

MEETING AGENDA

UTAH SUPREME COURT ADVISORY COMMITTEE
ON THE RULES OF EVIDENCE

Matheson Courthouse
450 South State Street
Council Room (N301)

Tuesday – June 27, 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 (May 16, 2017) *(Attached)*.....Mr. John Lund
 - 2. Report on Supreme Court MeetingMr. John Lund
 - 3. Final Review of Rule 504 *(Attached)*Mr. John Lund
 - 4. Review Draft of Proposed EIE Rule (Eyewitness Identification Rule) *(Attached)*.....
.....Ms. Linda Jones et al.
 - 5. Other Business.....Mr. John Lund

TAB 1

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

MEETING MINUTES

**Tuesday – May 16, 2017
5:15 p.m.
Council Room**

Mr. John Lund, Presiding

MEMBERS PRESENT

Mr. John R. Lund (Chair)
Hon. Matthew D. Bates
Ms. Tenielle Brown
Ms. Deborah Bulkeley
Mr. Matthew Hansen
Mr. Ed Havas
Ms. Linda Jones
Hon. Keith A. Kelly
Mr. Terry Rooney
Ms. Jacey Skinner
Ms. Teresa Welch
Ms. Lacey Singleton

GUESTS PRESENT

MEMBERS EXCUSED

Mr. Adam Alba
Mr. Chris Hogle
Hon. David Mortensen
Ms. Michalyn Steele
Hon. Vernese Trease

STAFF PRESENT

Ms. Nancy Merrill
Mr. Richard Schwermer

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

Mr. Lund welcomed everyone to the meeting.

Motion: *Mr. Ed Havas moved to approve the minutes from the Evidence Advisory Committee meeting on April 18, 2017. Ms. Teresa Welch seconded the motion. The motion carried unanimously.*

2. Rule 511 Committee Note and Final Approval: (attached) (Mr. Rick Schwermer)

Motion: Ms. Teresa Welch moved to approve the minor edits to Rule 511 and the committee note drafted by Mr. Schwermer. Mr. Ed Havas seconded the motion. The motion passed unanimously.

3. Rule 1102: (attached action item) (Ms. Lacey Singleton and Committee)

Ms. Singleton reported that she talked with Dr. Nancy Klein, director of Professional Affairs for the Utah Psychological Association. The information that Ms. Singleton received is that there is no significant correlation between reliability and proximity of when a statement is reported. The Committee discussed drafting a Committee Note.

Motion: Mr. Matthew Hansen made a motion to recommend the proposed amendment to Rule 1102. Judge Matthew Bates seconded the motion. The motion passed.

The Committee drafted an amended committee note.

Motion: Judge Matthew Bates moved to approve the revised Committee Note. Mr. Matthew Hansen seconded the motion. The motion passed.

4. Eyewitness Identification Proposed Rule: (attached) (Ms. Linda Jones et al.)

Ms. Jones reported the work that has been done so far by the subcommittee on the proposed rule. She noted that the subcommittee considered the input from the previous Evidence Advisory Committee meeting and drafted a new introduction. The subcommittee organized the body of the rule in set criteria to be considered for eyewitness identification. The Committee discussed the language in the subcommittee's proposed rule and about the language in the rule addressing line ups and photo arrays, and defining specific language in the rule to determine how broadly the rule will apply.

Going forward, Ms. Jones agreed to incorporate the edits that the Committee suggested today and recirculate the revisions to her subcommittee via email. The subcommittee will present the newly drafted proposed rule at the next Evidence Advisory Committee meeting.

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

Mr. Lund reviewed the impetus for Rule 504. He reviewed the following proposed edits that he and his subcommittee have made:

- clean up the reference to what it means to be getting legal services
- eliminate the word "professional" in the rule every time it comes before "legal services"
- edited the term "representative of a the client" and "representative of a the lawyer" throughout the rule to read a "client's representative" and "lawyer's representative"
- section (7)(B) the last line will read "incidental to the client legal services"

- edit section (2)(B) to read “between clients or clients representatives as to matters of common interest but only if their lawyers were also present or included in the communication”

Mr. Lund agreed to make the edits and send it to the committee for review.

6. Other Business (Mr. John Lund)

The committee scheduled the next meeting

Next Meeting:

June 27 2017
5:15 p.m.
AOC, Council Room

TAB 3

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 ~~or a lawyer referral service~~ ~~with a view to obtaining professional 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, 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~~ participate in or 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

Existing

~~(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~~

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

Possible Alternative

(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 their lawyers or lawyer's representatives were also directly involved present or included in the communications; or

(C) between 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:

- (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) "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, 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) participate in or 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 their lawyers or lawyer's representatives were also directly involved present or included in the communications; or

(C) between 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:

- (1) **Furtherance of the Crime or Fraud.** If the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud;
- (2) **Claimants through Same Deceased Client.** As to a communication relevant to an issue between parties who claim through the same deceased client, regardless of whether the claims are by testate or intestate succession or by inter vivos transaction;
- (3) **Breach of Duty by Lawyer or Client.** As to a communication relevant to an issue of breach of duty by the lawyer to the client;
- (4) **Document Attested by Lawyer.** As to a communication relevant to an issue concerning a document to which the lawyer was an attesting witness; or
- (5) **Joint Clients.** As to the communication relevant to a matter of common interest between two or more clients if the communication was made by any of them to a lawyer retained or consulted in common, when offered in an action between any of the clients.

TAB 4

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. 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.

(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 (1) 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.

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)(3) 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 (c) 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 instructions 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.]