

MEETING AGENDA

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

Matheson Courthouse
450 South State Street
Council Room (N301)

Tuesday – April 18, 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 (2/21/17) (*Attached*).....*Mr. John Lund*
 2. Eyewitness Identification Rule Draft Discussion (*Attached*).....*Ms. Linda Jones and Guests*
 3. Rule 1102(Input and discussion) (*Attached*).....*John Lund and Guests*
 4. Rule 504 (Time Permitting).....*Mr. John Lund*
 5. Other Business.....*Mr. John Lund*

TAB 1

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

MEETING MINUTES

**Tuesday – February 21, 2017
5:15 p.m.
Council Room**

Mr. John Lund, Presiding

MEMBERS PRESENT

Ms. Teresa Welch
Hon. Matthew D. Bates
Ms. Deborah Bulkeley
Ms. Linda M. Jones
Hon. Keith A. Kelly
Mr. John R. Lund
Mr. Terence Rooney
Hon. David Mortensen
Ms. Jacey Skinner
Mr. Adam Alba
Ms. Michalyn Steele
Hon. Vernice Trease
Mr. Matthew Hansen

GUESTS PRESENT

Kristin Zimmerman
Craig Johnson
Heather Stewart
Insurance Commission

STAFF PRESENT

Ms. Nancy Merrill
Mr. Richard Schwermer

MEMBERS EXCUSED

Ed Havas
Teneille Brown
Lacey Singleton
Chris Hogle

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 November 29, 2016. The motion was seconded the motion. The motion carried unanimously.

2. Insurance Commission Amendments to Rule 511 (*attached*) (Insurance Commission)

Insurance Commissioner Kiser reviewed the proposed amendments to Rule 511 with the Committee. The proposal is to amend Rule 511 in order to broaden the protection of the privilege to additional documents beyond those covered in the amendment made last year. The Committee discussed the language in the proposed amendment. They noted that the Committee is not able to recommend the amended rule to the Supreme Court until the statute implicating the change is passed.

Motion: Judge Keith Kelly made a motion to recommend the insurance commission amendment to Rule 511 per the language edits discussed by the Committee, contingent upon the legislation passing and the governor signing the bill. The Committee requested that Mr. Schwermer be responsible to draft a 2017 Advisory Committee note. Mr. Adam Alba seconded the motion. The motion passed unanimously.

3. Proposed Amendment to Rule 1102 (*attached*) (Kristin Zimmerman, et al.)

Ms. Zimmerman reviewed the impetus for the change being proposed to Rule 1102. The group is proposing to change the language in a section of the rule that relates to the timing of disclosure of sexual abuse by a child. The guests reviewed history of this issue. The Committee had further discussion about the topic.

The Committee discussed the presentation by the speakers and recommended processing the information internally within the Committee. They would like to invite the defense bar and SWAP to attend the next Evidence Advisory Committee meeting to hear their perspective on the proposal.

4. Particular Circumstances Sub Committee: (Linda Jones, et al.)

Ms. Jones reported on the work that the eye-witness subcommittee has completed so far. The Committee distributed two options for the Committee to review.

- a broad proposed rule on particular circumstance
- a more specific rule

The Committee discussed the two options. They agreed to ask prosecution, defense and law enforcement representatives to provide input on the proposals.

5. Rule 504 (*attached*) (Mr. John Lund)

The Committee will address Rule 504 at the next meeting.

6. Other Business (Mr. John Lund)

Next Meeting:

March 21, 2017
5:15 p.m. at the AOC

TAB 2

Rule ____ . Eyewitness Identification

(a) Out-of-Court Identification.

(1) Identification Procedures. [Eyewitness identification evidence based on pretrial procedures is subject to suppression if the procedures were unnecessarily suggestive or conducive to mistaken identification.] [Evidence of eyewitness identification is not admissible unless it is shown that the procedures used for the photo array or lineup were not conducive to mistaken identification and were not unnecessarily suggestive]. To determine whether eyewitness identification evidence is admissible, the trial judge should consider whether the following factors are present

(A) law enforcement used double blind procedures in organizing the lineup or photo array and in conducting the process with the [eye]witness [making the identification];

(B) law enforcement properly informed the witness that

(i) the wrongdoer may or may not be in the lineup or depicted in the photographs,

(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 the 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) law enforcement did not disclose to the witness that a suspect is in custody;

(D) the photo array or lineup was composed of or included persons who possess reasonably similar features and characteristics, such as

- (i)
- (ii)
- (iii)
- (iv);

(E) the photo array or lineup included at least five photo fillers or five additional persons for every photograph or use of the suspect;

(F) law enforcement presented individuals in the lineup or displayed photos in the array using the same or sufficiently similar process or formatting;

(G) law enforcement used computer generated arrays where possible;

(H) law enforcement presented individuals for the lineup and fillers for the photo array sequentially rather than simultaneously;

- (I) the lineup or photo array procedures were recorded;
- (J) law enforcement asked the witness how certain he or she was of any identification and documented all responses, including initial responses, before the witness received feedback;
- (K) there was no unreasonable delay between the events in question and the identification;
- (L) the witness was involved in multiple identification procedures in which the witness viewed the same suspect more than once;
- (M) in a case involving multiple suspects, law enforcement presented each suspect in a separate lineup or separate photo array; and
- (N) any other factors relevant to the circumstances.

(2) Admissibility of Photographs. Photographs used in an out-of-court identification may be admitted 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 showup identification evidence is admissible, the trial judge should consider whether the following factors are present

- (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 buildings;
- (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, they were not permitted to communicate before or after any procedure regarding the identification of the suspect;
- (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 was confident immediately following an identification;
- (J) law enforcement avoided elements of unfairness; and
- (K) the prosecution has shown that law enforcement had good cause to use a one-on-one identification procedure.

(b) Expert Testimony. Expert testimony on the issue of eyewitness identification is admissible subject to rules 701 and 702.

(c) Jury Instruction.

(1) No Defense Expert. Where the defense has not relied on expert evidence for eyewitness identification and eyewitness identification is a central issue in the case, the trial judge shall instruct the jury regarding evaluation of eyewitness identification testimony[based on the Model Utah Jury Instruction.] [, including factors affecting the accuracy and inaccuracy of eyewitness identification. Those factors include but are not limited to

- (A) whether the witness had an adequate opportunity to observe the events;
- (B) whether the witness had the capacity to observe the person who engaged in the act or whether the witness's ability to observe was somehow impaired by the circumstances;
- (C) whether the witness was sufficiently attentive to the person at the time of the act;
- (D) whether the witness's identification of the person was the product of the witness's own memory;
- (E) whether the witness may have been influenced by other circumstances; and
- (F) information about the procedures used by law enforcement in the identification process.]

(2) Defense Expert. Where the defense has relied on expert evidence for eyewitness identification, the trial judge has discretion to provide an instruction to the jury regarding evaluation of eyewitness identification testimony, including factors affecting the accuracy and inaccuracy of eyewitness identifications.

Committee Note: This rule ensures that when called upon, a trial judge will perform a gatekeeping function and will exclude unreliable eyewitness identification evidence. The court in *State v. Long* addressed factors to include in a jury instruction on eyewitness identification. A copy of the instruction is found in the Model Utah Jury Instructions, Instruction CR404, Eyewitnesses 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.

[Ramirez Language:

To determine whether eyewitness identification evidence is admissible, the trial judge should consider the following factors: (A) whether the witness had the opportunity to view the actor during the event; (B) whether circumstances affected the witness's opportunity to observe; (C) the witness's degree of attention to the actor at the time of the event; (D) the witness's capacity to observe the event, including his or her physical and mental acuity and various circumstances that may impair the witness's capacity to observe; (E) whether the witness's identification was made spontaneously and remained consistent thereafter; (F) whether the witness was exposed to any circumstances that may influence observation or the identification; and (G) the nature of the event being observed and the likelihood that the witness would perceive, remember, and relate it correctly.]

Utah Jury Instruction

CR404 Eyewitnesses Identification [Long instruction].

An important question in this case is the identification of the defendant as the person who committed the crime. The prosecution has the burden of proving beyond a reasonable doubt that the crime was committed AND that the defendant was the person who committed the crime. If you are not convinced beyond a reasonable doubt that the defendant is the person who committed the crime, you must find the defendant not guilty.

The testimony you have heard concerning identification represents the witness's expression of (his) (her) belief or impression. You don't have to believe that the identification witness was lying or not sincere to find the defendant not guilty. It is enough that you conclude that the witness was mistaken in (his) (her) belief or impression.

Many factors affect the accuracy of identification. In considering whether the prosecution has proven beyond a reasonable doubt that the defendant is the person who committed the crime, you should consider the following:

(1) Did the witness have an adequate opportunity to observe the person who committed the crime? In answering this question, you should consider:

- (a) the length of time the witness observed that person;
- (b) the distance between the witness and that person;
- (c) the extent to which that person's features were visible and undisguised;
- (d) the lighting conditions at the time of observation;
- (e) whether there were any distractions occurring during the observation;
- (f) any other circumstance that affected the witness's opportunity to observe the person committing the crime.

(2) Did the witness have the capacity to observe the person committing the crime? In answering this question, you should consider whether the capacity of the witness was impaired by:

- (a) stress or fright at the time of observation;
- (b) personal motivations, biases or prejudices;
- (c) uncorrected visual defects;
- (d) fatigue or injury;
- (e) drugs or alcohol.

[You should also consider whether the witness is of a different race than the person identified. Identification by a person of a different race may be less reliable than identification by a person of the same race.]

(3) Even if the witness had adequate opportunity and capacity to observe the person who committed the crime, the witness may not have focused on that person unless the witness was aware that a crime was being committed. In that instance you should consider whether the witness was sufficiently attentive to that person at the time the crime occurred. In answering this question you should consider whether the witness knew that a crime was taking place during the time (he) (she) observed the person's actions.

(4) Was the witness's identification of the defendant completely the product of the witness's own memory? In answering this question, you should consider:

- (a) the length of time that passed between the witness's original observation and the time the witness identified the defendant;
- (b) the witness's mental capacity and state of mind at the time of the identification;
- (c) the exposure of the witness to opinions, to photographs, or to any other information or influence that may have affected the independence of the identification of the defendant by the

witness;

[(d) any instances when the witness either identified or failed to identify the defendant;]

[(e) any instances when the witness gave a description of the person that was either consistent or inconsistent with the defendant's appearance;]

(f) the circumstances under which the defendant was presented to the witness for identification.

[You may take into account that an identification made by picking the defendant from a group of similar individuals is generally more reliable than an identification made from the defendant being presented alone to the witness.]

[You may also take into account that identifications made from seeing the person are generally more reliable than identifications made from a photograph.]

[A witness's level of confidence in (his) (her) identification of the perpetrator is one of many factors that you may consider in evaluating whether the witness correctly identified the perpetrator. However, a witness who is confident that (he) (she) correctly identified the perpetrator may be mistaken.]

Again, I emphasize that it is the prosecution's burden to prove beyond a reasonable doubt that the defendant is the person who committed the crime.

TAB 3

Rule 1102. Reliable Hearsay in Criminal Preliminary Examinations

- (a) Statement of the Rule. Reliable hearsay is admissible at criminal preliminary examinations.
- (b) Definition of Reliable Hearsay. For purposes of criminal preliminary examinations only, reliable hearsay includes:
 - (1) hearsay evidence admissible at trial under the Utah Rules of Evidence;
 - (2) hearsay evidence admissible at trial under Rule 804 of the Utah Rules of Evidence, regardless of the availability of the declarant at the preliminary examination;
 - (3) evidence establishing the foundation for or the authenticity of any exhibit;
 - (4) scientific, laboratory, or forensic reports and records;
 - (5) medical and autopsy reports and records;
 - (6) a statement of a non-testifying peace officer to a testifying peace officer;
 - (7) a statement made by a child victim of physical abuse or a sexual offense which is ~~promptly reported by the child victim and~~ recorded in accordance with Rule 15.5 of the Utah Rules of Criminal Procedure;
 - (8) a statement of a declarant that is written, recorded, or transcribed verbatim which is:
 - (A) under oath or affirmation; or

(B) pursuant to a notification to the declarant that a false statement made therein is punishable; and

(9) other hearsay evidence with similar indicia of reliability, regardless of admissibility at trial under Rules 803 and 804 of the Utah Rules of Evidence.

(c) Continuance for Production of Additional Evidence. If hearsay evidence is proffered or admitted in the preliminary examination, a continuance of the hearing may be granted for the purpose of furnishing additional evidence if:

(1) The magistrate finds that the hearsay evidence proffered or admitted is not sufficient and additional evidence is necessary for a bindover; or

(2) The defense establishes that it would be so substantially and unfairly disadvantaged by the use of the hearsay evidence as to outweigh the interests of the declarant and the efficient administration of justice.

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 1102 applies only in criminal preliminary examinations, and implements language added by amendment to Article I, section 12 of the Utah Constitution, effective July 1, 1995:

Where the defendant is otherwise entitled to a preliminary examination, the function of that examination is limited to determining whether probable cause exists unless otherwise provided by statute. Nothing in this constitution shall preclude the use of reliable hearsay evidence as defined by statute or rule in whole or in part at any preliminary examination to determine probable cause or at any

pretrial proceeding with respect to release of the defendant if appropriate discovery is allowed as defined by statute or rule.

Discovery is allowed under Rule 16, Utah Rules of Criminal Procedure, as well as by case law and other statutes.

Accordingly, paragraph (a) provides for admissibility of "reliable hearsay" evidence in criminal preliminary examinations (commonly called "preliminary hearings"). To the extent that *State v. Anderson*, 612 P.2d 778 (Utah 1980), prohibited the use of hearsay evidence at preliminary examinations, that case has been abrogated.

Paragraph (b) defines "reliable hearsay" in subparagraphs (1) through (8). Evidence which is admissible under any other law or rule of evidence is not rendered inadmissible by anything in paragraph (b).

Subparagraph (b)(2) specifically incorporates hearsay that would be admissible under U.R.E. 804 but eliminates the foundational element of unavailability.

Subparagraph (b)(3) permits the admission of exhibits in preliminary hearings even though the necessary foundation for admissibility is by hearsay only. For example, proving the chain of custody for controlled substances may be accomplished under this section without calling the witnesses in the chain.

Subparagraphs (b)(4) and (b)(5) permit the specified types of reports and records to be admitted without the testimony of the person who prepared the report or record or the custodian of the record. If there is special reason for exploring foundation or authenticity, subparagraph (c) gives the magistrate power to require additional evidence after a continuance.

Subparagraph (b)(6) is similar to the "fellow officer" rule applicable to search or arrest warrant affidavits as providing sufficiently "reliable" evidence.

Subparagraph (b)(7) requires that a child victim's hearsay report be close in time to the event reported and that it be recorded in compliance with the conditions prescribed in Utah Rules of Criminal Procedure 15.5(1)(a) through (d). This subparagraph does not necessitate a hearing under Utah Rules of Criminal Procedure 15.5 (1)(e) through (h) as a prerequisite to admission at a preliminary examination.

Under subparagraph (b)(8), written, recorded, or transcribed testimony of non-testifying witnesses is admissible if it is sworn, affirmed, or given under notification that false statements are prosecutable. The potential for prosecution under perjury or other criminal provisions tends to ensure the reliability of such testimony.

Subparagraph (b)(9) provides catchall admissibility for other forms of hearsay of similar reliability, not unlike U.R.E. Rules 803(24) and 804(5) provide under existing hearsay exceptions. Unlike U.R.E. Rules 803(24) and 804(5), there is no requirement that advance notice be given to the adverse party of evidence offered under subparagraph (b)(9). If there is special reason for exploring foundation or authenticity, subparagraph (c) gives the magistrate power to require additional evidence after a continuance.

Paragraph (c) provides for continuances in the preliminary examination to enable a party to provide live witnesses or a more reliable form of hearsay where a party is substantially disadvantaged by the admission or exclusion of hearsay evidence proffered under this rule.

Under subparagraph (c)(1), the prosecution can get a continuance where hearsay evidence is not admitted and would be necessary to get the case bound over.

Under subparagraph (c)(2), a defendant may obtain a continuance by demonstrating that he is substantially and unfairly disadvantaged by a particular proffer of evidence that would be otherwise admissible under the rule and the disadvantage outweighs the interests of the witness and the efficient administration of justice. In making a decision as to whether the defendant is substantially and unfairly disadvantaged by the use of reliable hearsay evidence, a magistrate may, among other factors, take into consideration the limitations on discovery available to the defendant.

Either party is at liberty to subpoena and call any live witnesses whose testimony would be germane to the determination of probable cause.