



**MODEL CRIMINAL JURY INSTRUCTIONS COMMITTEE**  
**Meeting Minutes of:**  
**Thursday, September 20, 2012**  
**3:00 – 5:00 p.m.**  
**Held at the Supreme Court – 8th floor conference room**

**Attendees:**

Justice Coats (Chair), Judge Dailey (Vice Chair), Judge Egelhoff, Judge K. Romeo, Judge Samour, Judge Tuttle, and Judge Warner.

**Telephone participants:**

Judge Burback, Judge Greenacre, Judge Lammons, Judge Phillips, and Judge Robison.

**Staff:**

Andrew Field (Reporter), and Penny Wagner (Court Services Analyst).

**I. Approval of Minutes**

The Committee approved the minutes for the August 16, 2012, meeting.

**II. Judicial Conference Review**

The Committee discussed the comments and suggestions of judges who attended the progress report at the Judicial Conference.

**III. Reporter's Update**

The Reporter reviewed the proposed draft materials that he had completed and posted on the Committee's secure web site since the last meeting: Chapter 5 (Fraud Offenses), and Chapter 6 (Offenses Involving the Family Relations).

**IV. Affirmative defenses: discussion of memoranda from Justice Coats and Judge Samour, and proposed instructions H:12 through H:15.**

The Committee agreed to begin all affirmative defense instructions with the following sentence:

The evidence presented in this case has raised the affirmative defense of "[name of affirmative defense]" as a defense to [insert name(s) of offense(s)].

The Committee also agreed to use the following language as the second sentence for Instruction H:12 (Use of Non-Deadly Physical Force (Defense Of Person)), and to number the conditions that follow:

The defendant was legally authorized to use physical force upon another person without first retreating if:

Although the Committee debated a proposal to revise the “without first retreating” language, the Committee concluded this was the most accurate way to state the relevant principle of law.

Further, the Committee agreed to use a modified version of this sentence in all of the other affirmative defense instructions. The sentence will be tailored to the various defenses, but the essential component will be a statement that: “The defendant’s conduct was legally authorized if:”).

An overwhelming majority of the Committee members voted to include the following language in all affirmative defense instructions, immediately after the enumerated conditions:

The prosecution has the burden to prove, beyond a reasonable doubt, that the defendant’s conduct was not legally authorized by this defense. In order to meet this burden, the prosecution must disprove, beyond a reasonable doubt, at least one of the above numbered conditions.

After considering all the evidence, if you decide the prosecution has failed to meet this burden, you must return a verdict of not guilty of [insert name of offense(s)].

There was also substantial agreement that an additional concluding paragraph is necessary to inform the jury what to do if the prosecution meets its burden. After considerable debate, a more tenuous majority settled on language explaining that the jury is to find the defendant guilty if it decides the prosecution has carried its burden with respect to the affirmative defense and all other elements of the offense.

The Committee agreed that, because in most cases only one of the self-defense exceptions of section 18-1-704(3) will apply (i.e., provocation, initial aggressor, and combat by agreement), it is unnecessary to include bracketed conjunctions at the end of the subparagraphs of the self-defense instructions that explain the provocation and initial aggressor exceptions in sections 18-1-704(3)(a) and (3)(b). Accordingly, the Committee asked the Reporter to draft comments explaining this decision.

The Committee asked the Reporter to draft comments explaining that, for offenses such as third degree assault that have alternative mens reas of “knowingly”

and “recklessly,” separate instructions should be used to define self-defense as (1) an affirmative defense; and (2) pursuant to section 18-1-704(4).

After engaging in an extensive discussion of the combat by agreement exception of section 18-1-704(3)(c), the Committee asked the Reporter to draft a memorandum summarizing how the relevant principles of law apply to the various proposals made by Committee members. The Committee will revisit this issue at the next meeting.

## **V. Format**

The Committee agreed to abandon the cumbersome “he or she” format that it had previously agreed to adopt and, instead, to enclose all female pronouns within brackets (i.e., “he [she],” “his [her],” etc.). The Reporter will revise all draft materials to reflect his change.

## **VI. Next Meeting**

The next meeting will be held in the same location, at the same time, on Thursday, October 18, 2012.

The Chair will set an agenda and have the Reporter distribute relevant written materials in advance of the meeting.

The Chair adjourned the meeting at 4:57 p.m.

Respectfully submitted,

Andrew Field, Reporter.