

**MEETING AGENDA**

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

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

**Tuesday – February 21, 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 (11/29/16) (*Attached*).....*Mr. John Lund*
  2. Insurance Commission Amendments To Rule 511 (*Attached*).....*Insurance Commission*
  3. Proposed Changes to Rule 1102 (*Attached*).....*Kristin Zimmerman, Craig Johnson and  
Heather Stewart*
  4. Particular Circumstances Subcommittee: (*attached*).....(*Linda Jones, et al.*)
  5. Rule 504 (*Attached*).....*Mr. John Lund*
  6. Other Business.....*Mr. John Lund*

TAB 1

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

**MEETING MINUTES**

**Tuesday – November 29, 2016  
5:15 p.m.  
Council Room**

*Mr. John Lund, Presiding*

**MEMBERS PRESENT**

Ms. Jacey Skinner  
Ms. Teresa Welch  
Mr. Christopher R. Hogle  
Ms. Linda M. Jones  
Hon. Keith A. Kelly  
Mr. John R. Lund  
Mr. Terence Rooney  
Hon. David Mortensen  
Mr. Ed Havas  
Hon. Vernice Trease  
Mr. Matthew Hansen  
Mr. Adam Alba  
Ms. Lacey Singleton

**GUESTS PRESENT**

Mr. Paul Boyden

**STAFF PRESENT**

Ms. Nancy Merrill  
Mr. Richard Schwermer

**MEMBERS EXCUSED**

Ms. Deborah Bulkeley  
Ms. Michalyn Steele  
Hon. Matthew Bates  
Ms. Teneille Brown

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

Mr. Lund welcomed everyone to the meeting.

***Motion:*** *Ms. Linda Jones moved to approve the minutes from the Evidence Advisory meeting on October 11, 2016. Mr. Matthew Hansen seconded the motion. The motion carried unanimously.*

**2. Victim Selection Rule (attached) (Mr. Paul Boyden)**

Mr. Boyden reported on a draft of a victim selections bill that will be presented to the legislature.

He is requesting that the draft be approved by the Evidence Advisory Committee. Mr. Boyden reported that the draft incorporates language that was discussed at the last Evidence Advisory Committee on the victim selection topic. The Committee had further discussion about the word “victim” in the draft and about language on lines 31-37. Specifically, they discussed the language on line 36.

***Motion:*** Judge Keith Kelly made a motion to recommend to the Supreme Court adoption of the proposed rule including the amended language on line 36 to read “specifically relates to the defendant’s selection of the victim of the crime charged.” The recommendation is also contingent upon the legislature passing the Victim Selection Penalty Enhancement Statute. Judge Vernice Trease seconded the motion. The motion passed unanimously.

### **3. Report Back on Meeting with the Court (*attached*) (Mr. Rick Schwermer)**

Mr. Schwermer reported on the following items:

- The Supreme Court approved the amendment to Rule 412, it will be effective May, 2017
- Rule 504 - the Supreme Court did not recommend adoption of the Committee’s draft and asked the Committee to redraft the rule. After further discussion Mr. Lund, Ed Havas, and Judge Kelly agreed to further research Rule 504 and report back at the next meeting.
- Rule 803 - the Supreme Court agreed with the Committee’s recommendation to defer adoption of the Rule.
- Rule 902 - the Supreme Court agreed with the drafting changes that added the notice clause to each specific sub paragraph. Judge Kelly, Chris Hogle, and Adam Alba agreed to draft a note for Rule 902 in order for the rule to go out for comment, with the goal of a May, 2017 effective date.
- Mr. Schwermer reported that the Supreme Court requested a broader perspective from the Committee on the eye-witness identification issue. He also noted that the Supreme Court recognized the thorough work that the subcommittee has done so far on the issue.
- Mr. Schwermer noted that the Committee will most likely be revisiting Rule 511

### **4. Rule 902 Committee Note: (*attached*) (Mr. Rick Schwermer)**

The Supreme Court agreed with the drafting changes that added the notice clause to each specific sub paragraph. Judge Kelly, Chris Hogle, and Adam Alba agreed to draft a committee note for Rule 902 in order for the rule to go out for comment, with the goal of a May 1, 2017 effective date.

### **5. Particular Circumstances Subcommittee: (*attached*) (Linda Jones, et al.)**

Ms. Jones discussed two possible perspectives to pursue with the eyewitness issue.

- Possibility one is to review and organize each circumstance and draft rules around each particular circumstance.
- Possibility two is to draft one broad rule, and to rely on jury instructions to supplement the rule.

The Committee discussed the pros and cons of both possibilities. The subcommittee agreed to start with the Massachusetts Rule, the work that they have already done, the *Long* instructions, and the summary of cases on eyewitness identification and draft a rule relating to eyewitness identification, then identify other particular circumstances issues.

**6. ABA Proposal for Attorney Client Privilege: (*attached*) (Mr. John Lund)**

The Committee agreed that there should be a privilege for communications between a person seeking legal help and lawyer referral services. The Committee had further discussion about language for defining different entities that provide legal assistance.

**7. Other Business: (Mr. John Lund)**

**Next Meetings:** January 17, 2017 if needed, & February 21, 2017  
5:15 p.m.  
AOC, Council Room

TAB 2

## **Rule 511. Insurance Regulators.**

### **(a) Definitions.**

(1) “Commissioner” has the same meaning as set forth in Utah Code section 31A-1- 301.

(2) “Department” has the same meaning as set forth in Utah Code section 31A-1- 301.

(3) “NAIC” means the National Association of Insurance Commissioners.

(4) “Confidential Information” means information, documents, and copies of these that are obtained by or disclosed to the Commissioner or any other person in the course of an examination or investigation made under Utah Code section 31A-16-107.5 and the contents of a report under Utah Code Section 31A-16a-107 and all information reported under Utah Code ~~section~~ sections 31A-16-105 and 31A-16a-105.

### **(b) Statement of the privilege for Confidential Information.**

(1) The Commissioner and the Department have a privilege to refuse to disclose in a private civil action Confidential Information that is within the possession or control of the Commissioner and the Department, unless the Commissioner has determined that the Confidential Information may be released pursuant to Utah Code ~~section~~ sections 31A-16-109 and 31A-16a-108.

(2) The NAIC has a privilege to refuse to disclose in a private civil action Confidential Information that is within the possession or control of the NAIC.

**(c) Who may claim.** The privilege may be claimed solely by the Commissioner, representatives of the Department, or representatives of the NAIC.

**(d) Circumstances not constituting waiver.** No waiver of any applicable privilege shall occur as a result of disclosure of documents, materials, or information to the Commissioner under Utah Code sections 31A-16-109 and 31A-16a-108 or as a result of the sharing of documents, materials, or information under Utah Code ~~section~~ sections 31A-16-109(3) and 31A-16a-108(3).

Effective July 1, 2016

**2016 Advisory Committee Note.** This rule is intended to complement the Insurance Holding Company System Regulatory Act (~~“Model Act”~~), enacted by the Utah Legislature in 2015 and the Own Risk Solvency Assessment Act enacted by the Utah Legislature in 2017 (collectively “Model Acts”). One purpose of the Model Acts is to expand the Insurance Commissioner’s scope of inquiry to better ensure that insurance companies doing business in the state are solvent. To facilitate an inquiry and to encourage companies to share sensitive and confidential information, the Model Acts allows the Commissioner to assert a privilege. The privilege extends to the State Insurance Commissioner, the State Insurance Department and the National

Insurance Commissioners (“NAIC”). All fifty states and the District of Columbia have enacted the Model Acts in some form.

The rule is narrowly crafted, consistent with the Model Act and similar legislation enacted in other states and the District of Columbia. The rule is inapplicable outside private civil actions, and the rule does not shield information possessed or controlled by parties other than the Utah Insurance Commissioner, the Utah Insurance Department, and the NAIC.



TAB 3

Proposal for Rule Change: The Children's Justice Center Committee proposes an amendment to the 1102 rule for permitting Children's Justice Center (CJC) recordings in lieu of live child testimony at preliminary hearings. This change would bring the Rule into line with established evidence-based research regarding the timing of many child sexual abuse reports. The proposed change is to delete the language "promptly reported" from 1102(b)(7) and delete the advisory note a "child victim's hearsay report be close in time to the event reported".

In 1995 the Rules Committee adopted a rule that permitted the playing of a CJC recording in lieu of live testimony at a preliminary hearing. Utah Rule of Evidence 1102 Reliable Hearsay only permits the playing of a CJC interview in lieu of a child's testimony at preliminary hearing if the abuse is "promptly reported by the child victim". (The advisory notes on the rule state that a "child victim's hearsay report be close in time to the event reported".) Evidence-based research since the passage of the rule makes clear that it is not uncommon for child sexual abuse victims to make a delayed disclosure: i.e. victims frequently do not "prompt[ly] report" the abuse.

It is the use of standardized forensic interviewing techniques that makes the CJC interview "reliable hearsay" and not the passage of time between the abuse and the victim's disclosure. Techniques used by CJC interviewers include preparing the child to relate a non-traumatic incident from beginning to end, open-ended questions, and educating the child to correct the interviewer. The forensic interviewing techniques are part of a standardized protocol that is consistent with what researchers have learned about the encoding and retelling of traumatic events.

The current Rule 1102 language leads to anomalous results as to which children are required to testify at a preliminary hearing. Due to this Rule, there was a recent Salt Lake County case where a twelve-year-old child, who had been repeatedly sexually abused by her step-father, but disclosed the abuse years later, was required to testify for an hour and a half on the witness stand in front of the abuser. Forty-five minutes of that time on the stand was cross-examination.

Ironically, under the same Rule, adults are permitted to submit their testimony in a written statement that acknowledges that they may be prosecuted for any false statements to insure reliability. This written statement is presumed reliable, no matter how much time has transpired from the crime and its report by the victim or a witness. There seems to be a double-standard for children. The current forensic interview of children protocol and admissibility procedure under Rule 15.5 of the Utah Rules of Criminal Procedure has the same indicia of reliability for children. As a result, we strongly support amending Rule 1102 in the attached proposed form.

Brown, D.A., Lamb, M.E., Lewis, C., Pipe, M.E., Orbach, Y., and Wolfman, M. (2013) The NICHD Investigative Interview Protocol: An Analogue Study. Journal of Experimental Psychology, 19(4): 367-382.

Collin-Vezina, D., De La Sablonnière-Griffin, M, Palmer, A, and Milne L. Q. (2015) A preliminary mapping of individual, relational and social factors that impede disclosure of childhood sexual abuse. Child Abuse and Neglect: The International Journal, (43): 123-134.

Lamb, M., Hershkowitz, I., Orbach, Y., and Esplin, P. *Tell Me What Happened: Structured Investigative Interviews of Child Victims and Witnesses*, Sussex, England: John Wiley & Sons Ltd, 2008.

Lamb, M., La Rooy, D., Malloy, L., and Katz, C. *Children's Testimony: A Handbook of Psychological Research and Forensic Practice (2<sup>nd</sup> ed.)*, Sussex, England: John Wiley & Sons Ltd, 2011.

McElvaney, R. (2015) Disclosure of Child Sexual Abuse: Delays, Non-disclosure and Partial Disclosure. What the Research Tells Us and Implications for Practice. Child Abuse Review, (24): 159-169.

Munzer, A., Fegert, J., Ganser, H., Loos, S., Witt, A., and Goldbeck, L. (2014) Please Tell! Barriers to Disclosing Sexual Victimization and Subsequent Social support Perceived by Children and Adolescents, (2014) Journal of Interpersonal Violence, Vol.31(2) 355-377.

Newlin, C., Cordisco Steele, L., Chamberlin, A., Anderson, J., Kenniston, J., Russell, A., Stewart, H., and Vaughan-Eden, V. (2015) Child Forensic Interviewing: Best Practices. Office of Juvenile Justice and Delinquency Prevention Bulletin, September, 2-17.

Roberts, K.P. and Powell, M.B. (2001) Describing Individual Incidents of Sexual Abuse: A Review of Research on the Effects of Multiple Sources of Information on Children's Reports. Child Abuse and Neglect, (25): 1643-1659.

Russell, A. (2009) Assessing Children's Statements for Investigative and Court Purposes. National Child Protection Center, Center Piece, 1 (6): 1-6.

# Disclosure of Child Sexual Abuse: Delays, Non-disclosure and Partial Disclosure. What the Research Tells Us and Implications for Practice

This paper reviews the research on disclosure of child sexual abuse with specific reference to delays in disclosing, non-disclosure and partial disclosure of experiences of child sexual abuse. Findings from large-scale national probability studies highlight the prevalence of both non-disclosure and delays in disclosure, while findings from small-scale qualitative studies portray the complexity, diversity and individuality of experiences. The possible explanations regarding why children are reluctant to disclose such experiences have significant implications for addressing the issue of child sexual abuse from the perspectives of child protection, legal and therapeutic professionals. The importance of understanding the dynamics of disclosure, in particular the needs of young people to maintain control over the disclosure process, the important role that peers play in this process, the responses of adults in both informal and formal networks, and the opportunities to tell, is key to helping young people speak more promptly about their experiences of sexual abuse. Copyright © 2013 John Wiley & Sons, Ltd.

## KEY PRACTITIONER MESSAGES:

- Children typically delay disclosing experiences of abuse.
- Asking children questions about their wellbeing gives them the opportunity to tell when they are ready.
- The challenge is to find the right questions at the right time.
- Peers can be the right people to ask these questions.
- Adolescents need to know about how to ask and what to do if someone tells.

KEY WORDS: child sex abuse; disclosure; research to practice

An issue of increasing concern in recent years is the phenomenon of delayed disclosure of childhood sexual abuse and the need to understand the process of how children and adults disclose their experiences of child sexual abuse, given the implications for child protection, social justice and

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**‘The importance of understanding the dynamics of disclosure’**

**‘Adolescents need to know about how to ask and what to do if someone tells’**



**'This paper reviews the research on disclosure patterns of childhood sexual abuse'**

**'Most people who experience sexual abuse in childhood do not disclose this abuse until adulthood'**

mental health outcomes. This paper reviews the research on disclosure patterns of childhood sexual abuse, specifically delays in disclosure, non-disclosure (as evident through adult retrospective studies) and partial disclosures, and discusses implications for practice. Literature searches of the online databases PSYCINFO and Social Sciences Citation Index, in addition to manual searches of texts published since 2000, were conducted using the search terms 'child sexual abuse', 'sex abuse' and 'disclosure'.

The research to date on disclosure patterns is based on two sampling methodologies – studies of adults reporting retrospective experiences and studies of children. The former group of studies has the benefit of drawing on large-scale national probability samples which can be considered to be representative of the general population. The latter group with some small exceptions (predominantly adolescent studies) uses samples of young people who have disclosed sexual abuse but would not be considered as representative of all children who have been abused:

'children who decide to tell someone about being sexually abused and whose cases therefore come to court are not representative of sexually abused children in general' (Olafson and Lederman, 2006, p. 29).

### Patterns of Disclosure: Delays and Non-disclosure

There is consensus in the research literature that most people who experience sexual abuse in childhood do not disclose this abuse until adulthood, and when disclosure does occur in childhood, significant delays are common. Table 1 summarises two large-scale studies to highlight the extent of delays in disclosure and the percentage of those who did not disclose to anyone prior to the study.

Kogan (2004) examined the timing of disclosure of unwanted sexual experiences in childhood or adolescence in a sub-sample (n = 263 adolescent women, aged 12 to 17) of the National Survey of Adolescents (Kilpatrick and Saunders, 1995) in the USA – a nationally representative study. Kogan's results can be summarised as follows: immediate disclosure (within 1 month) 43 per cent, delayed disclosure (less than 1 year) 31 per cent and non-disclosure (disclosed only during the survey) 26 per cent. Smith and colleagues (2000) examined a sub-sample (n = 288) of the National Women's Study in the USA (Resnick *et al.*, 1993, cited in Smith *et al.*, 2000) who had reported a childhood rape prior to the age of 18. Smith *et al.*'s findings can be summarised as follows: immediate disclosure (within 1 month) 27 per cent, delayed disclosure (more than a year) 58 per cent and non-disclosure (survey only) 28 per cent. Those who had never disclosed prior to the survey constitute comparable proportions in these two studies while the rates for immediate

**Table 1.** Patterns of disclosure – delay and non-disclosure

	Kogan (2004) (n = 263 adolescents)	Smith <i>et al.</i> (2000) (n = 288 adults)
Told within 24 hours	24%	18%
Told within 1 month	19%	9%
Told within 1 year	12%	11%
Delayed telling more than 1 year	19%	47%
Never told before survey	26%	28%

disclosure are higher in the adolescent study than in the adult study, a reassuring finding given the increased awareness of sexual abuse in society during the past 20 years.

Goodman-Brown and colleagues (2003) examined USA district attorney files of 218 children. Their categories were slightly different from the previous two studies but in summary, immediate disclosers (within 1 month) constituted 64 per cent of the sample while 29 per cent disclosed within six months. This study is unusual insofar as the sample studied had reported their experience of abuse to the authorities and a prosecution was in progress. Goodman-Brown *et al.* also pointed out that families who participated in this study were more likely to represent those children who experienced abuse by someone outside the family. Research has found that delays in disclosure are longer for those abused within the family (Sjoberg and Lindblad, 2002; Goodman-Brown *et al.*, 2003; Kogan, 2004; Hershkowitz *et al.*, 2005). Therefore, children who disclose more promptly may be overrepresented in legal samples.

In Sweden, Priebe and Svedin (2008) conducted a national survey of 4339 adolescents, of whom 1962 reported some form of sexual abuse (65% of girls and 23% of boys). Details of the time lapse in disclosing were not available from this study. However, of those who had disclosed and answered the questions on disclosure ( $n = 1493$ ), 59.5 per cent had told no-one of their experiences prior to the survey. Of those who did disclose, 80.5 per cent mentioned a 'friend of my own age' as the only person who they had told. In this study, 6.8 per cent had reported their experiences to the social authorities or police. A further Swedish study of 122 women who had experienced childhood sexual abuse (Jonson and Lindblad, 2004) found that 32 per cent disclosed during childhood (before the age of 18) while the majority told in adulthood (68%). The delay was up to 49 years, with an average of 21 years ( $SD = 12.9$ ). Of those who told in childhood, 59 per cent told only one person. In Ireland, the SAVI study ( $n = 3118$ , McGee *et al.*, 2002) found that 47 per cent of those respondents who had experienced some form of sexual assault prior to age 17 had told no-one of this experience until the survey. McElvaney (2002) investigated delay in a legal sample of ten adults who had made formal complaints of childhood sexual abuse in Ireland and found delays ranging from 20 years to 50 years.

Studies of children in the context of forensic/investigative interviews where children are interviewed by professionals due to concerns that the child has been sexually abused also point to high non-disclosure rates, particularly striking in cases where there is corroborative evidence that abuse has occurred – medical evidence (Lyon, 2007), or confessions from the abuser or videotaped evidence/witness reports (Sjoberg and Lindblad, 2002). Lyon (2007) reported his findings from a review of studies published between 1965 and 1993 of children diagnosed with gonorrhoea where the average disclosure rate among 579 children was 43 per cent ( $n = 250$ ). In a study where the evidence for the abuse was available on videotape, children have denied abuse when interviewed by the police (Sjoberg and Lindblad, 2002).

In summary, significant numbers of children do not disclose experiences of sexual abuse until adulthood and adult survey results suggest that significant

**'The rates for immediate disclosure are lower in the adolescent study than in the adult study'**

**'Children who disclose more promptly may be overrepresented in legal samples'**

**'Delays ranging from 20 years to 50 years'**



**'High numbers of respondents disclosing to researchers for the first time'**

**'They found that interviewers behaved differently with the two groups'**

**'A parent described how her teenage son told her over a period of days'**

proportions of adults have never disclosed such abuse, as evidenced by the high numbers of respondents disclosing to researchers for the first time.

#### **Patterns of Disclosure – Partial Disclosure**

Information on how children disclose over time can be obtained from studies of children who participated in forensic/investigative interviews where children are interviewed by professionals due to concerns that the child has been sexually abused. The issue of partial disclosures was highlighted by earlier studies such as those by DeVoe and Faller (1999) of five- to ten-year olds (i.e. making detailed informal disclosures that were not replicated in formal interviews) and Elliott and Briere (1994) of children aged eight to 15 years (i.e. disclosing only partial information until confronted with external evidence that led to more complete disclosures).

More recently, investigators have examined the role of the interviewer and questioning styles in the forensic interview and how this impacts on children's disclosures and the level of detail provided in interview. Hershkowitz *et al.* (2006) compared tapes of interviews with children who disclosed sexual abuse and those who did not (but about whom there was 'substantial' reason to believe that they had been abused). They found that interviewers behaved differently with the two groups, using different types of prompts with children who presented as somewhat uncooperative, offered fewer details and gave more uninformative responses at the beginning of the interview. It would appear that interviewers responded to less communicative children by increasing the proportion of closed questions which in turn led to children being less forthcoming. Lamb *et al.* (2002) have found that the use of a protocol that emphasises the use of prompts that elicit free narrative (e.g. 'tell me about that') as compared with closed questions (those requiring a yes/no response) has resulted in more detail and more accuracy in children's accounts.

Although few studies exist that examine the phenomenon of disclosure in informal settings (when disclosure is made to a friend or family member), some qualitative studies have described this process. McElvaney (2008) quoted one teenage girl who described hinting to her mother prior to disclosing the experience: 'I didn't tell her what happened but I was saying things that made her think it made her think that it happened but I didn't tell her' (p. 127). A parent described how her teenage son told her over a period of days, keeping the most difficult parts of the story until last:

'He came out with like it came out over two or three days so you know...he'd say well I've something else to tell you... the bad stuff last... what hurt him most and what he's saying what hurt him most' (p. 92)

And finally, one young person described how she told her social worker:

'I couldn't tell her most things but I just gave things to her to read... I told her at first I told her bits of it and em then just the others. I finished writing and then I gave them to her... later I told her that it was the father as well.' (p. 93)

This young person had been abused by both a father and son in a family with whom she was staying.

In reviewing the literature on this subject, London and colleagues (2005) noted, 'when children do disclose, it often takes them a long time to do so' (p. 204).

### Reasons for Patterns of Delay, Partial Disclosure and Non-disclosure

There are many influences on disclosure that have been identified in the research literature to help explain why it is that children delay disclosure, are reluctant to disclose, provide details of their experiences over time or do not disclose at all. Age has been identified as a significant predictor of disclosure in that younger children are less likely to disclose than older children. Children who are abused by a family member are less likely to disclose and more likely to delay disclosure than those abused by someone outside the family (Smith *et al.*, 2000; Goodman-Brown *et al.*, 2003; Kogan, 2004). Children who do disclose during forensic interviews compared to children who do not disclose in such contexts (yet concerns remain that they have been abused) are more likely to have parents (particularly mothers) who are more supportive (Lawson and Chaffin, 1992). In Priebe and Svedin's (2008) study of young people, parental bonding (positive relationship with parent who was not overprotective) was identified as the most significant predictor of disclosure for both boys and girls. However, close relationships can also act as an inhibitor to disclosure. McElvaney (2008) found that many young people in her study were reluctant to disclose due to concerns of upsetting their parents while others were concerned about the consequences for others of their disclosure. One 13-year-old girl described her concern that if she told, her uncle would go to jail and her small cousins would be left without a father:

'I didn't want them to grow up with no Dad and just looking at ... their other little friends having their Dad holding their hand I felt like I was taking their Dad away from them' (p. 130)

Gender has been found to influence disclosure in that boys appear to be more reluctant to disclose than girls (Goodman-Brown *et al.*, 2003; Hershkowitz *et al.*, 2005; Ungar *et al.*, 2009a). Mental health difficulties on the part of the child have also been found to be relevant, particularly when children experience dissociative symptoms or other post-traumatic stress symptomatology (Priebe and Svedin, 2008).

Some studies have found that the severity of abuse (e.g. penetrative abuse) predicts earlier disclosure while other studies have found no relationship between different types of abuse and disclosure timing. Similarly, the relationship between the duration of abuse – one-off incidents of abuse compared with abuse that takes place over a significant period of time – and timely disclosure has been investigated with mixed findings. Fear of the consequences of disclosure has been identified as a predictor of delayed disclosure and this in turn is associated with the age of the child (Goodman-Brown *et al.*, 2003). Older children are more cognitively competent in terms of being able to reflect on and anticipate possible reactions to their disclosure. This can act then as an inhibitor to disclosure, although as noted above, most studies have found that older children are more likely to disclose than younger children. Fears of not being believed have been described by young people as inhibiting their disclosure and these fears are often

**“When children do disclose, it often takes them a long time to do so”**

**‘Younger children are less likely to disclose than older children’**

**‘Many young people in her study were reluctant to disclose due to concerns of upsetting their parents’**

**‘Fear of the consequences of disclosure has been identified as a predictor of delayed disclosure’**



**‘Investigating the precise circumstances that led to disclosures for children’**

**‘Significant proportions of disclosure have been prompted by questions by caregivers, friends or others’**

**‘The implications of these findings can be considered in interrelated contexts’**

justified. Hershkowitz *et al.* (2007) interviewed children about their initial disclosures prior to formal interview and 50 per cent of the sample ( $n = 30$ ) reported feeling afraid or ashamed of their parents’ reaction. The authors reported that parents did show a tendency to blame their children and react angrily to the disclosure.

Recent research has highlighted the need for children to be asked direct questions to facilitate their disclosure. Of those children who did disclose, significant proportions disclosed following prompts rather than it being initiated by the child (Kogan, 2004). Qualitative studies drawing on interviews with children that focus on the disclosure process are important in investigating the precise circumstances that led to disclosures for children. McElvaney (2008) found that parents’ questioning of children was prompted by their concern about the young person’s emotional distress. On occasion, young people were communicating that something was not right in their world but were not able to articulate this verbally. Signs of psychological distress were, however, evident and questions targeted at the reasons for this distress were identified by McElvaney as a factor that helped young people to tell. Thus, many children may not have told about their experiences of abuse because they were not asked. McGee *et al.* (2002) followed up a sample of their respondents who had disclosed childhood abuse for the first time in their survey. When asked why they had not disclosed prior to the survey, many respondents noted that it was because they had not been asked. Increasingly, research studies are finding that significant proportions of disclosure have been prompted by questions by caregivers, friends or others in the child’s educational and social milieu that in themselves provide an opportunity for the young person to tell (Jensen *et al.*, 2005; Hershkowitz *et al.*, 2007; McElvaney *et al.*, 2012).

Finally, **some children need time to tell**. Mudaly and Goddard (2006) quote a 13-year-old girl: **‘she (mother) helped by not making me, not rushing me to get it out,** which, um, I think it’s a really stupid idea to make kids get it out A.S.A.P.’ (p. 91).

**Implications for Practice**

The consensus in the research literature at the present time is that disclosure is multi-determined, influenced by a complex range of factors that may influence each child in a different way. **Large-scale national probability studies confirm that non-disclosure and delays in disclosure are significant problems facing society and in particular for those professionals tasked with safeguarding the wellbeing of children. Children’s fears and anxieties in relation to telling need to be understood** and contained by those in their environment so that early disclosure can be encouraged and facilitated.

The implications of these findings can be considered in interrelated contexts: the legal context where action can only be taken if the child is able to give a clear, credible account of his/her experiences; child protection and therapeutic contexts where a comprehensive account is required to enable child protection professionals to intervene and where the psychological sequelae can be addressed to minimise the long-term impact of the experiences; and family and community contexts where early disclosure needs to be encouraged, and

other family issues addressed in the aftermath of disclosure and where peers play an important role.

Studies have confirmed the importance of professionals asking children and young people in a sensitive, open manner about possible experiences of abuse using non-leading questioning styles to minimise inaccurate accounts or contaminate children's narratives. It is clearly important for professionals to remain open to the possibility of abuse and further disclosure. It is equally important for professionals to be able to avoid persisting with questioning those children who are 'reluctant disclosers'. Similarly, professionals engaged with children in therapeutic work need to be open to the possibility of both initial and further disclosures.

Contradiction in witness statements is a well-known feature of false statements and giving additional detail to original formal statements can be interpreted within child protection, therapeutic and legal contexts as a contradiction of an earlier account. Listening to children's accounts of their experiences of disclosure helps us understand why it is that disclosure can be delayed and that when they do feel ready to tell this is not an 'all or nothing' decision. As one young person in Staller and Nelson-Gardell's (2005) study noted, 'it's never finished, never' p. 1426. This understanding in turn helps us identify those circumstances and reactions that may encourage the child to disclose.

The importance of asking children questions, thus giving them an opportunity to tell, has been identified. While parents, teachers and those in daily contact with children are often reluctant to question children, it is clear that many children do not disclose unless given this opportunity. Education and increased awareness are needed on how to question children in an appropriate manner. McElvaney (2008) noted that questions did not need to be about sexual abuse *per se*, but rather questions prompted by the young person's psychological distress, asking after the young people's wellbeing. This questioning in effect acted as an external pressure for the young person to tell his/her secret (McElvaney *et al.*, 2012). In Ungar *et al.*'s (2009a) study of Canadian youth, they found that young people used a range of disclosure strategies ranging from less direct strategies (such as risk-taking behaviours, not talking about the abuse) to direct strategies (such as seeking support from peers, turning to non-professional adult supports, disclosing to formal service providers), representing a process that relied heavily on others to 'build the bridges between the youth and formal care providers' (p. 352).

The tendency to delay disclosing and the partial nature of many disclosures are not conducive to successful legal investigations and prosecutions. In addition, the knowledge base that exists within the legal sphere is limited if only a percentage of the children who experience sexual abuse engage with this system. The disproportionately high 'immediate disclosure' rate found in Goodman-Brown *et al.*'s (2003) legal sample compared to Kogan's (2004) community sample raises the question of the representation of delayed disclosers in the legal system. Are children who delay in disclosing less likely to engage with the legal system? Are delays in disclosing contributing to decisions not to prosecute child sexual abuse crimes? In Ireland, the 1990s saw a significant increase in the numbers of complainants coming before the courts reporting experiences of childhood sexual abuse. Many of these cases were referred to the higher courts for judicial review proceedings to establish whether the cases could proceed without prejudicing the accused given the

**'Contradiction in witness statements is a well-known feature of false statements'**

**'Education and increased awareness are needed on how to question children in an appropriate manner'**

**'Are children who delay in disclosing less likely to engage with the legal system?'**



**'Concerns that engagement with the legal system will lead to further psychological trauma need to be considered'**

**'Many young people who delayed disclosure to an adult had told a friend'**

**'An adaptive strategy on the part of the young person to contain the experience'**

delay in the complaint being made and giving due regard to the accused's right to a speedy trial. Psychological expert testimony was sought as part of these proceedings to explain the delay in disclosure in each individual case to enable the courts to adjudicate on whether the delay in reporting was reasonable (see McElvaney, 2002). This legal mechanism provided an opportunity to enhance the knowledge base within the legal profession as to the complexities involved in disclosing and formally reporting experiences of childhood sexual abuse for adults. While one might expect that the legal system would be more sympathetic to children's difficulties in making disclosures, it may also be the case that the belief that 'if the child was really sexually abused, why would they not tell?', as articulated by Summit (1983), still prevails.

In addition, concerns that engagement with the legal system will lead to further psychological trauma need to be considered. A prospective longitudinal study conducted by Quas *et al.* (2005) indicated that the consequences of legal involvement change over the course of development and as a function of the child's reactions to and experiences during the legal case. The associations between legal involvement and outcomes varied with age. The authors suggested that although younger children may be at increased risk for some adverse outcomes such as mental health problems, older children may be at increased risk for other undesirable sequelae such as the negative attitudes of others toward them. Quas and Goodman's (2011) recent review notes that older children are more at risk in developing poor mental health outcomes. Thus, as noted earlier, young people's fears of the consequences of disclosure may well be justified. Raised awareness of both the prevalence of non-disclosure of sexual abuse and the importance of supporting children to disclose may go some way to addressing children's fears.

One interesting finding in recent studies is that many young people who delayed disclosure to an adult had told a friend. McElvaney (2008) and Ungar *et al.* (2009b) identified peer influence as significant in encouraging disclosure among adolescents. There is some suggestion from the research that regardless of the age at the time of abuse, adolescence may be a 'critical period' for disclosure. It may be that targeting adolescents in general (rather than those at risk of abuse) may be a powerful prevention tool in encouraging early disclosure. Evaluations of child abuse prevention programmes have shown significant improvements in the levels of awareness of child abuse in children and young people (Rispiers *et al.*, 1997; Zwi *et al.*, 2007). It may be that the increasing trend towards peer disclosure is a by-product of such educational and awareness-raising programmes. There is evidence that public awareness campaigns when implemented as part of a multi-dimensional strategy that involves targeting children, parents and communities (see Lalor and McElvaney, 2010, for a review of child abuse prevention programmes) are an effective tool in the prevention of child abuse.

McElvaney *et al.* (2012) describe the importance for young people of containing the secret of abuse and their need for confidentiality following disclosure as representing an adaptive strategy on the part of the young person to contain the experience and his/her emotional reaction to it. The conflict between wanting/needing to keep the secret and wanting/needing to tell is mediated by what they term the 'pressure cooker effect'. Young people in their study described influences from within and without that led to a build up of pressure, ultimately leading to disclosure. They suggest that building up the

pressure for young people by providing opportunities to tell may be needed to help young people tell more promptly. However, the lack of control that young people experience following disclosure remains an issue (Ungar *et al.*, 2009b; Quayle *et al.*, 2012). This highlights the need for dissemination of information directly to young people about the legal process, the possible consequences of disclosure, as well as ongoing developments in legal proceedings when young people and their families interface with the legal system.

The more recent focus on investigating those strategies that children use in making disclosures rather than solely on identifying barriers to disclosure is perhaps more helpful in informing awareness-raising campaigns and professional interventions. The author is involved in a large-scale review of children's files in an assessment service to ascertain those factors that helped children tell about their experiences of sexual abuse. A pilot study has suggested that this is an appropriate methodology for gathering data on children's experiences of informal disclosure, acknowledging the limitations of such an approach. Ungar *et al.* (2009a) describe the optimal conditions for disclosure as follows: being directly asked about experiences of abuse; having access to someone who will listen, believe and respond appropriately; having knowledge and language about what constitutes abuse and how to access help; having a sense of control over the process of disclosure both in terms of their anonymity (not being identified until they are ready for this) and confidentiality (the right to control who knows); and effective responses by adults both in informal and formal contexts.

Ungar *et al.* (2009b) support recent developments in prevention programmes that target supportive formal and informal caregivers in being better able to detect the possibility of abuse and support disclosures rather than focusing on empowering children themselves in making disclosures. Their findings in relation to the importance of bridge building for young people to access formal supports are supported by Jensen *et al.*'s (2005) emphasis on the dialogical nature of disclosure, and the important role that trusted adults and peers play in the disclosure process through noticing signs of psychological distress and asking young people about their psychological wellbeing (Collings *et al.*, 2005; Jensen *et al.*, 2005; McElvaney *et al.*, 2012). More emphasis is therefore needed on providing opportunities for children and young people to disclose. The challenge for professionals and those who care for children is how to do this in a way that protects children and promotes their wellbeing.

**'More recent focus on investigating those strategies that children use in making disclosures'**

**'Having a sense of control over the process of disclosure both in terms of their anonymity and confidentiality'**

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Proposal for Rule Change: The Children's Justice Center Committee proposes an amendment to the 1102 rule for permitting Children's Justice Center (CJC) recordings in lieu of live child testimony at preliminary hearings. This change would bring the Rule into line with established evidence-based research regarding the timing of many child sexual abuse reports. The proposed change is to delete the language "promptly reported" from 1102(b)(7) and delete the advisory note a "child victim's hearsay report be close in time to the event reported".

In 1995 the Rules Committee adopted a rule that permitted the playing of a CJC recording in lieu of live testimony at a preliminary hearing. Utah Rule of Evidence 1102 Reliable Hearsay only permits the playing of a CJC interview in lieu of a child's testimony at preliminary hearing if the abuse is "promptly reported by the child victim". (The advisory notes on the rule state that a "child victim's hearsay report be close in time to the event reported".) Evidence-based research since the passage of the rule makes clear that it is not uncommon for child sexual abuse victims to make a delayed disclosure: i.e. victims frequently do not "prompt[ly] report" the abuse.

It is the use of standardized forensic interviewing techniques that makes the CJC interview "reliable hearsay" and not the passage of time between the abuse and the victim's disclosure. Techniques used by CJC interviewers include preparing the child to relate a non-traumatic incident from beginning to end, open-ended questions, and educating the child to correct the interviewer. The forensic interviewing techniques are part of a standardized protocol that is consistent with what researchers have learned about the encoding and retelling of traumatic events.

The current Rule 1102 language leads to anomalous results as to which children are required to testify at a preliminary hearing. Due to this Rule, there was a recent Salt Lake County case where a twelve-year-old child, who had been repeatedly sexually abused by her step-father, but disclosed the abuse years later, was required to testify for an hour and a half on the witness stand in front of the abuser. Forty-five minutes of that time on the stand was cross-examination.

Ironically, under the same Rule, adults are permitted to submit their testimony in a written statement that acknowledges that they may be prosecuted for any false statements to insure reliability. This written statement is presumed reliable, no matter how much time has transpired from the crime and its report by the victim or a witness. There seems to be a double-standard for children. The current forensic interview of children protocol and admissibility procedure under Rule 15.5 of the Utah Rules of Criminal Procedure has the same indicia of reliability for children. As a result, we strongly support amending Rule 1102 in the attached proposed form.

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TAB 5

## 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 professional legal services by a lawyer or who consults a lawyer with a view to obtaining professional legal services.

**Commented [JRL1]:** This is quaint terminology. Perhaps "for the purpose of"

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

**Commented [JRL2]:** If and when Utah creates Limited License Paralegals, they will likely need to be added to this Rule.

(3) "Lawyer referral service" means a non-profit or for-profit organization providing intake or screening services to clients or prospective clients for the purpose of referring them to a lawyer.

(43) "Representative of the lawyer" means a person or entity employed to assist the lawyer in a rendition of professional legal services.

(54) "Representative of the client" means a person or entity having authority:

- (A) to obtain professional legal services;
- (B) to act on advice rendered pursuant to legal services on behalf of the client; or
- (C) person or entity specifically authorized to communicate with the lawyer concerning a legal matter.

(65) "Communication" includes:

- (A) advice given by the lawyer in the course of representing the client; and
- (B) disclosures of the client and the client's representatives to the lawyer or the lawyer's representatives incidental to the professional relationship.

(76) "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 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:

(1) made for the purpose of obtaining or facilitating the rendition of professional legal services to the client; and

(2) the communications were between:

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

(B) among the client's representatives, lawyers, lawyer's representatives, and lawyers representing others in matters of common interest; or

(C) the client or the client's representatives and a 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:

**Commented [JRL3]:** This does not show the changes to this section which the Committee recommended to the Court because the Court has requested a rework of those changes. This shows the current rule with only suggested changes related to the lawyer referral service issue.

- (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.

**2011 Advisory Committee Note.** – The language of this rule has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

#### ADVISORY COMMITTEE NOTE

Rule 504 is based upon proposed Rule 503 of the United States Supreme Court. Rule 504 would replace and supersede Utah Code Ann. § 78-24-8(2) and is intended to be consistent with the ethical obligations of confidentiality set forth in Rule 1.6 of the Utah Rules of Professional Conduct.

The Committee revised the proposed rule of the United States Supreme Court to address the issues raised in *Upjohn Co. v. United States*, 449 U.S. 383, 101 S. Ct. 677 (1981), as to when communications involving representatives of a corporation are protected by the privilege. The Committee rejected limiting the privilege to members of the "control group" and added as subparagraph (a)(4) a definition for "representative of



the client" that includes within the privilege disclosures not only of the client and the client's formal spokesperson, but also employees who are specifically authorized to communicate to the lawyer concerning a legal matter. The word "specifically" is intended to preclude a general authorization from the client for the client's employees to communicate under the cloak of the privilege, but is intended to allow the client, as related to a specific matter, to authorize the client's employees as "representatives" to disclose information to the lawyer as to that specific matter with confidence that the disclosures will remain within the lawyer-client privilege.

A "representative" of the lawyer need not be directly paid by the lawyer as long as the representative meets the requirement of being engaged to assist the lawyer in providing legal services. Thus, a person paid directly by the client but working under the control and direction of the lawyer for the purposes of providing legal services satisfies the requirements of subparagraph (a)(3). Similarly, a representative of the client who may be an independent contractor, such as an independent accountant, consultant or person providing other services, is a representative of the client for purposes of subparagraph (a)(5) if such person has been engaged to provide services reasonably related to the subject matter of the legal services or whose service is necessary to provide such service.

The client is entitled not only to refuse to disclose the confidential communication, but also to prevent disclosure by the lawyer or others who were involved in the conference or learned, without the knowledge of the client, the content of the confidential communication. Problems of waiver are dealt with by Rule 507.

Under subparagraph (b) communications among the various people involved in the legal matter, relating to the providing of legal services, are all privileged, except for communications between clients. Those are privileged only if they are part of a conference with others involved in legal services.

Subparagraph (c) allows the "successor, trustee, or similar representative of a corporation, association, or other organization, whether or not in existence" to claim the privilege. Where there is a dispute as to which of several persons has claims to the rights of a previously existing entity, the court will be required to determine from the facts which entity's claim is most consistent with the purposes of this rule.

The Committee considered and rejected an exception to the rule for communications in furtherance of a tort. Disallowing the privilege where the lawyer's services are sought in furtherance of a crime or fraud is consistent with the trend in other states. The Committee considered extending the exception to include "intentional torts," but concluded that because of the broad range of conduct that may be found to be an intentional tort, such an exception would create undesirable ambiguities and uncertainties as to when the privilege applies.

The Committee felt that exceptions to the privilege should be specifically enumerated, and further endorsed the concept that in the area of exceptions, the rule should simply

state that no privilege existed, rather than expressing the exception in terms of a "waiver" of the privilege. The Committee wanted to avoid any possible clashes with the common law concepts of "waiver."