UTAH SUPREME COURT ADVISORY COMMITTEE
ON THE RULES OF EVIDENCE

MEETING MINUTES
Tuesday– January 14, 2020
5:15 p.m.-7:15 p.m.
Council Room

Mr. Chris Hogle, Presiding

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

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1. Welcome and Approval of Minutes:

Mr. Lund was not able to attend; Mr. Hogle was the acting chair. He welcomed everyone to the meeting. The Committee reviewed the minutes from the October 8, 2019 and November 12, 2019 meetings.

Motion: ***Ms. Parrish moved to approve the minutes from the Evidence Advisory Committee meeting held on October 8, 2019. The Committee expressly adopted the edits referenced in the October minutes. Mr. Hansen seconded the motion and it carried unanimously.***

Motion: ***Judge McKelvie moved to approve the minutes from the Evidence Advisory Committee meeting held on November 12, 2019. Mr. Alba seconded the motion and it carried unanimously.***

2. Committee Note Drafting Principles:

Mr. Hogle reviewed the drafting principles outlined by the Committee at the November meeting. The Committee discussed whether statutory and caselaw references should be included in Committee notes. The Committee determined that members, when revising the Committee notes, should use their discretion in determining whether key caselaw and statutory references should be included. When the Committee sends a revised committee note to the Supreme Court, it will provide an explanation about why key cases and statutory references are, or aren't, included in the note. The Committee will ask the Court for feedback on its drafting principles.

3. URE Rule 512. Victim Communications:

Ms. Williams provided an update on the status of URE 512. She and Judge Bates were able to schedule a meeting with Representative Snow and Jacqueline Carlton to obtain their feedback on the subcommittee's latest draft. That meeting will be held on January 21st.

4. URE 1101 Update:

Chris Hogle provided an overview of the Court's guidance on URE 1101, and thanked Matt Hansen and Dallas Young for their extensive work. Mr. Hansen reported on the subcommittee's research. The subcommittee did not get into the policy question. The research covers the history and how the issue has been treated, comparing the federal court to state courts. In drafting the last proposed rule amendment, this Committee voted to include the wording from the statute in the rule itself. Some of the states have similar statutes, but they didn't include the wording in their rules. Mr. Hansen found only one case (included in the materials as an exhibit), addressing whether adverse witnesses should appear. In that case, the court applied the statute allowing for witness appearance. The Committee has discussed whether we should allow statutes to dictate what the rules of evidence should be at hearings. That seems like a policy consideration, but no other state does it in this context. That may be a good policy question for the Court.

It's difficult to compare it to the federal rule because the federal rule is very different and more expansive. Mr. Hansen reviewed some of the wording in rules in other states. Our legislative history isn't clear as to why they included the adverse witness requirement. Do we feel that we should incorporate the statutory language, or leave it out and let judges apply it in certain circumstances? Mr. Hogle asked Mr. Hansen to explain the evidentiary question, aside from the policy question that might be answered by the legislation.

Mr. Hansen provided an example: Tony is a probationer on probation in Judge Trease's court. One of the terms of probation is that he cannot have any new violations. AP&P files an affidavit saying, 'I went to his house and his mom said he's been dealing cocaine out of her house. I conducted a search and found cocaine in Tony's room.' The question becomes, can judges rely

on an affidavit of what an agent was told by Tony's mom. Historically, that has been the case. I can't think of many times where a defendant has even asked to call witnesses himself. Typically, the only witnesses who appear are the probation agents. The question is whether hearsay applies in those hearings. It would certainly apply if Tony was on trial for that offense.

Mr. Hogle: What are the constitutional requirements for probation hearings? Is there a right to confrontation guaranteed by the Utah or U.S. constitution, or is it just due process? Mr. Nielsen: It's just due process. The 6th amendment applies to the accused. Once you've been convicted, you're not the accused. Judge McKelvie: It's a sentencing issue, not a conviction issue. Judge Trease: Are you satisfied that the Order to Show Cause is more akin to or part of sentencing? Mr. Hansen: That's one of the questions I tried to frame up here. Historically, cases have held that the rules of evidence don't apply at sentencing, but the way the statute reads, they do. The statute redefines caselaw. Judge Trease: The defendant could have a sentencing hearing and request to call witnesses. Mr. Hansen: Right. It's similar to a bail hearing. At a bail hearing, I can just go off probable cause in the Information and the judge can determine bail. At that time if the defendant wants, he can ask for witnesses to come in. Theoretically, in this case the defendant could say he wants the mom as his witness. The question becomes, if the mom doesn't appear, can the judge still rely upon the affidavit?

Mr. Nielsen: It seems the Court wants to know if they should draw a line with the Legislature that this is procedure, the Court governs probation hearings, and determines what kind of evidence is admissible? Or whether it is good policy and they should leave it alone? How often do people ask for a hearing on the Orders to Show Cause? Mr. Hansen: It's rare, but it's unfair to say that it's the defense attorneys' fault, because it's just not something done in practice. Judge Trease: Typically, a lot of hearsay comes in from the probation officer. The defendant may want witnesses to testify every now and then. In those cases, the defendant subpoenas the witnesses, but they don't usually object to the state putting on their hearsay evidence. Mr. Hansen: The confrontation issue isn't usually brought up. If an agent says the defendant tested positive, it's pretty rare that prosecutors would bring in the blood or toxicologists. If a toxicologist was required to appear in every evidentiary hearing, it would completely tax the system.

Mr. Young: Practically, I think part of why that's the case is because defendants in on an Order to Show Cause have been picked up on a warrant and are being held without bail. They can't get out of jail until they resolve it. Plenty of clients have said they want to fight it, but when I tell them they'll probably have to stay in jail for 2-3 weeks they say forget it. Mr. Hogle: In any of the jurisdictions you researched, did you find any states that do it differently? Do any have a more robust process where witnesses come in? Mr. Hansen: No. The closest state would be Oklahoma. Almost all of the states have a statute stating that the rules of evidence don't apply at sentencing. The hard part is determining what sentencing is in each state. Historically in caselaw, sentencing includes probation revocation hearings and the rules of evidence don't apply.

Mr. Hogle: Do you think we're in a position to make a recommendation to the Supreme Court about whether to follow legislation and maintain the status quo? Mr. Hansen: I don't think we should include the wording from the statute in the rule of evidence. It doesn't appear that any other states do it, and it would set the precedent that changes to the statute can change the rules of evidence. Mr. Nielsen: Where does that leave a trial court ruling on objections then? Do they follow the rule or the statute? Judge Trease: The judge could still say they want the witness to appear, or find that it's not in the interest of justice that they be required to appear. What we're talking about is whether prosecutors are required to bring in witnesses. The defendant can subpoena anyone they want to testify. Mr. Hansen: That's the only dilemma. What do judges do if mom doesn't show up? In my opinion, the way it works now is judges have discretion to determine good cause, and they get a feel for what cases are important and what cases need witnesses. Judge Trease: In Mr. Hansen's scenario, mom's testimony is not that critical because they found the drugs in Tony's room. Judge Williams: A different situation is when mom says, 'He doesn't live here anymore.' Judge Welch: And what if mom is dead by the time the hearing is held? It's a rare scenario, but it's the rare scenario that invokes this issue.

Judge Williams: I've had a situation where the probation officer said, 'I knocked on the door, a lady answered the door and said she was the defendant's mother and said he doesn't live there anymore.' The defense was, 'That wasn't my mom.' Mr. Hansen: In my opinion, judges should have discretion in probation revocation hearings to determine how the rules of evidence are applied. Judge Welch: Does the statute create a right that the court needs to recognize? Mr. Hansen: If you look at the statute, the adverse witnesses shall appear, unless the court for good cause otherwise orders. Judges make those balancing decisions all the time. It's rare that a revocation hearing is contingent on one factor, it's usually 7 or 8.

Mr. Hogle: Should we have your subcommittee take another look at drafting amendments to URE 1101? Judge Williams: I tend to agree that we shouldn't put the language of the statute in the rule. I would hate to set some kind of precedent that we should do that for every rule, or let legislation amend our rules. It's a broader issue. Mr. Hogle: In notes from the meeting with the Supreme Court, they think the rule is confusing as written. They want us to address it. They don't want us to leave it alone or slavishly include the statutory language. Although there may be some benefit to having the statutory language in the rule, they want us to give it careful thought. The research is helpful. They also want us to recommend a different proposed rule. Mr. Hansen: It's hard to change URE 1101 until the Court decides what the policy should be. Judge Trease: Maybe there are two issues: Should we include the statutory language? And even if the answer is no, it sounds like the Court still wants us to fix the rule to make it less confusing.

Mr. Hogle: The Court stated that the rule is an exception to an exception and it's confusing for that reason. And there is a question of whether the rule, as proposed, interferes with judicial discretion and balancing. It seems like the statute allows for a greater exercise of discretion and balancing. Maybe that idea ought to be included in URE 1101, if not the actual language from

the statute. Mr. Nielsen: When they say it's an exception to an exception, it's the statute that's the exception to the rule. Mr. Hogle: Do we want to create a presumption that witnesses must appear unless the court for good cause otherwise orders, or do we want to create the presumption that the rules of evidence don't apply? Judge Trease: What's interesting about this is, if we go the route of putting the statute in the rule, the statute also says the rules don't apply in any proceeding with respect to release on bail. However, caselaw says that if you are going to order no-bail, you have to have a hearing and find substantial evidence. If we put the statutory language in, it won't just be for probation violations, it will be for some of the other hearings. If you do it for one, you have to do it for all.

Mr. Hogle: We don't have to include the statutory language. What do we want the policy recommendation to be? Right now, the rule says the rules of evidence don't apply in probation revocation hearings. Do we want to include 'unless the court for good cause otherwise orders,' creating the presumption that you don't need the evidence but the court could decide you do? Or do we go with the statutory presumption that the rules of evidence apply, unless the court says otherwise? It seems that in order to be consistent with current practice, it would be the first option. You don't need to bring in adverse witnesses unless the court says you should. Judge Welch: That seems consistent with the Constitution. You don't have a constitutional right. Mr. Graf: I think that's a good approach because it gives judges discretion. Each case is not the same. Some are more weighty than others. This would give judges the flexibility to make those determinations.

Mr. Young: Why shouldn't the default favor the person who might be going to jail or prison? Mr. Nielsen: Because they have diminished rights at that point. Mr. Young: But the subject of the accusation is something subsequent to the conviction. You are on probation, you violated a condition of probation, now you are subject to sanctions. I can see that there are times when it doesn't make sense to have a full battery of constitutional rights, but when the court puts somebody on probation, the judge says 'as long as you do x,y,z, I won't send you to jail for the time imposed.' Probationers ought to be able to rely on that, and when someone seeks to revoke that "contract," the probationer should have the right to challenge it. What's confusing about the rule is when it says granting or revoking probation. Granting probation sounds like sentencing. Revoking probation is an Order to Show Cause and it's very different because there's an expectancy on behalf of the probationer that he's not going to jail as long as he follows the conditions. Now the probation officer is saying he didn't. It seems that the state ought to carry the burden of proof. I think the presumption should be that adverse witnesses are required, but with a good cause escape hatch.

Mr. Graf: Another issue is the commission of a new crime. In most instances the Order to Show Cause trails the new crime, and then the due process safeguard is already built in. Mr. Nielsen: Another comparison is parole. This is arguably akin to parole revocation hearings before the parole board. When you're a prisoner, you have very limited due process rights. Probationers already have more rights than prisoners.

Judge Trease: We could also consider the other alternative. If we're talking about revocation of probation and we want the rules of evidence to apply, then just take 'probation revocation hearings' out of the rule altogether and let the statute deal with it. Mr. Nielsen: But then it becomes somewhat of an empirical question. How much more work is this going to create? That has to factor in as well. As much as we'd like to have the Cadillac system of justice, sometimes you have to have the Buick. Ms. Parrish: What if under miscellaneous proceedings, we keep the existing language but preface it with, "unless otherwise stated by law or ordered by the court…" That kind of opens the door that there might be something more than the rule, but we don't go into it. Mr. Nielsen: That becomes a question for the court, do we want to let the legislature tell us what to do when the constitution says the Court decides rules of procedure. Ms. Parrish: From what I understand, regardless of what this rule says, if I'm the defendant and I know the statute exists I can go to the judge and say I want a witness to appear. Mr. Neilsen: But then the rule could conflict and say no you don't have that right. Ms. Parrish: But the statute allows the judge to side-step the entire situation.

Judge Williams: I like the policy behind the statute, for the reason I outlined in the case I referenced. Perhaps the person who's giving the adverse information ought to be there. You shouldn't let the probation agent be the only person to testify, unless there's good cause to do so. Mr. Hogle: Do you like the presumption that witnesses appear, or the presumption that they don't? Judge Williams: I'd side with Mr. Young given the potential consequences. Judge Trease: Isn't there a case that says you can't revoke someone's probation based entirely on hearsay?

Mr. Hogle: Let's have Mr. Hansen and Mr. Young each create a draft of the rule in line with their ideas on the presumption and bring it back to the Committee at the next meeting. Mr. Hansen: I agree that it might be good policy to require adverse witnesses to appear, but it's a tax on the system and most of the time you wouldn't be doing the defendants a favor. Judge McKelvie: Think about the analogy we discussed about the mom saying defendant doesn't live there and the defendant saying it wasn't his mom. She's making an off-the-cuff statement after being confronted by somebody face-to-face. The probation hearing will be 3 weeks later. What are the chances that she's going to show up, and if she does show, will she testify against her son when she knows her testimony is going to send him back to jail? Judges are then put in the position of determining whether they believe the statement she made to the probation officer (which is probably admissible even if it doesn't carry the day), or her testimony that she was mistaken. Or if she doesn't show up, is the hearing over? The state has to dismiss? Judge Williams: That's a really good point. It might've changed my mind because it becomes a lot like a preliminary hearing. People might start scheduling Order to Show Cause hearings when they know the witness won't show up.

Mr. Nielsen: Dallas, I think your concerns could still be met with the opposite presumption (it doesn't apply unless ordered) because the judge could hear the probation officer's testimony and if they're uncomfortable with what's going on, they can reschedule and order witnesses to

appear. There is a potential problem of stacking prelims and having people sitting around. Mr. Hansen: Before they sentence someone, judges have looked at the presentence report and the defendant's history, and they usually have a pretty good sense of the person. Mr. Graf: To answer Judge Trease's question, the case is *State v. Tate*, a 1999 case that talks about how hearsay cannot be the sole reason for a revocation.

Mr. Hansen and Mr. Young will present 'dueling' rule proposals at the next meeting. Mr. Hogle asked them to marshal the research in the way that they want to, and include the practical considerations and prior practice. The committee may select one proposal, or send both to the Court and have the Court make the call.

5. URE 106 Update:

Judge Welch reported that the URE 106 Subcommittee is working on a fifty-state survey. Utah Rule 106 mimics the Federal Rule. The federal rules committee has proposed an amendment to Federal Rule 106. Judge Welch: I propose that this Committee wait to see what happens with the Federal Rule. Depending on what happens, we may want to follow suit or explain why we disagree. The Subcommittee will continue to conduct research and work on the 50-state survey, and will report back to the Committee at the February meeting. Mr. Hogle: Are the federal rule amendment proceedings underway? Judge Welch: I don't know the exact status, I saw some notes of the committee's discussion and a copy of the proposed amendment. I can include a copy of that amendment and the committee notes in the packet for the next meeting. I will try to find out what the status is. Mr. Nielsen: The 50-state survey should be complete by the next meeting.

6. Body Camera Violations:

The Administrative Office of the Court sent a memo to the Supreme Court outlining a request from the ACLU and Libertas asking the Supreme Court to consider whether court rules should be amended to provide guidance to judges when presented with issues related to the absence of law enforcement body camera recordings. The memo included a list of procedural and evidentiary rules related to the issue. Mr. Hogle: Justice Pearce believes this could be a legislative topic this session. Rule 616, about custodial interrogations, seems like it might be in the same arena. The Court encouraged the Committee to get ahead of the session by inviting interested parties to address the Committee about their concerns. We should be looking at various alternatives and what other states are doing in this regard, but if we make some legitimate efforts toward addressing the situation, that may discourage the legislature from proposing a resolution amending the rules.

Ms. Salazar-Hall: Are they thinking about requiring the use of body cameras in the statute? Are they thinking about making an adverse inference? Isn't it still optional to use body cameras? There may be some rural law enforcement agencies that can't afford them. Ms. Brown: I can't

imagine Libertas and the ACLU are interested in that. They are probably coming at this from the perspective of outlining what the privacy protections are when cameras are used, as opposed to pushing the legislature to require body cams. Ms. Williams: The Court talked about the potential for inconsistent treatment depending on which court you're in when addressing violations of the body camera statute. For example, what should you do if law enforcement is supposed to use the camera but they don't turn it on, or they don't provide it to the opposing party, etc.? Judges may need guidance. What presumptions are we going to build in? Libertas is advocating for a spoliating function if the video doesn't exist. The Court didn't say whether those were good ideas or not, they were just explaining where the interested parties were coming from.

Mr. Hansen: It's a difficult topic. In Weber County, they cannot use body cameras if they are on an FBI task force. The FBI doesn't allow it. Ms. Salazar-Hall: Salt Lake City has a policy for body camera use. Mr. Hansen: Typically these types of hearings address whether law enforcement violated its own policy, not a statutory requirement. Mr. Nielsen: There are some separation of powers concerns if you are trying to dictate policy in admissibility rules. Judge Trease: Is there a reason we should treat this type of discovery differently than any other type of discovery? Mr. Hogle: As I understand it, it's not mandating that body cameras be used, it's what happens *if* body cameras are required. Ms. Salazar-Hall: I think it would be treated just like any other evidentiary issue, for example, if a recording existed and the prosecution destroys it as a part of their daily procedures. Mr. Young: Or they forget to key the camera, or they leave it on mute so there is no audio. Mr. Havas: The statute states, *if* body cameras are used, then law enforcement agencies must have a written policy. It doesn't say what happens if they violate the policy or what happens if the policy is inadequate. We had the same issue come up with chases. The statute stated that if a police agency had a chase policy, then they had to have a written policy, but it didn't say what was required in the policy. It could be as simple as, if you initiate a high-speed chase, be careful.

Ms. Brown: This seems like a policy question outside of our committee's purview. If there's a rule that says it won't be admissible if you don't follow your own policies, then maybe they'll stop using body cameras and we want there to be body cameras. Does that take away the incentive to use body cameras? Mr. Graf: I share Judge Trease's concerns. I think it should be treated like any other piece of evidence, and subject to impeachment if there are policies that aren't followed. Mr. Nielsen: Let defense counsel argue that you don't get an automatic jury instruction. Mr. Graf: It would seem weird to have a particular rule of evidence about misusing body camera policies.

Mr. Hogle: These are all valid considerations. The committee discussed inviting representatives on each side of the issue to the next meeting - the ACLU/Libertas, and someone from an agency that uses body cameras. Ms. Salazar-Hall recommended inviting Mark Kittrell from Salt Lake City. Mr. Havas recommended someone from a public relations office. Mr. Hogle will reach out to Mr. Kittrell. Ms. Williams will work with Mike Drechsel to reach out to the ACLU and Libertas.

7. URE 404(b) Character Evidence; Crimes or other Acts:

Mr. Hogle welcomed Judge Pullan to the meeting. Mr. Hogle: The Evidence Committee received a directive from the Supreme Court to research 404(b) and they suggested that the Committee hear from Judge Pullan because of his expertise. The Court is open to pretty much anything. Federal rule 413 allows propensity evidence to come in in sexual abuse cases. That's one option. Another option is to tighten up Rule 404(b).

Judge Pullan: Oftentimes we talk about Rule 404(b) in caselaw as a rule of inclusion and that is not true. Rule 404(b) is a rule of exclusion. That's how it starts, the exclusion of character evidence, and then there are exceptions to that rule of exclusion. One of the oldest principles of Anglo-American law is that a person should not be judged strenuously in reference to the specter of his entire life. We try people for what they did, not for who they are. That is the character bar in a nutshell. There are good reasons for that. Evidence of bad character can undermine the proof beyond a reasonable doubt standard. Jurors can be influenced to say, well they didn't quite meet the burden but if we acquit we will let a really bad person go. There is also the risk of preventative conviction where jurors say, he didn't commit this crime, but he'll likely go out and do other horrible things so we better convict. Character evidence in some ways lacks real probative value because it's not very good at predicting whether a person does something on a particular day, but it's pretty good about predicting how people will act over time.

With some of those general policies in mind, the difficulty is that Utah caselaw in sexual assault cases has drifted away from the character bar. We have rule 404(c) which mirrors federal rule 414 in child molestation cases. The propensity reasoning, which is expressly forbidden by rule 404(a), has polluted our caselaw in sexual assault cases. To give you the best example, it began in *State v. Nelson-Waggoner* and has been perpetuated since then. The most recent example is *State v. Gasper*. Gasper is charged with raping a woman at a house party. His basic method of operation was: he meets her for the first time, he engages in sexual banter with her, she resists, he offers to give her a massage, she says no, he tries to get her to drink shots with him, she says no, no, no, she eventually relents, immediately when she drinks the shots she feels sick and nauseated, she doesn't remember much after that, she remembers being moved to a couch at some point, she wakes to find Gasper in the act of sexual intercourse with her the next morning, somehow she's been moved to a bedroom but she doesn't remember that, she reports the rape. The trial court admits the testimony of a witness who testifies that she met Gasper for the first time at her brother's home. Gasper touched her buttocks and offered to give her a massage (Gasper is a massage therapist). At some point he gives her an open beer, she drinks it, she's immediately sick, she's raped. It's a very similar method of operation.

Gasper is convicted. On appeal he challenges the admissibility of the other crimes evidence and the court rules that it's admissible. The court's holding quotes directly from *Nelson-Wagonner*: "Historically, evidence that a defendant raped others has been viewed solely as impermissible

character evidence and has not been considered probative of whether a current victim was raped. However, in recent years, courts have admitted such bad acts evidence for the noncharacter purpose of proving the element of lack of consent in certain rape cases." Turning to the *Gasper* case, the court writes, ""The two incidents represent a ***pattern of behavior that is distinctively similar*** and therefore admissible to show intent . . . to engage in sexual activity without Victim's consent." I would submit that is nothing but propensity reasoning. What is a pattern of behavior other than character reasoning? The question becomes, what are we going to do about that? We either have to find a non-character, rational explanation for where we are, or we have to quit giving sanctimonious lip-service to the character bar and just admit that what we're doing is admitting propensity evidence. Judge Benson has written in his most recent book that trial courts find a way to get this stuff into evidence.

There are a couple of choices to address the Supreme Court's questions. The development of the doctrine of chances is a non-character explanation for what's going on here, and the alternative is to adopt rule 413.

Federal Rule 413:

How rules 413, 414, and 415 got into the federal rules of evidence is an interesting story. They were part of the Violent Crime Control and Law Enforcement Act of 1994. The rules were in the statute and the statute said these rules will take effect in 150 days unless the judicial conference recommends alternatives. And if Congress doesn't act on those alternatives, the rules become effective. One of the chief criticisms of that process is that it bypassed the Rule Enabling Act, which requires several levels of vetting and drafting. The judicial conference sought recommendations from the Advisory Committee on the Federal Rules of Evidence, the Standing Committee on the Rules of Practice and Procedure, and the Advisory Committee on the Federal Civil and Criminal Rules of Procedure. Ultimately, the advisory committee also sought a lot of public comment. The overwhelming majority of those comments opposed the rules. Opposed: 11 lawyers, 56 evidence professors, 19 judges, and 12 organizations. Support: 0 lawyers, 3 evidence professors, 1 judge, and 3 organizations. The reasons given for the opposition were: angst about circumventing the enabling act; Rules 413 and 414 are not models of clarity and they don't fit where they are; concerns about unconstitutionality and insufficient empirical data on propensity evidence; and the rules are unfair, unnecessary, and have significant drafting problems.

In the end, the advisory committee recommended: "We believe with these commentators, that the existing Rules of Evidence are adequate to deal with the concerns expressed by members of Congress. Furthermore, we are concerned that the enacted rules may work to diminish significantly the policies established by long standing rules and case law guarding against undue prejudice to persons accused in criminal cases and parties in civil cases." The judicial conference adopted that recommendation and noted the unusual unanimity in the committee. There was only one vote against approving the recommendation and it came from the Department of Justice. Congress disregarded the judicial conference's recommendations and the rules went

into effect. As we look at rule 413, if that's the road we want to go down, it's important to remember that it hasn't really been vetted. We now have 25 years of caselaw on how 413 has played out in court.

Doctrine of Chances:

Judge Pullan referred the committee to two recent opinions, *State v. Lane* and *State v. Murphy*, where Judge Harris issues concurring opinions raising some significant questions about the doctrine of chances. Judge Pullan provided an example: If you flip a coin 15 times and it always comes up heads, pretty soon they think you're cheating. When we talk about probabilities, it doesn't say anything about whether I cheated on any particular flip. It's just more likely that one or more of those flips was a cheat. That's one of the concerns with the doctrine of chances, it's on the hinterland of reasoning about how this is objective. There is a high risk that juries are not going to understand the logical, objective reasoning that makes it non-character. They are just going to use for propensity. There are some commenters that say the doctrine of chances is propensity. Ms. Brown: I agree with those commenters. It's just really good propensity evidence.

Judge Pullan: In the materials I've listed several important questions. Given the high risk that it may be used improperly, when we talk about these other acts, should we elevate the level of proof in 104(b) to clear and convincing evidence. That's a really interesting question and it makes some sense. The probative value of this type of evidence may be overstated. *State v. Verde* gives two different similarity standards that are concerning. The actual foundational requirements of the doctrine require a high degree, or rough similarity between, the other acts and the charged offenses. Isn't that the very thing we're worried about? They have to be similar or the objective reasoning doesn't make sense. The frequency analysis is fascinating. Judge Harris says that nobody knows what the rare event of misfortune is. Who is the typical person? How frequently does this thing happen to a typical person? *State v. Lane* is interesting because it involves a guy in a fight at the homeless shelter and the judge said, it doesn't happen to me very often that I would get into a fight and have to claim self-defense. Judge Harris says that's not a good standard. We can't rely on our own intuition to make these calls. When are we going to require actual statistical evidence on how frequently something actually happens? The interesting thing is, it turns on why. If I'm talking about actus reus - did I engage in a particular act – I'm talking about the frequency with which something bad happens. How often does a baby die of asphyxiation? There is likely some statistical evidence to answer that question. But if I'm talking about mens rea, I'm asking how often this bad thing happens to the accused? No one keeps statistics on that.

My opinion in *State v. Heath* was sustained in the court of appeals, and it raises that question. When are we going to insist on statistical evidence? The doctrine of chances has a problem when it comes to rare events that are truly random. This is the guy who has three wives that all die in the bathtub, and he claims that the fourth time was an accident or mistake. After the second one, wouldn't he be in a state of hyper-vigilance about what happens in the bathtub?

That makes some sense. But what Judge Harris said is, when we apply these to things that aren't random, things that are based on acts of volition between people like self-defense or consent, are we really talking about random acts? Doesn't the argument about probabilities fall apart when volition is introduced into the analysis? We have caselaw that says we shouldn't consider probability evidence when it comes to determining who tells the truth. Isn't that what the doctrine of chances is? It's probability evidence, especially when applied to rebut claims of fabrication surrounding consent.

Lastly, you have the limiting instruction problem. Evidence on how effective limiting instructions are is not hopeful. So if we're going to rely on limiting instructions as the backstop to cure prejudice when it comes to the doctrine of chances, that's concerning. At the end of my materials I provided some observations and recommendations for consideration by the Committee.

Mr. Nielsen: Another thing to consider as I'm going over the materials is that we're not writing on a blank slate. This debate has taken place in every generation for at least 50 years. In the 80's it was Justice Stewart and Justice Zimmerman going at it, in the early 2000's it was Judge McHugh saying the same things that Judge Harris is saying now. You had the switch in the Utah Supreme Court in the early 2000's in two cases. The catalyst for the switch was that the legislature was about to amend rule 404(b) and say this stuff comes in because it's crucial evidence that should be admitted. I recognize that defense attorneys and academics hate rule 404(b), or at least they wish less evidence came in under it, and that prosecutors and the public love it. Where we're at now is the result of decades of litigation and negotiation, so I don't think that we should lightly tinker with the rulemaking that has taken place up to this point. That's not to say that we shouldn't take a look at it, but it's a philosophical difference that never really goes away. I don't know that we're ever really going to agree. On one side people are saying that it's just propensity evidence similar to the argument in Judge Harris's concurrences – this is propensity and no one's going to convince me otherwise. On the other side, people are saying no it's not. It's like hearsay coming in for a non-hearsay purpose. We do this all the time with other rules of evidence when we admit evidence not for the truth of the matter, but to prove something else. That's all that 404(b) is about. Arguments that this stuff is coming in too often is really a 403 concern. I don't think it has anything to do with 404(b). Under 404(b) it's a breeze, do you have a non-character purpose? If so, you're done, you've passed 404(b). Then you move on to 403 and balancing.

Judge Pullan: Do you agree that simply citing 'non-character purpose' doesn't mean that you've engaged in non-character reasoning? I see that all the time. Ms. Brown: Most of the stated examples for exceptions go straight through the box of required propensity reasoning. They are just common law exceptions that were, at the time, considered not to require propensity reasoning, but most of them, if you look very closely at the inferential chain from past acts to inferences about disposition, are requiring the dispositional inference. Sometimes it's automatic, and sometimes the probability seems close to one, so the argument is that it couldn't be anyone

else. That's just really good propensity evidence. It's character use, it's just a 200-year-old permitted character evidence use. Judge Pullan: In 2017, Judge Campbell talked about this issue in a federal committee. One question was, should we require the proponent of this evidence to show the inferential chain and how they got there to avoid this problem? My concern is that all of the non-character purposes are thrown onto the wall. Ms. Brown: And they don't connect it up. Or they'll just use a word like 'motive,' but then they're making a claim about a motive to do the thing that is propensity evidence. Judge Pullan: Or they offer it for its intent. Because he intended to do it on this day, he intended to do it on another day.

Judge Welch: I think what's at play here is looking at the need for the doctrine of chances to be carved out in a rule, because it's all spelled out in caselaw. The doctrine of chances isn't found in 404(b), but the courts have developed it in caselaw over time. *State v. Lane* was my case on appeal. In researching the origin of the doctrine of chances, the Supreme Court relied heavily on Imwinkelried's law review articles when introducing the doctrine of chances into caselaw. Then in Imwinkelried's most recent law review article in 2017, he says trial courts and appellate courts are doing a bad job of applying it. He said one of the things courts should be looking at is, even if you allow in the evidence under the doctrine of chances, you need to give a certain cautionary instruction. The default here is that character evidence shouldn't come in, unless it meets the doctrine of chances standard that Utah caselaw spells out. To me, for the doctrine of chances to apply you have to show that the 4-part test is met. You have to go through 404(b), 402, and then 403. I think the interesting question is, is it beneficial to put everything that has been developed in caselaw into a rule that can provide guidance on when evidence is not character evidence? Mr. Nielsen: And which rule? Because we've tried to get the Court to say whether it's 404(b) or 403, and they've said either one. Judge Welch: There may be a benefit to having a rule. What's happening now is, because it's not in a rule, it's being fleshed out in each case as it comes along. We know from other things like the eyewitness identification rule that the Court doesn't necessarily want to keep developing the standards in caselaw when it would be helpful to have a rule.

Judge Pullan: The theory, as you know, is that every rule that follows rule 403 in Article 4 is an example over time of how 403 balancing ought to happen. To throw independent rules like 413, 414, and 415 into that mix makes no sense. If we are going to be tinkering with exceptions, in my view it ought to be in 404. In fact, the federal judicial conference actually re-drafted a 404 rule in response to 413 and 415. Congress didn't do anything with it, but it exists and it might be a good place to start if that's the direction you decide to go in. Ms. Brown: I like the idea of cleaning up what is happening. We should identify those instances where we know it's not an exception, but we think there's an important policy reason for allowing it. And then separate those from instances where there truly is a non-character purpose. There are a lot of cases about knowing how to do something that might actually be non-character cases. The same goes for bias cases. A lot of the doctrine of chances in particular, lack of accident, M.O., pattern, is all classic propensity evidence. Maybe we should just be honest about the tradeoffs we make for the 400 series of rules. We think this may be relevant, but in certain cases it may be so

prejudicial that we'll create a rule saying it doesn't come in. The opposite could also happen. These things are prejudicial, but we think they are really probative or we think they're really important. I think being more intellectually honest would lead to fewer appeals. It's the most litigated rule on appeal and it leads to a lot of judicial waste and confusion.

Judge Pullan: In the end, if what we say is let's just be honest that we're admitting these prior acts for propensity purposes, we have to recognize that 403 balancing still exists. It was the character purpose that was the primary prejudice to the accused. After that, what ends up in the balance is very little. That's what we've seen with 404(c).

Mr. Hogle: Judge Pullan, you mentioned the judicial conference draft of 404(b), have you seen a rule either in draft form or something that was adopted that would satisfy Judge Harris? Judge Pullan: I've not looked outside the state of Utah, but it would be interesting to see what other states have done. I suspect you are not going to find a rule that addresses the doctrine of chances. Mr. Nielsen: One of your suggestions was potentially looking at 104. In *State v. Lucero*, I did a 50-state survey about other states' burdens – could a jury find this by preponderance, clear and convincing, or reasonable doubt? There were 2-3 states that said beyond a reasonable doubt, a handful of states said clear and convincing, and the vast majority said preponderance just like any other evidence. Mr. Young: You're talking about a non-charged prior bad act? Is that uniformly a question the jury has to decide? Mr. Nielsen: The question is, is there enough for a jury to decide. It's kind of like sufficiency of the evidence. Could a jury find this by a preponderance of the evidence? If so, then it comes in. The Court adopted that standard in *Lucero*. The judge acts like a gatekeeper, but it's sort of like a directed verdict motion. Judge Pullan: Ultimately, the jury could decide that the defendant didn't commit the other act and then not consider it, but there's a threshold standard.

Judge Trease: Is our mandate to change rule 404(b) to add something about the doctrine of chances? Mr. Hogle: It's not entirely clear. What is clear is that the Supreme Court justices are unanimously of the view that Judge Harris's opinions raise questions worthy of careful consideration. And they ask us to delve into these matters and propose recommendations to the Court on whether, and to what extent we should address the problems in amendments to the rules of evidence. Judge Pullan: There is some merit in limiting the type of cases where the doctrine of chances should have application. Judge Harris raises some very persuasive arguments about how the reasoning falls apart in certain circumstances. Professor Imwinkelried says multiple times, the doctrine of chances is easily misused and can undermine the character bar very quickly. So long as the defendant has done something like the charged offense, it's admissible. Is that really what the doctrine was about? Or was intended to be confined to rare, random events?

Ms. Brown: Judge Pullan, can you clarify your statement about when the act is volitional or not? I thought the point of the doctrine of chances is that when something happens repeatedly, you're inferring mens rea because your wives wouldn't accidentally drown 4 times. Judge

Pullan: In *Lane*, Lane claimed self-defense in the knife fight and he had claimed self-defense in a fight twice before. Judge Harris said, why are we more likely to disbelieve Lane? Because he's the type of person who stabs people and then claims self-defense. In the end, the nuances of the decisions a person makes when they are in fear of imminent harm have nothing to do with random events that happen to occur. Those are human choices. It's a philosophical question about free will. Those aren't random events, they happen between people who are making choices. Consent falls in that category as well. Judge McKelvie: And should he be forever precluded from defending himself in a knife fight because it's happened twice before? Judge Welch: That was one of the first questions I got from Judge Harris right out of the gate, does the doctrine of chances apply in self-defense cases? There's an issue of the scope of the type of cases where the doctrine of chances should apply. Judge Pullan: Things might be different at the appellate level, but what I'm seeing at the district level is that the doctrine of chances is just added to a laundry list in motions to admit prior bad acts. The foundational basis for the doctrine is complex, and young attorneys especially don't understand it. It ought to be rare.

Mr. Nielsen: Another thing to consider is that our debates about the arcane matters of evidence usually don't get a lot of public interest. This one has a lot of potential for interest and we should consider a response for the kinds of things that we propose. In this day and age, if it gets out that there's a rule that will keep a jury from learning that a serial rapist is a serial rapist, that's probably not going to go over well. It will be a lot harder to convict if it's always going to be a he said/she said situation in every case, rather than a he said/she said, she said, she said, she said situation. Ms. Brown: I think it's highly probative that the same thing happened 30 times. Judge Trease: In a serial rapist case here in Utah, the defendant was charged with six rapes. In his initial trial, no 404(b) evidence was admitted and he was acquitted. In the second trial, 404(b) evidence was admitted and he was convicted. That might be an argument against admitting 404(b) evidence. Mr. Nielsen: And then the public will go to the legislature and say they want 404(b) amended because they don't want guys like that walking around. The narrative will be that this is relevant evidence and it has to come in. That's the other side of this. I understand the philosophical arguments against it, but there is a public sense that juries have to know about some of this stuff, especially in cases like serial rapes.

Judge Pullan: One thing we have to think about is if we were to move to a 413-type of admissibility for propensity purposes, would 413 and 412 work to undermine each other? Example: 412 says a victim's prior sexual behavior is inadmissible to show sexual predisposition. Then 413 says a defendant's prior sexual behavior is admissible for sexual predisposition. Won't every defendant then say there's a due process problem? Under 412, constitutionally shouldn't I get to refer to other acts, or even to other acts of third parties to show the character of someone else who did it? That's a really interesting question. Judge Welch: Judge Harris said the law tells you you shouldn't be judged based upon your character or propensity, but society could decide that you can be judged if it's this certain type of evidence. That's what the federal rule says. Everyone decides that character isn't allowed except for this specific type of case, and doctrine of chances evidence isn't necessarily a type of evidence as much as it is a requirement

that you meet the 4-part test. The difference that I see between the doctrine of chances and 413, is that it's a specific type of evidence for which society has decided that the value of letting it in outweighs the defendant being convicted on propensity evidence. It's like a privilege.
Judge Pullan: That's what happened in Congress. They determined that great harm is caused by sexual assault and sexual assaults are underreported significantly, so they made a policy decision. That speaks to Mr. Nielsen's issue about the legislature's involvement.

Mr. Hogle: This issue is high-profile and it's been an issue for a long time. The Committee formed a 404(b) subcommittee to conduct research and report back to the Committee with proposals. The subcommittee members are:

- Judge Welch (Chair)
- Tenielle Brown
- John Nielsen
- Dallas Young

8. Other Business:

Next Meeting: February 11, 2020
5:15 p.m.
AOC, Council Room