

MEETING AGENDA

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

**Matheson Courthouse
450 South State Street
Council Room (N301)**

**September 26, 2017
5:15 p.m. to 6:45 p.m.**

Mr. John Lund, Presiding

Light dinner will be served

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1. Welcome & Approval of Minutes (8/29/17) (*Attached*).....*John Lund*
 2. Rule 504 & Committee Note (*Attached*).....*Ed Havas*
 3. Eyewitness Identification Rule Finalization (*Attached*).....*Linda Jones et al.*
 4. First Responder Privilege Proposal.....*John Lund*
 5. Other Business.....*John Lund*

TAB 1

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

MEETING MINUTES

**Tuesday– August 29, 2017
5:15 p.m.
Council Room**

Mr. John Lund, Presiding

MEMBERS PRESENT

Ms. Teneille Brown
Hon. Matthew D. Bates
Mr. Christopher R. Hogle
Ms. Teresa Welch
Hon. Keith A. Kelly
Mr. John R. Lund
Mr. Terence Rooney
Hon. David Mortensen
Ms. Lacey Singleton
Mr. Matthew Hansen
Mr. Ed Havas
Hon. Vernice Trease
Mr. Adam Alba
Ms. Deborah Bulkeley

GUESTS PRESENT

MEMBERS EXCUSED

Ms. Michalyn Steele
Ms. Linda Jones
Ms. Jacey Skinner

STAFF PRESENT

Mr. Richard Schwermer

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

Mr. Lund welcomed everyone to the meeting.

The following correction was made to the minutes:

- Include Mr. Matthew Hansen in members excused in the June 27, 2017 Evidence Advisory Committee meeting minutes.

Motion: Judge Havas moved to approve the minutes from the June 27, 2017 Evidence Advisory Committee meeting. The motion was seconded. The motion carried unanimously.

2. Eyewitness Identification Rule (attached) (Linda Jones, et al.)

Ms. Welch reported on behalf of the Eyewitness Identification Rule subcommittee. The Committee discussed the role of suggestibility in the proposed rule. They agreed that the rule should be written so that it is consistent with existing case law. They discussed the possibility of providing optional language vetted by the Evidence Advisory Committee to the Court that considers an alternative standard. The Committee had further discussion about the direction of the Eyewitness Identification Rule assignment and they suggested the following edits to the draft rule:

- **(b) Admissibility of Eyewitness Testimony.** “An eyewitness’s identification of the defendant as the person who committed the charged crimes(s) shall be excluded at the criminal trial if the court determines that the identification procedure was unnecessarily suggestive or conducive to the mistaken identification.”
- **(1) Photo Array or Lineup Procedures.** Remove the brackets on line two and use the suggested language.
- **(d) Jury Instruction and Expert Testimony.** Remove the brackets and strike the second sentence.

The Committee agreed to draft the discussed changes and email the edited version to the Evidence Advisory Committee for review.

3. Rule 1102 & 511 Public Comments (attached) (Rick Schwermer)

Mr. Schwermer noted that any comments submitted to Rules 1102 and 511 were supportive. The Committee agreed to recommend the Supreme Court adopt Rules 1102 and 511.

Motion: Judge Mortensen made a motion to recommend the Supreme Court adopt Rule 1102. Mr. Hogle seconded the motion. The motion carried, two Committee members opposed the motion.

Motion: Judge Mortensen made a motion to recommend to the Supreme Court to adopt Rule 511. Judge Kelly seconded the motion. The motion carried unanimously.

Motion: Judge Kelly made a motion to submit the Committee notes for Rules 1102 and 511 to the Supreme Court with the corresponding rules. The motion was seconded. The motion carried unanimously.

4. Rule 504 (attached) (John Lund)

The Committee reviewed the clean version of proposed Rule 504 included in the meeting packet. The Committee agreed to make the following changes:

- (a) Definitions. (1) Line two delete “is” change “rendered” to “renders”
(3) Line two should delete “which is” change “providing” to read “provides”
- (b) (B) delete “or” at the end of the paragraph

Motion: Mr. Ed Havas made a motion to present Rule 504 including the above edits to the Supreme Court. Judge Keith Kelly seconded the motion. The motion passed unanimously.

The Committee discussed the Linda Smith email about pro se litigants bringing a companion to participate in the attorney/client meeting without destroying the privilege, and the inclusion of a research exception. They agreed to consider these notions separately at a later date, but the consensus was that these two circumstances may already be covered.

The Committee agreed to submit the rule to the Supreme Court. Mr. Havas agreed to begin a draft of a Committee Note.

6. Other Business (Mr. John Lund)

Next Meeting: September 26, 2017
5:15 p.m.
AOC, Council Room

TAB 2

Rule 504. Lawyer - Client.

(a) Definitions.

(1) ~~(1)~~—"Client" means a person, public officer, corporation, association, or other organization or entity, either public or private, who is rendered ~~professional~~ legal services by a lawyer or who consults a lawyer ~~with a view to obtaining professional or a lawyer referral service to obtain~~ legal services.

(2) "Lawyer" means a person authorized, or reasonably believed by the client to be authorized, to practice law in any state or nation.

~~(3) "Lawyer referral service" means an organization, either non-profit or for-profit, which is providing provides intake or screening services to clients or prospective clients for the purpose of referring them to legal services.~~

~~(4) "Legal services" means the provision by a lawyer or lawyer referral service of:~~

~~(A) professional counsel, advice, direction or guidance on a legal matter or question;~~

~~(B) professional representation on the client's behalf on a legal matter;~~
~~or~~

~~(C) referral to a lawyer.~~

~~(3) "Representative of the lawyer"~~~~(5) "Lawyer's representative"~~ means a person or entity employed to assist the lawyer in ~~a the~~ rendition of ~~professional~~ legal services.

~~(4) "Representative of the client"~~~~(6) "Client's representative"~~ means a person or entity ~~having authority~~~~authorized by the client to:~~

~~(A) to obtain professional~~ legal services ~~for or on behalf of the client;~~

~~(B) to act on advice rendered pursuant to legal services~~ ~~for or~~ on behalf of the client; or

(C) ~~person or entity specifically authorized to communicate~~ facilitate confidential communications with the lawyer concerning a legal matter.

~~(5)~~(7) "Communication" includes:

(A) ~~advice~~, direction or guidance given by the lawyer, ~~the lawyer's representative or a lawyer referral service~~ in the course of ~~representing the client~~ providing legal services; and

(B) disclosures of the client and the client's ~~representatives~~ representative to the lawyer ~~or~~, the lawyer's ~~representatives~~ representative or a lawyer referral service incidental to the ~~professional relationship~~ client's legal services.

~~(6)~~(8) "Confidential communication" means a communication not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of rendition of ~~professional~~ legal services to the client or to those reasonably necessary for the transmission of the communication.

(b) Statement of the Privilege. A client has a privilege to refuse to disclose, and to prevent any other person from disclosing, confidential communications if:

(1) the communications were made for the purpose ~~of or in the course of~~ obtaining or facilitating the rendition of ~~professional~~ legal services to the client; and

(2) the communications were ~~between~~:

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(A) ~~(A) between~~ (i) the client ~~and or~~ the client's ~~representatives~~ representative and (ii) the lawyer, ~~lawyers, the~~ lawyer's representatives, ~~and lawyers or a lawyer~~ representing others in matters of common interest; ~~or or~~

(B) ~~(B) among the client's~~ between clients or clients' representatives, ~~lawyers, lawyer's representatives, and lawyers representing others in~~

as to matters of common interest, but only if each clients' lawyer or lawyer's representatives was also present or included in the communications; or

(A) between (i) the client or the client's representatives and (ii) a lawyer referral service; or

(B) between (i) the client's lawyer or lawyer's representatives and (ii) the client's lawyer referral service.

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

- (1) the client;
- (2) the client's guardian or conservator;
- (3) the personal representative of a client who is deceased;
- (4) the successor, trustee, or similar representative of a client that was a corporation, association, or other organization, whether or not in existence; and
- (5) the lawyer or the lawyer referral service on behalf of the client.

(d) Exceptions to the Privilege. Privilege does not apply in the following circumstances:

- (1) Furtherance of the Crime or Fraud. If the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud;
- (2) Claimants through Same Deceased Client. As to a communication relevant to an issue between parties who claim through the same deceased client, regardless of whether the claims are by testate or intestate succession or by inter vivos transaction;
- (3) Breach of Duty by Lawyer or Client. As to a communication relevant to an issue of breach of duty by the lawyer to the client;

(4) Document Attested by Lawyer. As to a communication relevant to an issue concerning a document to which the lawyer was an attesting witness; or

(5) Joint Clients. As to the communication relevant to a matter of common interest between two or more clients if the communication was made by any of them to a lawyer retained or consulted in common, when offered in an action between any of the clients.

TAB 3

(a) Definitions

(1) Lineup. A “lineup” is a live presentation of multiple individuals, before an eyewitness, for the purpose of identifying or eliminating a suspect in a crime.

(2) Identification Procedure. An “identification procedure” is a lineup, photo array, or showup.

(3) Photo Array. A “photo array” is the process of showing photographs to an eyewitness for the purpose of identifying or eliminating a suspect in a crime.

(4) Showup. A “showup” is 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. A showup is sometimes referred to as a field identification.

(b) Admissibility of Eyewitness Testimony. In a criminal trial, a witness may not identify the defendant as the person who committed the charged crime(s) if the witness previously participated in an identification procedure administered by law enforcement and the court has determined that the identification procedure was unreliable. A procedure is unreliable if it is unnecessarily suggestive or conducive to mistaken identification. ~~} [unnecessarily suggestive and the unnecessarily suggestive identification procedure rendered the eyewitness identification clearly unreliable].~~

(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 whether law enforcement adhered to the following procedures:

(A) Double Blind or Blinded Procedures. Law enforcement used double blind procedures in organizing a lineup or law enforcement used double blind or blinded procedures in organizing the 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. 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. 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. 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. Law enforcement did not involve the witness in multiple identification procedures wherein the witness viewed the same suspect more than once. 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 whether law enforcement adhered to the following procedures:

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

(B) Law enforcement conducted the showup at a neutral location as opposed to law enforcement headquarters or other public safety building and the suspect was not in a patrol car, handcuffed, or physically restrained by police officers.

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

(D) When the showup was conducted with two or more witnesses, law enforcement took steps to ensure that the witnesses were not permitted to communicate before or after any procedure regarding the identification of the suspect. If a witness made a positive identification and law enforcement was justified in making an arrest, additional witnesses not involved in the showup were shown live lineups or photo arrays.

(E) Law enforcement did not present the same suspect to the witness more than once.

(F) The suspect was not required to wear clothing worn by the perpetrator or to conform his or her appearance in any way to the perpetrator.

(G) The suspect was not required to speak any words uttered by the perpetrator or perform any actions done by the perpetrator.

(H) Law enforcement did not suggest by any words or actions that the suspect is the perpetrator.

(I) 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) above, the court may evaluate an identification procedure using any other circumstance that the court determines is relevant.

(c) Admissibility of Photographs. Photographs used in an out-of-court identification 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.

(d) Jury Instruction and Expert Testimony. When the court admits eyewitness identification evidence, it shall instruct the jury regarding evaluation of eyewitness identification testimony upon request of the defendant and it may also receive related expert evidence. ~~} [If the defendant chooses not to call an expert on the reliability of eyewitness identifications, the court upon-~~

~~request shall instruct the jury on known factors that may affect the reliability of an identification].~~

Committee Note: This rule ensures that when called upon, a trial court will perform a gatekeeping function and will exclude unreliable eyewitness identification evidence in a criminal case. Several organizations, including the Department of Justice and the ABA, have published best practices for eyewitness identification procedures when a witness is asked to identify a perpetrator who is a stranger to the witness. Subsection (b)(1) of this rule reflects some of those best practices in the context of photo array and lineup procedures, including use of double blind or blinded procedures; providing instructions to the witness at the beginning of the procedure; displaying photos or presenting a lineup with individuals who generally fit the witness's description of the suspect and who are sufficiently similar so as not to suggest the suspect to the witness; documenting the procedures, including the witness's responses; and guarding against influencing the witness through use of multiple procedures or when multiple witnesses are involved.

Use of double blind or blinded procedures. The literature, including the National Academies of Science report, supports that whenever practical, the person who conducts a lineup or organizes a photo array and all those present (except defense counsel) should be unaware of which person is the suspect through use of double blind or blinded procedures. Use of double blind procedures provides assurance that an administrator who is not involved in the investigation does not know what the suspect looks like and is therefore less likely to suggest or confirm that the perpetrator is in the lineup or the photo array. At times, double blind procedures may not be practical. In such cases, the administrator should adopt blinded procedures, such as a "folder shuffle," to prevent him or her from knowing which photo a witness is viewing at a given time and to ensure that he or she cannot see the order or arrangement of the photographs viewed by the witness. Blinded procedures may be necessary to use in smaller agencies with limited resources or in high profile cases where all officers are aware of the suspect's identity. As a practical matter, blinded procedures work only for photo arrays and are not recommended for use in lineups. Lineups must be conducted using double blind procedures.

Providing instructions to the witness. The person conducting the lineup or photo array should not disclose or convey to the witness that a suspect is in custody. Rather, the person should read instructions to the witness that are neutral and detached and should allow the witness to ask questions about the instructions before the process begins. The witness should sign and date the instructions. Organizations have published instructions for use in lineup or photo array procedures that may be used by agencies. While a witness is viewing the photo array, the person conducting the procedure should not interrupt the witness or interject.

Displaying photos or presenting a lineup. In selecting fillers or individuals for the photo array or lineup procedure, at least five fillers—or non-suspects—should be used with the suspect photo. Fillers should generally fit the witness's description of the perpetrator as opposed to match a specific suspect's appearance. Fillers should not make the suspect noticeably stand out. Photos should be of similar size with similar background

and formatting. They should be numbered sequentially or labeled in a manner that does not reveal identity or the source of the photo, and they should contain no other writing. More recent literature supports that where practical, agencies should employ a simultaneous procedure, which allows the witness to observe at one time all of the photos in an array for a single suspect.

Documenting witness responses. Law enforcement should clearly document by video or audio recording a witness's level of confidence verbatim at the time of an initial identification. New research shows that a witness's confidence at the time of an initial identification is a good indicator of accuracy. A recording will ensure that investigators and fact-finders fully understand a witness's level of confidence.

Multiple procedures and multiple witnesses. According to the literature, multiple identification procedures create a "commitment effect" in which the witness might recognize a lineup member or photo from a previous procedure, rather than from the crime scene. In addition, when multiple witnesses are involved, a procedure that ensures the suspect is not in the same position for each procedure guards against witnesses influencing one another.

Other factors. Other factors may include whether there was no unreasonable delay between the events in question and the identification procedures.

Showup procedures are inherently suggestive and should be discouraged. The International Association of Chiefs of Police (IACP) and other organizations recommend that witnesses should not be shown suspects while they are in suggestive settings such as a patrol car, handcuffs, or other physical restraints. Such settings can lead to a prejudicial inference by the witness. Notwithstanding the suggestive nature of showups, subsection (b)(2) addresses factors to consider in those circumstances. Once law enforcement has probable cause to arrest a suspect, however, a witness should not be allowed to participate in showup proceedings but should participate only in lineup or photo array procedures. Also, a judge should consider a witness's own words immediately after a showup procedure when assessing the witness's confidence level, as opposed to law enforcement's assessment that a witness "was confident."

Subsection (d) is included because the National Academies of Science (NAS) report recommends both expert testimony and jury instructions due to the fact that many scientifically established aspects of eyewitness identification memory are counterintuitive and jurors will need assistance in understanding the factors that may affect the accuracy of an identification. The jury should be instructed on both estimator variables (circumstances at the time of the crime) and system variables (procedures) that have an effect on witness identification.

Sources: National Academies of Science, *Identifying the Culprit: Assessing Eyewitness Identification* (2014), available at <https://www.nap.edu/catalog/18891/identifying-the-culprit-assessing-eyewitness-identification>; U.S. D.O.J., *Eyewitness Identification: Procedures for Conducting Photo Arrays* (2017); ABA Statement of Best Practices for Promoting the Accuracy of Eyewitness Identification Procedures (2004); IACP National Law Enforcement Policy Center, *Eyewitness Identification: Model Policy* (2010).

[Housekeeping Notes: While the court in *State v. Long* has addressed factors to include in a jury instruction on eyewitness identification, the instruction should be modified. The instruction is currently found in the Model Utah Jury Instructions, Instruction CR404, Eyewitness Identification.

The advisory committee on the Utah Rules of Criminal Procedure should amend rule 12 to require a defendant to present a motion aimed at eyewitness identification before trial.]