

MEETING AGENDA

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

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

**Tuesday- August 29, 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 (6/27/17) (*Attached*).....*John Lund*
 2. Eyewitness Identification Rule (*Attached*).....*Linda Jones, et al.*
 3. Rule 1102 & 511 Public Comments (*Attached*).....*Rick Schwermer*
 4. Rule 504 (*attached*).....*John Lund*
 5. Other Business.....*Mr. John Lund*

TAB 1

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

MEETING MINUTES

**Tuesday– June 27, 2017
5:15 p.m.
Council Room**

Mr. John Lund, Presiding

MEMBERS PRESENT

Mr. John Lund, Presiding
Hon. Matthew D. Bates
Mr. Christopher R. Hogle
Ms. Linda M. Jones
Hon. Keith A. Kelly
Mr. Adam Alba
Mr. Terence Rooney
Hon. David Mortensen
Ms. Jacey Skinner
Mr. Ed Havas
Ms. Lacey Singleton

GUESTS PRESENT

Ms. Nancy Merrill
Mr. Richard Schwermer

MEMBERS EXCUSED

Ms. Teresa Welch
Ms. Michalyn Steele
Ms. Deborah Bulkeley
Mr. Matthew Hansen

Hon. Vernice Trease
Ms. Teneille Brown

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

Mr. Lund welcomed everyone to the meeting.

Motion: Judge Kelly moved to approve the minutes from the Evidence Advisory Committee meeting on May 16, 2017. Mr. Ed Havas seconded the motion. The motion carried unanimously.

2. Report on Supreme Court Meeting (Mr. John Lund)

Mr. Lund reported that he and Mr. Schwermer recently attended the Supreme Court conference. He noted that they presented Rule 511 and Rule 1102 to the Supreme Court; both rules were approved and will go out for public comment.

Mr. Schwermer discussed Committee membership guidelines for Supreme Court Standing Committees. The Supreme Court will revisit the issue in the upcoming fall and Mr. Schwermer will update the Evidence Advisory Committee as it relates to them.

3. Final Review of Rule 504 (*attached*) (Mr. John Lund)

Mr. Hogle began the discussion by explaining his proposed edits to Rule 504. They discussed the definition of legal services, privilege, and confidentiality in the proposed rule. The Committee agreed to make the following edits to the proposed rule:

- (b) (1) include “legal service” after the word “obtaining”
- (b) (2) (B) edit the second line to read “but only if each client’s lawyer or lawyer’s representative was also present or included in the communications;”
- (b) add “(D) Lawyer referral service and lawyer”

After further discussion, Mr. Lund suggested that he make the edits that the Committee discussed and circulate the updated draft to the Committee for review.

4. Review of Draft Proposed EIE Rule (Eyewitness Identification Rule) (*attached*) (*Ms. Linda Jones et al.*)

Three guests from the Attorney General’s office attended the meeting to comment on Eyewitness Identification. The Committee and the guests discussed the question of whether to adopt the current legal standard or if the court should adopt more strict standards. The Committee suggested the following edits to the language in the proposed rule:

- (a)(4) definition of Showup should read: “Showup” means the presentation of a single person.....”
- (3)(C) amend the language to read: “Law enforcement instructed the witness that the person may or may not be the suspect.”
- (b) Admissibility of Eyewitness Testimony, amend the last line last line to read; “the identification procedure was:
(Subsection) unnecessarily suggestive or conducive to mistaken identification
(Subsection) clearly unreliable”

The Committee had further discussion on the language in the proposed rule. Mr. Lund suggested finishing the minor wordsmithing and reporting to the Supreme Court for further direction.

5. Other Business (Mr. John Lund)

Next Meeting:

August 29, 2017
5:15 p.m.
AOC, Council Room

TAB 2

Rule ____. Eyewitness Identification.**(a) Definitions.**

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

(2) Identification procedure. "Identification procedure" means a lineup, photo array, or showup.

(3) Photo array. "Photo array" means showing photographs to an eyewitness for the purpose of identifying or eliminating a suspect in a crime.

(4) Showup. "Showup" means the presentation of a single suspect to an eyewitness in a short time frame following commission of a crime to confirm or eliminate him or her as the perceived perpetrator. Showups, sometimes referred to as field identifications, are conducted in a contemporaneous time frame and setting with the crime.

(b) Admissibility of Eyewitness Testimony. An eyewitness's identification of ~~In a criminal trial, a witness may not identify the defendant as the person who committed the charged crime(s) shall be excluded at a criminal trial if the court determines~~ witness previously participated in an identification procedure administered by law enforcement and the court has determined that the identification procedure was unnecessarily suggestive or conducive to mistaken identification, 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) Selection of Photos or Persons and Recording Procedures.

(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) A photo array or lineup that includes the suspect also includes 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) The lineup or photo array procedures were recorded.

(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) Admissibility of Photographs. Photographs used in an out-of-court identification may be admitted in evidence if:

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

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

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

(3) 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) The showup was conducted 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 suspect may or may not be present.
 - (D) When the showup was conducted with two or more witnesses, 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) The same suspect was not presented 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.
- (4) In addition to the factors for the procedures described in parts (I) through (3) of this rule, the court may evaluate an identification procedure using any other circumstance that the court determines is relevant.

(c) Jury Instruction and Expert Testimony. ~~When the court admits eyewitness identification evidence, it shall instruct the jury regarding evaluation of eyewitness identification testimony and 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.~~

AG Notes/Explanations.

Subsection (b). Current subsection (b) calls for the exclusion of identification testimony if the court determines that “the identification procedure was unnecessarily suggestive *or* conducive to mistaken identification.” That standard is far stricter than the constitutional standard adopted by the Utah Supreme Court and would exclude otherwise reliable identification testimony. The proposed language appears to come from language in *State v. Bullock*, 699 P.2d 753 (Utah 1985), but with a couple of key differences (highlighted):

“An identification procedure does not deny a defendant due process of law unless it is ‘so unnecessarily suggestive and conducive to irreparable mistaken identification as to deny the accused a fair trial.”

Bullock, 699 P.2d at 755-56. The committee’s language thus imposes a far stricter standard for admission of eyewitness identification testimony by substituting the conjunctive “and” for the disjunctive “or” used in *Bullock*, and by referring only to identifications that are “conductive to mistaken identification” rather than “conductive to **irreparable** mistaken identification.”

- To remedy this incongruity, we propose that subsection (b) be amended to call for exclusion of identification testimony when (1) the identification procedure employed by police was unnecessarily suggestive, and (2) the unnecessarily suggestive identification procedure rendered the identification “clearly unreliable.” This allows courts to consider all factors identified by the Supreme Court in *State v. Long*, 721 P.2d 483 (Utah 1986).

We use “clearly unreliable,” rather than “conductive to irreparable misidentification,” because it is the language used by the Supreme Court under State due process analysis. See *State v. Hubbard*, 2002 UT 45, ¶130, 48 P.3d 953 (holding that courts “should not step into the province of the jury and decide the ultimate matter of identification” but should merely decide whether identification “was sufficiently reliable so as not to offend defendant’s right to due process by permitting identification clearly unreliable).

The Supreme Court, however, has never clarified or explained the standard for judging what amounts to a “clearly unreliable” identification. We would advocate for a standard akin to the federal standard, i.e., when an unnecessarily suggestive identification creates a “very substantial likelihood of irreparable misidentification.” *Perry v. New Hampshire*, 565 U.S. 228, 232 (2012) (quoting *Simmons v. United States*, 390 U.S. 377, 384 (1968)). And we believe that standard should be written into the rule.

- Subsections (b)(1) and (b)(3) also contain the language “unnecessarily suggestive or conducive to mistaken identification”; we thus propose deleting “or conducive to mistaken identification.” That language should be deleted because the procedures set forth in subsections (b)(1) and (b)(3) are relevant to the question of a procedure’s suggestiveness, not to the conditions affecting the witness during the criminal event—the *Long* factors against which the suggestiveness of the procedure are weighed.

Subsection (c). We propose that subsection (c) be amended to require that trial courts give an instruction on known factors that may affect the reliability of an identification only when an eyewitness identification expert is not called to testify and requests such an instruction. We believe that counsel should have the latitude, in the exercise of his or her professional judgment, of not requesting an instruction. For example, an instruction may not be needed if the witness knows the perpetrator. Additionally, we believe an instruction is inappropriate when an expert testifies because in that case, the instruction will either improperly bolster the testimony of the expert or contradict that testimony.

Rule ____. Eyewitness Identification

(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 [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.]

TAB 3

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3 thoughts on “Utah Rules of Evidence – Comment Period Closes August 12, 2017”

Nathan Evershed

June 29, 2017 at 7:32 pm

The “promptly reported” language in Rule 1102(7) does not make sense. Rule 1102 relaxes the hearsay rules by allowing “reliable hearsay” for “criminal preliminary examinations.” In every other application, Rule 1102 allows in evidence that would not be so easily admitted, and likely excluded, in a trial. For example, forensic reports and records, a statement of a non-testifying peace officer to a testifying peace officer, and an affidavit of a non-testifying witness are examples of evidence where the hearsay rules are relaxed for a preliminary hearing compared to a trial.

The “promptly reported” language turns Rule 1102 on its head. Instead of a more relaxed standard to introduce evidence, in keeping with the essence of Rule 1102, it adds a requirement that a jury trial would not include. If a prosecutor wanted to introduce a video interview of a child victim of sexual or physical abuse at a trial, then he or she would need to follow Rule 15.5 of the Utah Rules of Criminal Procedure, which outlines the requirements to introduce such a video at a trial, and even at a preliminary hearing under Rule 1102. None of the requirements in Rule 15.5 require that the child must have promptly reported his or her victimization in order to allow such evidence, which Rule 1102 currently requires in a preliminary hearing. Thus, the “promptly reported” language of Rule 1102 makes evidence, involving child victims no less, more difficult to introduce at a preliminary hearing than at a jury trial, which is not in keeping with the essence of Rule 1102. Therefore, the “promptly reported” language should be removed and it is very encouraging that this amendment is being suggested.

Thank you for your time.

Paul Lyman

June 30, 2017 at 3:02 pm

Proposed Rules 7 and 7A of Criminal Procedure allow only seven day continuances. In rural areas some courts are only held monthly and others are only held every two weeks. There may

- -Rules of Evidence
- -Rules of Juvenile Procedure
- -Rules of Professional Conduct
- -Rules of Small Claims Procedure
- CJA01-0201
- CJA01-0204
- CJA01-0205
- CJA01-0304
- CJA01-0305
- CJA02-0103
- CJA02-0104
- CJA02-0106.01
- CJA02-0106.02
- CJA02-0106.03
- CJA02-0106.04
- CJA02-0106.05
- CJA02-0204
- CJA02-0206
- CJA02-0212
- CJA03-0101
- CJA03-0102
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- CJA03-0306.04
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- CJA03-0404
- CJA03-0406
- CJA03-0407

not be a judge available within seven days. Longer periods should be allowed “for good cause shown.”

Sandi Johnson

July 3, 2017 at 6:03 pm

I support the proposed change to remove the “promptly reported by the child victim” language. Research has shown that with child victims, the promise to tell the truth and using proper interviewing techniques are the important factors to consider. Removing this language protects victims from the trauma of reliving the experience more than is necessary.

- CJA03-0408
- CJA03-0410
- CJA03-0411
- CJA03-0412
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3 thoughts on “Utah Rules of Evidence – Comment Period Closes August 12, 2017”

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June 29, 2017 at 7:32 pm

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The “promptly reported” language turns Rule 1102 on its head. Instead of a more relaxed standard to introduce evidence, in keeping with the essence of Rule 1102, it adds a requirement that a jury trial would not include. If a prosecutor wanted to introduce a video interview of a child victim of sexual or physical abuse at a trial, then he or she would need to follow Rule 15.5 of the Utah Rules of Criminal Procedure, which outlines the requirements to introduce such a video at a trial, and even at a preliminary hearing under Rule 1102. None of the requirements in Rule 15.5 require that the child must have promptly reported his or her victimization in order to allow such evidence, which Rule 1102 currently requires in a preliminary hearing. Thus, the “promptly reported” language of Rule 1102 makes evidence, involving child victims no less, more difficult to introduce at a preliminary hearing than at a jury trial, which is not in keeping with the essence of Rule 1102. Therefore, the “promptly reported” language should be removed and it is very encouraging that this amendment is being suggested.

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- CJA01-0305
- CJA02-0103
- CJA02-0104
- CJA02-0106.01
- CJA02-0106.02
- CJA02-0106.03
- CJA02-0106.04
- CJA02-0106.05
- CJA02-0204
- CJA02-0206
- CJA02-0212
- CJA03-0101
- CJA03-0102
- CJA03-0104
- CJA03-0109
- CJA03-0111
- CJA03-0111.01
- CJA03-0111.02
- CJA03-0111.03
- CJA03-0111.04
- CJA03-0111.05
- CJA03-0111.06
- CJA03-0112
- CJA03-0114
- CJA03-0115
- CJA03-0116
- CJA03-0117
- CJA03-0201
- CJA03-0201.02
- CJA03-0202
- CJA03-0301
- CJA03-0302
- CJA03-0304
- CJA03-0304.01
- CJA03-0305
- CJA03-0306
- CJA03-0306.01
- CJA03-0306.02
- CJA03-0306.03
- CJA03-0306.04
- CJA03-0306.05
- CJA03-0402
- CJA03-0403
- CJA03-0404
- CJA03-0406
- CJA03-0407

not be a judge available within seven days. Longer periods should be allowed “for good cause shown.”

Sandi Johnson

July 3, 2017 at 6:03 pm

I support the proposed change to remove the “promptly reported by the child victim” language. Research has shown that with child victims, the promise to tell the truth and using proper interviewing techniques are the important factors to consider. Removing this language protects victims from the trauma of reliving the experience more than is necessary.

- CJA03-0408
- CJA03-0410
- CJA03-0411
- CJA03-0412
- CJA03-0413
- CJA03-0414
- CJA03-0418
- CJA04-0103
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- CJA04-0201
- CJA04-0202
- CJA04-0202.01
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- CJA04-0202.06
- CJA04-0202.07
- CJA04-0202.08
- CJA04-0202.09
- CJA04-0202.10
- CJA04-0202.12
- CJA04-0203
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- CJA04-0401.01
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- CJA04-0408.01
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- CJA04-0603
- CJA04-0610
- CJA04-0613
- CJA04-0701
- CJA04-0702
- CJA04-0704
- CJA04-0801

TAB 4

Rule 504. Lawyer - Client.

(a) Definitions.

- (1) "Client" means a person, public officer, corporation, association, or other organization or entity, either public or private, who is rendered legal services by a lawyer or who consults a lawyer 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 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.
- (5) "Lawyer's representative" means a person or entity employed to assist the lawyer in the rendition of legal services.
- (6) "Client's representative" means a person or entity authorized by the client to:
 - (A) obtain legal services for or on behalf of the client;
 - (B) act on advice rendered pursuant to legal services for or on behalf of the client; or
 - (C) facilitate confidential communications with the lawyer concerning a legal matter.

(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 providing legal services; and

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

(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 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 or in the course of obtaining or facilitating the rendition of legal services to the client; and

(2) the communications were:

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

(B) between clients or clients' representatives 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

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

(D) 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.

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 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~~

(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

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

(D) 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
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(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.