UTAH SUPREME COURT ADVISORY COMMITTEE
ON THE RULES OF EVIDENCE

MEETING MINUTES
Tuesday– November 12, 2019
5:15 p.m.-7:15 p.m.
Council Room

Mr. John Lund, Presiding

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

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1. Welcome and Approval of Minutes:

Mr. Lund welcomed everyone to the meeting. Without a quorum the Committee could not vote on the October 8, 2019 minutes, however, the following corrections were recommended:

- Page 3, second paragraph, change "affect" to "effect"
- Page 4, second paragraph, correct spelling of Ms. Salazar-Hall's name

2. URE 1101 Applicability of Rules:

Mr. Lund and Ms. Williams presented URE 1101 to the Supreme Court on October 21, 2019. Mr. Lund pointed to an email from Dallas Young with his feedback, and provided an overview of the Court's discussion. The Committee intended subsection (c)(3)(C) to match the language in the statute verbatim. The court expressed the following concerns:

- As written, (c)(3)(C) is hard to understand.
- The concept is that this is an exception to the rules, and yet it requires a certain type of witness to attend the hearing. It seems like a procedural issue, rather than a question of the scope of the evidence.
- Does this take away the sentencing judge's discretion if the person is not present? Is there no alternative then but to consider the case not established?

The Supreme Court asked the Evidence Advisory Committee to find out when and how the requirement for the appearance of adverse witnesses at probation hearings came about, with a summary of the legislative history. The Court was concerned that this procedure may not be followed in practice. It is problematic to write this requirement into the rule if we have a practicality problem. Ms. Williams noted that the Supreme Court expressed concern about legislative overreach by including an evidentiary procedure in a statute. But before addressing that issue, the Court would like the Committee to research whether this is good policy by looking to see what other states are doing, reviewing legislative history, and identifying practical issues. Judge Jones asked whether the court discussed due process concerns if we don't follow the statute. If the person who isn't making the allegation doesn't come to a probation violation hearing to testify, we're taking someone's freedom away in a case where all the state has to establish is preponderance of the evidence. Ms. Williams stated that the Court did not discuss that issue.

Mr. Lund noted that the biggest question was the pragmatic implication. There was a concern that, requiring the person with percipient knowledge of the violation to appear in person in order to conduct a probation revocation hearing was, practically speaking, not what happens. Judge Jones: In the majority of my revocation hearings, the probation officer appears and testifies about the violation. Mr. Hansen: But probation officers' information is mostly second-hand, "I went to the house and the defendant's mom said they're not living there anymore," or "I did a drug test and they tested positive," but the probation officer didn't conduct the test. Judge McKelvie: Sometimes they'll show up at the house and they'll find drugs in the home or beer in the fridge, but most often probation officers are referring to things that people told them. Mr. Nielsen: They testify about hearsay information. Judge Jones: The number one violation is that the defendant didn't report, which is first-hand knowledge. Ms. Williams: The Court discussed the pragmatic issue extensively, noting that it's hard to get mom and other witnesses into court to testify, and because of that it may not be happening as a practical matter. Judge McKelvie: The people who are most aware of the violations are usually the people most aligned with the probationers, and the most reluctant to show up to hearings. Mr. Lund: Essentially, the Court wants us to put some thought and consideration into how probation hearings should be handled, and not simply follow the statute. This may not be an issue requiring research into other states. It might be unique to what's happening in Utah.

Judge Jones: It's possible that there will be more developing in this area in the future. In August, the U.S. Supreme Court ruled that a State's probation statute allowing a court to revoke probation based on a preponderance of the evidence, in a situation where the allegation was criminal conduct that would lead to a mandatory sentence, violated the defendant's constitutional rights and the State was required to prove that beyond a reasonable doubt. They had to have a mini trial essentially. Judge McKelvie: As a practical matter, what usually happens is if the probation violation is predicated on a new offense, everybody decides to push the probation violation off until after the new offense is adjudicated so you don't run into that problem. No rule mandates that practice, it's just common sense under those circumstances.

Ms. Williams spoke to Brent Johnson about any overlap with the Rules of Criminal Procedure. There is no overlap right now. The Advisory Committee on the Rules of Criminal Procedure is planning on eventually doing an overhaul of procedures related to probation hearings, but they have not yet begun that work.

A URE 1101 subcommittee was created to address the Supreme Court's concerns and report back to the Evidence Committee at the next meeting. The URE 1101 subcommittee consists of: Matt Hansen and Dallas Young. Judge Jones will send Mr. Hansen a copy of the Supreme Court case she discussed above.

3. URE 512 Victim Communications Update:

Ms. Williams reported that Mike Drechsel is attempting to plan a meeting with Representative Snow to discuss URE 512. Ms. Williams is still waiting for meeting dates. Rep. Snow's version of URE 512 and the related statute are currently in effect as passed last session. Mr. Lund raised the question; is the statue going to change in the upcoming legislative session or is there no reason to alter it? Ms. Williams: I belive Representative Snow is willing to discuss any concerns that the Committee may have with the current rule or statute, but from his perspective, the responsibility lies with the Court to propose changes if they feel any are necessary. Mr. Lund discussed the following options:

- Let the issue drop and leave the existing rule, as adopted by the legislature, in effect. It would only be revisited if the Supreme Court addressed it in a case.
- Ask the Supreme Court for guidance as to whether there is anything specific in the Rule that they want the Evidence Advisory Committee to address.

Mr. Havas: The Committee created a second revision of URE 512 that we think is an improvement, but it has not been blessed by Rep. Snow or presented to the Court. Rep. Snow has no incentive to meet with the Committee, so it seems that the Committee should take its revised version to the Court and explain why it's better than the current rule. Judge Jones: The rule is hanging by a thread because the legislature doesn't have constitutional authority to create a rule out of whole cloth. Mr. Lund: The practical issue is, what are victim advocates being told about whether the communications they're having are privileged? Who can waive the privilege and under what circumstances? The agencies and non-governmental organizations are probably reading the current rule and thinking it's valid. Mr. Havas: If they have competent legal counsel, they should be told that it's an open question.

After further discussion, the Committee agreed to the following:

- Mr. Lund will send a letter to Rep. Snow explaining the Committee's view that there continues to be a question about whether the existing rule/legislation is valid.
- The letter will ask to meet with Rep. Snow to discuss the issue further, with a deadline for that meeting.
- After that deadline has passed, the Evidence Committee will report to the Supreme Court and present its revised rule for adoption.

Mr. Lund: If we go back to the Court without attempting to visit with Rep. Snow, the Court may send it back to the Committee again with that direction. A letter may help resolve that issue. Mr. Havas: My experience with Rep. Snow is that he is bright, engaged, and interested in following up with things, but he also has a lot on his plate competing for his attention that may be higher in priority. A letter may elevate the issue on his list. Judge McKelvie: It would be beneficial to both the Supreme Court and the Legislature to resolve any concerns at this level rather than to wait for a case in controversy to arise in the worst possible circumstance, for example, a child abuse homicide.

Without a quorum, the motion was tabled.

4. URE 106 Remainder of or related writings or recorded statements:

Mr. Lund reviewed the history of URE 106 for the new members of the Committee. The Rule 106 question was raised in a Supreme Court decision about which version of Rule 106 should be utilized: 1) Rule 106 is preemptive of all the rules of evidence and if something needs to come in to complete what has already been allowed into evidence, then it doesn't matter if it's hearsay, or 2) Simply treat Rule 106 as a matter of timing - if evidence is coming in, the rest of the story has to be there for context at the time it's coming in.

The issue arose in one of Ms. Welch's cases and the Supreme Court recommended that the Evidence Advisory Committee take a look at it. The Committee researched the question and presented a draft to the Court. Mr. Lund summarized some of the Court's questions:

- What do other jurisdictions do in these cases?
- What does the scholarly writing on the subject say about what is and isn't advisable?
- What does the federal rules committee say on the subject?

Mr. Hansen: Ms. Welch knows of several law review articles on the subject. Mr. Lund identified an extensive note drafted by Emily Nuvan, a University of Utah law student. Mr. Lund will send the note to Ms. Brown. Ms. Brown offered to speak to Ms. Nuvan to get her perspective and see if she has a sense of what other states are doing.

Mr. Lund: If the Committee provided the Court with a thorough memo containing more substantive information backing up the Committee's draft of Rule 106, we can still make the same recommendation. Mr. Hansen: Ms. Welch sent us her motion and the AG's motion with a counter-argument.

Mr. Lund noted the following questions from one of the Justices: What is happening in other states, is there a trend, and is there a majority position? It seems like they don't necessarily want to be on the bleeding edge of this issue, they'd rather hear the pros and cons of different approaches and make a more measured decision. A URE 106 Subcommittee was formed via email prior to the meeting. The members are:

- Teresa Welch, Chair

- Judge Williams
- John Nielsen
- Tenielle Brown

Mr. Lund and Ms. Williams reviewed the Supreme Court's feedback. Mr. Lund: The proposed Rule says that the evidence comes in if necessary to qualify, explain, or place into context the portion already introduced, even if otherwise inadmissible. The Court's question was: Is there no 403 analysis on the rest of it? With that language, what are we saying to trial judges about whether they have any discretion to think about the other rules of evidence when they are looking at the rule of completeness? Ms. Williams: The "unless the court for good cause otherwise orders" language was Mr. Lund's recommendation during the Court conference in response to that question, with the idea that adding the good cause language gives the judge discretion to conduct the 403 analysis.

Mr. Lund: The entire clause is awkward. The other problem is that it's cut from whole cloth. That was a question the Court raised. If you write these in whole cloth, you leave the judges with little idea of how to look at this. Should it be a balancing test? Mr. Havas: If you take away 403, you're taking away a lot. Ms. Brown: There is only one section in the rules where 403 doesn't apply, so this would be unusual. When it says, "the adverse party may require the introduction, at that time" (despite if it's not admissible), is it clear what they mean? Does it mean introduction to the court to be reviewed in camera? Do you have to show it to opposing counsel? Mr. Lund: That language tracks back to the federal rule. I think it means that they can ask that it be admitted into evidence. Ms. Brown: So is it interpreted to be admitted, despite the rest of it not being admissible? Mr. Havas: That's how I've always read it. Either it's going to be an exhibit, or it's read as testimony so that it's part of the record.

Ms. Williams: The Court pointed out that a 2019 note is necessary to counter the language in the original note saying that this is the federal rule verbatim. The Court questioned whether the 2019 note should cite *State v. Sanchez* and/or "other cases." Mr. Lund: It would be helpful to the Court if the Committee presents a rule proposal, along with a memo explaining the background, context, other cases, information from other jurisdictions, and the pros and cons to each approach. They seem to be looking for some framework from which they can make a decision.

Per Ms. Parrish's request, Mr. Lund provided an overview of the Court's decision in *State v. Sanchez* prompting the Supreme Court to look at Rule 106. Mr. Lund: The defendant in *Sanchez* had tortured his girlfriend for hours. He wanted to introduce a statement during his interview with the officer about the fact that the girlfriend was cheating. Ms. Salazar-Hall: The prosecution entered part of the interview, but not all of it. The defendant wanted to admit the rest of the interview to get the cheating statement into evidence as context that he was under extreme emotional duress. The Court didn't let it in. Mr. Lund: The Court deferred on this issue by saying any error was harmless, and asked the Evidence Advisory Committee to review URE

106. One of the questions was, should the prosecutor have anticipated that and presented their case differently so as to not create that argument for the defense?

Ms. Brown: It's not the same rule, but normally when you think about conditions against interest, it's very clear that each statement or section of each statement is treated differently so you can't bring in things that are pro-party to make it look more favorable than it actually would be because it's supposed to come in as against interest, so the parts that are not against interest don't come in under that rule. Normally we don't think of an entire statement as one statement. We carve it up with commas and say which parts can and can't come in. Mr. Lund: In Ms. Nuvan's note, she refers back to *Wigmore on Evidence* and old concepts about how this developed. You can't say half of a statement about what you saw at the scene of an accident, but leave out the part about "he entered the intersection on a red," if it's part of what the witness saw. It's misleading. How does that blossom into undoing all the rules of evidence? Ms. Parrish: So the problem isn't necessarily that fairness ought to be considered at the same time, but the fact that it doesn't discuss whether admissibility comes into play.

Mr. Lund noted that Ms. Welch was appointed to the 3rd District bench. She will remain on the Evidence Advisory Committee.

5. Committee Note Review:

Mr. Havas reported that he and Mr. Hogle were asked to look at Rules 406, 407, and 409. Mr. Havas asked for clarification about the assignment. Is the assignment to review the caselaw cited in the Committee note to determine if it is still applicable, identify any newer, more applicable cases, and refining the note so that it's more on point? Or is the assignment to remove comments or make them historical only and put substantive information in the Rule itself? Are we looking at whether we need a note at all, or are we just looking at notes that exist which reference caselaw and making sure that caselaw is still pertinent? Ms. Parrish: In reviewing the caselaw in the notes, are you only making changes if you come across something that makes it really obvious that the note needs to be revised? Mr. Havas: For example, Rule 407 is a pretty straightforward rule. Not much needs to be elaborated on. One case says that paving portions of a parking lot after a fall is a subsequent remedial measure which is inadmissible. The case is simply saying that Rule 407 applies to that fact situation, which may be helpful in terms of an example, but it doesn't really interpret the rule and I don't think the rule is all that controversial. The existing note to Rule 407 also incorporates the federal note. I don't think that's helpful either. We don't need federal notes in state rules. The question in Rule 407 is do we need a note period? But if you look at Rule 409, it's a much newer iteration of something that's a lot less clearly understood and there hasn't been much elucidation on the issue. There is a case on point that I think would be helpful to synthesize the application of that rule. "I'm sorry" is clearly protected, "we screwed up" is not. I think explaining that in the note is helpful because it provides guidance to practitioners and the courts.

Ms. Brown: I instructed the students to review the caselaw in the notes to determine whether they are still applicable.

Mr. Lund: One thing that's happened with notes is that when we've made a change to a rule, we have often added a note explaining the change. The assignment is to clean out erroneous, outdated information in the Committee notes and only keep current pertinent information ('good law'). Going forward, as the Committee proposes notes to the Court, if the note provides a substantive understanding of the rule then it could be added to the rule itself. The notes should not further develop what the rule is. They don't want the notes to speak to what the law is. What is the line between explaining and developing the rule? Mr. Havas: If we're saying that nothing in the note should help us understand and apply the rule, that eviscerates the beneficial purpose of the note. The cases in Rule 409 explain the application of the rule to very specific facts and certain language, utterances, and semantics. That's what's important. No amount of fine tuning the language of the rule itself would eliminate the need for the note.

Mr. Lund: We've been stacking the new notes on top of the old ones. Do we want to continue that practice or delete the old notes and start fresh? Mr. Havas: As it applies to Rule 409, I would do both. My understanding of the 2011 note was to avoid the inadvertent reinterpretation of the rule; we changed these stylistically, not substantively. Don't argue that if the Court hadn't intended to have a different application, they wouldn't have changed the language. But we've been doing this now for 8 years and I don't know if that admonition is as necessary now as it was then. I would clear out all the old notes and write a new note highlighting new cases.

Mr. Lund: Channeling Rick Schwermer, does that mean that a practitioner can look at the note and be comfortable that any new case or important case about that rule has been catalogued there? Mr. Havas: No, but that's true of every case. You can't be comfortable that a case that came down last month or last year is the most recent expression of the law because there may be something more recent. That's why we have Westlaw and key cites. Ms. Brown: Going forward it probably does make sense to include as much substance and interpretation in the rule as possible to resolve ambiguity. But is there usefulness in having a note for things that haven't been litigated yet, but that reveal some Committee institutional history, similar to legislative intent? Also, is the audience for the note practitioners or pro se parties?

Judge Jones: The biggest challenges will be Rules 404 and 702 because they are both vastly different. Rule 404 includes an extensive note and the Court said 'no' to almost everything in there, but the Court has relied on the note in Rule 702 over and over. Ms. Williams: Just since I've been with the Committee, the Court praised the extensive note in Rule 617 and has asked for more explanatory notes in Rules 106 and 1101. When presenting a rule amendment to the Court, it might be helpful to include an explanation in the accompanying memo about why information in a note was eliminated or added. Mr. Havas: I can see a difference between a change to a note that has universal ongoing application verifying the rule in its very language, as opposed to a note that is about application or different interpretations of the rule. If the rule

can be improved to be less ambiguous, clearer, or more clearly applied, then it should be, but I find the committee notes to be helpful in deciphering the underlying intent and determining how it is supposed to be interpreted and applied. It's not binding, but it's helpful to practitioners and judges.

Mr. Lund suggested writing down drafting principals for guidance when the Committee revises notes:

1. Eliminate outdated and out of jurisdiction material.
2. Keep notes explaining changes to the rule, including any case decisions triggering the changes.
3. Where appropriate, reference significant Utah caselaw interpreting the rule.
4. Assess whether a note is necessary. Not every rule needs a note.
5. Include statutory references if required to understand the context of the rule.

Mr. Lund recommended that the Committee move forward with revising the committee notes and applying the drafting guidelines as discussed. Members will notify Ms. Williams when they have notes ready for review by the Committee. Mr. Havas believes he and Chris can have Rules 406, 407, and 409 ready for the January 14th meeting. Mr. Lund said he will review the remaining unassigned rules and assign the notes that need to be addressed.

6. Other Business:

Judge Williams asked whether the Committee was interested in working on Rule 404(b), per Judge Pullan's recommendation during his presentation at the Annual Judicial Conference. Judge Pullan recommended following Federal Rule 413. Judge Jones: The Supreme Court may have a change of heart about whether we adopt FRE 413. Judge Pullan is willing to attend the next Evidence Advisory Committee meeting in January to discuss the issue. Judge Williams asked Ms. Williams to distribute Judge Pullan's materials to the Evidence Advisory Committee prior to the meeting.

Next Meeting: January 14, 2020
5:15 p.m.
AOC, Council Room