AGENDA

Utah Supreme Court Advisory Committee / Rules of Evidence

April 30, 2019

5:15 p.m. – 6:45 p.m.

Council Room – 3rd Floor, N31
Matheson Courthouse
450 S. State St., Salt Lake City, UT

***Light Dinner will be served*

Welcome and Approval of Minutes • March 19, 2019	Action	Tab 1	John Lund
Administrative Update: • Membership Terms • Committee Web Page • Meeting Schedule	Discussion	Tab 2	Keisa Williams John Lund
Victim Communications Subcommittee: • URE 512 • H.J.R. 3 • H.B. 53	Action	Tab 3	Judge Bates Deborah Bulkeley Dallas Young
URE 804 Subcommittee: • State and Federal caselaw on "similar motive to develop" • Proposed rule amendments	Action	Tab 4	Lacey Singleton Adam Alba Dallas Young Matt Hansen Judge Bates

Guests: Representative Lowry Snow (via phone)

Queue:

- Representative Ken Ivory (and legislative research)
  - URE 409 – Expressions of Empathy
  - URE 412 – Protecting sexual assault victims who "freeze"
- Ongoing Project: Rule Comments
  - Law student caselaw review
  - Remove comments or make them historical only – put substantive information in the rule itself

Tab 1

UTAH SUPREME COURT ADVISORY COMMITTEE
ON THE RULES OF EVIDENCE

MEETING MINUTES
Draft
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."

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

Tab 2

SUPREME COURT ADVISORY COMMITTEE ON THE RULES OF EVIDENCE

Committee Membership

LAST NAME	FIRST NAME	POSITION	LOCATION	CHAIR	ORIGINAL APPOINTMENT	REAPPOINTMENT	TERM 1 END	TERM 2 END	CURRENT TERM
Alba	Adam	Attorney	Salt Lake City		7/1/2016		7/1/2020	7/1/2024	1
Bates	Matthew D.	District 3	Tooele		7/1/2011		7/1/2015	7/1/2019	2
Brown	Teneille	Professor	Salt Lake City		8/1/2013		8/1/2017	8/1/2021	2
Bulkeley	Deborah	Attorney	South Jordan		7/1/2015		7/1/2019	7/1/2023	1
Hansen	Matthew	Attorney	Ogden		7/1/2016		7/1/2020	7/1/2024	1
Havas	Edward	Attorney	Salt Lake City		7/1/2001	7/1/2009		Emeritus	N/A
Hogle	Christopher	Attorney	Salt Lake City		7/1/2011		7/1/2015	7/1/2019	2
Jones	Linda M.	District 3	Salt Lake City		9/14/2007	7/1/2011	7/1/2015	7/1/2019	3
Lund	John R.	Attorney	Salt Lake City	CHAIR	7/1/1998	7/1/2013	7/1/2017	7/1/2021	4
Mortensen	David	Court of Appeals	Salt Lake City		9/14/2007	7/1/2011	7/1/2015	7/1/2019	3
Rooney	Terence	Attorney	Salt Lake City		7/1/2015		7/1/2019	Resigned	1
Salazar	Nicole	Attorney	Salt Lake City		10/1/2017		10/1/2021	10/1/2025	1
Singleton	Lacey	Attorney	Salt Lake City		7/1/2016		7/1/2020	7/1/2024	1
Skinner	Jacey	AOC	Salt Lake City		7/1/2011		7/1/2015	7/1/2019	2
Steele	Michalyn	BYU Professor	Provo		7/1/2016		7/1/2020	7/1/2024	1
Trease	Vernice	District 3	Salt Lake City		7/1/2016		7/1/2020	7/1/2024	1
Welch	Teresa	Attorney	Salt Lake City		7/1/2014		7/1/2018	7/1/2022	2
Young	Dallas	Attorney	Provo		10/1/2017		10/1/2021	10/1/2025	1

***Supreme Court Rule 11-101 - Members may not serve more than two, 4-year terms without approval from the Supreme Court (exception for academia). May have up to two non-voting emeritus members. Chairs may serve up to four terms.*

Tab 3

Rule 512. Victim Communications.

(a) **Definitions.**

(1) "Advocacy services" means the same as that term is defined in Utah Code section 77-38-403.

(2) "Confidential communication" means communication made privately for the purpose of obtaining or receiving victim advocate services and not intended for further disclosure except to other persons in furtherance of the purpose of the communication.

(3) "Victim" means an individual defined as a victim in Utah Code section 77-38-403.

(4) "Victim advocate" means the same as that term is defined in Utah Code section 77-38-403.

(b) **Statement of the Privilege.** A victim communicating with a victim advocate has a privilege during the victim's life to refuse to disclose and to prevent any other person from disclosing a confidential communication. However, a victim advocate may disclose the confidential communication under the circumstances described in Utah Code section 77-38-405(1)(a). Such disclosure does not waive the privilege.

(c) **Who May Claim the Privilege.** The privilege may be claimed by:

(1) the victim;

(2) the guardian or conservator of the victim if the guardian or conservator is not the accused; and

(3) the victim advocate during the life of the victim.

(d)**Exceptions.**

(1) No privilege exists under paragraph (b) if

(A) a court reviews the confidential communication in camera and determines that:

(i) the probative value of the confidential communication substantially outweighs the adverse effect of the disclosure of the confidential communication on

(a) the victim; or

(b) the relationship between the victim and the victim advocate; or

(ii) in a criminal case, the confidential communication is exculpatory evidence or impeachment evidence; or

(B) a prosecutor determines that the confidential communication must be disclosed to a defendant in a criminal action.

(2) A request for a hearing and in camera review under paragraph (d)(1)(A) may be made by any party by motion. The court shall give all parties and the victim notice of any hearing and an opportunity to be heard.

Enrolled Copy **H.J.R. 3**

JOINT RESOLUTION ADOPTING PRIVILEGE UNDER RULES OF EVIDENCE

2019 GENERAL SESSION

STATE OF UTAH

Chief Sponsor: V. Lowry Snow

Senate Sponsor: Todd Weiler

LONG TITLE

General Description:

This joint resolution adopts a privilege under the rules of evidence related to confidential communications of victims.

Highlighted Provisions:

This resolution:

- defines terms;
- states the privilege and who may claim the privilege; and
- provides for exceptions from the privilege.

Special Clauses:

This bill provides a special effective date.

Utah Rules of Evidence Affected:

ENACTS:

Rule 512, Utah Rules of Evidence

Be it resolved by the Legislature of the state of Utah, two-thirds of all members elected to each of the two houses voting in favor thereof:

As provided in Utah Constitution Article VIII, Section 4, the Legislature may amend rules of procedure and evidence adopted by the Utah Supreme Court upon a two-thirds vote of all members of both houses of the Legislature:

Section 1. **Rule 512**, Utah Rules of Evidence is enacted to read:

Rule 512. Victim Communications.

(a) **Definitions.**

(a) (1) "Advocacy services" means the same as that term is defined in UCA § 77-38-403.

(a) (2) "Confidential communication" means a communication that is intended to be confidential between a victim and a victim advocate for the purpose of obtaining advocacy services as defined in UCA § 77-38-403.

(a) (3) "Criminal justice system victim advocate" means the same as that term is defined in UCA § 77-38-403.

(a) (4) "Health care provider" means the same as that term is defined in UCA § 78B-3-403.

(a) (5) "Mental health therapist" means the same as that term is defined in UCA § 58-60-102.

(a) (6) "Victim" means an individual defined as a victim in UCA § 77-38-403.

(a) (7) "Victim advocate" means the same as that term is defined in UCA § 77-38-403.

(b) **Statement of the Privilege.** A victim communicating with a victim advocate has a privilege during the victim's life to refuse to disclose and to prevent any other person from disclosing a confidential communication.

(c) **Who May Claim the Privilege.** The privilege may be claimed by the victim engaged in a confidential communication, or the guardian or conservator of the victim engaged in a confidential communication if the guardian or conservator is not the accused. An individual who is a victim advocate at the time of a confidential communication is presumed to have authority during the life of the victim to claim the privilege on behalf of the victim.

(d) **Exceptions.** An exception to the privilege exists in the following circumstances:

(d) (1) when the victim, or the victim's guardian or conservator if the guardian or conservator is not the accused, provides written, informed, and voluntary consent for the disclosure, and the written disclosure contains:

(d) (1) (A) the specific confidential communication subject to disclosure;

(d) (1) (B) the limited purpose of the disclosure; and

(d) (1) (C) the name of the individual or party to which the specific confidential communication may be disclosed;

(d) (2) when the confidential communication is required to be disclosed under Title 62A, Chapter 4a, Child and Family Services, or UCA § 62A-3-305;

(d) (3) when the confidential communication is evidence of a victim being in clear and immediate danger to the victim's self or others;

(d) (4) when the confidential communication is evidence that the victim has committed a crime, plans to commit a crime, or intends to conceal a crime;

(d) (5) if the confidential communication is with a criminal justice system victim advocate, the criminal justice system victim advocate may disclose the confidential communication to a parent or guardian if the victim is a minor and the parent or guardian is not the accused, or a law enforcement officer, health care provider, mental health therapist, domestic violence shelter employee, an employee of the Utah Office for Victims of Crime, or member of a multidisciplinary team assembled by a Children's Justice Center or law enforcement agency for the purpose of providing advocacy services;

(d) (6) if the confidential communication is with a criminal justice system victim advocate, the criminal justice system victim advocate must disclose the confidential communication to a prosecutor under UCA § 77-38-405;

(d) (7) if the confidential communication is with a criminal justice system victim advocate, and a court determines, after the victim and the defense attorney have been notified and afforded an opportunity to be heard at an in camera review, that:

(d) (7) (A) the probative value of the confidential communication and the interest of justice served by the admission of the confidential communication substantially outweigh the adverse effect of the admission of the confidential communication on the victim or the relationship between the victim and the criminal justice system victim advocate; or

(d) (7) (B) the confidential communication is exculpatory evidence, including impeachment evidence.

Section 2. **Effective date.**

(1) Except as provided in Subsection (2), this resolution takes effect on July 31, 2019.

(2) If the Utah Supreme Court adopts a rule of privilege for victim communications on or before July 30, 2019, this resolution does not take effect.

VICTIM COMMUNICATIONS AMENDMENTS

2019 GENERAL SESSION

STATE OF UTAH

Chief Sponsor: V. Lowry Snow

Senate Sponsor: Todd Weiler

LONG TITLE

General Description:

This bill enacts provisions related to victim communications.

Highlighted Provisions:

This bill:

- enacts the Privileged Communications with Victim Advocates Act, including:
  - providing a purpose statement;
  - defining terms;
  - outlining the scope of the part;
  - providing a privilege for confidential communications;
  - addressing government records; and
  - requiring certain notices;
- addresses examination of a victim advocate; and
- makes technical changes.

Money Appropriated in this Bill:

None

Other Special Clauses:

None

Utah Code Sections Affected:

AMENDS:

78B-1-137, as renumbered and amended by Laws of Utah 2008, Chapter 3

ENACTS:

77-38-401, Utah Code Annotated 1953

77-38-402, Utah Code Annotated 1953

77-38-403, Utah Code Annotated 1953

77-38-404, Utah Code Annotated 1953

77-38-405, Utah Code Annotated 1953

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

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

Part 4. Privileged Communications with Victim Advocates Act.

77-38-401. Title.

This part is known as the "Privileged Communications with Victim Advocates Act."

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

77-38-402. Purpose.

It is the purpose of this part to enhance and promote the mental, physical, and emotional recovery of victims by restricting the circumstances under which a confidential communication with the victim may be disclosed.

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

77-38-403. Definitions.

As used in this part:

(1) "Advocacy services" means assistance provided that supports, supplements, intervenes, or links a victim or a victim's family with appropriate resources and services to address the wide range of potential impacts of being victimized.

(2) "Advocacy services provider" means an entity that has the primary focus of providing advocacy services in general or with specialization to a specific crime type or specific type of victimization.

(3) "Confidential communication" means a communication that is intended to be confidential between a victim and a victim advocate for the purpose of obtaining advocacy services.

(4) "Criminal justice system victim advocate" means an individual who:

(a) is employed or authorized to volunteer by a government agency that possesses a role or responsibility within the criminal justice system;

(b) has as a primary responsibility addressing the mental, physical, or emotional recovery of victims;

(c) completes a minimum 40 hours of trauma-informed training:

(i) in crisis response, the effects of crime and trauma on victims, victim advocacy services and ethics, informed consent, and this part regarding privileged confidential communication; and

(ii) that have been approved or provided by the Utah Office for Victims of Crime; and

(d) is under the supervision of the director or director's designee of the government agency.

(5) "Health care provider" means the same as that term is defined in Section 78B-3-403.

(6) "Mental health therapist" means the same as that term is defined in Section 58-60-102.

(7) "Nongovernment organization victim advocate" means an individual who:

(a) is employed or authorized to volunteer by an nongovernment organization advocacy services provider;

(b) has as a primary responsibility addressing the mental, physical, or emotional recovery of victims;

(c) has a minimum 40 hours of trauma-informed training:

(i) in assisting victims specific to the specialization or focus of the nongovernment organization advocacy services provider and includes this part regarding privileged confidential communication; and

(ii) (A) that have been approved or provided by the Utah Office for Victims of Crime; or

(B) that meets other minimally equivalent standards set forth by the nongovernment organization advocacy services provider; and

(d) is under the supervision of the director or the director's designee of the nongovernment organization advocacy services provider.

(8) "Record" means a book, letter, document, paper, map, plan, photograph, file, card, tape, recording, electronic data, or other documentary material regardless of physical form or characteristics.

(9) "Victim" means:

(a) a "victim of a crime" as defined in Section 77-38-2;

(b) an individual who is a victim of domestic violence as defined in Section 77-36-1; or

(c) an individual who is a victim of dating violence as defined in Section 78B-7-402.

(10) "Victim advocate" means:

(a) a criminal justice system victim advocate;

(b) a nongovernment organization victim advocate; or

(c) an individual who is employed or authorized to volunteer by a public or private entity and is designated by the Utah Office for Victims of Crime as having the specific purpose of providing advocacy services to or for the clients of the public or private entity.

(d) "Victim advocate" does not include an employee of the Utah Office for Victims of Crime.

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

77-38-404. Scope of part.

This part governs the disclosure of a confidential communication to a victim advocate, except that:

(1) if Title 53B, Chapter 28, Part 2, Confidential Communications for Institutional Advocacy Services Act, applies, that part governs; and

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

Section 5. Section **77-38-405** is enacted to read:

77-38-405. Disclosure of a communication given to a victim advocate.

(1) (a) A victim advocate may not disclose a confidential communication with a

victim, including a confidential communication in a group therapy session, except:

(i) that a criminal justice system victim advocate shall provide the confidential communication to a prosecutor who is responsible for determining whether the confidential communication is exculpatory or goes to the credibility of a witness;

(ii) that a criminal justice system victim advocate may provide the confidential communication to a parent or guardian of a victim if the victim is a minor and the parent or guardian is not the accused, or a law enforcement officer, health care provider, mental health therapist, domestic violence shelter employee, an employee of the Utah Office for Victims of Crime, or member of a multidisciplinary team assembled by a Children's Justice Center or a law enforcement agency for the purpose of providing advocacy services; or

(iii) to the extent allowed by the Utah Rules of Evidence.

(b) If a prosecutor determines that the confidential communication is exculpatory or goes to the credibility of a witness, after the court notifies the victim and the defense attorney of the opportunity to be heard at an in camera review, the prosecutor will present the confidential communication to the victim, defense attorney, and the court for in camera review in accordance with the Utah Rules of Evidence.

(2) A record that contains information from a confidential communication between a victim advocate and a victim may not be disclosed under Title 63G, Chapter 2, Government Records Access and Management Act, to the extent that it includes the information about the confidential communication.

(3) A criminal justice system victim advocate, as soon as reasonably possible, shall notify a victim, or a parent or guardian of the victim if the victim is a minor and the parent or guardian is not the accused:

(a) whether a confidential communication with the criminal justice system victim advocate will be disclosed to a prosecutor and whether a statement relating to the incident that forms the basis for criminal charges or goes to the credibility of a witness will also be disclosed to the defense attorney; and

(b) of the name, location, and contact information of one or more nongovernment

organization advocacy services providers specializing in the victim's service needs, when a nongovernment organization advocacy services provider exists and is known to the criminal justice system victim advocate.

Section 6. Section **78B-1-137** is amended to read:

78B-1-137. Witnesses -- Privileged communications.

There are particular relations in which it is the policy of the law to encourage confidence and to preserve it inviolate. Therefore, a person cannot be examined as a witness in the following cases:

(1) (a) Neither a wife nor a husband may either during the marriage or afterwards be, without the consent of the other, examined as to any communication made by one to the other during the marriage.

(b) This exception does not apply:

(i) to a civil action or proceeding by one spouse against the other;

(ii) to a criminal action or proceeding for a crime committed by one spouse against the other;

(iii) to the crime of deserting or neglecting to support a spouse or child;

(iv) to any civil or criminal proceeding for abuse or neglect committed against the child of either spouse; or

(v) if otherwise specifically provided by law.

(2) An attorney cannot, without the consent of the client, be examined as to any communication made by the client to the attorney or any advice given regarding the communication in the course of the professional employment. An attorney's secretary, stenographer, or clerk cannot be examined, without the consent of the attorney, concerning any fact, the knowledge of which has been acquired as an employee.

(3) A member of the clergy or priest cannot, without the consent of the person making the confession, be examined as to any confession made to either of them in their professional character in the course of discipline enjoined by the church to which they belong.

(4) A physician or surgeon cannot, without the consent of the patient, be examined in a

civil action as to any information acquired in attending the patient which was necessary to enable the physician or surgeon to prescribe or act for the patient. However, this privilege shall be waived by the patient in an action in which the patient places the patient's medical condition at issue as an element or factor of the claim or defense. Under those circumstances, a physician or surgeon who has prescribed for or treated that patient for the medical condition at issue may provide information, interviews, reports, records, statements, memoranda, or other data relating to the patient's medical condition and treatment which are placed at issue.

(5) A public officer cannot be examined as to communications made in official confidence when the public interests would suffer by the disclosure.

(6) (a) A sexual assault counselor as defined in Section 77-38-203 cannot, without the consent of the victim, be examined in a civil or criminal proceeding as to any confidential communication as defined in Section 77-38-203 made by the victim.

(b) A victim advocate as defined in Section 77-38-403 may not, without the written consent of the victim, or the victim's guardian or conservator if the guardian or conservator is not the accused, be examined in a civil or criminal proceeding as to a confidential communication, as defined in Section 77-38-403, unless the victim advocate is a criminal justice system victim advocate, as defined in Section 77-38-403, and is examined in camera by a court to determine whether the confidential communication is privileged.

Tab 4

RULE 804 CASE LAW

STATE LAW:

The following states do not have the "similar motive to develop" language.

1. Alabama 804 (b)(1) (1) *Former Testimony.* Testimony of a witness, in a former trial or action, given (A) under oath, (B) before a tribunal or officer having by law the authority to take testimony and legally requiring an opportunity for cross-examination, (C) under circumstances affording the party against whom the witness was offered an opportunity to test his or her credibility by cross-examination, and (D) in litigation in which the issues and parties were substantially the same as in the present cause.
    a. *"The videotaped testimony of the victim, which was recorded during a preliminary hearing, was properly admitted at trial, as the victim, who was hospitalized at the time of the hearing, was unavailable to testify. The appellant argues that the use of the videotape denied him of his right to fully cross-examine the victim. However, the record indicates that the appellant was represented by counsel at the preliminary hearing and that counsel was made aware that the testimony might be used at a future date during the appellant's trial. During the preliminary hearing, the appellant's counsel objected to any future use of the video tape because it would violate the appellant's Sixth Amendment right to confront witnesses. "In order that the testimony of a witness, given on a formal trial or proceeding, may be admissible, it is essential that the party against whom it is offered was given an opportunity to cross-examine the witness during the former trial or proceeding...."It is not essential that the party actually cross-examine the witness at the formal trial or proceeding. His failure to exercise the right when afforded the opportunity does not exclude the former testimony...."If the tribunal, on the former hearing, improperly restricted the right of the party to cross-examine, the former testimony of the witness clearly is inadmissible.*902 "In the trial of a defendant for a crime, the testimony of a now-unavailable witness, given on a former trial of the defendant on the same charge, is not admissible upon the offer of the State in the present trial if the defendant was not represented by counsel on the former trial and if the defendant did not effectively waive his constitutional rights to the assistance of counsel on the former trial*." C. Gamble, *McElroy's Alabama Evidence* § 245.07(5) (3d ed. 1977). *The record indicates that, before the jury venire was qualified in the appellant's trial, a hearing was held in the trial judge's chambers in which the prosecutor indicated that the defense counsel had previously stated that he would stipulate to the fact that the victim was "unavailable" as that term is defined under the law, based on a letter provided from the victim's physician. The prosecutor stated that the defense counsel stipulated that the witness was unavailable "such that testimony from a prior proceeding which meets all the requirements under the opportunity to cross-examine" would be admissible in place of the victim's trial testimony. The prosecutor*

stated that if the appellant had changed his mind, she wanted the victim's physician to be subpoenaed to testify so that the trial court could determine whether or not the victim was unavailable. Defense counsel replied that he unquestionably had stipulated to the fact that the victim was unavailable to testify because he was in the hospital, but defense counsel objected to the introduction of the videotape from the preliminary hearing on the grounds that if the examination had been conducted during a jury trial, he might have asked other questions or cross-examined in another manner. Defense counsel acknowledged that the prosecutor had telephoned him, prior to videotaping the victim's testimony at the preliminary hearing, and that defense counsel had consented to the taping. However, defense counsel argued that he did not consent to its use at a future time. Other jurisdictions have held videotaped testimony of an unavailable witness in a criminal trial admissible under certain "exceptional" circumstances: where the witness is unavailable; where the videotape is made under the supervision of the proper judicial authority and with the defendant present; where the defendant is given his fair rights to cross-examine the witness; and where the videotape is sufficiently clear that the jury is able to observe the witness's demeanor. State v. Jeffries, 55 N.Car.App. 269, 285 S.E.2d 307, app. den., 305 N.C. 398, 290 S.E.2d 367 (1982). See also People v. Wilson, 112 A.D.2d 746, 492 N.Y.S.2d 242, app. den., 66 N.Y.2d 768, 497 N.Y.S.2d 1043, 488 N.E.2d 129 (1985). *In the present case, there is no question that the victim was unavailable to testify at trial. Moreover, there is no question that the testimony was taken at a preliminary hearing before a district judge, and that the victim was testifying under oath. A transcript of the victim's prior testimony is included in the record on appeal and shows that the victim was extensively cross-examined by the appellant's counsel. Therefore, the videotape was properly admitted into evidence.* Ready v. State, 574 So. 2d 894, 901–02 (Ala. Crim. App. 1990)

2. Virginia 804 (b)(1):
    a. "In *Longshore*, the Virginia Supreme Court reiterated that preliminary hearing testimony of an unavailable witness was admissible provided: (1) that the witness is presently unavailable; (2) that the prior testimony of the witness was given under oath (or in a form of affirmation that is legally sufficient); (3) that the prior testimony was accurately recorded or that the person who seeks to relate the testimony of the unavailable witness can state the subject matter of the unavailable witness's testimony with clarity and in detail; and (4) that the party against whom the prior testimony is offered was present, and represented by counsel, at the preliminary hearing and was afforded the opportunity of cross-examination when the witness testified at the preliminary hearing. *380 260 Va. at 3–4, 530 S.E.2d at 146 (citing *Shifflett v. Commonwealth*, 218 Va. 25, 28, 235 S.E.2d 316, 318 (1977); *Fisher v. Commonwealth*, 217 Va. 808, 812–13, 232

S.E.2d 798, 801–02 (1977)). Morgan v. Com., 50 Va. App. 369, 379–80, 650 S.E.2d 541, 546 (2007).

3. Nevada:
    a. "*The Confrontation Clause of the Sixth Amendment guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him." U.S. Const. amend. VI. In accordance with that right, prior testimony from a witness unavailable at trial is admissible only if the defendant had "a prior opportunity for cross-examination." Crawford v. Washington, 541 U.S. 36, 68, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). In Chavez v. State, we held "that a preliminary hearing can afford a defendant an adequate opportunity to confront witnesses against him pursuant to Crawford." 125 Nev. 328, 337, 213 P.3d 476, 482 (2009). "The adequacy of the opportunity to confront will be decided on a case-by-case basis, turning upon the discovery available to the defendant at the time and the manner in which the magistrate judge allows the cross-examination to proceed." Id. Applying that test to the facts in Chavez, in which a victim of sexual assaults died after testifying at a preliminary hearing but before trial, we noted that "nearly all the discovery was complete" at the time of the hearing, "and the magistrate judge allowed Chavez unrestricted opportunity to confront [the witness] on all the pertinent issues." Id. at 341, 213 P.3d at 485–86. We therefore concluded that admitting the witness's testimony at trial did not violate Chavez's Confrontation Clause rights. See id.* at 341–42, 213 P.3d at 486. State v. Eighth Judicial Dist. Court in & for Cty. of Clark, 412 P.3d 18, 21 (Nev. 2018)

    b. *"We recognize that this court has previously indicated that three conditions must be met before testimony from a preliminary hearing may be used at a criminal trial: "first, that the defendant was represented by counsel at the preliminary hearing; second, that counsel cross-examined the witness; third, that the witness is shown to be actually unavailable at the time of trial." Hernandez v. State, 124 Nev. 639, 645, 188 P.3d 1126, 1130 (2008) (quoting Drummond v. State, 86 Nev. 4, 7, 462 P.2d 1012, 1014 (1970)); see also Grant v. State, 117 Nev. 427, 432, 24 P.3d 761, 764 (2001); Funches v. State, 113 Nev. 916, 920, 944 P.2d 775, 777–78 (1997); Aesoph v. State, 102 Nev. 316, 320, 721 P.2d 379, 381–82 (1986). All of these cases derive from Drummond, in which we tried to reconcile dicta from two United States Supreme Court cases decided in the 1960s. 86 Nev. at 7, 462 P.2d at 1014. But neither Drummond nor the cases cited above addressed the issue of whether an opportunity to cross-examine suffices when no actual cross-examination occurred. See Grant, 117 Nev. at 432 n.5, 24 P.3d at 764 n.5 ("[W]hether mere opportunity is sufficient has not been addressed since in most cases, the witness was actually cross-examined."). Therefore, because those cases did not turn on whether an opportunity to cross-examine is sufficient for confrontation purposes, statements addressing that issue are noncontrolling dicta. See Armenta–Carpio v. State, 129 Nev. 531, 535, 306 P.3d 395, 398 (2013) (declining to apply the doctrine of stare decisis to statements from a prior opinion that "went beyond*

> *answering the limited question that was before the court"). We see no reason to adhere to that dicta when the Supreme Court has since clarified that prior testimony from a witness unavailable at trial is admissible as long as the defendant had "a prior opportunity for cross-examination."*[1] *Crawford*, 541 U.S. at 68, 124 S.Ct. 1354 (emphasis added). State v. Eighth Judicial Dist. Court in & for Cty. of Clark, 412 P.3d 18, 22 (Nev. 2018)

FEDERAL LAW:

There aren't many federal cases that have addressed the issue in the context of Rule 804 only. In fact, they almost all appear to conflate the Confrontation Clause issues with Rule 804. And they always admit the testimony or affirm the admission of the testimony. Below are some examples:

- *U.S. v. Carneglia*, 256 F.R.D. 366 (E.D. N.Y. 2009) (holding that victim's testimony at preliminary hearing on state charges against the defendant was admissible at federal trial, even though the rules and procedures between the proceedings were "slightly different," because the defendant had a "substantial interest in challenging" the testimony at the preliminary hearing).

- *U.S. v. Hargrove*, 382 Fed. Appx. 765 (10th Cir. 2010) (affirming admission of testimony from state preliminary hearing in federal criminal trial because "the motive at a preliminary hearing is sufficiently similar to the motive at trial"). One problem with this case, though, is that it conflates the Confrontation Clause analysis with Rule 804 analysis.

- *U.S. v. Avants*, 367 F.3d 433 (6th Cir. 2004) (affirming admission of testimony from state preliminary hearing in federal criminal trial because the defendant's motive in both cases was to discredit the witness). This case also conflates the Confrontation Clause with Rule 804.

Proposed Amendment (Statewide Association of Public Attorneys)

Rule 804. Exceptions to the Rule Against Hearsay – When the Declarant is Unavailable as a Witness

(a) Criteria for Being Unavailable. A declarant is considered to be unavailable as a witness if the declarant:

(1) is exempted from testifying about the subject matter of the declarant's statement because the court rules that a privilege applies;

(2) refuses to testify about the subject matter despite a court order to do so;

(3) testifies to not remembering the subject matter;

(4) cannot be present or testify at the trial or hearing because of death or a then-existing infirmity, physical illness, or mental illness; or

(5) is absent from the trial or hearing and the statement's proponent has not been able, by process or other reasonable means, to procure the declarant's attendance.

But this subdivision (a) does not apply if the statement's proponent procured or wrongfully caused the declarant's unavailability as a witness in order to prevent the declarant from attending or testifying.

(b) The Exceptions. The following are not excluded by the rule against hearsay if the declarant is unavailable as a witness:

(1) Former Testimony. Testimony that:

(A) was given as a witness at a trial, hearing, or lawful deposition, whether given during the current proceeding or a different one; and

(B) **(i)** in a criminal case, is now offered against a party who had ~~— or, in a civil case, whose predecessor in interest had —~~ an opportunity ~~and similar motive~~ to develop it by direct, cross-, or redirect examination; or

(ii) in a civil case, is now offered against a party who had — or whose predecessor in interest had — an opportunity and similar motive to develop it by direct, cross-, or redirect examination.

(2) Statement Under the Belief of Imminent Death. In a civil or criminal case, a statement made by the declarant while believing the declarant's death to be imminent, if the judge finds it was made in good faith.

(3) Statement Against Interest. A statement that:

(A) a reasonable person in the declarant's position would have made only if the person believed it to be true because, when made, it was so contrary to the declarant's proprietary or pecuniary interest or had so great a tendency to invalidate the declarant's claim against someone else or to expose the declarant to civil or criminal liability; and

(B) is supported by corroborating circumstances that clearly indicate its trustworthiness, if it is offered in a criminal case as one that tends to expose the declarant to criminal liability.

(4) Statement of Personal or Family History. A statement about:

(A) the declarant's own birth, adoption, legitimacy, ancestry, marriage, divorce, relationship by blood or marriage, or similar facts of personal or family history, even though the declarant had no way of acquiring personal knowledge about that fact; or

(B) another person concerning any of these facts, as well as death, if the declarant was related to the person by blood, adoption, or marriage or was so intimately associated with the person's family that the declarant's information is likely to be accurate.

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