UTAH SUPREME COURT ADVISORY COMMITTEE ON THE RULES OF EVIDENCE

MEETING MINUTES
Tuesday – March 19, 2018
5:15 p.m. – 6:45 p.m.
Council Room, Matheson Courthouse

MEMBER PRESENT	MEMBERS EXCUSED	STAFF PRESENT	GUESTS PRESENT
Adam Alba	Judge Vernice Trease	Keisa Williams	Jensie Anderson
Deborah Bulkeley	Tenielle Brown	Nancy Merrill	
Nicole Salazar-Hall	Lacey Singleton		
Mathew Hansen	Judge Matthew Bates		
Ed Havas	Michalyn Steele		
Chris Hogle	Terry Rooney		
John Lund, Chair	Jacey Skinner		
Judge Linda Jones			
Judge David Mortensen			
Michalyn Steele			
Teresa Welch			
Dallas Young			

1. Welcome and Approval of Minutes

Mr. Lund welcomed everyone to the meeting and announced that Keisa Williams, AOC Associate General Counsel, would be staffing the Evidence Advisory Committee going forward. Keisa introduced herself to the Committee.

Motion: Judge Jones moved to approve the minutes from the Evidence Advisory Committee meeting on February 5, 2019. Deb Bulkeley seconded the motion. The motion carried unanimously.

2. Legislative Session Review

Rule 512 / HJR 3 / HB 53

Mr. Lund reviewed HJR 3, a joint resolution passed during the legislative session creating a new rule of evidence (URE 512) related to victim communications. The resolution includes a delayed effective date of July 31, 2019, allowing the court to adopt its own version of the rule no later than July 30, 2019, at which point the resolution does not take effect.

The Committee expressed concern regarding the breadth of the privilege and the ability of a guardian to waive on behalf of a victim. After additional discussion, the Committee formed a subcommittee to work on a rule draft for consideration at the next meeting. The subcommittee

will be comprised of Dallas Young, Deborah Bulkeley, and Judge Bates. Ms. Williams will send the members a follow-up email and notify Judge Bates that he has been elected the Chair. The Committee asked Ms. Williams to invite Representative Snow to the next meeting in order to solicit his feedback during substantive discussions regarding this rule.

Rule 417 / SJR 8 / SB 103

SJR 8 is a joint resolution passed during the legislative session creating URE 417, which prohibits the admissibility of evidence regarding a defendant's expressions or associations as it relates to penalty enhancements for a defendant's selection of a victim. The Committee took no action on this rule.

HJR 25

HJR 25 is a joint resolution which did not pass during the legislative session. The resolution was sponsored by Representative Ken Ivory and sought to amend URE 409 regarding expressions of sympathy and compassion by nonprofit entities. Representative Ivory will be invited to a future meeting to discuss this rule. The Committee took no action.

3. Rule 804

The Committee will address Rule 804 at the next meeting.

4. Rule 106

Judge Mortensen and Teresa Welch discussed their proposed amendments to URE 106. This rule amendment was derived from the Committee's discussions on January 8, 2019 regarding *State v. Sanchez*. During that meeting, the Committee agreed that Rule 106 is a timing rule at a minimum and asked for a short draft with a privilege backstop.

Judge Mortensen recommended striking subsection (b) because otherwise it would be susceptible to gamesmanship. Ms. Welch stated that the Committee's original intention was to make the rule a timing and a trumping function, and to have a privilege backstop, meaning the rule should trump everything except for privilege. However, that led to concerns regarding gamesmanship. After additional discussion, the Committee agreed to strike subsection (b) entirely.

Ms. Welch noted that the subcommittee was also asked to determine what is necessary and sufficient for introducing the writing or recorded statement. Once a written statement is introduced, Rule 106 applies. If you have an oral statement, Rule 611 is triggered. In *State v. Sanchez* (para 21) the court said it had previously left open the question about whether Rule 106 applies to transcribed oral statements that are used extensively at trial but are not actually introduced into evidence. Some courts have said reading a writing or recorded statement into the record or directly quoting it on cross examination is enough, while other courts require actual introduction of the evidence before Rule 106 applies. Currently, jurisdictions are split on what triggers the application of Rule 106. Ms. Welch recommended that the Committee take a

position on which approach is correct and then either add it to the rule or include a committee note. Ms. Welch reviewed several relevant cases.

The Committee discussed the difference between "introducing" and "admitting" evidence and how to define "introduce." The Committee reviewed Rule 612, which uses "introduced" to mean "admitted" and whether the two rules should be consistent. The Committee discussed the fairness requirement and agreed that the word "necessary" is important because there are circumstances when admission of the entire statement or document is prejudicial or irrelevant. The word "fairness" was not used because caselaw has defined "fairness" as "necessary to qualify, explain, or place into context the portion already introduced."

Mr. Havas reviewed Utah Rule of Civil Procedure 32, which addresses the use of all or part of a deposition, specifically subsection (a)(4) "If only part of a deposition is offered into evidence…an adverse party may require him to introduce any other part which ought in fairness to be considered with the part introduced…" Under URCP 32, you read part of the deposition into the record, but the deposition itself is not admitted into evidence.

After additional discussion, the Committee amended the language of Rule 106 as follows:

- (a) If a party introduces all or part of a writing or recorded statement, <u>or testimony of the contents thereof,</u> an adverse party may…

<u>Motion</u>: Teresa Welch made a motion to delete subsection (b) entirely, and to approve the language changes to subsection (a) as outlined above. Adam Alba seconded the motion. The motion passed unanimously.

5. Rule 617

Judge Jones discussed amendments to Rule 617. At its January 8, 2019 meeting, the Committee asked the Rule 617 subcommittee to review the public comments and:

- Provide a brief summary of the policy objections and debate;
- Identify any constructive suggestions for improvements to the rule;
- Identify functionality questions that the Committee did not address in its previous research of Rule 617; and
- Consider adding an explanation of the intent of the rule to the Committee Note.

Several comments regarded issues discussed and addressed by the Committee and subcommittee prior to publication:

- Various prosecutor offices concerned that Rule 617 would allow the judge to usurp the function of the jury. Committee discussion involved the fact that it is not unusual for a judge to have an evidentiary hearing on threshold issues, whether it's expert issues or Rule 412 or Rule 404(b) issues, and Rule 617 falls within that category of evidence.
- The rule doesn't mirror the federal constitutional standard. The Committee presented variations of Rule 617 to the Supreme Court. The Court amended the language to what was eventually published for comment.

- The applicability of Rule 617 to eyewitness identification in every case, even if the witness knows the defendant. The Committee included language addressing that point in the introductory paragraph of the Committee Note.

Judge Jones highlighted two points in the public comments that weren't raised by the Committee or subcommittee. First, how would the Committee keep up with the science to amend Rule 617 going forward? Should there be a standing Rule 617 subcommittee? Second, what would the training expenses be for law enforcement?

Judge Mortensen stated that he believed the Committee did discuss evolving science and subsection (3) was the Committee's response to that question. The Committee discussed whether to include a reference to "evolving science" or potential future revisions in subsection (3) or the Committee Note. The Committee also discussed whether to create a standing Rule 617 subcommittee to address future changes related to evolving science. Ultimately, the Committee decided to add language to subsection (b) and to the end of the first paragraph of the Committee Note to clarify the Committee's intention that the language in the rule itself is meant to be broad enough to encompass evolving science. Final proposed amendments:

- **(b) Admissibility in General:** In cases where eyewitness identification is contested, the court shall exclude the evidence if a factfinder, considering the factors in this subsection (b), could not reasonably rely on the eyewitness identification. In making this determination, the court may consider expert testimony and other evidence on the following <u>non-exclusive factors</u>:

- **Committee Note** (Added to the end of the1st paragraph): <u>As scientific research advances, other factors in addition to those outlined in subsection (b) may be considered.</u>

Professor Jensie Anderson, University of Utah S.J. Quinney College of Law, informed the committee that her organization, through the National Innocence Project, conducted training on eyewitness identification with Salt Lake City Police and the Unified Police. The training will be offered free of charge to any police department and will be instructed by social scientists and experts in the field, including police chiefs who have adopted the practices and are experienced in training police officers. The training explains evolving science and focuses on both rural and urban police forces. If a police department would like to receive this free training, they can contact Professor Anderson and she will set it up. Professor Anderson offered to send a letter to every police department in Utah making them aware that the training is available. The Committee suggested that she seek support from the Utah Chiefs of Police and Sheriff's Association in sending a joint letter encouraging law enforcement agencies to take advantage of the training. The Committee thanked Professor Anderson for her efforts.

The Committee discussed the option of including "non-exclusive factors" to subsections (c)(1) and (2), but ultimately determined that it was unnecessary because subsection (3) is sufficient.

Judge Jones directed the Committee to the amendments in subsection (c)(1)(D). Those changes were based on public comments made by scientists and academics who study perception and

eyewitness memory. Some Committee members expressed concern that the word "immediate" was vague and invited litigation. After discussion, the Committee determined that "immediately after the identification" should be deleted, and the word "timely" should be included instead. Final proposed amendment:

- **(c)(1)(D) Documenting Witness Response.** Whether law enforcement timely asked the witness how certain he or she was of any identification and documented all responses, including initial responses; and whether law enforcement refrained from giving any feedback regarding the identification.

Mr. Lund discussed the status of the rule draft and approval process. Rule 617 was approved by the Court for public comment, the comment period expired and the Committee reviewed and addressed the comments. The Committee did not making any changes which would warrant sending the draft out for another public comment period so the proposed rule as amended today would go to the Supreme Court with a recommendation that they adopt it as final.

Motion: Dallas Young made a motion to adopt the proposed edits to section (c)(1)(D), the new language added to subsection (b), and the new language added to the end of the first paragraph of the Committee Note – all as outlined above. Nicole Salazar-Hall seconded the motion. The motion passed unanimously.

Motion: Judge Mortensen made a motion to recommend to the Supreme Court that they adopt Rule 617 as amended above. Chris Hogle seconded the motion. The motion passed unanimously.

Motion: Chris Hogle made a motion to approve and recommend adoption by the Supreme Court, the additional changes to the Committee Note made by Judge Jones in:

- Subsection (b);
- Displaying photos or presenting a lineup;
- Documenting witness responses;
- Subsection (c)(2); and
- Sources.

Nicole Salazar-Hall seconded the motion. The motion passed unanimously.

Note: The Committee agreed that it would be beneficial to make the Supreme Court aware of the training offered by Jensie Anderson. John Lund will include that information when presenting the rule draft to the Court for approval.

6. Other Business: None

7. Next Meeting: April 30, 2019 at 5:15 p.m.
Matheson Courthouse, 3rd Floor, N31, Council Room