UTAH SUPREME COURT ADVISORY COMMITTEE
ON THE RULES OF EVIDENCE

MEETING MINUTES
Tuesday– October 8, 2019
5:15 p.m.-7:15 p.m.
Council Room

Mr. John Lund, Presiding

MEMBERS PRESENT	MEMBERS EXCUSED	GUESTS	STAFF
Adam Alba	Teresa Welch	Joseph Wade,	Keisa Williams
Tony Graf	Lacey Singleton	Legislative Research	Nancy Merrill
Nicole Salazar-Hall	Hon. David Williams	Jacquelyn Carter,	Michael Dreschel
Mathew Hansen	Tenielle Brown	Legislative Research	
Ed Havas		Hon. Matthew Bates	
Chris Hogle			
John Lund, Chair			
Hon. Richard McKelvie			
John Nielsen			
Jennifer Parrish			
Dallas Young			
Deborah Bulkeley			
Hon. Linda Jones			
Michalyn Steele			
Hon. Vernice Trease			

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

Mr. Lund welcomed everyone to the meeting. The following corrections were made to the August 13, 2019 minutes:

- Correct the spelling of John Nielsen's last name throughout
- Page 5, second to last paragraph, change "effect" to "affect"

***Motion:** Adam Alba made a motion to approve the amended minutes from the Evidence Advisory Committee meeting held on August 13, 2019. John Nielsen seconded the motion and it carried unanimously.*

Tony Graf introduced himself to the Evidence Advisory Committee.

2. URE 1101. Applicability of Rules:

The Supreme Court asked that the committee flesh out the committee note. The Court felt the note was too broad and needed to include the case history in *Weeks*. Mr. Nielsen provided an overview of the revisions he made to the Committee Note. Chris Hogle also provided some recommended edits. Mr. Nielsen added another case reference (*Williams v. New York*). For a long time sentencing hearings have included a wide array of information. The note now includes the rationale in *Weeks* about why it's good to have that kind of flexibility at sentencing. Judge Jones noted that "court ordered restitution" is a term of art. There are two kinds of restitution that judges generally order, complete and court-ordered. Is use of that term intentional? Are you focusing only on court-ordered restitution and not complete? Mr. Nielsen stated that he focused on court-ordered restitution because that's what *Weeks* focused on and court-ordered is also the aspect of restitution that takes into account a defendant's ability to pay, etc.. Judge Jones agreed because complete restitution encompasses factors in court-ordered restitution.

Mr. Hogle reviewed his recommended edits. He suggested that a space be added before the paragraph symbol in the case citations. Mr. Lund asked Ms. Williams to use the same format as that included in previous notes. Judge Jones asked whether fines go to the state. Mr. Drechsel stated that fines in district court cases go directly to the state, but fines in justice court cases are split between the local prosecuting entity and the city or county running the court. Mr. Young asked whether "subsection" is the right word in the first line. Mr. Lund asked Ms. Williams to review other notes and ensure the use of "subsection" is consistent. Mr. Lund asked whether this new note should be stacked on top of the older committee notes. The committee agreed that the note should be stacked. Mr. Nielsen reviewed the older notes to ensure they are still accurate. The committee discussed whether case citations should be italicized or underlined and determined that they should be italicized. Mr. Lund stated that he believes this note, in conjunction with the amended language in the rule itself, fulfills the Court's request. The committee discussed and made other nonsubstantive edits.

Motion: ***Chris Hogle moved to recommend Rule 1101 and the Committee Note, including the suggested edits, to the Supreme Court for approval for public comment. Mr. Young seconded the motion and it passed unanimously.***

3. Rule 512. Victim Communications:

Judge Bates reviewed the updated version of Rule 512. The subcommittee hasn't had time to run this past Representative Snow yet. The subcommittee took the existing Rule 512 and kept as much of the original structure and content as possible. The issue with the original version of Rule 512 is that it contains a long list of exceptions and it isn't clear whether those exceptions make the evidence admissible, or whether they allow disclosure but the information isn't admissible. It's confusing because the privilege is created in both the rule and the statute, and the exceptions are found in the rule. The subcommittee left the exceptions in the rule but

divided them up between disclosures in (d) that could be made without waiving the privilege and do not make the communication admissible, and disclosures in (e) where the privilege is waived and the communication becomes admissible. Ms. Williams stated that the heading in (d) isn't clear.

Judge Bates expressed concern about the exceptions in (e)(1)(A). The existing rule includes an exception if the victim gives informed consent to the disclosure. If that happens, the communication can be disclosed to anyone the victim chooses. Judge Bates questioned whether, in that circumstance, the disclosure becomes admissible in court or whether the privilege remains? For this to be a fair rule, if the victim chooses to disclose to someone not listed in (d), then that ought to effect a waiver of the privilege. Therefore, he added (e)(1)(A)(4), which includes a warning in the waiver that the disclosure would waive the privilege. The warning would ensure the victim is aware that the communication will become admissible in court. Mr. Nielsen agreed that the heading "no waiver" isn't clear, and suggested changing the heading in (d) to "circumstances that do not waive the privilege" and (e) to "circumstances that waive the privilege." After discussion the committee amended those two headings to (d) "disclosures that waive the privilege" and (e) "disclosures that do not waive the privilege."

Judge Bates recommended that the subcommittee send the new draft to Representative Snow for review and if he doesn't have any changes, the committee can vote to send it on to the court for approval for public comment. Mr. Young questioned whether the Court asked that statutory references not be included in the rule. He suggested removing the citation in the definitions section and including the actual statutory language. Ms. Williams stated that the Court's feedback was more about not including statutory references in the substance of the rule. Judge Bates noted that the legislature created a privilege in Rule 507 and the definitions in that rule refer to the statute. Judge Bates stated that the legislature invented the Rule 512 privilege and it makes sense to look to them to define who it applies to. Mr. Lund views the committee's role as more about ensuring that, in terms of architecture and consistency with other rules of privilege, Rule 512 has a similar integrity, and not so much about making a decision regarding what should or should not be a disclosure. The substance of the privilege is really coming from the statute. Mr. Lund stated that he envisions the Court asking, does the committee view this version of the rule of evidence as acceptable without getting into policy.

Judge Bates expressed concerns about the scope of (d) and the extent to which the communication can be widely disseminated throughout the criminal justice system except the defendant. It is unclear whether that is a policy or rule issue. If the Court feels it's a policy issue, then this is a good version of the rule. Mr. Lund stated that it seems like a policy issue in a Rule of Evidence, and the Court will ultimately need to make that call. Mr. Lund noted that the Court's primary directive to the committee was not to rush. During the session, there was an urgency to get something on the books before the statutory privilege became effective. In doing that, the committee referenced the statute heavily. That was an issue for the Court because it gave the legislature the ability to change the substance of a Rule of Evidence by legislative

amendment.

Ms. Williams noted that she and Mr. Lund send a memo to the Court when recommending proposed rules. The committee could express in the memo any lingering concerns about the defendant being excluded. That would alert the Court that the committee drafted the rule in a way that appeased Representative Snow, but it's not necessarily the draft the committee would have done. Mr. Young expressed concern that there are still larger Article 8, Section 4 concerns about whether the legislature has the authority to create a Rule of Evidence out of whole cloth. Judge Jones stated that because the Court has adopted Rule 512, the new draft would be an amendment to an existing rule. Mr. Nielsen noted that, historically, there have been legislative privileges in the rules. This is nothing new. The rules have changed a lot. There was a time in the 1980's when the rules were determined entirely by common law. Going back many decades, the legislature created these privileges and the Utah Supreme Court has never really decided whether that's a problem or not. Mr. Lund agreed that there may be a history, but the advisory note in Rule 501 provides clarification and he believes the Court's current view is that the Court makes rules, including rules of privilege. Representative Snow tried to create the rule in collaboration with the committee during the last session, but it just wasn't possible because the pace of the session and the rule-making process didn't match. It would have been much better precedent if the committee was given sufficient time to work through the substantive privilege, similar to the first responder rules.

Ms. Salazar-Hall suggested that the Supreme Court memo also include the committee's constitutional concerns. Ms. Bulkeley questioned whether the committee should even recommend adopting the current version of the rule because of the very clear constitutional problems. Mr. Lund believes there is an open question about whether a valid privilege exists because it was created in statute. Mr. Young asked whether there are grounds for a constitutional challenge. The committee discussed whether the memo should include both the constitutional concern, and the concern regarding the breadth of the exception and exclusion of the defendant.

Judge Trease noted that there are other rules dealing with discovery and subpoenas that allow a judge to determine what goes to a defendant and what doesn't. There may be privileged victim information that, even if it is provided in a criminal action, may not go to the defendant. Mr. Hogle agreed stating that it happens all the time with medical records, counsel records, etc. Judges review those documents in camera. Judge Bates pointed out that those privileges exist by rule and the information isn't given to the multi-disciplinary team or the victim's parents, or anyone else that the victim advocate thinks it needs to go to. None of the information in Rule 512 exceptions is reviewed by a judge. If a judge is managing disclosures in camera, that's okay because it's the judges role, but this rule puts the victim advocate in that position. Judge McKelvie noted that *Brady/Giglio* would supersede the exceptions. No matter what, if it's Brady material, it goes to the defendant. He questioned what communications are left that would really benefit or harm the defendant by not knowing. *Brady/Giglio* also comes into play when

talking about possession. If the documents are in the possession of the government then they must be disclosed. If they are in the possession of the victim advocate, it doesn't apply. Judge Bates agreed. If the documents are in the possession of a private victim advocate then *Brady/Giglio* doesn't apply and neither does (e). For example, *Brady/Giglio* doesn't apply to private advocates at the Crime Victims Clinic or Rape Crisis Center.

Judge Bates noted that Rule 512 doesn't require private advocates to disclose privileged communications to the court or prosecutor, but it lets them disclose it to everybody but the defendant. Looking at (d) "…it can be disclosed in the following circumstances without waiving the privilege…" …if the victim advocate feels the communication is evidence that the victim committed a crime, they can disclose it to anyone they need to for that purpose and it doesn't waive the privilege. Mr. Nielsen stated that the circumstance most concerning for the defendant would be that the victim commits perjury. Judge Bates provided examples of things that could be disclosed that would be relevant to a defendant's case: recantation to the victim advocate, a statement to the victim advocate that the victim intends to commit perjury at trial, or impeaching a witness. Judge Jones pointed out that those things could be disclosed under (d)(3), it just wouldn't waive the privilege. Under (d)(4), it can be disclosed to a universe of folks without waiving the privilege. It is unclear how, why, or when the disclosure should happen.

Mr. Lund stated that when he sits down with a client as a lawyer and says you need to be candid with me and everything you say is going to be kept in confidence, that's partly so that the client is open and truthful. It seems that the legislature's primary intent behind Rule 512 was to ensure victims felt like they could be forthright about whatever it was that they needed to be forthright about. However, that doesn't appear to be true under this rule. Mr. Hansen stated that attorneys at some organizations serve as both attorneys and victim advocates, but primarily victim advocates are social workers, not attorneys.

Mr. Lund outlined two actions for the committee: 1) get feedback from Representative Snow on the current draft before sending it back to the court, and 2) determine how the committee wants to communicate its broader constitutional concerns. Mr. Nielsen recommended that the committee take time to research the constitutional question before deciding whether to include it in the Supreme Court memo. Judge Jones asked whether Representative Snow created the rule out of whole cloth or whether he followed a model from another state. She stated that it would be helpful for the committee to have some historical information about the impetus behind the privilege and why it was crafted the way it was. Subsection (d)(3) is unclear. There is a privilege and it's not waived, but the confidential communication indicates that the victim was planning to commit a crime. The privilege still exists but the communication is out there somewhere. Judge McKelvie questioned whether it then only becomes a testamentary privilege. Is the only restriction that the advocate cannot be called as a witness to testify, but they can disclose to others? Judge Bates noted that the privilege starts in statute so it isn't just about whether it comes in a courtroom, it is more like HIPAA. First, the advocate can't tell anyone. And then the advocate has to figure out that in order to determine whether they can disclose a

communication, they have to go to the Rules of Evidence and look at (d).

Mr. Lund posed a hypothetical. The victim advocate discloses a communication to a DV shelter employee, does the DV shelter employee understand what to do with that information? Do they understand that the communication is confidential? Does the rule continue to apply to the person the advocate tells? Mr. Young stated that the rule would only continue to apply if the person who was told meets the definition of a crime victim advocate. The DV shelter employee is not prohibited from passing it on, and the victim has no way to stop them from disclosing it further. Mr. Hansen reviewed similar privileges in other states. In Hawaii, there is no privilege under the rule "when the victim counselor reasonably believes that the victim has given perjured testimony." The privilege can be breached. But how would the victim advocate know when perjured testimony was given?

Judge Bates suggested that the subcommittee meet with Representative Snow because the committee is trying to draft a rule based on a guess about what the legislature intended. Mr. Drechsel stated that Representative Snow is happy to discuss an amendment to the rule if the committee has a substantive issue. He is open to the possibility of passing clarifying legislation, but now that the rule has been adopted it's up to the committee to identify issues that need his attention. Judge Bates would prefer to meet with Representative Snow to try and craft a rule that both he and the committee support before going back to the Supreme Court. Mr. Havas suggested trying to identify the stakeholders behind the task force and ask them to attend a committee meeting, or the meeting with Representative Snow, to get clarification. Mr. Wade stated that Representative Snow was the House chair of the task force and Senator Weiler was the Senate chair. Mr. Young identified Craig Johnson from the Utah County Attorney's Office as a stakeholder. Mr. Lund is deferring to Judge Bates to determine which subcommittee members want to be included in the meeting. Ms. Williams will email the current draft of Rule 512 to the committee.

<u>Motion:</u> Mr. Lund asked for a motion that the subcommittee request a meeting with Representative Snow and interested parties on the legislative side to talk about Rule 512. Ms. Salazar-Hall made that motion. Ms. Bulkely seconded and the motion passed unanimously.

4. URE 617 Eyewitness Identification:

Mr. Lund reviewed the Rule 617 Subcommittee charge. The subcommittee will keep track of the requirements in Rule 617 and conduct related education. Judge Jones asked that "educate law enforcement" be added because it will be difficult for law enforcement agencies to learn how to apply what's in the rule. Jensie Anderson is in touch with an organization that will train law enforcement for free and she has agreed to help facilitate that training. Mr. Lund noted that Ms. Brown was interested in chairing that group. Judge Jones will stay on the subcommittee as needed. Mr. Lund suggested that the subcommittee get together to determine how they want to implement the charge. The subcommittee should report to the committee at least annually

so that it can be tracked by staff. The Subcommittee will include Teneille Brown (Chair), Judge Jones, Judge D.J. Williams, John Nielsen, and Teresa Welch.

Motion: ***John Nielsen made a motion to approve the Charge. Judge McKelvie seconded the motion and the motion passed unanimously.***

5. Committee Note Review:

Ms. Williams provided an overview of her discussion with Ms. Brown. Some of Ms. Brown's students submitted committee note drafts of various rules. Ms. Brown stated that some of the notes are pretty long and suggested that at least 2 members work together on one rule. Ms. Williams put the notes in a Dropbox folder and shared it with the committee. Mr. Lund suggested that the rules be grouped.

The Committee volunteered to conduct reviews in teams as follows:

- **URE 401, 403, 404, 405:** John Nielsen, Tony Graf, Adam Alba, and Dallas Young
- **URE 406, 407, 409:** Chris Hogle, Ed Havas
- **URE 608, 609:** Deborah Bulkeley, Michalyn Steele
- **URE 801, 803, 804:** John Lund, Jennifer Parrish, and Nicole Salazar-Hall

Ms. Williams will send a follow up email after the meeting with the assignments. Mr. Nielsen suggested waiting to make a decision about due dates until the next meeting after each group has time to review the drafts and determine how long it's going to take. The due dates could be spread out amongst the committee's 2020 meeting dates. The committee will talk to Ms. Brown about whether she wants to invite students to attend committee meetings for educational purposes.

6. Potential Queue Item CCJ/COSCA Resolution:

Ms. Williams reviewed the resolution passed by the Conference of Chief Justices and State Court administrators regarding the admission of information on cell phones and other personal electronic devices. Litigants often want to show judges material stored on their cell phones during judicial proceedings, i.e., photos, call logs, text messages, emails, videos, etc. This is a growing trend especially in cases involving large numbers of self-represented parties. The resolution encourages Chief Justices and State Court Administrators to consider adopting policies or protocols to guide and assist judges in dealing with practical and evidentiary issues.

Mr. Lund question how this related to the rules of evidence. The Federal Rules of Evidence were recently extensively amended on issues surrounding authenticity. Judge Bates agreed that the Court should consider adopting rules that govern the admissibility of information on parties' phones and electronic devices. This issue comes up in the majority of protective order and divorce cases. He now gives a pretrial speech about why that information is inadmissible. He

will sometimes allow them to email it to the in-court clerk so that it can be printed. Mr. Young stated that this doesn't seem like an evidence issue, but rather an issue of creating policies which would provide pro se litigants with more accessibility, such as setting up a copier in the courtroom. Mr. Nielsen stated that it's not a question about the authenticity of the evidence, it's a question about the logistics of getting the information to the court and in the record. Mr. Lund suggested sending the resolution to the Policy and Planning Committee for consideration.

7. Other Business:

Mr. Lund questioned whether Representative Ivory's requests surrounding Rules 409 and 412 should still be in the committee's queue. Ms. Salazar-Hall reminded the committee that Representative Ivory attempted to pass a statute and rule of evidence last session. Ms. Williams reached out to Representative Ivory to see if he still wanted to address the committee. He responded that he resigned from the legislature but still wanted the issue to move forward. He suggested that the committee reach out to Representative Lisonbee. Mr. Drechsel is going to talk to Representative Lisonbee to see if that is something she's planning to take up. Representative Ivory asked that the issue be kept in the committee's queue and that he be included in any committee meetings where the issue is addressed.

Mr. Lund expressed concern that the committee would not find out about a proposed bill or rule until too late into the session. He requested that Ms. Williams keep checking to ensure the committee is informed as soon as possible. Ms. Williams spoke to Mr. Drechsel about it. He didn't know if anyone intends to sponsor a bill this session, but he would talk to Representative Lisonbee and report back to Ms. Williams.

Next Meeting: November 12, 2019
5:15 p.m.
AOC, Council Room