing the jury of a presumption that the defendant has acted in accordance with the appropriate standard of care or duty."

- Gaston v. Hunter, 588 P.2d 326 (AZ 1978).

- Wardell v. McMillan, 844 P.2d 1052 (Wyo. 1992).

- **Objections Must Be *Timely***

  - Under Rule 51(f), you must make your objections **before** they are given to the jury or, in the case of oral instructions, before the jury deliberates.

  - Do not follow the formerly-common practice of having a chambers conference to decide on instructions, then moving on to closing argument, and only putting objections to instructions on the record after the jury retires to deliberate.

    - Jones v. Cyprus Plateau Mining Corp., 944 P.2d 357, 360 (Utah 1997)("This case is complicated by the trial court's failure to hear exceptions to the jury instructions on the record before the jury retired for its deliberations")

    - Nielson v. Pioneer Valley Hospital, 830 P.2d 270 (Utah 1992) ("trial judges are to take objections to jury instructions before the jury is dismissed to begin deliberations. It is all too common today to have counsel recite objections to the court reporter after the jury has retired and the judge has left the bench. This is ill-advised because it defeats the rule's primary function")

    - State v. Cowan, 490 P.2d 890 (Utah 1971)

    - Hill v. Cloward, 377 P.2d 186 (1962)

- **Objections Must Be *Specific***

  - It is not enough to say that the instruction "misstates the law" or is "inaccurate;" you must identify with specificity *why that is so*

- R.T. Nielson Co. v. Cook, 40 P.3d 1119, 2002 UT 11 (jury instructions must be objected to with specificity in order to give the trial court an opportunity to correct any errors or fill any inadequacies in the instructions given so that the jury may consider the case on the proper basis.).

- Jones v. Cyprus Plateau Mining, 944 P.2d 357, 359 (Utah 1997) (objection that instruction "misstates the law, the law in Utah and that it does not-well, that's the grounds for the exception" was inadequate).

- Nielsen v. Pioneer Valley Hosp., 830 P.2d 270, 271 (Utah 1992) Objection that jury instruction was improper statement of law of res ipsa loquitur, particularly with respect to common knowledge exception, was sufficiently specific to direct the judge's attention to claimed error.

- Dejavue v. US Energy, 993 P.2d 222, 1999 UT App 355.

- Anton v. Thomas, 806 P.2d 744. (Utah 1991)(objection to jury instruction which did not include statement with particularity as to what objection was and did not propose alternate instruction would not be reviewed on appeal.)

- VanDyke v. Mountain Coin Mach. Distribs., Inc., 758 P.2d 962, 964 (Utah Ct. App. 1988)

- Godesky v. Provo City, 690 P.2d 541 (Utah 1984) (stating that "the instruction is not suggested by, and is contrary to law," simply isn't good enough).

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

- Beehive Medical Electronics, Inc. v. Square D Co., 669 P.2d 859, 860-61 (Utah 1983) ([P]laintiffs' objections were phrased in similar, nonspecific language: the objections on the record to certain instructions are that each instruction "is not a correct statement of the law involving the case." Objections to certain other instructions claim that the instructions are "not supported by any evidence in the record." These objections fail to serve the purpose of the rule, which is to put the trial court on notice of error in the instructions and thereby afford the court an opportunity to correct the error before the case is presented to the jury. Expansion on nonspecific objections in a motion for a new trial or in a brief on appeal, as plaintiff did in this case, does not cure the lack of timeliness in making proper objections to the trial court. Therefore, on the basis of the objections made at the time of the trial, plaintiffs have not preserved their assignment of error."

- Tolman v. Winchester Hills Water Co., 912 P.2d 457, 460-61 (UT App. 1996)(developer failed to object specifically to jury instructions on privity grounds, failed to submit instructions on privity to refute application of third-party attorney fees rule, and failed to argue privity exception in any motions to court; thereby waived issues on appeal

- Lamkin v. Lynch, 600 P.2d 530 (Utah 1979) (objection that "I take general exception to the failure to give plaintiff's requested instructions and specifically those instructions with regard to the effect of violation of the Motor Vehicle Code where it is designed for the safety of people and vehicles, the same not having been given" was not sufficientl.

- **Alternative Instructions Should Be Offered**

  - In addition to objecting to a proposed instruction, where feasible you should also offer an alternative instruction that correctly states the law.

  - For example, if you are a defendant claiming that a comparative fault allocation must be made, it is your obvious duty to proposed an instruction on point (such as 2 MUJI CV 211) *and* a special verdict form including an allocation section, or you waive the point for purposes of both the post-trial motions and the appeal

- Kesler v. Rogers, 542 P.2d 354, 358 (Utah 1975)

- Anton v. Thomas, 806 P.2d 744, 747 (Utah 1991)(objection to jury instruction which did not include statement with particularity as to what objection was and did not propose alternate instruction would not be reviewed on appeal).

- Jones v. Cyprus Plateau Mining, 944 P.2d 357, 359 (Utah 1997) ("[b]ecause Cyprus neither requested an alternative instruction nor asked the court to reword its instruction, we find that Cyprus did not provide the trial court with a sufficient basis upon which to amend or correct its instructions. Cyprus failed to preserve its objection to instruction 41 adequately").

- **Making the Record**

  - Make certain that objections to instructions are made on the record-- be careful of chambers conferences in some courtrooms.

  - This has become all the more difficult when we are reliant on an audio record, and can only assume that the recorder has been turned on

  - Hansen v. Stewart, 761 P.2d 14, 16 (Utah 1988) (supplementation of record to show that required objections to instructions were made would not be permitted, where there were no means of verifying accuracy of alleged copies of appellants' proposed instructions.)

  - Holmstrom v CR England, 2000 Ut App 239, 8 P.3d 281, 289 (no clear record made on what ruling was on proferred instruction)

  - Hart v. Salt Lake County Com'n, 945 P.2d 125 (Utah 1997)(county waived claim that trial court erred by failing to include plaintiff motorist on special verdict form for purposes of apportioning fault, even though county's attorney allegedly requested during off-record conference in chambers that plaintiff be included on form, where there was no objection, on the record, to plaintiff's absence on form.

  - Home Sav. and Loan v. Aetna Cas. and Sur. Co., 817 P.2d 341 (Utah 1981)(court would not consider objections to verdict form where party did not make on-the-record objections to verdict form)

  - It gets tricky if the legal issue was decided on a pretrial motion, such as a motion in limine or an MSJ: do you need to renew at the time of trial?

    - Evidence Rule 103(b) addresses the problem of the need to renew pretrial objections to the admission of evidence:

      - *(b) Not Needing to Renew an Objection or Offer of Proof. Once the court rules definitively on the record — either before or at trial — a party need not renew an objection or offer of proof to preserve a claim of error for appeal.*

      - Note that the amended rule requires a definitive ruling from the trial court on the record that admits or excludes evidence.5 So ask for a definitive ruling; that is, make sure the specific evidence is addressed and the judge states that her ruling is final. Then confirm it in a written order. If that's not possible, you must renew your objection and, if needed, make an offer of proof at trial.

- Compare State v. Mitchell, 779 P.2d 1116, 1119 n.4 (Utah 1989) (a pretrial motion to suppress adequately preserves an issue for appeal, if the trial judge is the same judge who ruled on the motion and a hearing was held on the motion), with State v. Hansen, 2002 UT 114, ¶¶ 12-21, 61 P.3d 1062 (where an issue has been raised but the court defers ruling on it and plainly instructs the objecting party to re-raise the issue at trial, failure to re-raise the issue waives it for appeal); Erickson v. Wasatch Manor, Inc., 802 P.2d 1323, 1325-26 (Utah Ct. App. 1990) (the trial court did not err in admitting evidence precluded by its earlier ruling on a motion in limine where that ruling was conditional).

- See State v. Dominguez, 72 P 4 .3d 127, 2003 Utah Ct. App. 158 (under Rule 103, a party was not required to object during trial to evidence offered in accordance with the court's pretrial ruling); State v. Saunders, 992 P.2d 951, 1999 UT 59 (because defendant objected to court's pretrial ruling, he wasn't required to make a further objection at trial to preserve issue for appeal).

- As to motions for summary judgment, generally you do not need to renew a denied motion, IF it was denied on "solely legal" and not factual basis. Read these cases and be careful:

  - Normandeau v. Hanson Equipment, Inc., 215 P.3d 152, 2009 UT 44

  - Blosch v. Natixis, 2013 UT App 214, ¶20, ____ P3d _____

  - ASC Utah, Inc. v. Wolf Mountain Resorts, LC, 2013 UT 24, ____ P.3d _____

  - Wayment v. Howard, 2006 UT 56, ¶ 19, 144 P.3d 1147

- When in doubt, make a record at trial. For example, in a hypothetical of a defendant wanting a comparative fault allocation, if evidence adduced at trial indicates that a fault allocation might be justified, do NOT assume that your raising the issue in a pretrial partial MSJ preserves the issue for appeal: propose an instruction, propose a special verdict form that includes a fault allocation, and object to the special verdict form that does not include comparative fault.

- **Special Verdict Forms**

  - A special verdict form is a form of jury instruction. Ames v. Maas, 846 P.2d 468, 471 (Utah Ct.App.1993); Home Sav. and Loan v. Aetna Cas. and Sur. Co., 817 P.2d 341 (Utah 1981).

  - The special verdict form is subject to the same objection requirements as jury instructions: you must object to an incorrect verdict form, and you must propose an alternative

  - Special verdicts are also governed by Rule 49(a):

    - Special verdicts. The court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact. In that event the court may submit to the jury written interrogatories susceptible of categorical or other brief answer or may submit written forms of the several special findings which might properly be made under the pleadings and evidence; or it may use such other method of submitting the issues and requiring the written findings thereon as it deems most appropriate. The court shall give to the jury such explanation and instruction concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue. If in so doing the court omits any issue of fact raised by the pleadings or by the evidence, each party waives his right to a trial by jury of the issue so omitted unless before the jury retires he demands its submission to the jury. As to an issue omitted without such demand the court may make a finding; or, if it fails to do so, it shall be deemed to have made a finding in accord with the judgment on the special verdict.

- Hart v. Salt Lake County Com'n, 945 P.2d 125 (Utah 1997)(county waived claim that trial court erred by failing to include plaintiff motorist on special verdict form for purposes of apportioning fault, even though county's attorney allegedly requested during off-record conference in chambers that plaintiff be included on form, where there was no objection, on the record, to plaintiff's absence on form.

- Cambelt Intern. Corp. v. Dalton, 745 P.2d 1239 (Utah 1987)(plaintiff could not raise failure of trial court to give special verdict or interrogatories, where it did not object below, and plaintiff did not meet burden of showing special circumstances warranting review of instructional error which had not been properly preserved.

- **A Bad Instruction Given Doesn't Necessarily Mean a Reversal on Appeal**

  - Just because a wrong instruction was given, or a correct one refused, does not mean a reversal on appeal follows. The appellate courts have phrased the "harmless error" test in various ways as to jury instructions.

  - Errors in jury instructions merit reversal only when "confidence in the jury's verdict is undermined." Turner v. University Hospital, 2013 UT 52, Par. 17, *citing* Hess v. Canberra Dev. Co., 2011 UT 22, ¶ 38, 254 P.3d 161.

  - Vitale for Christensen v. Belmont Springs, 916 P.2d 359 (Utah.App.1996) (In order for improper jury instruction to warrant new trial, court must conclude that error was “prejudicial,” or tended to mislead jury to prejudice of complaining party or insufficiently or erroneously advise jury on law.)

  - Stevensen 3rd East, LC v. Watts, 210 P.3d 977 (Utah. App. 2009)(appellate court must find both that the instruction was inaccurate and that there is not a mere possibility, but a reasonable likelihood that the error affected the result; if it appears highly probable that the jury considered the correct factors during its deliberations even though not specifically instructed to do so, a court's error in instructing the jury will not be considered to have affected the verdict).

  - Laws v. Blanding City, 893 P.2d 1083 (Utah. App. 1995)(appellate court must conclude not only that trial court erred, but that error was prejudicial, that is, error tended to mislead jury to prejudice of complaining party).

  - From the *Utah Appellate Blog* (Zimmerman Jones & Booher) re Miller v UDOT, 2012 UT 54 (Clemens A. Landau on September 6th, 2012)

    - *http://www.utahappellateblog.com/2012/09/06/utah-supreme-court-miller-v-udot-jury-instructions-jury-questionnaires-and-witness-exclusion*

    - "The court recently issued Miller v. Utah Department of Transportation, 2012 UT 54, in which it reversed a jury verdict and remanded for a new trial on the ground that the district court abused its discretion in failing to give an adverse inference instruction. . .

    - The Miller decision’s relatively brief discussion of the adverse jury instruction issue raises a number of questions as to the degree of review that will be conducted in a particular case. After Miller, there is no longer any doubt that some refusals to give jury instructions which are not central to a party’s “theory of the case” will be reviewed for an abuse of discretion. Id. at 41 (noting that a refusal to give an instruction pertaining to a damages cap or the accounts from which damages will be funded, are solidly within the discretion of the district court).

- Other decisions, such as refusals to instruct a jury on the elements of a claim or a theory of the case that is supported by competent evidence, easily fall outside of the district court's discretion and can be reversed because those instructions are "legally required." The middle ground between these two extremes is more difficult to predict. Id. at ¶41. If a proponent of an instruction can make a colorable argument that, absent the requested instruction, "a jury might well assume" something about a "potentially crucial" aspect of the proponent's case, they are free under Miller to argue that the district court's discretion was "cabined" because under those circumstances the proponent was "legally entitled" to the instruction."