

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

**MEETING MINUTES**

**Tuesday – October 11, 2016  
5:15 p.m.  
Council Room**

*Mr. John Lund, Presiding*

**MEMBERS PRESENT**

Mr. John Lund  
Hon. Matthew D. Bates  
Mr. Christopher R. Hogle  
Ms. Linda M. Jones  
Hon. Keith A. Kelly  
Ms. Lacey Singleton  
Mr. Adam Alba  
Hon. David Mortensen  
Mr. Matthew Hansen  
Ms. Deborah Bulkeley  
Hon. Vernice Trease

**GUESTS PRESENT**

**STAFF PRESENT**

Ms. Nancy Merrill  
Mr. Richard Schwermer

**MEMBERS EXCUSED**

Ms. Teresa Welch  
Ms. Jacey Skinner  
Mr. Terry Rooney  
Ms. Tenielle Brown  
Mr. Ed Havas  
Ms. Michalyn Steele

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

Mr. Lund welcomed everyone to the meeting.

***Motion: Mr. Chris Hogle moved to approve the minutes from the Evidence Advisory meeting on August 23, 2016. Judge Vernice Trease seconded the motion. The motion carried unanimously.***

**2. Proposed Federal Amendments 803 (16) and 902(13) and (14): *Mr. Chris Hogle, Judge Keith Kelly, and Mr. Adam Alba***

Rule 803(16) – The basis for the proposed rule change is that given the exponential development and growth of electronic information since around 1998, the hearsay exception for ancient documents has potentially become an open door for vast amounts of unreliable electronically stored data, especially since no showing of reliability needs to be made to qualify under the exception. The Federal Advisory Committee found that this potential exists now, and therefore proposes the amendment, which would limit this presumption of reliability to documents created before 1998.

The Utah subcommittee is not persuaded that the problem is imminent, and recommends that Utah not adopt the change to the ancient documents standard until it is clear that there is a problem. The full committee discussed the issue at length, and agreed to recommend reconsidering the proposed change until after there is more experience with the issue at the State level.

Rule 902(13) and (14) - The Federal Rules of Evidence Advisory Committee proposes adding two subsections, (13) and (14), to Rule 902, Certified Records Generated by an Electronic Process or System and Certified Data Copied from an Electronic Device, Storage Medium, or File. The aim is to reduce the necessity of routinely producing a witness to authenticate certain generally reliable electronic data. The Federal proposal also incorporates by reference a notice provision found elsewhere in Rule 902.

The Utah subcommittee agrees with the recommendation, but structurally, proposes that instead of referencing the existing notice provisions, they should be restated in each subsection, for clarity. The full committee discussed the changes, acknowledged that the Utah rule would differ slightly from the Federal, but agreed with the subcommittee recommendation.

***Motion: Ms. Linda Jones made a motion to adopt the subcommittee’s report. Judge Matt Bates seconded the motion. The motion passed unanimously.***

**3. Eyewitness ID Joint Subcommittee Update: *Judge Matt Bates, Ms. Linda Jones. Ms. Teresa Welch and Ms. Teneille Brown***

Ms. Jones reported on the subcommittees work. She noted the report that the subcommittee is presenting in the meeting is an initial report. The Supreme Court appears concerned about poor eyewitness identification issues and asked the Committee to review two issues; the propriety and policy implications of jury instructions advising jurors on how to view particular circumstance evidence; and to possibly draft a rule or jury instructions to consider.

The subcommittee requested comment from the Evidence Advisory Committee on two issues concerning their report. After looking at how Utah views particular circumstance evidence the subcommittee suggested that one rule is not capable of covering all the different categories of evidence, i.e. law enforcement procedures, investigations, lineups and identifications, and best practices would have to be adopted. Their research suggests that in Utah jury instructions may be preferable.

The next issue the subcommittee looked at is if there is a rule instead of jury instructions what would that rule look like? They found that the types of particular circumstance evidence that the rule would cover is too broad for one rule. The Committee had further discussion about the assignment and the broad topic of eyewitness identification. They noted that the jury instruction committees are not tied directly to the Court. The subcommittee agreed to draft a rule addressing what procedures might need to be followed when determining when eyewitness testimony should be admitted. The subcommittee agreed to study further what other states have done, perform more research on the topic, and create a draft. The committee suggests that the rule should empower trial court judges to adjust instructions for admissibility to evolving social science.

**4. Final Consideration of Rules 412 and 504: *Mr. Rick Schwermer***

Mr. Schwermer reported that there were no comments to proposed rules 412 and 504.

***Motion: Mr. Chris Hogle made a motion to recommend rules 412 and 504 as presented to the Supreme Court. Judge David Mortensen seconded the motion. The motion passed unanimously.***

**5. ABA Proposal for Attorney Client Privilege Amendment: *Mr. John Lund***

Mr. Lund presented proposed material that would be included in the privilege rules. The proposed material would amend Rule 504; it would protect information discussed in the context of a lawyer referral service even when that discussion occurs prior to the attorney client privilege relationship being established. Mr. Lund agreed to investigate the different kinds of lawyer referral services and look at options for the Committee to consider.

**6. Other Business (Mr. John Lund)**

Mr. Lund requested that Mr. Boyden be included on the next agenda to discuss proposed Rule 417.

**Next meeting:**

The Committee scheduled the next Evidence Advisory Committee meeting on Tuesday, November 29<sup>th</sup> at 5:15 p.m.