

MEETING AGENDA

**UTAH SUPREME COURT ADVISORY COMMITTEE
ON THE RULES OF EVIDENCE**

Matheson Courthouse
450 South State Street
Council Room (N301)

February 13, 2018
5:15 p.m. to 6:45 p.m.

Mr. John Lund, Presiding

Light dinner will be served

<u>MEMBER PRESENT</u> Hon. Matthew Bates Ms. Tenielle Brown Ms. Deborah Bulkeley Ms. Nicole Salazar-Hall Mr. Mathew Hansen Mr. Ed Havas Mr. Chris Hogle Mr. John Lund Hon Linda Jones Hon. David Mortensen Mr. Terry Rooney Ms. Lacey Singleton Ms. Michalyn Steele Hon. Vernice Trease Ms. Teresa Welch Mr. Dallas Young Mr. Adam Alba Ms. Jacey Skinner	<u>GUESTS PRESENT</u>
<u>MEMBERS EXCUSED</u>	<u>STAFF PRESENT</u> Ms. Cathy Dupont Ms. Nancy Merrill Mr. Richard Schwermer

1. Welcome & Approval of Minutes (1/9/18) (attached).....*John Lund*

2. Report to the Supreme Court.....*John Lund*
3. Rule 507 First Responder Peer Review (*attached*).....*JudgeMortensen*
4. H.B. 298 Victim Advocate Confidentiality Amendments (*attached*).....*Committee*
5. Rule 617 Eyewitness Identification(*attached*).....*Judge Jones*
6. Other Business.....*John Lund*

TAB 1

**UTAH SUPREME COURT ADVISORY COMMITTEE
ON THE RULES OF EVIDENCE**

MEETING MINUTES

**Tuesday – January 9, 2018
5:15 p.m.
Council Room**

Mr. John Lund, Presiding

<p><u>MEMBER PRESENT</u> Judge Mathew Bates Ms. Tenielle Brown Ms. Nicole Salazar-Hall Mr. Mathew Hansen Mr. Ed Havas Mr. Chris Hogle Mr. John Lund Judge David Mortensen Ms. Lacey Singleton Ms. Teresa Welch Mr. Dallas Young</p>	<p><u>GUESTS PRESENT</u></p>
<p><u>MEMBERS EXCUSED</u> Ms. Deborah Bulkeley Judge Linda Jones Mr. Terry Rooney Ms. Jacey Skinner Ms. Michalyn Steele Judge Vernice Trease</p>	<p><u>STAFF PRESENT</u> Ms. Nancy Merrill Mr. Richard Schwermer Ms. Cathy Dupont</p>

1. WELCOME AND APPROVAL OF MINUTES: (Mr. John Lund)

Mr. Lund welcomed everyone to the meeting; he also welcomed Cathy Dupont, Appellate Court Administrator for the Court.

The following amendments were made to the minutes:

-include Jacey Skinner and Judge Trease to **MEMBERS EXCUSED**

-Item 2 the last bullet point should read “making inadmissible”

-Item 2 the second bullet point edit the word “elusive” to read “exclusive”

Motion: Judge Mortensen moved to approve the amended minutes from the Evidence Advisory meeting held on November 14, 2017. Judge Bates seconded the motion. The motion carried unanimously.

2. Report on meeting with the Supreme Court:

Mr. Schwermer passed around the current draft of Rule 504 and Committee note to the Committee for discussion. The Committee discussed the drafts and suggested the following: (6)(C) amend the word “provides” to read “provide”

The Committee addressed Rule 617 and suggested the following:

- **(b) Admissibility in General.** “In cases where eyewitness identification is contested, the court shall exclude the evidence if no fact finder, considering the factors in this subsection (b), could reasonably rely on the eyewitness identification.”

-**(c) Identification Procedures.** The Committee discussed the language “clear and convincing evidence.” After further discussion they agreed to recommend the wording “unless the court determines that the indicia of reliability substantially outweigh the danger of a mistaken identification”

- **(e) Expert Testimony.**

The Committee agreed to add an additional subsection **(f) Jury Instruction.** The language would read, “when the court admits eyewitness identification evidence, the court may, and shall when requested, instruct the jury consistent with the factors outlined in (B)”

Mr. Lund noted that the Committee agreed to address the Committee Note after the Supreme Court reviews the proposed rule.

Motion: Judge Bates moved to recommend the revised rule to the court including changes to sections (b), (c) and new (f). The motion was seconded. The motion passed, Dallas Young voted no as he is opposed to the term “reliable” in the rule.

3. First Responder Privilege:

Judge Bates reported about the work that the subcommittee has done so far on Rule 506. The Committee discussed the proposed draft and how to approach addressing a first responder privilege. After further discussion the Evidence Advisory Committee agreed to draft a stand-alone rule. The subcommittee agreed to meet in the next week to redraft the proposed rule.

Motion: Adam Alba moved to support in concept the draft in progress as a stand-alone Rule 507 consistent with the proposed bill and rules of privilege. Nicole Salazar-Hall seconded the

motion. The motion passed unanimously.

4. Other Business:

The Committee agreed to hold the next Evidence Advisory Committee meeting on February 13, 2018

Next Meeting: February 13, 2018
5:15 p.m.
AOC, Council Room

TAB 3

Rule 507. First Responder Peer Review.

(a) Definitions.

- (1) "Communication" means an oral statement, written statement, note, record, report, or document made during, or arising out of, a meeting with a peer support team member.
- (2) "Emergency medical service provider peer support team member" means a person who is:
 - a. an emergency medical service provider, as defined in section Utah Code Ann. § 26-8a-102(7), a regular or volunteer member of a rescue unit acting as an emergency responder as defined in Utah Code Ann. 53-2a-502, or other person who has been trained in peer support skills; and
 - b. who is officially designated by the supervisor of an emergency medical service agency as a member of an emergency medical service provider's peer support team under Utah Code Ann. 78B-5-901; and
 - c. functioning within the peer support guidelines under Utah Code Ann. 78B-5-901.
- (3) "Law enforcement or firefighter peer support team member" means a person who is:
 - a. a peace officer, civilian employee, or volunteer member of a law enforcement agency or a regular or volunteer member of a fire department or other person who has been trained in peer support skills; and
 - b. who is officially designated by a police chief, the Superintendent of the Utah Highway Patrol, a sheriff, or a fire chief as a member of a law enforcement agency's peer support team or a fire department's peer support team under Utah Code Ann. 78B-5-901; and
 - c. Functioning within the peer support guidelines under Utah Code Ann 78B-5-901.
- (4) "Emergency medical service Ppeer support member" or "law Enforcement or firefighter peer support member" does not

include a person who was a witness or a party to an incident ~~connected with~~ that prompted the delivery of the peer support services.

- (5) “Trained” means completing a peer support training program as provided in Utah Code Ann. 78B-5-901.

(b) Statement of the Privilege. An emergency medical service provider, peace officer, ~~volunteer member of a rescue unit under Utah Code Ann. 53-2a-502,~~ or firefighter has a privilege to refuse to disclose and to prevent any emergency medical service provider peer support team ~~member~~ or law enforcement or firefighter peer support team member from disclosing ~~information transmitted among persons~~ communications made by a person participating in peer support services ~~to the peer support team member,~~ including group therapy sessions.

(c) Who May Claim the Privilege. The privilege may be claimed by the ~~patient~~ person who received the peer support services, or the guardian or conservator of the ~~patient~~ person who received the peer support services. The person who was the ~~physician or mental health therapist~~ peer support team ~~member~~ at the time of the communication is presumed to have authority during the life of the ~~patient~~ person who received the peer support services to claim the privilege on behalf of the ~~patient~~ person who received the peer support services.

(d) Exceptions. No privilege exists under paragraph (b) for:

(1) ~~information received by communication to~~ a peer support team member that is indicative of actual or suspected child neglect or abuse;

(2) ~~communication to a peer support team member that is~~ ~~or~~ indicative that a person receiving peer support ~~services~~ is a clear and immediate danger to the person’s self or others,

(3) ~~communication to a peer support team member that establishes reasonable cause for the peer support team member to believe that the person receiving peer support has a mental illness, is an imminent threat to the person’s self or others, or is a person with a disability;~~ ~~or~~

(4) ~~to information given in the course of a criminal investigation, or to an admission of criminal conduct, or a breach of department policy exists and that breach amounts to a violation of laws that are normally enforced~~

by law enforcement communicated, communication to the peer support team member that the peer support team member has reasonable cause to believe is indicative of criminal conduct involving the person receiving the peer support services; or

(5) communication to a peer support team member if the person receiving peer support services gives affirmative consent to disclosure of the communication to third parties.

TAB 4

VICTIM ADVOCATE CONFIDENTIALITY AMENDMENTS

2018 GENERAL SESSION

STATE OF UTAH

Chief Sponsor: Michael K. McKell

Senate Sponsor: _____

LONG TITLE

General Description:

This bill addresses confidentiality related to victim advocates.

Highlighted Provisions:

This bill:

- ▶ enacts the Confidential Communications with Crime Victim Advocates Act,

including:

- defining terms;
- outlining the scope of the act;
- providing when communications or any other information is confidential;
- requiring training and supervision; and
- providing exceptions.

Money Appropriated in this Bill:

None

Other Special Clauses:

None

Utah Code Sections Affected:

ENACTS:

77-38-401, Utah Code Annotated 1953

77-38-402, Utah Code Annotated 1953

77-38-403, Utah Code Annotated 1953



28 77-38-404, Utah Code Annotated 1953

29

30 *Be it enacted by the Legislature of the state of Utah:*

31 Section 1. Section 77-38-401 is enacted to read:

32 **Part 4. Confidential Communications with Crime Victim Advocates Act**

33 **77-38-401. Title.**

34 This part is known as the "Confidential Communications with Crime Victim Advocates
35 Act."

36 Section 2. Section 77-38-402 is enacted to read:

37 **77-38-402. Definitions.**

38 As used in this part:

39 (1) "Crime victim advocate" means a person, including a domestic violence victim
40 advocate, who is employed or authorized by a public or private entity to provide counseling,
41 treatment, or other supportive assistance to a victim.

42 (2) "Victim" means the same as "victim of a crime" as defined in Section 77-38-2.

43 Section 3. Section 77-38-403 is enacted to read:

44 **77-38-403. Scope of part.**

45 (1) If Title 53B, Chapter 28, Part 2, Confidential Communications for Institutional
46 Advocacy Services Act, applies, that part governs.

47 (2) If Part 2, Confidential Communications for Sexual Assault Act, applies, that part
48 governs.

49 Section 4. Section 77-38-404 is enacted to read:

50 **77-38-404. Confidentiality -- Exceptions.**

51 (1) Unless the victim consents in writing to the disclosure, a crime victim advocate
52 may not disclose as a witness or otherwise any communication made by or with a victim,
53 including any communication made to or in the presence of others.

54 (2) Unless the victim consents in writing to the disclosure, a crime victim advocate
55 may not disclose a record, note, document, correspondence, report, or memorandum that
56 contains an opinion, theory, or other information made while advising, counseling, or assisting
57 the victim or that is based on communications made by or with the victim, including
58 communications made to or in the presence of others.

59 (3) A communication or information described in Subsection (1) or (2) is not
60 confidential if:

61 (a) the crime victim advocate knows that the victim will give or has given perjured
62 testimony;

63 (b) the communication or information contains exculpatory evidence; or

64 (c) the crime victim advocate is under a duty to report a suspected case of child abuse
65 or neglect under Section 62A-4a-403 or any other law other than this part.

66 (4) (a) A defendant may make a motion for disclosure of confidential information.

67 (b) If the court finds there is reasonable cause to believe that the communication or
68 information is exculpatory or that the victim will give or has given perjured testimony, the
69 court shall hold a hearing in camera.

70 (c) Communication or information that the court finds is exculpatory or reveals
71 perjured testimony by the victim shall be disclosed to the defendant.

72 (5) If, with the written or oral consent of the victim, the crime victim advocate
73 discloses to the prosecutor or a law enforcement agency a communication between the victim
74 and the crime victim advocate or a record, note, document, correspondence, report, or
75 memorandum, the prosecutor or law enforcement agency shall disclose the communication or
76 information to the defendant's attorney only if the communication or information is otherwise
77 exculpatory.

78 (6) Notwithstanding Subsections (1) and (2), if a victim consents either orally or in
79 writing, a crime victim advocate may disclose information to other professionals and
80 administrative support persons that the crime victim advocate works with for the purpose of
81 assisting the crime victim advocate in providing services to the victim and to the court in
82 furtherance of any victim's right pursuant to this chapter.

83 (7) (a) To qualify for the confidentiality prescribed in this section, a domestic violence
84 victim advocate must have at least 30 hours of training in assisting victims. A portion of this
85 training must include an explanation of this section.

86 (b) The training prescribed in this Subsection (7) may be provided by the entity for
87 which the person provides victim services or by an outside agency that issues a certificate of
88 completion. The records custodian of the entity for which the person provides victim services
89 shall maintain the training documents.

90 (8) A crime victim advocate who is a volunteer shall perform all activities under
91 qualified supervision.

Legislative Review Note
Office of Legislative Research and General Counsel

TAB 5

(a) Definitions

(1) **“Eyewitness Identification”** means witness testimony or conduct in a criminal trial that identifies the defendant as the person who committed a charged crime.

(2) **“Identification Procedure”** means a lineup, photo array, or showup.

(3) **“Lineup”** means a live presentation of multiple individuals, before an eyewitness, for the purpose of identifying or eliminating a suspect in a crime.

(4) **“Photo Array”** means the process of showing photographs to an eyewitness for the purpose of identifying or eliminating a suspect in a crime.

(5) **“Showup”** means the presentation of a single person to an eyewitness in a time frame and setting that is contemporaneous to the crime and is used to confirm or eliminate that person as the perceived perpetrator.

(b) Admissibility in General. In cases where eyewitness identification is contested, the court shall exclude the evidence if no ~~reasonable juror, instructed on and applying~~ factfinder, considering the factors in this subsection (b), could ~~find~~ reasonably rely on the eyewitness identification ~~reliable~~. In making this determination, the court shall consider:

(1) Whether the witness had an adequate opportunity to observe the actor committing the crime;

(2) Whether the witness’s degree of attention to the actor committing the crime was hindered because of a weapon or any other distraction;

(3) Whether the witness had the capacity to observe the actor committing the crime, including the physical and mental acuity to make the observation;

(4) Whether the witness was aware a crime was taking place and the likelihood that the witness would perceive, remember, and relate it correctly;

(5) Whether there was any difference in race between the witness and the actor committing the crime;

(6) The length of time that passed between the witness’s original observation and the time the witness identified the actor;

(7) Any instance in which the witness either identified or failed to identify the actor and whether this remained consistent thereafter;

(8) Whether the witness was exposed to opinions, photographs, or any other information or influence that may have affected the independence of the witness in making the identification; and

(9) Whether any other aspect of the identification was shown to affect reliability.

(c) Identification Procedures. If an identification procedure was administered to the witness by law enforcement and the procedure is contested, the court must determine whether the identification procedure was unnecessarily suggestive or conducive to mistaken identification. If so, the eyewitness identification must be excluded unless ~~there is clear and convincing evidence that the eyewitness identification is reliable under subpart (b)~~ [the court finds that] the indicia of reliability substantially outweigh the danger of a mistaken identification.

(1) Photo Array or Lineup Procedures. To determine whether a photo array or lineup is unnecessarily suggestive or conducive to mistaken identification, the court should consider the following:

(A) Double Blind. Whether law enforcement used double blind procedures in organizing a lineup or photo array for the witness making the identification. If law enforcement did not use double blind procedures, the court should consider the degree to which the witness's identification was the product of another's verbal or physical cues.

(B) Instructions to Witness. Whether, at the beginning of the procedure, law enforcement provided instructions to the witness that

(i) the person who committed the crime may or may not be in the lineup or depicted in the photos;

(ii) it is as important to clear a person from suspicion as to identify a wrongdoer;

(iii) the person in the lineup or depicted in a photo may not appear exactly as he or she did on the date of the incident because features such as weight and head and facial hair may change; and

(iv) the investigation will continue regardless of whether an identification is made.

(C) Selecting Photos or Persons and Recording Procedures. Whether law enforcement selected persons or photos as follows:

(i) Law enforcement composed the photo array or lineup in a way to avoid making a suspect noticeably stand out, and it composed the photo array or lineup to include persons who match the witness's description of the perpetrator and who possess features and characteristics that are

reasonably similar to each other, such as gender, race, skin color, facial hair, age, and distinctive physical features;

(ii) Law enforcement composed the photo array or lineup to include the suspected perpetrator and at least five photo fillers or five additional persons;

(iii) Law enforcement presented individuals in the lineup or displayed photos in the array using the same or sufficiently similar process or formatting;

(iv) Law enforcement used computer generated arrays where possible; and

(v) Law enforcement recorded the lineup or photo array procedures.

(D) Documenting Witness Response. Whether law enforcement asked the witness how certain he or she was of any identification and documented all responses, including initial responses.

(E) Multiple Procedures or Witnesses. Whether or not law enforcement involved the witness in multiple identification procedures wherein the witness viewed the same suspect more than once and whether law enforcement conducted separate identification procedures for each witness, and the suspect was placed in different positions in each separate procedure.

(2) Showup Procedures. To determine whether a showup is unnecessarily suggestive or conducive to mistaken identification, the court should consider the following:

(A) Whether law enforcement documented the witness's description prior to the showup.

(B) Whether law enforcement conducted the showup at a neutral location as opposed to law enforcement headquarters or any other public safety building and whether the suspect was in a patrol car, handcuffed, or physically restrained by police officers.

(C) Whether law enforcement instructed the witness that the person may or may not be the suspect.

(D) Whether, if the showup was conducted with two or more witnesses, law enforcement took steps to ensure that the witnesses were not permitted to communicate with each other before or after any procedure regarding the identification of the suspect.

(E) Whether the showup was reasonably necessary to establish probable cause.

(F) Whether law enforcement presented the same suspect to the witness more than once.

(G) Whether the suspect was required to wear clothing worn by the perpetrator or to conform his or her appearance in any way to the perpetrator.

(H) Whether the suspect was required to speak any words uttered by the perpetrator or perform any actions done by the perpetrator.

(I) Whether law enforcement suggested, by any words or actions, that the suspect is the perpetrator.

(J) Whether the witness demonstrated confidence in the identification immediately following the procedure and law enforcement recorded the confidence statement.

(3) Other Relevant Circumstances. In addition to the factors for the procedures described in parts (1) and (2) of this subsection (c), the court may evaluate an identification procedure using any other circumstance that the court determines is relevant.

(d) Admissibility of Photographs. Photographs used in an identification procedure may be admitted in evidence if:

(1) the prosecution has demonstrated a reasonable need for the use;

(2) the photographs are offered in a form that does not imply a prior criminal record; and

(3) the manner of their introduction does not call attention to their source.

(e) Expert Testimony. When the court admits eyewitness identification evidence, it may also receive related expert testimony upon request.

(f) Jury Instruction. When the court admits eyewitness identification evidence, the court may, and shall if requested, instruct the jury consistent with the factors in (b).