

**MEETING AGENDA**

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

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

**Tuesday – February 16, 2016  
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 (November 17, 2015) *(Attached)*.....*Mr. John Lund*
  2. Hate Crimes Rule Legislative Proposal.....*Mr. Rick Schwermer*
  3. Rule 504 Report and Discussion *(Attached)*.....*Mr. Ed Havas*
  4. Eyewitness Subcommittee.....*Mr. John Lund*
  5. Other Business.....*Mr. John Lund*

AGENDA

ITEM

1

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

**MEETING MINUTES**

**Tuesday – November 17, 2015**

**5:15 p.m.**

**Council Room**

*Ms. Linda Jones, Presiding*

**MEMBERS PRESENT**

Mr. Ed Havas  
Mr. Matthew D. Bates  
Mr. Christopher R. Hogle  
Ms. Linda M. Jones  
Hon. Keith A. Kelly  
Hon. Thomas Kay  
Mr. Patrick Anderson  
Ms. Jacey Skinner  
Ms. Deborah Bulkeley  
Ms. Teresa Welch

**GUESTS PRESENT**

**MEMBERS EXCUSED**

Mr. Chad Platt  
Mr. Terry Rooney  
Mr. John Lund  
Mr. Tom Seiler  
Ms. Teneille Brown  
Hon. David Mortensen

**STAFF PRESENT**

Mr. Richard Schwermer  
Mr. Tim Shea  
Ms. Nancy Merrill

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

Ms. Jones welcomed everyone to the meeting.

Mr. Hogle made the following amendment to the minutes:

- Item 3 the definition of confidential information should be included in the rule

***Motion:*** *Mr. Ed Havas moved to approve the minutes from the October 6, 2015 Evidence Advisory meeting including the recommended amendment. Judge Thomas Kay seconded the motion. The motion carried unanimously.*

## **2. Spousal Privilege Issue: (Mr. Tom Seiler & Mr. John Lund)**

The Committee discussed Rule 502. Mr. Matt Bates suggested using the word “person” instead of “spouse” in Rule 502.

***Motion: Judge Thomas Kay moved as amended by Mr. Matt Bates to recommend to the Supreme Court to adopt Rule 502. Judge Keith Kelly seconded the motion. The motion passed unanimously.***

The Committee agreed to include a Committee Note with Rule 502 stating, “The rule was modified to make it gender neutral.”

The Sub-Committee made up of Mr. Havas, Mr. Seiler, and Mr. Lund worked on revising Rule 504 to include issues of spousal immunity and attorney/client confidentiality intersect. Mr. Havas reported on the subcommittee’s work so far.

Mr. Havas reported the sub committee’s work on Rule 504. The Committee discussed the wording in the draft addressing the use and intentions of the word “specific” in the rule. After further discussion the Committee decided to include the rule on the agenda at the next meeting addressing the following points:

- Identify the goals for modifying the rule
- Discuss how proposed revisions achieve the goals
- What are the consequences of changing the rule
- Mr. Havas will draft a new Committee Note for the Committee to review

## **3. Discussion of Federal Rule Proposal: (Mr. Rick Schwermer)**

Mr. Schwermer reported that there are three rules being proposed for amendment which are still in the comment period. The Committee decided to wait until after the comment period is over to address the three rules. The Committee requested to have the Insurance Privilege Issue included on the December 9 Supreme Court Agenda. Mr. Schwermer reported that the Supreme Court would like to discuss the possibility of creating a joint working group combining sub-committee members from the Evidence Advisory Committee and Rules for Criminal Procedure Committee to talk about eye-witness identification.

## **4. Other Business: (Mr. John Lund)**

The Committee requested to have the Insurance Privilege Issue included on the December Supreme Court Agenda. Mr. Schwermer reported that the Court would like to discuss the possibility of creating a joint working group combining sub-committee from members of the Evidence Advisory Committee and Rules for Criminal Procedure Committee to talk about eye witness identification.

**Next Meeting:** February 16, 2016  
5:15 p.m.  
AOC, Council Room

AGENDA

ITEM

3

## 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.

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

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

(4) "Representative of the client" means a person or entity specifically authorized by the client: ~~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 specific a legal matter.

(5) "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.

(6) "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 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.

**(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 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.

**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 persons, such as the client's employees or spouse contractors, 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. Similarly, a non-corporate client might specifically authorize a spouse to communicate with the lawyer as to a specific matter with the same assurance of confidentiality under the 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, or the client's spouse assisting the client with the legal matter, 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."