UTAH SUPREME COURT ADVISORY COMMITTEE
ON THE RULES OF EVIDENCE

MEETING MINUTES
Tuesday– April 30, 2019
5:15 p.m.
Council Room

Mr. John Lund, Presiding

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

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1. Welcome and Approval of Minutes:

Mr. Lund welcomed everyone to the meeting.

Teresa Welch made the following correction to the minutes from the Evidence Advisory Committee meeting on March 19, 2019. Tab 4, Rule 106, paragraph 5, the last sentence should be amended to read: "The word 'fairness' was not used because caselaw has defined 'fairness' as 'necessary to qualify, explain, or place into context the portion already introduced.'"

Motion: ***Judge Mortenson moved to approve the amended minutes from the March 19, 2019 Evidence Advisory meeting. The motion was seconded and carried unanimously.***

2. Administrative Update:

Mr. Lund reviewed current membership terms and noted that there will be several vacancies as of July 1, 2019. He asked Committee members to talk to anyone they think would be a good candidate and encourage them to apply. Judge Trease stated that one discouraging factor in the past has been the requirement for applicants to write an essay explaining why they want to be

on the Committee. She questioned whether a sentence or two might be sufficient. Mr. Lund stated that the Committee has traditionally received 40-50 applications.

Keisa Williams reviewed the following term rules for members; a member cannot serve more than two 4-year terms, however, a chair can serve up to four terms. The court can approve exceptions and the Committee can have up to two emeritus members.

Keisa reported that the Supreme Court wants the Advisory Committees to be more transparent to the public and has asked that meeting materials and minutes be posted on the Court's Website. Ms. Williams presented a mockup of an Evidence Advisory Committee webpage and asked for the Committee's comments and suggestions. In addition, Keisa said she would email a link to the webpage so that Committee members can explore content and functionality and provide feedback.

The Committee discussed the idea of scheduling Evidence Advisory Committee meeting dates one year in advance. After discussion, the Committee agreed to set five meetings a year, with the ability to add or cancel meetings as needed. Meetings will be held the second Tuesday of the month. 2019 meetings will be held August 13, October 8, and November 12. Starting in 2020 and moving forward, the meetings will be scheduled on the second Tuesday of January, February, April, June, October, and November.

3. Victim Communications Subcommittee (URE 512):

The subcommittee was charged with reviewing H.J.R. 3 and H.B. 53, and recommending a draft of URE 512 for consideration by the Committee. Representative Snow was unable to attend the meeting via phone. Judge Bates, Dallas Young, and Deborah Bulkeley discussed their draft, including the following changes:

(a) Definitions. Removed a couple of definitions which became unnecessary based on changes made later in the rule.

(a)(2) Confidential Communication. Slightly amended to make it mirror definitions in the attorney/client privilege rule.

(b) Statement of the privilege. Slightly amended because the original language included a long list of exceptions that don't belong in a rule of evidence. The exceptions weren't matters likely to come up in court. They happen outside of court. In addition, it appeared to be the intent of the legislature that those exceptions were instances in which a victim advocate could make a disclosure without waiving the privilege for purposes of being admissible or inadmissible in court. To address those concerns, the subcommittee added two sentences at the end of (b) referencing Utah Code section 77-38-405(1)(a).
Mr. Lund asked what the reference to 77-38-405(1)(a) accomplishes. Judge Bates clarified that

criminal justice victim advocates can disclose (without waiving the privilege) to a prosecutor, parent or guardian of a victim, law enforcement officer, health care provider, mental health therapist, domestic violence shelter employee, employee of the Utah Office for Victims of Crime, or member of a multidisciplinary team assembled for a certain purpose, and to the extent allowed by the rules of evidence. The subcommittee's reason for drafting (b) the way they did (disclosure without waiving the privilege) is because it seems that was the intent of the legislature. Looking at (1)(a)(i), in a scenario where every confidential communication must be disclosed to the prosecutor, and if disclosing that communication waives the privilege and makes it admissible in court, you've now negated the privilege. There is no privilege. So it must have been the intent of the legislature that these are situations in which the victim advocate can disclose communications to certain people while keeping the privilege intact. Mr. Havas agreed, stating that otherwise, the exceptions swallow the rule. Judge Bates likes referencing the statute because it allows the legislature to easily amend or expand the exceptions without having to change the rules of evidence.

(c) Who May Claim the Privilege. The substance is the same. Putting them in a list made it easier to read and clarified the intent.

(d) Exceptions. Judge Bates stated that it seems the intent of the rule is to waive or terminate the privilege in the event that a court determines that the evidence must be turned over and used under Brady. The subcommittee was concerned about that kind of limitation and felt that the exception to the privilege should be a little broader than just Brady material. The subcommittee made two big changes:

(d)(1)(A) and (d)(2). The subcommittee created a mechanism for any party in a civil or criminal case to ask the Court to review the communication and then balance the probative value with the adverse effect disclosure would have on the victim or the victim's relationship with the victim advocate. If the Court finds the probative value outweighs that negative effect, then it can order the material to be disclosed and used in a civil or criminal case. Making this provision applicable to both civil and criminal cases supports removal of the distinction between "criminal justice system advocates" and other advocates.

The subcommittee recognizes that the balancing test is created out of whole cloth but they felt it mirrors URE 403. Mr. Young stated that this test clears up the language in H.J.R.3 which used "admissibility" and "disclosure" interchangeably. It wasn't always clear whether the legislature was talking about the admissibility of the evidence vs. just handing it over in the first instance. This amendment fixes that problem by saying no privilege exists, so it is both admissible and disclosable.

(d)(1)(B). Gives prosecutors carte blanche discretion to decide when the communication needs to be disclosed to the defense. Prosecutors already make these determinations all the time about Brady material and other discovery issues and they work very closely with victim

advocates. Giving prosecutors the discretion to make these decisions will avoid a lot of work on the part of the judiciary to hold in camera reviews, especially where the prosecutor decides to disclose, the defense attorney is not going to object, and the judge is not likely to deny the request. So why not just allow the prosecutor to decide when communications may be disclosed.

Mr. Lund expressed a concern about giving prosecutors sole discretion. Judge Trease likes the provision because it makes the prosecutors think twice about not disclosing things that should be disclosed. Things that may not necessarily be Brady material, but probably should be disclosed anyway. Judge Bates posed a hypothetical: I'm a prosecutor and there are notes from the victim advocate in my case file. I think that a couple of things in those notes should be disclosed to the defense because they could be impeachable or exculpatory. If I go file a motion with the court and ask for an in camera review, the defense attorney is certainly not going to object. Now the judge is in the position of trying to determine if the communication is really Brady material, whether they should order that the communication be disclosed, do they want to create an appealable issue, etc. I can't imagine a judge would second guess the prosecutor and not allow disclosure.

Mr. Lund asked about the potential impact on victims. Hypothetically: A victim advocate tells a victim, "I'm your advocate. You can tell me stuff. I'm here to help you. Please share everything with me." Then months down the road all of that information is shared with the prosecutor, and then the prosecutor gives it to defense counsel who represents the alleged offender. What happened to the promise of keeping this person's communications confidential? Mr. Young clarified that disclosures circumventing the privilege would be limited to Brady material. For example, "Oh by the way, I made all that stuff up, he never touched me." Garden variety communications ("I felt horrible when this happened") would not be admissible or disclosable.

The Committee discussed the distinction between criminal justice system victim advocates and other advocates. Judge Bates stated that H.J.R.3 created a very narrow exception only for Brady material. Evidence, testimony, or statements in the possession of a non-government agent are not Brady material and the prosecutor can never be responsible for what's in the possession of a third party. The subcommittee felt that was too narrow. Judge Bates' view is that every time we create a privilege we are sacrificing truth for some other policy reason, for encouraging confidentiality in some other relationship. The subcommittee didn't feel this rule needed to be as strict as an attorney/client or doctor/patient privilege so this proposal intends to strike a balance between the two.

Mr. Young expressed a concern about whether the legislature has the authority to create a rule of evidence under Article 8, Section 4 of the Utah Constitution. That Article seems to reserve the right to create rules out of whole cloth to the judiciary, and the right of the legislature is to amend. Ms. Salazar noted that the separation of powers issue was discussed at the Governmental Relations Committee meeting and it was hotly contested. There were a number

of people who felt H.J.R.3 wasn't an amendment, but rather a full enactment of a new rule. Judge Mortensen asked whether the Constitution states that the legislature can amend "a" rule, or that they can amend "the rules." Ms. Salazar reads it as the ability to amend "a" rule that is already in existence because rulemaking is within the Supreme Court's purview. The legislative committee reviewed *Brown v. Cox*, 387 P.3d 1040, during those discussions.

Mr. Havas stated that *Brown v. Cox* was very clear and adopting this rule ignores the fact that what the legislature is doing runs afoul of the constitutional prohibition. In not addressing that issue, it appears as if the Court is becoming complicit in its own lack of constitutional separation of powers. Mr. Lund suggested that the Committee express this concern to the Supreme Court and note that if the Court is inclined to adopt a rule, the Committee's version is the one they should adopt.

Mr. Lund stated that he doesn't believe it was Representative Snow's intention to wrest power away from the Court, it was more a need to have a rule in place when the bill goes into effect in order to protect victim communications in court proceedings. Mr. Lund recognized and appreciates Representative Snow's willingness to work with the Committee throughout the session and in allowing the Court an opportunity to create its own version of the rule before H.J.R.3 becomes effective.

The Committee suggested the following changes to the subcommittee's proposed Rule 512:

> (a)(2) "Confidential communication" means communication made privately for the purpose of obtaining or receiving ~~victim advocate~~ advocacy services and not intended for further disclosure except to other persons in furtherance of the purpose of the communication."
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> (b) "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 the victim's ~~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 disclose does not waive the privilege."
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> (c)(2) the guardian or conservator of the victim**,** ~~if~~ unless the guardian or conservator is ~~not~~ the accused; and
>
> (d)(1)(A)(i)(b) ~~the relationship between the victim and the victim advocate; or~~ the provision of advocacy services; or

Motion: ***Chris Hogle made a motion that if the Supreme Court is inclined to adopt a new rule of evidence created by the legislature, the Evidence Advisory Committee recommends they adopt the Committee's version of URE 512 as revised today. Dallas Young seconded the***

motion. The motion passed unanimously.

4. URE 804 Subcommittee:

Lacey Singleton reported on the URE 804 subcommittee's work. She pointed to the recent Bar Journal article (Utah Bar Journal, May/Apr 2019, Volume 32 No. 2) written by Matt Hansen and Blake Hills which discusses their concerns about what the *Goins* decision does in terms of eliminating testimony that could have been used at trial and having witnesses testify multiple times (*State v. Goins*, 2017 UT 61, ¶ 7, 423 P.3d 1236).

Ms. Singleton's concern about the *Goins* decision is that it seems to be contradictory. Since the *Goins* decision, prosecutors have been objecting to everything defense attorneys ask which is even remotely afield of probable cause. Prosecutors are also often going forward with paper prelims using only URE 1102 statements without ever putting on witnesses. Ms. Singleton believes prosecutors engaging in that practice are acting contrary to the concern regarding preservation of testimony for future reference. If you go forward with a prelim using only URE 1102 statements and then a witness disappears, you've got nothing, whereas if a witness was called to testify and defense attorneys are allowed to get into more details during cross examination, there is at least an argument that the testimony is preserved and it could potentially be introduced at trial.

The subcommittee is requesting an opinion from the Evidence Advisory Committee on the Statewide Association of Prosecutors' (SWAP) proposed amendment to remove the language regarding a "similar motive" for cross examination. Ms. Welch stated that keeping the motive requirement in the rule seems to protect the ability to cross examine witnesses because defense attorneys don't have a similar motive when addressing evidence that comes in later. If you take it out then defense attorneys would have concerns about their right to cross examine on issues outside of probable cause. The Committee discussed "similar motive" language in other jurisdictions.

Mr. Lund addressed the proposed amendments to URE 804 and asked what effect those changes would have, especially in criminal cases. Ms. Singleton said it seems, in a criminal case, to limit defense attorneys to only having the opportunity to develop testimony on cross. But it doesn't specify what that means. Currently, defense attorneys can develop testimony on cross at a prelim, but only testimony addressing issues of probable cause. Does this proposed amendment now authorize defense attorneys to address other issues at a prelim related to impeachment, credibility, etc.?

Ms. Welch restated the question at hand: At a preliminary hearing the witness is there, but at a trial the witness is not there. Can the prelim transcript come in at trial? Under current law, the transcript only comes in if the defense attorney had a similar motive in cross examining the witness at the preliminary hearing as they do in cross examining the witness at trial. So if you

take out the "similar motive" language, it seems that much emphasis will be placed on what constitutes an "opportunity" to develop it. Is it enough to give the defense attorney a chance to stand up and ask some questions? If so, that is complicated by whether the prelim limits questions to only those pertaining to probable cause. That highlights the tension between defense and prosecution on this issue.

Mr. Lund posed a hypothetical: A witness is on the stand at the preliminary hearing and there are questions about probable cause that the defense attorney has a right to cross examine them about. The defense attorney might not have a motive, but they have an opportunity. What happens if the witness says something else? For example…Not only did I see this, but then I told 3 other people about it and here's a whole bunch of other information that corroborates my story about how believable I am, etc. Do defense attorneys then not have the ability to cross examine the witness on those additional statements?

Ms. Singleton identified Mr. Lund's hypothetical as the problem defense attorneys are facing now. Prosecutors are objecting to any line of questioning which goes afield of probable cause. Judge Trease stated that defense attorneys will have to walk a fine line of deciding whether to ask certain questions which they know to be objectionable at a prelim. Caselaw says you don't get discovery at a preliminary hearing. Defense lawyers who know the caselaw might not ask certain questions at a prelim that they would want to ask later at trial because they know the law. Just because defense attorneys have the opportunity and choose not to ask the questions, doesn't mean they didn't have a motive. It seems that this proposal might be contrary to what the caselaw says. If the proposal is approved, defense attorneys will have to argue that they didn't have an opportunity.

Ms. Welch asked whether the "similar motive" language needs to be there. Judge Jones asked why the "similar motive" language is there in the civil context. Ms. Singleton said she doesn't understand why SWAP is making a distinction between civil and criminal cases. Judge Bates asked whether the civil/criminal distinction contemplates the scenario in which you take preliminary hearing testimony from a criminal case and try to offer it in a civil case. He assumes they aren't talking about depositions. Judge Jones said it doesn't make sense to have a distinction between criminal and civil cases. Ms. Singleton agreed. She felt it might create confusion and the potential for a higher bar for civil cases than for criminal.

Mr. Lund described a hypothetical: In civil litigation, a company representative gives a deposition in a completely different case, but now opposing counsel (Mr. Havas) wants to offer it in the current case as former testimony to support some piece of evidence about the company. Because Mr. Lund didn't have an opportunity to cross examine the witness, it shouldn't come in. Mr. Havas said arguably he could admit the deposition because a deposition can be used for any lawful purpose and if it was the testimony of a corporate entity such that it's an admission of a party, he can use it for that purpose. He wouldn't have to put the witness on the stand if the witness was speaking on behalf of the corporation and had the ability to bind the

corporation. Judge Jones said Mr. Havas's argument articulates the difference between opportunity and motive. Mr. Havas said it seems even more important to include the "similar motive" language in the criminal context due to the different standards applied at a prelim vs. trial. The focus of those two proceedings is different.

Judge Jones said you don't have the right to confrontation at a prelim, but you do at the trial. It is her impression that the attorneys from the AG's office wanted to eliminate "similar motive" because it was the problematic language in *Goins* and the Supreme Court didn't address the confrontation issue. The Supreme Court said because there isn't a similar motive in a prelim under URE 804, they would address the issue under URE 804. Judge Jones questioned what happens if "similar motive" is taken out. Would the confrontation clause then govern that issue or does it change the result in *Goins*? Mr. Hogle said he doesn't know how much the proposed amendment solves because if you're getting shut down on even straying remotely from the probable cause determination, you've got an awfully good argument that you didn't have the opportunity to develop the testimony to keep that prelim testimony out at trial.

Mr. Havas always read "similar motive" to be similar to the "fully and fairly litigated" concept in res judicata. Ms. Singleton agreed. Ms. Welch feels, in the criminal context, defense and prosecution are split about keeping the "similar motive" language in or taking it out. She asked where that would fall with the civil bar. Mr. Havas said he is unsure. He didn't think it would fall neatly on sides of the "v." because it would depend on who the testimony was offered against. Mr. Lund agreed.

Mr. Young discussed the request from SWAP. He spoke to Ryan Peters. Mr. Peters' concern centered around cases involving gang activity. In many of those cases, witnesses may testify at a prelim but then be threatened and not show up at trial. Prosecutors want to be able to use the witness's prelim testimony. Judge Bates suggested that this proposal may not be the best way for prosecutors to accomplish their goals. It might be better for them to ask the Rules of Criminal Procedure Committee to expand the deposition statutes or create a rule that provides more power in criminal cases to take depositions. Ms. Singleton agreed that changing URE 804 isn't the best remedy. If prosecutors' concern is not to require witnesses to testify or be cross examined more than once, then this proposal seems contrary to that goal. The Committee discussed the current restrictions surrounding depositions in criminal cases, and the possibility of broadening those rights to allow parties more discretion to take depositions. Mr. Young cautioned that such a change may, for defense attorneys, create another avenue of accusations of ineffective assistance if they don't take a deposition and a witness vanishes. A majority of the Committee agreed that exploring the ability to depose a witness to preserve testimony rather than trying to accomplish it during a prelim seems to be a much better remedy.

Mr. Lund asked whether defense attorneys typically make a record in prelims stating that they would like to cross examine the witness on a variety of subjects but are prevented from doing so in a preliminary hearing, and if they do make such a record, are they undercutting the

prosecutors' ability to use the witnesses testimony later? Ms. Singleton stated that defense attorneys do typically make such a record. Judge Jones said if a prosecutor is constantly objecting in a prelim, she will make a statement on the record that she is making a finding right now that defense counsel doesn't have an opportunity or similar motive in cross examination so the testimony will not be admissible at trial. She is unsure if other judges make similar findings. Judge Jones said that there are typically 30 prelims set on one calendar so if the "similar motive" language is stricken and even 5 prelims go forward, they would essentially be conducting mini trials and it would be difficult to get through them all. Judge Trease pointed out the significant difference between a 2-3 day trial and a 30-45 minute prelim and doesn't understand how anyone would think that cross or direct examination at a preliminary hearing translates to "you've had your full opportunity."

Mr. Lund noted that Mr. Hansen has strong feelings about this proposal but wasn't able to attend the meeting today. The Committee determined that Ms. Singleton will speak to Matt Hansen about this discussion and obtain his feedback.

5. **Other Business:**

The Committee agreed to have another meeting before October 2019.

Next Meeting: August 13, 2019
5:15 p.m.
AOC, Council Room