UTAH SUPREME COURT ADVISORY COMMITTEE
ON THE RULES OF EVIDENCE

MEETING MINUTES
Tuesday– August 13, 2019
5:15 p.m.-7:15 p.m.
Council Room

Mr. John Lund, Presiding

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

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

Mr. Lund welcomed everyone to the meeting and announced the new members: Judge McKelvie, John Nielsen, Jennifer Parrish, and Judge Williams. Both current and new members briefly introduced themselves.

***Motion:* Mr. Young moved to approve the minutes from the Evidence Advisory Committee meeting held on April 30, 2019. Mr. Alba seconded the motion and it carried unanimously.**

2. COMMITTEE WEBPAGE REVIEW:

Ms. Williams reviewed the new Evidence Advisory Committee webpage. A link to the webpage will be included on the **utcourts.gov** website in the **About**/**Boards and Committees** drop down bar**.** Select the **Evidence Committee**. The link would be on the right-hand side of the committee's page titled **Committee Information**.

Approved minutes for each meeting are included under the corresponding meeting date. The right side of the webpage lists each rule the Committee has worked on. You can click on a specific rule to see the materials from every meeting where that rule was discussed. The intent is to provide a history of the Committee's work on that

particular rule. Materials going back to February 2017 have been posted and Nancy Merrill is working on adding historical materials as she has time.

The webpage includes the Committee's meeting dates, members, links to the current rules of evidence, rules published for public comment, and rules approved. Mr. Lund asked whether the Advisory Committee Notes are included on the webpage. Ms. Williams stated that committee notes are included at the end of each rule found in the current rules of evidence.

Mr. Lund stated that one of the projects in the Committee's queue is to review all of the Advisory Committee Notes in the Rules of Evidence to address whether language in existing notes are now outdated by new rules or changes in caselaw. The Committee has been engaged in an ongoing dialogue with the Supreme Court about what the notes should include and how they should be used. Some of the discussions with the Court have been that there should be little to no information in the note about changes to the rule; rather the language of the rule itself should be clear enough that detailed explanations in a note are unnecessary. However, the Supreme Court just recently approved, and was very pleased with, the long note in URE 617.

Committee notes are included in the rule when it is published for comment. Ms. Williams explained that if you click on "Continue Reading" at the bottom of each meeting date, it will provide a list of the rules discussed at that particular meeting so you do not have to open the materials and search through them to find out.

Ms. Williams stated that the Supreme Court suggested that each Committee's website include a description, note, or record of the status of each rule at any given time - whether the rule is with the Committee for review, with the Supreme Court for approval, published for comment, etc. Ms. Williams felt that would be very labor intensive and unnecessary because you can click on the rule links to see the history of the Committee's action on a particular rule and the public comment and rules approved websites are also searchable by a specific rule.

Ms. Welch suggested that a tracking note could be added for rules moving forward, but would not be required for historical actions. However, she questioned whether it would provide any benefit. Mr. Young asked whether the Court was thinking about something similar to the bill tracker published by the legislature. Mr. Lund stated that the minutes are very detailed now and the meeting materials are posted. That may be sufficient. Mr. Havas stated that he doesn't see much benefit in including a timeline. The only thing that might be useful is to make a note when a rule is before the Supreme Court for consideration. Ms. Williams stated that she could include a note under each meeting date if/when a rule is approved by the Committee for submission to the Court during that meeting. Mr. Lund stated that the only issue would be that the rules go back and forth between the Court and the Committee several times. Mr. Hogle stated that the only important thing for members of the public to know would be when a rule is out for public comment. Ms. Williams said there is a link to the rules published for comment. Ms. Brown asked whether the Supreme Court was interested in information about who sponsored or proposed changes to the rules. Ms. Williams is not aware of any such request. Mr. Nielsen noted that the point is to be transparent about what the Committee is working on and the materials on our webpage accomplish that.

Mr. Lund noted that the meeting dates are listed on the webpage for the upcoming year. He explained to new members the reasoning behind the timing and frequency of the meeting dates.

<u>Motion:</u> Chris Hogle moved to approve the webpage. Ms. Salazar-Hall seconded the motion and it passed unanimously.

3. SUPREME COURT CONFERENCE SUMMARY:

Mr. Lund provided an update on the Supreme Court Conference. Judge Jones and Ms. Williams attended the conference with Mr. Lund. They discussed the membership of the Evidence Advisory Committee and the rules included on today's agenda.

4. URE 1101. APPLICABILITY OF RULES:

URE 1101 refers to the applicability of the rules of evidence in restitution and probation revocation hearings. The proposed amendments were based on a holding in *State v. Weeks* and a provision in Utah Code 77-18-1(12)(d)(iii) dealing with probation revocation. Ms. Williams provided an overview of the Supreme Court's concerns with the amendments. The first sentence of the Committee note troubled the Court because the *Weeks* opinion included a long history of caselaw leading up to the holding. The Court requested a more detailed note outlining how the Court led up to the decision in *Weeks*, rather than just referencing *Weeks*.

The Court also posed the question: Does Utah Code section 77-18-1(12)(d)(iii) necessarily mean that all of the Rules of Evidence apply? Should that be a legislative decision? If it doesn't mean that all of the Rules of Evidence apply, then don't imply that the Committee knows what the legislature intended to do. Mr. Lund said the Court questioned whether the Committee is overriding the scope by taking the statutory language and deciding it applies to all matters of evidence as opposed to just presentation of a witness.

The Committee discussed the language in Utah Code section 77-18-1(12) and the proposed amendments. Mr. Nielsen stated that one of the problems is with the terms courts tend to use. Courts say they "revoke and restart" probation all the time so technically probation is revoked, but it's also restarted. It's not really revocation; it's more like an extension, although courts style it as one of revocation. Judge Williams stated that this issue was recently argued in his court so it needs to be clarified. Mr. Lund suggested that there may be similar language in the federal rules. Ms. Brown stated that the federal rules use language about the rules of evidence being relaxed, but the federal rules don't explicitly say that the rules of evidence don't apply in particular instances, just that they don't apply to the same extent.

Ms. Parrish suggested using language directly from the statute in 77-18-1(12(d)(iii), including the exception. After discussion, the Committee agreed. Ms. Welch suggested that the problem is not with incorporating the statutory language into the rule; the debate is what the statute stands for. Is it enough under the statute, for example, that the probation officer testifies about what the mother of the defendant told him, or is the probation officer required to bring the mother into court. Ms. Brown felt that the mother would be required to testify because she is the person providing adverse information.

Judge McKelvie stated that in the federal prosecution system, case agents were routinely brought before the grand jury to obtain indictments and incarcerate individuals in the short term, or certainly subject them to trial, using that kind of hearsay information. And those hearings are directed toward persons who still maintain a presumption of innocence. What we're dealing with here are probationers and individuals who have already

been convicted. The only allegation against them is that they have violated some term or condition of their probation. In this discussion, we are presenting them hypothetically, with much more due process than we're giving to people cloaked in the presumption of innocence, including 1102 statements in preliminary hearings.

Ms. Welch stated that it gets complicated when the allegation is a new charge. It hasn't been litigated and they are doing it through an Order to Show Cause. Judge McKelvie stated that in those circumstances, the defense attorney will most often ask the Court to continue the hearing until the underlying case is resolved because the charge is still pending and they don't want to make any kind of admission that would impact the underlying case. Ms. Brown said it then becomes a burden of proof issue because if someone is convicted, in the Supreme Court cases on sentencing, if you don't prove those aggravating factors beyond a reasonable doubt, then you can't bring them into sentencing even though technically the rules don't apply. Ms. Welch said she has experienced instances where the State would purposefully try to proceed first on the Order to Show Cause, and not on the underlying charges, because the burden was lower.

Mr. Young stated that an Order to Show Cause isn't necessarily a proceeding revoking probation. It's rare but there are times when the court finds a violation but they don't revoke probation, they impose a sanction. He stated that the remedy is revocation, whereas the underlying hearing is to determine whether a violation occurred. Mr. Nielsen said you don't know whether it's a hearing granting or revoking probation until you get to the end of the hearing. Mr. Lund suggested changing the language to "probation hearings." After discussion, the Committee agreed.

The Committee made amendments to sections (b), (c), and (d) in the body of the rule and deleted the second paragraph of the committee note. Mr. Nielsen agreed to amend the first paragraph of the committee note to add more detail about the Court's reasoning behind the *Weeks* decision. The Committee will review the revised note at the next meeting.

Motion: Ms. Brown made a motion to send the Committee's amended version of the body of URE 1101 to the Supreme Court for approval for public comment, including Mr. Nielsen's note once approved by the Committee. Judge Williams seconded the motion and it passed unanimously.

5. URE 512. Applicability of Rules:

Mr. Lund provided an overview of the history of the URE 512 rule revisions for the new members. During the 2019 legislative session, the Committee was charged with addressing the legislature's concerns regarding privileged communications between victims and victim advocates. The Committee attempted to be responsive to the legislature's desire for a rule of evidence to accompany the statute establishing a victim advocate privilege, but the Committee and the legislature were unable to come up with mutually agreeable language before the session ended.

House Joint Resolution 3 (HJR 3) passed during the 2019 Legislative Session and is currently in effect. The resolution creates a rule of privilege, which is by definition a rule of evidence. The creation of new rules of evidence lies solely within the authority of the Court. The legislature, by a 2/3 vote, can amend a rule of evidence but can't necessarily create one. Regardless, a subcommittee chaired by Judge Bates drafted a version of rule 512 that the Committee presented to the Supreme Court for adoption on July 17th. HJR 3 would take

effect on July 31st unless the Court adopted its own version of the rule.

The Court didn't like the subcommittee's approach of referencing the statute and letting the legislature, by virtue of amending the statute, regulate what the privilege would be. The Court felt that approach would result in the Court lacking control over the privilege and procedures in its own rule. The legislature would be free to amend the rule simply by amending the statutory language. The Court suggested that the actual language in the statute be incorporated into the rule. The Court decided to allow HJR 3 to go into effect and sent the rule back to the Committee for further consideration, working with Representative Snow and legislative research to come up with a new draft.

Michael Dreschel, the Court's Legislative Liaison, reported that he and Ms. Williams met with Jacqueline Carlton from Legislative Research and Representative Snow about HJR 3 and the Committee's draft version of Rule 512. Representative Snow expressed concern that the Committee's version of Rule 512 did not give full weight to the distinction between justice system victim advocates and community-based victim advocates and he would like to see that be given the Committee's full attention. Representative Snow's intent in crafting the statute and HJR 3 was to create a robust privilege that is only subject to exception if and when it impedes a person's due process rights and discovery in the criminal prosecution context.

Representative Snow felt that the Committee's version of the rule watered down the privilege, particularly with the non-justice system advocates. The Committee discussed the difference between the justice system advocates' disclosure requirements vs community-based advocates. Judge McKelvie noted that certain information is subject to disclosure as Brady/Giglio material. Justice system advocates are primarily a part of the prosecutor's office with more strict disclosure requirements, whereas statements made to advocates working at the rape crisis center are subject to more protection, similar to the physician-patient privilege.

Mr. Lund asked whether Representative Snow agreed that the Committee's version was clearer about how and when disclosure would be required. Ms. Williams stated that her sense of Representative Snow's concern was not about how clear the language is to the judge, but rather how clear it is to victim advocates who are trying to figure out what they are required to disclose and what they aren't. The focus seems to be different. The Committee is focused on what would be most clear in court proceedings, and the Representative is focused on whether an advocate would know what they're supposed to do. Mr. Lund feels that the rule should do both. Rules of privilege affect what happens in the world more so than what happens in court; similar to the attorney-client privilege.

Ms. Welch said the subcommittee focused on two main themes. First, how robust is the privilege? The subcommittee erred on the side of 'very robust' by taking away some of the exceptions under which information would be revealed, for instance, parents' ability to get access. Second, what is the best process to disclose information if it needed to be disclosed? The subcommittee discussed whether or not hearings were needed every time a prosecutor has to hand over Brady material. Judge Bates brought up a good point that we shouldn't require prosecutors to request a hearing every time they want to disclose Brady material. We should trust prosecutors to understand and comply with their obligations to disclose, thus a hearing isn't necessary in every instance.

Judge Bates asked what the Supreme Court's direction was. Mr. Lund stated that the timing of the effective

date played a large part in their decision. HJR 3 would go into effect so there was no need to rush to make amendments. They were aware of Representative Snow's concerns regarding the Committee's version and weren't comfortable adopting anything until the Committee had more time to address the issues Rep. Snow was raising. The Court wants the Committee to work with Rep. Snow to come up with a better version. Ms. Williams stated that her sense of the Court's decision was that the Committee didn't like HJR 3 and Rep. Snow didn't like the Committee's version of URE 512. Because of the timing, HJR 3 will go into effect. Go back to the drawing board and talk to Rep. Snow. If the Committee feels that HJR 3 should be revised, bring an amended version back to the Court. Alternatively, the Committee could report back to the Court that it is fine with the language in HJR 3 and the Committee is choosing not to propose a new amended URE 512. The Committee determined that HJR 3 should be revised.

Judge Bates noted that the language in HJR 3, subsection (d), is confusing. As a judge, he wouldn't know whether an "exception to the privilege" maintains the privilege or waives the privilege. Ms. Welch reads that section as limiting, not broadening, the privilege. Judge McKelvie suggested adding the language "the application of the privilege" so at least a Court would know whether the privilege exists or not. If you have a privilege, the presumption is that it protects everything, except for the exceptions listed. As you are reading (d), the rule seems to be anticipating that unless those particular restrictions apply, the privilege is intact. Judge Bates posed a hypothetical: There is a communication between a victim and victim advocate. The victim advocate decides that the communication needs to be disclosed to a 3rd party under (d)(3) because the victim is suicidal. Now that the communication has been disclosed, if the prosecution or defense wants to admit the statement, is it admissible or not? The language isn't clear. Ms. Brown noted that the language seems to say that the privilege shall not be considered waived if disclosed under that circumstance.

The Evidence Committee agreed to rework Rule 512 including input from Jacqueline Carlton and Representative Snow. The following members agreed to form a subcommittee to amend Rule 512: Dallas Young, Judge Bates (Chair), Deborah Bulkeley, and Judge McKelvie.

6. URE 617. EYEWITNESS IDENTIFICATION:

John Lund reported that URE 617 and the Committee Note were approved as final by the Supreme Court. The Court amended language in subsection (b) to clarify that the party challenging the evidence bears the burden of proof. The Rules of Criminal Procedure Committee did not create a companion rule or make any amendments related to URE 617 so there was no need for a reference.

The Court asked that the Evidence Committee consider forming a standing subcommittee that would monitor and stay abreast of emerging law and science on the subject and would advise the Court if any tweaks needed to be made to the rule. The following members agreed to make up the standing subcommittee: Tenielle Brown (Chair), Judge Williams, John Nielsen, Judge Jones (if interested), and Teresa Welch.

Mr. Lund said there would be no need to report to the Committee unless there is something to report. The Court suggested that the Committee could ask researchers to report regularly to the subcommittee, and noted that the subcommittee might consider conducting CLEs on the subject. Ms. Brown agreed to contact Jensie Anderson to discuss possible CLEs on URE 617.

<u>Motion</u>: Mr. Nielsen made a motion to form a Rule 617 Monitoring Subcommittee. Ms. Brown seconded the motion. The motion passed unanimously.

7. OTHER BUSINESS:

Mr. Lund asked Ms. Williams to update the Committee on items in the queue. Ms. Williams reported that Representative Ivory would like the Committee to look at two issues. The first is adding a protection in URE 412 for victims of sexual assault who freeze during an assault. Currently the rule addresses fight or flight, but not freeze. The second is amending URE 409 to protect non-profit organizations' expressions of empathy.

Ms. Williams will reach out to Representative Ivory and invite him and Jacqueline Carlton to an upcoming Evidence Committee meeting to discuss his concerns and recommendations.

Ms. Brown reported that her students have been working on updating the caselaw in some of the Evidence Advisory Committee notes. Ms. Brown will review the work that her students have submitted and provide them to Ms. Williams for distribution to Committee members for edits. Mr. Lund asked whether new committee notes should be added to the old notes as an update, or whether the old notes should be replaced with the new ones. Would the history be helpful? The Committee determined that it would be best to add the new notes to the old ones, with the newest on top. Ms. Brown stated that some of the drafts are long and it might be best for 2 members to work on them together. Mr. Nielsen volunteered to review URE 505.

Ms. Welch asked about the status of URE 106. Ms. Williams will find out and report back to the Committee.

Next Meeting: October 8, 2019
5:15 p.m.
AOC, Council Room