AGENDA

Utah Supreme Court Advisory Committee / Rules of Evidence

February 11, 2020 / 5:15 p.m. – 7:15 p.m.

Council Room - 3rd Floor, N31, Matheson Courthouse

(Next door to Council Room)

450 S. State St., Salt Lake City, UT

***Light Dinner will be served*

Welcome and Approval of Minutes • *January 14, 2020*	Action	Tab 1	Chris Hogle
Supreme Court Meeting re Legislation • *Legislative Subcommittee Process* • *CJA 11-102*	Action	Tab 2	Chris Hogle Judge Jones
URE 512. Victim Communications • *Draft for Final Approval*	Action	Tab 3	Judge Bates
Committee Note Review/Approval • *URE 406. Habit; routine practice* • *URE 407. Subsequent remedial measures* • *URE 409. Payment of medical and similar expenses; expressions of apology*	Action	Tab 4	Ed Havas Chris Hogle
URE 1101. Applicability of Rules	Action	Tab 5	Matt Hansen, Dallas Young
Update: URE 106. Remainder of or related writings or recorded statements	Discussion	Tab 6	Judge Welch
Update: URE 404(b). Character Evidence; Crimes or Other Acts.	Discussion	Tab 7	Judge Welch
Update: Body Camera Joint Subcommittee	Discussion		Tony Graf Dallas Young

Queue:

- Rep. Ivory's Requests (Rep. Ivory resigned. Waiting for new sponsor)
  - URE 409. Payment of Medical & Similar Expenses; Expressions of Apology
  - URE 412. Admissibility of Victim's Sexual Behavior or Predisposition
- Ongoing Project: Law Student Rule Comment Review

2020 Meeting Dates:

April 14, 2020 October 13, 2020
June 9, 2020 November 10, 2020

Rule Status:

URE 512 – With Committee for final approval
URE 106 – Back to Committee per SC
URE 1101 – Back to Committee per SC

Tab 1

UTAH SUPREME COURT ADVISORY COMMITTEE
ON THE RULES OF EVIDENCE

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

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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. Rule Review 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 rule 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 Pierce 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

Tab 2

Administrative Office of the Courts

Chief Justice Matthew B. Durrant
Utah Supreme Court
Chair, Utah Judicial Council

Mary T. Noonan
State Court Administrator
Catherine J. Dupont
Deputy Court Administrator

MEMORANDUM

To: Utah Supreme Court
From: Nancy Sylvester
CC: Liaison Committee, chairs and staff of advisory rules committees
Date: January 31, 2020
Re: Rules committees and the Legislature

This memorandum memorializes our discussions at the January 29, 2020 meeting of the Supreme Court and chairs and staff of the advisory rules committees. The committees represented were Criminal Rules, Civil Rules, Juvenile Rules, Appellate Rules, Rules of Evidence, and Rules of Professional Conduct. The purpose of the meeting was to discuss having a coordinated, faster, and more respectful response to legislative requests for rule changes.

BACKGROUND

During the legislative session, legislators often add court procedure to proposed bills, or they may introduce joint resolutions to amend the court rules. The Judicial Council's Liaison Committee typically responds to these situations by asking that the sponsor work on a compromise with the appropriate rules committee. But some legislators have complained about the treatment they and their constituents have received, as well as the pace at which the committees work.

PROPOSED SOLUTIONS

To address these concerns moving forward, the group discussed the following solutions: 1) committee chairs will set the expectation of diplomacy and rapid response to legislative requests; 2) each advisory committee will have a standing legislative response team; and 3) the Supreme Court will hold a training each September to connect with the advisory committees and to discuss court priorities. I have bulleted more detailed discussion of these solutions below.

Conduct of committees generally

- Advisory committees should accord all guests the utmost respect and consideration when they bring an idea forward, especially when they attend a meeting. Think over-the-top diplomacy.

- With respect to legislator requests in particular, the requests should be red tagged (given high priority) and the committee should review the request quickly and seek a compromise if possible.
- The advisory committees do not have to bend a legislator's way. It is okay to say, "We don't think the Court will get behind this" if the idea is not a good one.
- An advisory committee should alert the Court of a request even if the committee thinks it's a bad idea.
- Sometimes things may come to the committees that won't make it through the legislative process.
- The committees may seek advance guidance from the court on any rule request.

Standing agenda item

- Discussion of legislative requests should be a standing agenda item. The item should be placed at the beginning of each meeting agenda.

Legislative response teams

- Track 1: The Supreme Court appoints a small group to comprise a legislative response team. Members should be appointed to these teams on alternating terms. The terms can be 2 or 3 years each, depending on members' remaining time with the advisory committee. During the session, each team is empowered to bring rules directly to the Court (bypassing the full committee) when a legislator works with the team. The courts' legislative liaison passes the request to the team through the staff person. The majority of advisory committees will take this track.
- Track 2: The advisory committee creates its own legislative response team comprised of the chair and committee staff and loops in the entire committee as quickly as possible by email or phone conference. The courts' legislative liaison passes the request to the team through the staff person. The Juvenile and Appellate Rules Committees, and perhaps others, will take this track.

Anticipated timelines and processes

- Each advisory rules committee is reminded in early January of the upcoming legislative session. The committee is advised that they may be called upon to comment on proposed legislation or rules and that response times will be quick.
- During the session and throughout the year, the court's legislative liaison (Mike Drechsel) identifies the need, in coordination with the Liaison Committee, to send a legislator request to an advisory committee. Those requests are sent through the advisory committee staff person.
- The legislative response team meets with the legislator and/or legislative staff to listen to and provide feedback on the legislator's concerns. The legislative response team drafts a rule quickly if possible or if needed.

- During the legislative session, the legislative response team is empowered, if time is of the essence, to present proposed rules to the Court.
- Outside the legislative session, or if time is not of the essence, the legislative response team draws in other people for feedback, including the larger committee.

Additional considerations

- All advisory committee members should be trained in the legislative process and the nuances of dealing with public officials.
- Members should be mindful of potential conflicts of interest, whether real or perceived, when it comes to proposed legislation or rules.
- Members should consider how they may volunteer without compromising their duty to a client, their law or business partners, or their employer.

Rule amendment

- Rule 11-102 will be amended to capture these new processes, or at least provide more flexibility in creating them.

Annual CLE

- The Supreme Court will hold a free annual CLE in September for all advisory committee members and staff.
- The training will be 3 hours long and include ethics, civility, and professionalism topics.
- The September timing is important because for new appointees this will be their first interaction with committee work and an opportunity to receive training on advisory committee processes and Supreme Court priorities.
- The training will also be an opportunity for the Court to recognize the hard work of its advisory committee members and to set the tone for the year's work ahead.

CONCLUSION

The proposed solutions and processes I've captured in this memo are not final. They will necessarily evolve with time and experience. But the hope is that this is the start to a better path forward for the Judiciary, Legislature, and policymaking generally across the state.

UTAH STATE COURTS

Keisa Williams <keisaw@utcourts.gov>

Rapid Response Subcommittee of the Advisory Committee on the Utah Rules of Evidence

Keisa Williams <keisaw@utcourts.gov> Thu, Jan 30, 2020 at 7:43 AM
To: Justice Deno Himonas <dhimonas@utcourts.gov>, Chief Justice Matthew Durrant <mdurrant@utcourts.gov>, Justice Paige Petersen <ppetersen@utcourts.gov>, Justice Thomas Lee <trlee@utcourts.gov>, Justice John Pearce <jpearce@utcourts.gov>
Cc: Michael Drechsel <michaelcd@utcourts.gov>, Chris Hogle <crhogle@hollandhart.com>, "John R. Lund" <jlund@parsonsbehle.com>, Judge Linda Jones <lmjones@utcourts.gov>

Justices - In response to your request yesterday, please see below the intended approach of the Evidence Committee's new rapid-response legislative subcommittee, along with member recommendations.

Thanks,
Keisa

---------- Forwarded message ---------
From: **Chris Hogle** <CRHogle@hollandhart.com>
Date: Thu, Jan 30, 2020 at 7:46 AM
Subject: Rapid Response Subcommittee of the Advisory Committee on the Utah Rules of Evidence
To: Keisa Williams <keisaw@utcourts.gov>
Cc: John R. Lund <jlund@parsonsbehle.com>, Judge Richard McKelvie <rmckelvie@utcourts.gov>, Dallas Young <dallasyounglegal@gmail.com>, Judge Linda Jones <lmjones@utcourts.gov>

Keisa,

During our meeting yesterday, Justice Lee asked for an email that identifies the intended approach of the new Rapid-Response Subcommittee of the Advisory Committee on the Utah Rules of Evidence, the members of the Advisory Committee, and which of those members will staff the Subcommittee. This email is intended to supply the requested information. Can you please forward this to the appropriate email addresses?

We agree that when a proposal is made in a legislative session that implicates the evidence rules, the Subcommittee should be empowered to make decisions on recommendations to the Supreme Court, but it will adopt a practice of notifying all members of the Advisory Committee, who can provide input if they wish and do so in a timely manner. When time and circumstances permit, the Subcommittee will involve the entire Advisory Committee in the proposal and seek its comments and recommendation, with the understanding that such involvement will not delay the response effort.

We understand that empowerment of the Subcommittee to make rules recommendations to the Supreme Court will require a variance to Rule 11-102(3) of the Supreme Court Rules of Professional Practice, which requires a majority of the Advisory Committee members to constitute a quorum necessary for the transaction of business.

The Subcommittee members will include Judge McKelvie, Dallas Young, and me. Judge McKelvie's and Dallas' email addresses are: Judge Richard McKelvie <rmckelvie@utcourts.gov> and Dallas Young <dallasyounglegal@gmail.com>. I can be reached at (801) 799-5884 (direct office line) or (801) 633-0494 (cell). Judge McKelvie's team line is (801) 238-7118. Dallas' phone # is (801) 602-3531 (cell).

All of the Committee members are:

John R. Lund

Chair, Attorney

Adam Alba

Attorney

Professor Teneille Brown

University of Utah - SJ Quinney College of Law

Deborah Bulkeley

Attorney

Tony Graf

Attorney

Matthew Hansen

Attorney

Edward Havas

Attorney

Christopher R. Hogle

Attorney

Judge Linda M. Jones

Third District Court

Judge Richard McKelvie

Third District Court

John Nielsen

Attorney

Jennifer F. Parrish

Attorney

Nicole Salazar Hall

Attorney

Lacey Singleton

Attorney

Professor Michalyn Steele

Brigham Young University

Judge Vernice S. Trease

Third District Court

Judge Teresa Welch

Third District Court

Judge David Williams

Second District Court

Dallas Brent Young

Attorney

Nancy Merrill

Staff, Administrative Assistant - Administrative Office of the Courts

Keisa Williams

Staff, Associate General Counsel - Administrative Office of the Courts

Thanks,

Chris

Chris R. Hogle

Partner

222 S. Main, Suite 2200

Salt Lake City, Utah 84101

Direct: (801) 799-5884

Assistant: (801) 799-5893

Fax: (801) 618-3863


http://www.hollandhart.com/images/h&hlogo_sml.gif

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Rule 11-102. Advisory Committee Procedures.

Intent:

To establish procedures governing the advisory committees.

Applicability:

This rule shall apply to the Supreme Court and the Supreme Court advisory committees.

Statement of the Rule:

(1) **Petitions**. Petitions for the adoption, repeal or amendment of a rule of procedure, evidence, or professional conduct, may be submitted by any interested individual to the chair of an advisory committee, or to the Supreme Court. Petitions shall be in writing, and should set forth the proposed rule, amendment, or instruction, or the text of the rule or instruction proposed for repeal, and shall specify the need for and anticipated effect of the proposal.

(2) **Committee agenda**. The Supreme Court shall forward petitions to the chair of the appropriate committee. All petitions shall be placed on the committee's agenda for consideration and the committee shall provide written notification of committee action to petitioners. In addition to petitions, the chairs shall place on the agenda any item of interest to the committee.

(3) **Committee work**. Committees shall meet as a whole, at the direction of the chair, to discuss and vote upon recommendations and to prepare written recommendations to the Supreme Court concerning petitions or committee-initiated proposals. A majority of the members of the committee shall constitute a quorum for the transaction of business. The chair may cast a vote only to break a tie vote of the members present. Voting by proxy shall not be allowed.

(4) **Expedited procedures.** ~~An individual c~~Committees ~~may~~ shall adopt ~~additional~~ expedited procedures for bypassing full committee processes and recommending rules to the Supreme Court ~~not~~ when time is of the essence, such as when immediate rule changes may be required due to changes or proposed changes in the law. The Supreme Court shall review and deny, modify, or approve any expedited procedures that involve bypassing the full committee. ~~inconsistent with these rules.~~

(5) **Minutes**. Minutes shall be taken at all meetings of the committee of the whole and a copy shall be forwarded to the Supreme Court's liaison for the committee.

Tab 3

URE 512. Victim Communications
Representative Snow Feedback
January 21, 2020

Timeline of URE 512 revisions:

- July 17, 2019 - Committee presented initial draft of URE 512 to the Supreme Court
  - Rep. Snow sent a memo to the Court with concerns about the Committee's draft
  - Court allowed the resolution to go into effect on July 31st
  - Court sent the rule back to the Committee for further study and requested that the Committee meet with Representative Snow to get feedback on future drafts.
- July 30, 2019 – Ms. Williams and Mike Drechsel met with Representative Snow and Jaqueline Carlton to discuss the Committee's initial draft.
- August 13, 2019 – the Evidence Committee formed a new subcommittee to rework URE 512 and meet with Rep. Snow and Ms. Carlton for additional feedback.
- August 21, 2019 – The Subcommittee met and prepared Version 2 of URE 512
- October 8, 2019 – The Subcommittee presented Version 2 to the Evidence Committee for feedback
- January 21, 2020 - Judge Bates and Ms. Williams met with Rep. Snow, Ms. Carlton, and Mike Drechsel to review Version 2.

Summary of the January 21st meeting:

- Rep. Snow explained the genesis of the statute and resolution. He emphasized:
  - A legislative task force met for 6-7 weeks
  - It was an exhaustive process involving many witnesses from the victim advocate community, prosecutors, and defense attorneys.
  - There was a solid foundation for the legislation; it wasn't pulled out of thin air.
- Rep. Snow asked that the definition of "confidential communication" in subsection (a)(2) be changed to mirror the statutory definition.
- Rep. Snow felt that subsections (d) and (e) capture most of what he was trying to accomplish in the statute. He likes the way it's broken out and likes the way the subcommittee's draft "preserves the privilege by allowing disclosures rather than calling them exceptions."
- Rep. Snow felt that all of the disclosures allowed under (d)(4) are good policy. Defendants will have access to Brady material under (d)(7)(A).
- Rep. Snow has a bill file open. He doesn't intend to make substantive changes to the statute, but wants to clean it up. He may change policy statements in the statute to align with Version 2 of the rule.
- Rep. Snow doesn't intend to pass another resolution, "if it looks like the Supreme Court will go forward with this" version. He can wait to cue up the bill in the session after the Supreme Court's meeting on February 19th.

URE 512. Victim Communications

(a) **Definitions.**

(a)(1) "Advocacy services" means the same as that term is defined in Utah Code section 77-38-403.

(a)(2) "Confidential communication" means a communication ~~made privately for the purpose of obtaining or receiving Advocacy Services from a Victim Advocate and not~~that is intended ~~for further disclosure except to other persons in furtherance of the communication~~to be confidential between a victim and a victim advocate for the purpose of obtaining advocacy services.

(a)(3) "Criminal justice system victim advocate" means the same as that term is defined in Utah Code section 77-38-403.

(a) (4) "Health care provider" means the same as that term is defined in Utah Code section 78B-3-403.

(a)(5) "Mental health therapist" means the same as that term is defined in Utah Code section 58-60-102.

(a)(6) "Victim" means an individual defined as a victim in Utah Code section 77-38-403.

(a)(7) "Victim advocate" means the same as that term is defined in Utah Code section 77-38-403.

(b) **Statement of the Privilege.** A victim communicating with a victim advocate has a privilege during the victim's life to refuse to disclose and to prevent any other person from disclosing a confidential communication.

(c) **Who May Claim the Privilege.** The privilege may be claimed by:

(c)(1) the victim;

(c)(2) the guardian or conservator of the victim if the guardian or conservator is not the accused; and

(c)(3) the victim advocate during the life of the victim.

(d) **Disclosures That Do Not Waive the Privilege.** The confidential communication may be disclosed in the following circumstances without waiving the privilege found in paragraph (b):

(d)(1) the confidential communication is required to be disclosed under Title 62A, Chapter 4a, Child and Family Services, or Utah Code section 62A-3-305;
(d)(2) the confidential communication is evidence of a victim being in clear and immediate danger to the victim's self or others;

(d)(3) the confidential communication is evidence that the victim has committed a crime, plans to commit a crime, or intends to conceal a crime;

(d)(4) if the confidential communication is with a criminal justice system victim advocate, the criminal justice system victim advocate may disclose the confidential communication to a law enforcement officer, health care provider, mental health therapist, domestic violence shelter employee, an employee of the Utah Office for Victims of Crime, a member of a multidisciplinary team assembled by a Children's Justice Center or law enforcement agency for the purpose of providing advocacy services, or a parent or guardian if the victim is a minor and the parent or guardian is not the accused;

(d)(5) the confidential communication is with a criminal justice system victim advocate, and the criminal justice system victim advocate must disclose the confidential communication to a prosecutor under Utah Code section 77-38-405;

(e) **Disclosures That Waive the Privilege.**

(e)(1) No privilege exists under paragraph (b) if:

(e)(1)(A) the victim, or the victim's guardian or conservator, if the guardian or conservator is not the accused, provides written, informed, and voluntary consent for the disclosure, and the written disclosure contains:

(e)(1)(A)(i) the specific confidential communication subject to disclosure;

(e)(1)(A)(ii) the limited purpose of the disclosure;

(e)(1)(A)(iii) the name of the individual or party to which the specific confidential communication may be disclosed; and

(e)(1)(A)(iv) a warning that the disclosure will waive the privilege;

(e)(2)(B) the confidential communication is with a criminal justice system victim advocate, and a court determines, after the victim and the defense attorney have been notified and afforded an opportunity to be heard at an in camera review, that:

(e)(2~~3~~)(B)(i) the probative value of the confidential communication and the interest of justice served by the admission of the confidential

communication substantially outweigh the adverse effect of the admission of the confidential communication on the victim or the relationship between the victim and the criminal justice system victim advocate; or

(e)(2~~3~~)(B)(ii) the confidential communication is exculpatory evidence, including impeachment evidence.

(e)(2) A request for a hearing and in camera review under paragraph (e)(1)(B) may be made by any party by motion. The court shall give all parties and the victim notice of any hearing and an opportunity to be heard.

Tab 4

R. 406

[retain or discard existing note(s)?]

~~Burchett v. Com.~~

~~Evidence that defendant smoked marijuana on a daily basis was not admissible as habit evidence to prove that he smoked marijuana on day of fatal collision.~~

~~Burchett v. Com.~~, ~~98 S.W.3d 492 (Ky. 2003)~~

~~The next most recent case regarding 406 is from 25 years ago, it is below.~~

~~Litster v. Utah Valley Community College~~

To establish mailing in accordance with office ~~mailing~~ custom, party must make threshold showing that document in question was actually prepared and placed in office outgoing mailbox~~, and subsequent showing pertaining to procedure~~ for removal ~~of documents from office outgoing mail box~~ into custody of United States Postal Service.~~:~~ W~~w~~hile habit evidence may be admissible to support mailing, threshold showing of document preparation must be made by direct evidence. Admissibility of evidence does not equate to sufficiency of evidence to prove what it is offered to prove.

Litster v. Utah Valley Community ~~College~~, 881 P.2d 933 (Utah Ct. App. 1994).

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R. 407

[delete note in its entirety?]

If not, add the following case citations?:

Johnson v. Gold's Gym, 2009 UT App. 76, 206 P.3d 302 (2009): evidence of repairing isolated parts of the parking lot after plaintiff tripped and fell on broken asphalt is classic subsequent remedial measure inadmissible under Utah R. Evid. 407.

Paget v. Dept. of Transportation, 2013 UT App 161 (2013): UDOT's decision to construct median barrier after crash is subsequent remedial measure inadmissible under 407. *Aff'd on other grounds*, *Paget v. Dept. of Transportation*, 322 P.3d 1180 (Utah Ct. App. 2014).

R. 409

~~UT 409:~~

Ver. A [CRH]: *Lawrence v. MountainStar Healthcare*, 2014 UT App 40, 320 P.3d 1037, interprets and applies this Rule. Lawrence was a medical malpractice case, in which the Court of Appeals held that Rule 409 and Utah Code section 78B-3-422 exclude offers of payment and expressions of apology and compassion, but not statements of fault. The Court further held that the doctor's statement that hospital staff "messed up" and there had been "a complication," while hospital administrators allegedly apologized and assured plaintiff and her family that the hospital would take care of "it," created an inference relevant to issues of causation and damages and were not inadmissible under Rule 409.

~~*Lawrence v. MountainStar Healthcare*. Sstatements such as "we will take care of it; you don't have to worry about it; you don't need to be concerned about treatment or whatever it takes to make her well" fall neatly within inadmissible evidence of offers to pay medical expenses under 409(a). and Aa doctor's statement of "I'm sorry" falls under 409(b)(1). However, this rule does not make inadmissible statements of fault or similar admissions. Doctor's statement that "we messed up" is not rendered inadmissible by this rule.~~

Ver. B [EBH]: *Lawrence v. MountainStar Healthcare*, 2014 UT App 40, 320 P.3d 1037: Statements such as "we will take care of it; you don't have to worry about it; you don't need to be concerned about treatment or whatever it takes to make her well" fall neatly within inadmissible evidence of offers to pay medical expenses under 409(a). A doctor's statement of "I'm sorry" falls under 409(b)(1). However, this rule does not make inadmissible statements of fault or similar admissions. Doctor's statement that "we messed up" is not rendered inadmissible by this rule. ~~I hope that does it, but let me know if you need anything further. Thanks for a great semester!~~

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Tab 5

My inclination is that we do not make any changes to URE 1101. However, I have supplied drafts for consideration.

Version 1

Rule 1101. Applicability of Rules.

(a) Proceedings Generally. These rules apply to all actions and proceedings in the courts of this state except as otherwise provided in Subdivisions (c) and (d). They apply generally to civil actions and proceedings, criminal cases and contempt proceedings except those in which the court may act summarily.

(b) Rule of Privilege. The rule with respect to privileges applies at all stages of all actions, cases and proceedings.

(c) Rules Inapplicable. The rules (other than with respect to privileges) do not apply in the following situations:

(c)(1) Preliminary Questions of Fact. The determination of questions of fact preliminary to admissibility of evidence when the issue is to be determined by the court under rule 104.

(c)(2) Grand Jury. Proceedings before grand juries.

(c)(3) Revoking probation. Unless, after the State has concluded presenting evidence, the court for good cause otherwise orders.

~~**(c)(3)**~~ **(c)(4) Miscellaneous Proceedings.** Proceedings for extradition or rendition; sentencing, ~~or granting or revoking probation;~~ issuance of warrants for arrest, criminal summonses, and search warrants; and proceedings with respect to release on bail or otherwise.

(d) Reliable Hearsay in Criminal Preliminary Examinations. In a criminal preliminary examination, reliable hearsay shall be admissible as provided under Rule 1102.

Version 2

The proposed language in (c)(3) is taken from §77-20-1(6)(c)

(6) (a) A motion to modify the initial order may be made by a party at any time upon notice to the opposing party sufficient to permit the opposing party to prepare for hearing and to permit any victim to be notified and be present.

(b) Hearing on a motion to modify may be held in conjunction with a preliminary hearing or any other pretrial hearing.

(c) The magistrate or court may rely on information as provided in Subsection (5) and may base its ruling on evidence provided at the hearing so long as each party is provided an opportunity to present additional evidence or information relevant to bail.

Rule 1101. Applicability of Rules.

(a) Proceedings Generally. These rules apply to all actions and proceedings in the courts of this state except as otherwise provided in Subdivisions (c) and (d). They apply generally to civil actions and proceedings, criminal cases and contempt proceedings except those in which the court may act summarily.

(b) Rule of Privilege. The rule with respect to privileges applies at all stages of all actions, cases and proceedings.

(c) Rules Inapplicable. The rules (other than with respect to privileges) do not apply in the following situations:

(c)(1) Preliminary Questions of Fact. The determination of questions of fact preliminary to admissibility of evidence when the issue is to be determined by the court under rule 104.

(c)(2) Grand Jury. Proceedings before grand juries.

(c)(3) Revoking probation. The court may rely on information provided in affidavits or unsworn written declarations as long as each party is provided an opportunity to present additional evidence or relevant information under the discretion of the Judge.

~~(c)(3)~~ **(c)(4) Miscellaneous Proceedings.** Proceedings for extradition or rendition; sentencing, ~~or granting or revoking probation;~~ issuance of warrants for arrest, criminal summonses, and search warrants; and proceedings with respect to release on bail or otherwise.

(d) Reliable Hearsay in Criminal Preliminary Examinations. In a criminal preliminary examination, reliable hearsay shall be admissible as provided under Rule 1102.

NOTES

§77-18-1

(12) (a) (i) Probation may be modified as is consistent with the supervision length guidelines and the graduated sanctions and incentives developed by the Utah Sentencing Commission under Section 63M-7-404.

(ii) The length of probation may not be extended, except upon waiver of a hearing by the probationer or upon a hearing and a finding in court that the probationer has violated the conditions of probation.

(iii) Probation may not be revoked except upon a hearing in court and a finding that the conditions of probation have been violated.

(b) (i) Upon the filing of an affidavit, or an unsworn written declaration executed in substantial compliance with Section 78B-5-705, alleging with particularity facts asserted to constitute violation of the conditions of probation, the court shall determine if the affidavit or unsworn written declaration establishes probable cause to believe that revocation, modification, or extension of probation is justified.

(ii) If the court determines there is probable cause, it shall cause to be served on the defendant a warrant for the defendant's arrest or a copy of the affidavit or unsworn written declaration and an order to show cause why the defendant's probation should not be revoked, modified, or extended.

Tab 6

URE 106 Subcommittee (Utah Supreme Court Advisory Committee for the Rules of Evidence): Formed December 2019.

URE 106 Subcommittee Members: Judge Teresa Welch (Chair), Judge David Williams, Tenielle Brown, John Nielsen, Karen Klucznik (Guest)[1].

Tasks: Address the Utah Supreme Court's concerns in *State v. Sanchez,* 2018 UT 31 regarding URE 106 and decide whether the rule and advisory notes should be amended to address the Court's concerns.

Recap of Events:

In *State v. Sanchez,* 2018 UT 31, the Utah Supreme Court referred two pertinent Rule 106 issues to the Evidence Advisory Committee (*see* footnote 4 in the decision). These issues/questions are:

> (1) How does Rule 106 operate—i.e., does it have a trumping function or only a timing function? Importantly, jurisdictions are split on this issue. If rule 106 has a trumping function, the rule overcomes other rules of evidence that would preclude admissibility. For example, if rule 106 has a trumping function, it would operate to admit otherwise inadmissible hearsay as long as the hearsay statement is necessary to explain or put into context a portion of a statement already introduced. The timing function of rule 106 allows a party to interrupt the proceedings to have the curative evidence introduced immediately because admitting the curative evidence later may not adequately remedy the effect of the misleading impression of the already introduced partial statement.
>
> (2) What are the necessary and sufficient conditions for triggering rule 106? For example, to trigger rule 106, is it a requirement for the recorded statement to be admitted into evidence as a trial exhibit, or is it sufficient that the pertinent statement is referred to extensively at trial (during witness testimony and/or cross-examination) but not actually admitted. This is also a split jurisdiction issue as noted by paragraph 21 of the *Sanchez* decision: "Some courts have said that reading a writing or recorded statement into the record or directly quoting it on cross examination is enough, while other courts require actual introduction of the evidence before rule 106 applies."). Importantly, pursuant to *State v. Cruz-Meza*, 2003 UT 32, oral statements (those that are not transcribed) are not treated under rule 106, but under Utah R. Evid. 611. And, for an oral statement to be admitted under Rule 611, the party seeking to admit the statement must prove the trustworthiness of the statement. (Note: Trustworthiness is a consideration that is absent from the plain language of Rule 106).

In 2019, the Evidence Advisory Committee met, discussed, and decided these two issues. The Committee decided:

(1) Utah's rule 106 has a trumping function so that it admits otherwise inadmissible hearsay if the hearsay statement is necessary to qualify, explain, or place into context the partial statement already introduced. In reaching this decision, the Committee relied on and deferred

[1] Ms. Klucznik is not a member of the Utah Supreme Court Advisory Committee for the Rules of Evidence (Committee) but she was invited to participate in the Subcommittee's research and discussions of URE 106 as she was counsel for the State on appeal in *State v. Sanchez*, 2018 UT 31. TWelch, who is currently a member of the Committee, was counsel for Mr. Sanchez (the appellant) on appeal.

to the court of appeals decision in *State v. Sanchez*, 2016 UT App 189, wherein the COAs outlined various reasons for why Utah's rule 106 should operate as having a trumping function.

(2) For Rule 106 to trigger, it is not a requirement that the pertinent written statement be admitted as evidence at trial. It is therefore sufficient for the parties to refer to the statement at trial to trigger rule 106 issues. The Committee then drafted a proposed rule 106 to reflect these decisions.

John Lund and Keisa Williams then met with the Utah Supreme Court Justices to discuss the proposed changes to URE 106. In short, the Justices made some edits to the proposed rule, and they requested additional info from the Committee, including (1) a discussion/explanation of the interplay between the proposed URE 106 and URE 403, (2) an answer to whether there is a need to create a new Committee Advisory Note to the rule since the proposed Utah rule would deviate from the Federal Rule, and (3) a request to hear what other scholars and states are saying about Rule 106 issues.

**The most recent revised/edited proposed URE 106 is as follows:

"If a party introduces all or part of a writing or recorded statement, or testimony of the contents thereof, an adverse party may require the introduction, at that time, of any part—or any other writing or recorded statement, even if the remainder is otherwise inadmissible under these rules, unless the court for good cause otherwise orders."

Note: the Committee purposefully took out the "fairness" language that is currently found in the rule since Utah Case law defines "fairness" in the rule 106 context as being what is "necessary to qualify, explain, or place into context the portion already introduced.

Update and developments regarding proposed Amendments to FRE 106:

The Advisory Committee for the United States Supreme Court is currently proposing an amendment to FRE 106. In short, it appears that there has been extensive discussion and review regarding the proposed revisions for FRE 106, and this info will be helpful when discussing any proposed revisions for URE 106.

A discussion of the proposed changes to FRE 106 is in a Drexel blog at the link below. The Drexel blog (dated August 14, 2019) discusses the various circuit split issues regarding rule 106 issues and notes, "As amended, Rule 106 would apply not only to testimony that is tantamount of a writing but to oral statements as well. It would not matter whether that statement was hearsay if the statement was necessary for context. The amendment would resolve many circuit splits discussed."

https://drexel.edu/law/lawreview/blog/overview/2019/August/federal-rule-106

The new amendment for FRE Rule 106 would state:

> **"If a party introduces all or part of a statement, an adverse party may require the introduction, at that time, of another part—or any other statement—that in fairness ought to be considered at the same time.**
>
> **A) A statement admissible under this rule should not be excluded under the rule against hearsay.**
>
> **B) In a criminal case, if evidence admissible under this rule, and offered by the defendant, is excluded under any other rule, the entire statement must be excluded."**

The link below will take you to the April 2018 Advisory Committee Meeting Notes (for the United States Supreme Court) which also provides detailed FRE 106 info. (See pgs 2, 373-428).

https://www.uscourts.gov/sites/default/files/agenda_book_advisory_committee_on_rules_of_evidence_-_final.pdf

The link below will take you to the May 3, 2019 Committee Meeting Notes for when the Advisory Committee (for the U. S. Supreme Court) met to discuss proposed revisions for FRE 106. (See pgs 5,187-275).

https://www.uscourts.gov/sites/default/files/2019-05-evidence-agenda-book.pdf

The link below will take you to the October 25, 2019 Meeting Notes for when the Advisory Committee (for the U. S. Supreme Court) where FRE 106 was discussed. (See pgs 2, 5-13).

https://www.uscourts.gov/sites/default/files/advisory_committee_on_rules_of_evidence_-_final_draft_agenda_book.pdf

It appears that the 5/3/2019 and 10/25/2019 meetings were the last two meetings where the Committee met and discussed FRE106. It is not clear when the Committee will next meet, but from looking at their website, it appears that they will likely meet again in Spring of 2020.

Pertinent Cases regarding URE 106:

1. *State v. Sanchez*, 2018 UT 31.
2. *State v. Cruz-Meza*, 2003 UT 32.
3. *State v. Jones*, 2015 UT 19.

Law Review Articles:

1. Andrea N. Kochert, *The Admission of Hearsay Through Rule 106: And Now You Know the Rest of the Story*, 46 Ind. L. Rev. 499.
2. Michael A. Hardin, *The Space Intentionally Left Blank: What to do When Hearsay and Rule 106 Completeness Collide*, 82 Fordham L. Rev. 1283.

3. Emily Nuvan, *The Incomplete Understanding of Rule 106: A Guide for Utah Courts to Take a Stand on the Rule of Completeness* (unpublished 2019 article).

Questions:

1. What issues are being discussed regarding proposed changes to FRE 106 and what is the current timeline/stage of this proposed rule change?

2. What impact does the proposed amendments to FRE 106 have on URE 106?

Proposed course of action for URE 106 Subcommittee:

1. Review all of the pertinent URE 106 materials, cases, and articles.
2. Compile a 50 State Survey to see how other states have drafted their rule 106.
3. Review the materials regarding the proposed changes to FRE 106.
4. Propose a course of action to the entire Committee regarding the pending proposed amendments to FRE106 and how this impacts URE 106.

Document: Rule 106 Fifty-State Summary.

Completed by: Rule 106 Subcommittee Members/Utah Supreme Court Advisory Committee for the Rules of Evidence–Judge Teresa Welch (Chair), Judge David Williams, John Nielsen, Teneille Brown, Karen Klucznik (Guest).

Summary of Document: This document lists the language and Advisory Committee Notes for Federal Rule of Evidence Rule 106. Thereafter, the document lists the language of Rule 106 and any Advisory Committee Notes for each of the fifty-states (as of January 2020).

> **FRE Rule 106:** Remainder of, or Related Writings or Recorded Statements. "If a party introduces all or part of a writing or recorded statement, an adverse party may require the introduction, at that time, of any other part--or any other writing or recorded statement--that in fairness ought to be considered at the same time."
>
> ADVISORY COMMITTEE NOTES. 1972 Proposed Rules: The rule is an expression of the rule of completeness. McCormick § 56. It is manifested as to depositions in Rule 32(a)(4) of the Federal Rules of Civil Procedure, of which the proposed rule is substantially a restatement. The rule is based on two considerations. The first is the misleading impression created by taking matters out of context. The second is the inadequacy of repair work when delayed to a point later in the trial. See McCormick § 56; California Evidence Code § 356. The rule does not in any way circumscribe the right of the adversary to develop the matter on cross-examination or as part of his own case. For practical reasons, the rule is limited to writings and recorded statements and does not apply to conversations.
>
> 1987 Amendments: The amendments are technical. No substantive change is intended.
>
> 2011 Amendments: The language of Rule 106 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 106 Fifty (50) State Survey (as of January 2020):

1) **Alabama:** Ala. Rule 106. Remainder of Writings or Recorded Statements. "When a party introduces part of either a writing or recorded statement, an adverse party may require the introduction at that time of any other part of the writing or statement that ought in fairness to be considered contemporaneously with it."

   ADVISORY COMMITTEE'S NOTES. This rule constitutes a specialized application of the common law completeness doctrine. *See* 7 J. Wigmore, *Wigmore on Evidence* § 2113 (Chadbourn rev. 1978). When one party introduces a portion of a writing or a recorded statement, it is deemed only fair that the adverse party be allowed to have admitted any other part of the writing or recorded statement that in fairness ought to be considered. Rule 106constitutes a rejection of that portion of the corresponding federal rule that expands the historic doctrine of completeness to include the admission of any additional writing or recorded statement that ought in fairness to be considered contemporaneously with an already admitted writing or recorded statement. See Fed. R. Evid. 106.

The doctrine of completeness has traditionally been recognized in Alabama law. *Coleman v. Sparkman*, 370 So.2d 977 (Ala.1979); C. Gamble, *McElroy's Alabama Evidence* § 316.01 (4th ed. 1991). With regard to completeness of depositions, Rule 106 is virtually a restatement of Ala. R. Civ. P. 32(a)(4), which provides that if only part of a deposition is offered in evidence by a party, then an adverse party may require the party introducing it to introduce all of it that ought in fairness to be considered with the part introduced.

Both this Rule 106 and Ala. R. Civ. P. 32(a)(4) vest in the trial judge considerable discretion to determine what "in fairness" ought to be considered with the part introduced. See *Hargress v. City of Montgomery*, 479 So.2d 1137 (Ala.1985).

Rule 106 applies only to writings and recorded statements or parts thereof. This rule is not intended to affect preexisting Alabama applications of the completeness doctrine that lie outside the confines of Rule 106. The rule, for example, has no impact upon instances when the completeness doctrine is applied to unrecorded conversations. A prominent example of such an application, having continuing existence after adoption of Rule 106, is the rule that if one party proves any part of an unrecorded oral conversation or oral statement, the other party has the right to prove the relevant remainder of it. *Abram v. State*, 574 So.2d 986 (Ala.Crim.App.1990); *Stockard v. State*, 391 So.2d 1049 (Ala.Crim.App.1979), rev'd, 391 So.2d 1060 (Ala.1980). Another completeness principle lying outside of Rule 106 is that under which a party, whose admission has been admitted against him or her, may prove all that was said at the same time as the admission and on the same subject. *Bank of Loretto v. Bobo*, 37 Ala.App. 139, 67 So.2d 77, cert. denied, 259 Ala. 374, 67 So.2d 90 (1953); C. Gamble, *McElroy's Alabama Evidence* § 180.01(8) (4th ed. 1991). In addition to specifying evidence that should be admitted as part of the doctrine of completeness, Rule 106 contains a provision regarding timeliness. The adverse party may require that the evidence needed to provide fairness be admitted at the time the initial evidence is admitted. Compare Ala. R. Civ. P. 32(a)(4). This allowance is afforded in the belief that delay in providing completeness evidence will render it less effective. This rule of contemporaneous admission in no way limits the right of the adverse party to go into the same matter on cross-examination of the witness or to offer evidence on the same matter as part of the adverse party's own case. See Fed. R. Evid. 106 advisory committee's note.

2) **Alaska:** AK Rule 106. Remainder of, or Related Writings or Recorded Statements. "When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or related statement which ought in fairness to be considered contemporaneously with it."

3) **Arizona:** AZ Rule 106. Remainder of or Related Writings or Recorded Statements. "If a party introduces all or part of a writing or recorded statement, an adverse party may require the introduction, at that time, of any other part--or any other writing or recorded statement--that in fairness ought to be considered at the same time."

COMMENT TO 2012 AMENDMENT. The language of Rule 106 has been amended to conform to the federal restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

4) **Arkansas:** ARE Rule 106. Remainder of or Related Writings or Recorded Statements. "Whenever a writing or recorded statement or part thereof is introduced by a party, an adverse party may require him at that time to introduce any other part or any other writing or recorded statement which in fairness ought to be considered contemporaneously with it."

   HISTORICAL NOTES. This rule is similar to Rule 106 of the Uniform Rules of Evidence (1974).

5) **California:** Evidence Code §356. Entire act, declaration, conversation, or writing to elucidate part offered. "Where part of an act, declaration, conversation, or writing is given in evidence by one party, the whole on the same subject may be inquired into by an adverse party; when a letter is read, the answer may be given; and when a detached act, declaration, conversation, or writing is given in evidence, any other act, declaration, conversation, or writing which is necessary to make it understood may also be given in evidence."

   COMMENT--ASSEMBLY COMMITTEE ON JUDICIARY. Section 356 restates the substance of and supersedes Section 1854 of the Code of Civil Procedure. The rule stated in Section 356, like the superseded statement of the rule in the Code of Civil Procedure, only makes admissible such parts of an act, declaration, conversation, or writing as are relevant to the part thereof previously given in evidence. See, *e.g.*, Witt v. Jackson, 57 Cal.2d 57, 67, 17 Cal.Rptr. 369, 374, 366 P.2d 641, 646 (1961) (the rule "is necessarily subject to the qualification that the court may exclude those portions of the conversation not relevant to the items thereof which have been introduced"). See also Evidence Code § 350.

6) **Colorado**: CRE Rule 106. Remainder of or Related Writings or Recorded Statements. "When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require him at that time to introduce any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it."

   HISTORICAL NOTES. This rule is similar to Fed.Rules Evid. Rule 106, 28 U.S.C.A.

7) **Connecticut:** Code of Evidence, Sec 1-5. Remainder of Statements. "(a) Contemporaneous Introduction by Proponent. When a statement is introduced by a party, the court may, and upon request shall, require the proponent at that time to introduce any other part of the statement, whether or not otherwise admissible, that the court determines, considering the context of the first part of the statement, ought in fairness to be considered contemporaneously with it. (b) Introduction by Another Party. When a statement is introduced by a party, another party may introduce any other part of the statement, whether or not otherwise admissible, that the court determines, considering the context of the first part of the statement, ought in fairness to be considered with it."

   COMMENTARY. (a) Contemporaneous introduction by proponent. Subsection (a) recognizes the principle of completeness. Sometimes, one part of a statement may be so related to another that, in fairness, both should be considered contemporaneously. Subsection (a) details the circumstances under which a court may or shall require a proponent of one part of a statement to contemporaneously introduce the other part. See *Clark* v. *Smith*, 10 Conn. 1, 5 (1833); *Ives* v. *Bartholomew*, 9 Conn. 309, 312-13 (1832); see also Practice Book § 13-31 (a) (5) (depositions); cf. *Walter* v. *Sperry*, 86 Conn. 474, 480, 85 A. 739 (1912). The basis for the rule is that matters taken out of context can create misleading impressions or inaccuracies and that

waiting until later in the trial to clear them up can be ineffectual. See, e.g., *State* v. *Arthur S.*, 109 Conn. App. 135, 140-41, 950 A.2d 615, cert. denied, 289 Conn. 925, 958 A.2d 153 (2008). "Statement," as used in this subsection, includes written, recorded and oral statements. Because the other part of the statement is introduced for the purpose of placing the first part into context, the other part need not be independently admissible. See *State* v. *Tropiano*, 158 Conn. 412, 420, 262 A.2d 147 (1969), cert. denied, 398 U.S. 949, 90 S. Ct. 1866, 26 L. Ed. 2d 288 (1970).

(b) Introduction by another party. Unlike subsection (a), subsection (b) does not involve the contemporaneous introduction of evidence. Rather, it recognizes the right of a party to subsequently introduce another part or the remainder of a statement previously introduced in part by the opposing party under the conditions prescribed in the rule. See *State* v. *Paulino*, 223 Conn. 461, 468-69, 613 A.2d 720 (1992); *State* v. *Castonguay*, 218 Conn. 486, 496-97, 590 A.2d 901 (1991); *Rokus* v. *Bridgeport*, 191 Conn. 62, 69, 463 A.2d 252 (1983); see also Practice Book § 13-31(a)(5) (depositions). Although the cases upon which subsection (b) is based deal only with the admissibility of oral conversations or statements, the rule logically extends to written and recorded statements. Thus, like subsection (a), subsection (b)'s use of the word "statement" includes oral, written and recorded statements. In addition, because the other part of the statement is introduced under subsection (b) for the purpose of putting the first part into context, the other part need not be independently admissible. See *State* v. *Paulino*, supra, 223 Conn. 468-69; *State* v. *Castonguay*, supra, 218 Conn. 496; cf. *Starzec* v. *Kida*, 183 Conn. 41, 47 n.6, 438 A.2d 1157 (1981).

8) **Delaware**: DRE Rule 106. Remainder of or Related Writings or Recorded Statements. "If a party introduces all or part of a writing or recorded statement, an adverse party may require the introduction, at that time, of any other part --or any other writing or recorded statement --that in fairness ought to be considered at the same time."

COMMENT. This rule tracks F.R.E. 106. It is similar to Federal Rule of Civil Procedure 32(a)(6) and Delaware Court of Chancery Rule 32(a)(4)and Delaware Superior Court Civil Rule 32(a)(4). The Committee rejected the substitution of a "relevance" test for a "fairness" test for what must also be introduced if part of a writing or statement is introduced. For prior Delaware case illustrating the law covered by this rule, see Lowber v. State, Del. Supr., 100 A. 322 (1917). D.R.E. 106 was amended in 2017 in response to the 2011 restyling of the Federal Rules of Evidence. The amendment is intended to be stylistic only. The pre-2017 "Comment" to D.R.E. 106 was revised only as necessary to reflect the 2017 amendments and the current language of the Federal Rules of Civil Procedure. There is no intent to change any result in ruling on evidence admissibility.

9) **Florida:** Evidence Code §90.108. Introduction of Related Writings or Recorded Statements. "(1) When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require him or her at that time to introduce any other part or any other writing or recorded statement that in fairness ought to be considered contemporaneously. An adverse party is not bound by evidence introduced under this section. (2) The report of a court reporter, when certified to by the court reporter as being a correct transcript of the testimony and proceedings in the case, is prima facie a correct statement of such testimony and proceedings."

LAW REVISION COUNCIL NOTE—1976. Generally, when a party introduces only a part of a writing or document, the adverse party may prove the contents of the remainder of the instrument or require his adversary to do so. See Crawford v. United States, 212 U.S. 183, 29 S.Ct. 260, 53 L.Ed. 465 (1909). The remainder of the document or writing can only be admitted in so far as it relates to the same subject matter and tends to explain and shed light on the meaning of the part already received. McCormick, *Evidence* § 56 (2nd ed. 1970).This section allows an adverse party to have his opponent introduce the remainder of a writing at the same time that a portion of it is introduced, and also have contemporaneously introduced any other writing or recorded statement which in fairness ought to be considered contemporaneously. The reasoning of this section is twofold. First, it avoids the danger of mistaken first impressions when matters are taken out of context. Second, it avoids the inadequate remedy of requiring the adverse party to wait until a later point in the trial to repair his case. This section is in addition to Fla.Rules of Civ.Pro. 1.330(b) [see, now, Rule 1.330(a)(4)] and 1.340(b) which provide that when portions of depositions and interrogatories are not offered by a party, an adverse party may require the introduction of any other part that in fairness ought to be considered with the part introduced, and any party may introduce any other parts. This section does not apply to conversations but is limited to writings and recorded statements because of the practical problem involved in determining the contents of a conversation and whether the remainder of it is on the same subject matter. These questions are often not readily answered without undue consumption of time. Therefore, remaining portions of conversations are best left to be developed on cross-examination or as a part of a party's own case. This treatment of conversations is in accord with Morey v. State, 72 Fla. 45, 72 So. 490 (1916), where in a criminal prosecution, when the state offered evidence of inculpatory statements made by the defendant, the court found that the defendant had the right to have placed before the jury, by means of cross-examination, the entire conversation or all statements made by the defendant at the same time and relating to the same subject matter, whether such other statements or the remainder of the conversation are exculpatory in nature.See Fed.Rule Evid. 106, Calif.Evid.Code § 356 allows the admission of remaining portions of acts, declarations, writings, and conversations that have been received in part.Commentary on 1978 Amendment: This amendment added a final sentence to Section 90.108 to make clear that a party, who is required to introduce writings or recorded statements under the section, will not be bound by the evidence so introduced.

10) **Georgia:** GA. Code Ann. §24-1-106. Remainder of or related writings or recorded statements. "When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which, in fairness, should be considered contemporaneously with the writing or recorded statement."

11) **Hawaii:** HRS §626-1, Rule 106. Remainder of or related writings or recorded statements. "When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the party at that time to introduce any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it."

RULE 106 COMMENTARY. This rule is identical with Fed. R. Evid. 106. The rule incorporates the common law doctrine of completeness, see McCormick § 56. As the Hawaii Supreme Court said in Holstein v. Young, 10 H. 216, 220 (1896), a party cannot "utilize so much of this evidence as will serve his turn and reject the remainder." Cf. HRCP 32(a)(4), which provides: "If only part of a deposition is offered in evidence by a party, an adverse party may require him to introduce any other part which ought in fairness to be considered with the part introduced." The

Advisory Committee's Note to Fed. R. Evid. 106 points out: "The rule is based on two considerations. The first is the misleading impression created by taking matters out of context. The second is the inadequacy of repair work when delayed to a point later in the trial."

12) **Idaho:** IRE Rule 106. Remainder of or related writings or recorded statements. "If a party introduces all or part of a writing or recorded statement, an adverse party may require the introduction, at that time, of any other part--or any other writing or recorded statement--that in fairness ought to be considered at the same time."

13) **Illinois**: Evid. Rule 106. Remainder of or related writings or recorded statements. "When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it."

14) **Indiana:** IN Rule 106. Remainder of or related writings or recorded statements. "If a party introduces all or part of a writing or recorded statement, an adverse party may require the introduction, at that time, of any other part--or any other writing or recorded statement--that in fairness ought to be considered at the same time."

15) **Iowa:** ICA Rule 5.106. Remainder of related acts, declarations, conversations, writings or recorded statements. "a. If a party introduces all or part of an act, declaration, conversation, writing, or recorded statement, an adverse party may require the introduction, at that time, of any other part or any other act, declaration, conversation, writing, or recorded statement that in fairness ought to be considered at the same time. b. Upon an adverse party's request, the court may require the offering party to introduce at the same time with all or part of the act, declaration, conversation, writing, or recorded statement, any other part or any other act, declaration, conversation, writing, or recorded statement that is admissible under rule 5.106(a). Rule 5.106(b), however, does not limit the right of any party to develop further on cross-examination or in the party's case in chief matters admissible under rule 5.106(a)."

16) **Kansas:** Appears to have no evidence rule. "The rule of completeness is a common law rule that has had limited application in Kansas." *State v. White*, 262 P.3d 698 (Kan. Ct. App. 2011).

17) **Kentucky:** KRE Rule 106. Remainder of or related writings or recorded statements. "When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it."

18) **Louisiana:** LSa-R.S. 15:450. Use of confession, admission or declaration in entirety. "Every confession, admission or declaration sought to be used against any one must be used in its entirety, so that the person to be affected thereby may have the benefit of any exculpation or explanation that the whole statement may afford."

19) **Maine:** ME Rule 106. Remainder of or related writings or recorded statements. "If a party utilizes in court all or part of a writing or recorded statement, an adverse party may require the introduction, at that time, of any other part--or any other writing or recorded statement--that in fairness ought to be considered at the time."

MAINE RESTYLING NOTE--NOVEMBER 2014. Maine Rule 106 is a little broader than its federal counterpart, in that it authorizes the introduction in evidence of a writing or other parts of a writing that is "utilized" in court, not just admitted. This is to allow a party to attempt to counteract potentially incomplete or misleading handling or reference to writings in court even if they are not formally offered in evidence. *See* Maine Advisers' Note to Rule 106. This policy choice has been carried over in the restyled Rule.

FEDERAL ADVISORY COMMITTEE NOTE. The language of Rule 106 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

ADVISERS' NOTE TO FORMER M.R. EVID. 106--FEBRUARY 2, 1976
This rule codifies the familiar principle of "completeness", which is already embodied in M.R.C.P. 32(a)(4) as to depositions. Its purpose is to enable the court to correct the misleading impression created by taking matters out of context. It applies to writings and recorded statements but not to conversations. When part of a writing or recording is introduced, an adverse party has the right to inspect it and move that any other part be put in evidence immediately after the incomplete portion has been introduced, so that its impact will not be lessened by the delay. The court obviously has a large measure of discretion in determining what in fairness should thus be contemporaneously considered. The words "utilized in court" are designed to permit the same procedure when a writing is silent on a point as when it is contrary to the testimony of a witness on the stand. A concession drawn from a witness that his written statement does not include a certain thing may be just as misleading as introduction of a part of a statement contrary to his testimony. The Federal Rule uses "introduced" instead of "utilized in court" and thus does not protect against the misleading effect which may result from the use of a statement without its introduction in evidence.

20) **Maryland:** MD Rule 5-106. Remainder of or related writings or recorded statements. "When part or all of a writing or recorded statement is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it."

Committee note: The change that this Rule effects in the common law is one of timing, rather than of admissibility. The Rule does not provide for the admission of otherwise inadmissible evidence, except to the extent that it is necessary, in fairness, to explain what the opposing party has elicited. In that event, a limiting instruction that the evidence was admitted not as substantive proof but as explanatory of the other evidence would be appropriate.
See *Richardson v. State,* 324 Md. 611 (1991). The Rule thus provides for the alternative of an earlier admission of evidence with regard to writings or recorded statements than does the common law rule of completeness. The timing under the common law remains applicable to oral statements and also remains as an alternative with regard to writings and recorded statements.

21) **Massachusetts:** R. Evid. 106. "(a) Remainder of writings or recorded statements. If a party introduces all or part of a writing or recorded statement, the court may permit an adverse party to introduce any other part of the writing or statement that is (1) on the same subject, (2) part of the same writing or conversation, and (3) necessary to an understanding of the admitted writing or statement. (b) Curative admissibility. When the erroneous admission of evidence causes a party to

suffer significant prejudice, the court may permit incompetent evidence to be introduced to cure or minimize the prejudice."

NOTES: Subsection (a). This subsection is derived from Commonwealth v. Aviles , 461 Mass. 60, 74 (2011). See Mass. R. Civ. P. 32(a)(4) . "When a party introduces a portion of a statement or writing in evidence the doctrine of verbal completeness allows admission of other relevant portions of the same statement or writing which serve to 'clarify the context' of the admitted portion." Commonwealth v. Carmona , 428 Mass. 268, 272 (1998), quoting Commonwealth v. Robles , 423 Mass. 62, 69 (1996). "The purpose of the doctrine is to prevent one party from presenting a fragmented and misleading version of events by requiring the admission of other relevant portions of the same statement or writing which serve to clarify the context of the admitted portion" (citations and quotations omitted). Commonwealth v. Eugene , 438 Mass. 343, 351 (2003). "The portion of the statement sought to be introduced must qualify or explain the segment previously introduced" (citations and quotations omitted). Commonwealth v. Richardson , 59 Mass. App. Ct. 94, 99 (2003). See, e.g., Commonwealth v. Aviles, 461 Mass. at 74 (where defendant offered portion of victim's testimony describing touching of her buttocks, Commonwealth was properly permitted to offer testimony about touching of vaginal area, as both answers pertained to issue of where defendant had touched victim and were made during the same line of questioning).

The decision as to when the remainder of the writing or statement is admitted is left to the discretion of the judge, but the "better practice is to require an objection and contemporaneous introduction of the complete statements when the original statement is offered." McAllister v. Boston Hous. Auth. , 429 Mass. 300, 303 (1999). See Section 611(a), Mode and Order of Examining Witnesses and Presenting Evidence: Control by the Court. Compare Commonwealth v. Thompson , 431 Mass. 108, 115, cert. denied, 531 U.S. 864 (2000) (doctrine is not applicable to defendant's effort to admit alibi portion of his or her statement that has nothing to do with statement offered by Commonwealth), with Commonwealth v. Crayton , 470 Mass. 228, 230 (2014) (in prosecution for possession of child pornography, it was error to admit defendant's statement to police that he had been using a particular computer at library while excluding his contemporaneous denial that he had viewed child pornography on that computer).

Subsection (b). This subsection is derived from Commonwealth v. Ruffen , 399 Mass. 811, 813-814 (1987) ("The curative admissibility doctrine allows a party harmed by incompetent evidence to rebut that evidence only if the original evidence created significant prejudice."). See also Commonwealth v. Reed , 444 Mass. 803, 810–811 (2005) (court required to admit evidence); Burke v. Memorial Hosp. , 29 Mass. App. Ct. 948, 950 (1990), citing Commonwealth v. Wakelin , 230 Mass. 567, 576 (1918).

22) **Michigan**: R. Evid., Rule 106. Remainder of or Related Writings or Recorded Statements. "When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it."

COMMENTS. Staff Comment to 1978 Adoption: MRE 106 is identical with Rule 106 of the Federal Rules of Evidence.

23) **Minnesota:** R. Evid. 106. Remainder of or Related Writings or Recorded Statements. "When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it."

COMMITTEE COMMENT 1977. The rule extends the present rule with regard to depositions to other writings and recordings. Minn.R.Civ.P. 32.01(4). The rule is not intended to apply to conversations.

24) **Mississippi:** R. Evid. Rule 106. Remainder of or Related Writings or Recorded Statements. "If a party introduces all or part of a writing or recorded statement, an adverse party may require the introduction, at that time, of any other part--or any other writing or recorded statement--that in fairness ought to be considered at the same time."

ADVISORY COMMITTEE HISTORICAL NOTE. Effective July 1, 2016, the Rule was amended as part of the general restyling of the Evidence Rules. Effective June 16, 2016, the "Comment" was retitled "Advisory Committee Note."

ADVISORY COMMITTEE NOTE. The language of Rule 106 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility. This rule is a codification of the common law doctrine of completeness. The rule is already codified with regard to depositions in M.R.C.P. 32(a)(4). However, Rule 106 is somewhat narrower than Mississippi common law. The rule only applies the doctrine of completeness to written or recorded statements of a specific document. Under Mississippi case law the rule of completeness is extended to other writings and even to oral statements. See *Davis v. State*, 230 Miss. 183, 92 So. 2d 359 (1957); *Sanders v. State*, 237 Miss. 772, 115 So. 2d 145 (1969). Such a rule attempts to prevent misleading the jury by taking evidence out of context.

25) **Missouri:** Appears to have no evidence rule, just the common law rule of completeness, *See, e.g., State v. Ellis*, 512 S.W.3d 816 (Mo. Ct. App. 2016).

26) **Montana:** R. Evid. Rule 106. Remainder of or related acts, writings, or statements. "(a) When part of an act, declaration, conversation, writing or recorded statement or series thereof is introduced by a party: (1) an adverse party may require the introduction at that time of any other part of such item or series thereof which ought in fairness to be considered at that time; or (2) an adverse party may inquire into or introduce any other part of such item of evidence or series thereof. (b) This rule does not limit the right of any party to cross-examine or further develop as part of the case matters covered by this rule."

COMMISSION COMMENTS: Subdivision (a). This subdivision incorporates Federal Rule 106 with Section 93-401-11, R.C.M. 1947 [superseded], and case law developed under it. The Commission intends that this combination will preserve Montana's completeness rule; adopt the Federal Rule allowing the whole of a writing or recorded statement to be admitted, if fairness requires it, when part of the writing or recorded statement is introduced; and, result in a rule of completeness that codifies all of Montana case law so that scattered fragments of the rule of completeness do not have to be searched for when the rule is to be applied. Therefore the Commission believes that this incorporation of the Federal Rule and Montana law is a more accurate statement of the rule of completeness.

The subdivision is identical to Federal and Uniform Rules (1974) Rule 106 with these exceptions: "When part of an act, declaration, conversation, writing or recorded statement or series thereof" is substituted for "When a writing or recorded statement or part thereof" in the first clause; "(1)" is added and "of such item or series thereof" is substituted for "any other writing or recorded statement" and "at that time" is substituted for "contemporaneously with it" in paragraph (1); and paragraph (2) is added.

The subdivision begins with an expanded list of matters to be covered by the rule. Section 93-401-11, R.C.M. 1947 [superseded], covers acts, declarations, conversations, and writings; Federal Rule 106 covers only writings and recorded statements. Therefore the rule adds the items from Montana law to the Federal Rule and the rule adds recorded statements to Montana law. This addition is consistent with the policy of Section 93-401-11, R.C.M. 1947 [superseded], whose title reads: "When part of the transaction proved, the whole is admissible", and with the items listed in that section; the addition is intended to be a modernization of that section. The list includes not only part of such items, but also a series of such items which is a codification of the Montana practice. Northwestern Electric Equipment Co. v. Leighton, 66 Mont. 529, 536, 213 P 1094 (1923).

Paragraph (1) is a statement of the operational part of Federal Rule 106 which allows the adverse party the right to require the immediate introduction of all items of evidence which ought to be considered with part of the item of evidence being offered by the proponent of such evidence. The reason for this rule is that a mistaken impression gained by out of context evidence is hard to correct when the whole of the matter is not presented until later. Advisory Committee Note to Federal Rule 106, 46 F.R.D. 161, 194. A similar provision has already been adopted in Montana in [former] Rules 26(d)(4), M.R.Civ.P. [now superseded], allowing immediate introduction of all relevant parts of a deposition when a part is introduced; the same provision applies to interrogatories under [former] Rule 33, M.R.Civ.P. [now superseded] and use of depositions in criminal trials under Section 95-1802(c), R.C.M. 1947 [46-15-202].

Paragraph (2) is a statement of the operation of Montana law under Section 93-401-11, R.C.M. 1947 [superseded], and case law construing it which allows the adverse party the right to inquire into other evidence necessary to make the proponent's evidence understood at any time. The evidence needed to make the part introduced understood is not normally admitted until the adverse party presents his case. McGonigle v. Prudential Life Ins. Co., 100 Mont. 203, 223, 46 P2d 687 (1935) and Rasmussen v. Lee, 104 Mont. 278, 282, 66 P2d 119 (1937). The Montana completeness rule allows evidence which would ordinarily be inadmissible on its own to be admitted. McConnell v. Combination M & M Co., 30 Mont. 239, 263, 76 P 14 (1904) and Hulse v. N. Pac. Ry., 47 Mont. 59, 63, 130 P 415 (1913).

The two paragraphs follow the normal sequence of trial in that paragraph (1) allows the adverse party to immediately require that the remainder of evidence be admitted at the same time that the proponent's evidence is admitted when fairness requires. Paragraph (2) allows an inquiry by the adverse party at any time, but also gives him the right to introduce such evidence as part of his own case if paragraph (1) was not used. Failure to demand introduction under paragraph (1) would not waive the right to introduce this evidence later. Therefore, this proposed rule expresses existing Montana law as well as expanding the completeness rule to include recorded statements and allows immediate introduction of the remainder of evidence to gain a complete impression, which is an expansion of [former]Rules 26(d)(4) and 33, M.R.Civ.P. [now superseded] and Section 95-1802(c), R.C.M. 1947 [46-15-202].

It should be noted that the trial court makes the final determination of how much evidence is needed to make a fair impression under this rule and to prevent abuses of the rule. The authority of the court to make such rulings is Rule 403, allowing exclusion of relevant evidence on the grounds of prejudice, confusion of issues, or misleading the jury and waste of time or undue delay; and Rule 611 allowing the court the authority to conduct trial.

Subdivision (b). This subdivision is original and therefore entirely different than Federal and Uniform Rules (1974) Rule 106. The Advisory Committee Note to Federal Rule 106, 46 F.R.D. 161, 194 states the same principle as this subdivision. The commission feels that the guarantee of the right of any party to cross-examine or further develop as part of his case matters covered by this rule is important enough to be stated in the rule. [Former] Rule 26(d)(4) and Rule 33 (by reference) M.R.Civ.P. [now superseded] and Section 95-1802(c), R.C.M. 1947 [46-15-202], state the same principle contained in Federal Rule 106 and proposed rule 106(a)(1) as applied to depositions and interrogatories and then conclude by giving any party the right to introduce any other part. There is no other Montana law specifically on this point, and therefore this would be new Montana law.

COMMISSION COMMENT TO JUNE 1990 AMENDMENT: The revision establishes gender neutral format only. No substantive change.

27) **Nebraska:** Revised Statute §27-106. Rule 106. Remainder of or related writings or recorded statements; action of judge. "(1) When part of an act, declaration, conversation or writing is given in evidence by one party, the whole on the same subject may be inquired into by the other. When a letter is read, all other letters on the same subject between the same parties may be given. When a detached act, declaration, conversation or writing is given in evidence, any other act, declaration or writing which is necessary to make it fully understood, or to explain the same, may also be given in evidence. (2) The judge may in his discretion either require the party thus introducing part of a total communication to introduce at that time such other parts as ought in fairness to be considered contemporaneously with it, or may permit another party to do so at that time."

28) **Nevada:** Revised Statutes 47.120. Remainder of writings or recorded statements. "1. When any part of a writing or recorded statement is introduced by a party, the party may be required at that time to introduce any other part of it which is relevant to the part introduced, and any party may introduce any other relevant parts. 2. This section does not limit cross-examination."

SUBCOMMITTEE'S COMMENT. Adapted from Draft Federal Rule 1-07, but reduced to present language of N.R.C.P. 26 concerning depositions. Subsection 2 clarifies that the adverse party may introduce related but different writings upon cross-examination as well as in his own case.

29) **New Hampshire:** R. Evid. 106. Remainder of or Related Writings or Recorded Statements. "(a) If a party introduces all or part of a writing or recorded statement, an adverse party may require the introduction, at the time, of any other part-- or any other writing or recorded statement-- that in fairness ought to be considered at the same time. (b) A party has a right to introduce the remainder of an unrecorded statement or conversation that his or her opponent introduced so far as it relates: (1) to the same subject matter; and (2) tends to explain or shed light on the meaning of the part already received."

REPORTER'S NOTES. This Rule is derived from the language of F.R.Civ.P. 32(a)(4) which provides that when part of a deposition is introduced, the proponent may be required "to introduce any other part which ought in fairness to be considered with the part introduced, and any party may introduce any other parts." It is comparable to the law in New Hampshire with

respect to depositions, writings and treatises. See, Graves v. Boston & Maine R.R., 84 N.H. 225, 149 A. 70 (1930) (regarding use of depositions). The Reporter's Notes of the Vermont Rules of Evidence explain that: The rule permits the adverse party to require immediate introduction of remaining parts or related documents in the case of a writing in order to prevent the misleading impression given by an out-of-context presentation from taking root. Conversations are not accorded similar treatment, because of the cumbersomeness of presenting testimonial evidence of related parts in the middle of proponent's case. The adverse party may, however, present related parts of conversations by way of cross-examination or as part of his own case. He may, of course, also present the remainder of a writing in the same fashion if he wishes. See generally, Federal Advisory Committee's Note to Rule 106; McCormick, Evidence 130-131 (2d Ed.1972).

The Rule does not purport to limit in any manner the right to cross-examine as to portions of the matter introduced, or to incorporate them into the case of the proponent's adversary.

2016 NHRE UPDATE COMMITTEE NOTE. The amendment made by supreme court order dated April 20, 2017, effective July 1, 2017, made stylistic and substantive changes to the rule. The amendment designated the first paragraph (a) and added subdivision (b). The changes to (a) are stylistic and mirror the federal rule. The addition of (b), not included in Federal Rule of Evidence 106, codifies New Hampshire case law as set forth in State v. Lopez, 156 N.H. 416, 421 (2007). State court rules are current with amendments received through December 15, 2019.

30) **New Jersey**: R. Evid. 106. Remainder of or related writings or recorded statements. "When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which in fairness ought to be considered contemporaneously."

Note: the following New Jersey Rule 106 was amended on September 16, 2019 and is to be effective July 1, 2020. "If a party introduces all or part of a writing or recorded statement, an adverse party may require the introduction, at that time, of any other part, or any other writing or recorded statement, that in fairness ought to be considered at the same time."

COMMENT. This rule follows Fed.R.Evid. 106 almost verbatim. While there is no 1967 New Jersey analogue to this rule, the Rules of Court have similar provisions governing the use at trial of depositions and interrogatories. See R. 4:16-1(d); R. 4:17-8(a). The federal rule is adopted because it incorporates the prevailing practice in this state.

31) **New Mexico:** N.M. R. Evid. 11.106. Remainder of or Related Writings or Recorded Statements. "If a party introduces all or part of a writing or recorded statement, an adverse party may quire the introduction, at that time, of any other party—or any other writing or recorded statement—that in fairness ought to be considered at the same time."

COMMITTEE COMMENTARY
The language of Rule 11-106 NMRA was amended in 2012 to be consistent with the restyling of the Federal Rules of Evidence, effective December 1, 2011, to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on admissibility.

32) **New York:** New York does not have a rule of evidence similar to Federal Rule of Evidence 106.

33) **North Carolina:** N.C. R. Evid. 106. Remainder of or Related Writing or Recorded Statements.
"When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require him at that time to introduce any other part of any other writing or recorded statement which ought in fairness to be considered contemporaneously with it."

NORTH CAROLINA COMMENTARY
This rule is identical to Fed.R.Evid. 106. The Advisory Committee's Note states:
"The rule is an expression of the rule of completeness. McCormick § 56. It is manifested as to depositions in Rule 32(a)(4) of the Federal Rules of Civil Procedure, of which the proposed rule is substantially a restatement."

"The rule is based on two considerations. The first is the misleading impression created by taking matters out of context. The second is the inadequacy of repair work when delayed to a point later in the trial… the rule does not in any awy circumscribe the right of the adversary to develop the matter on cross-examination or as part of his own case."

"For practical reasons, the rule is limited to writings and recorded statements and does not apply to conversations."

N.C.Civ.Pro.Rule 32(a)(5), which applies to depositions, is similar to Rule 106.

34) **North Dakota:** N.D.R.Ev. 106. Remainder of or Related Writings or Recorded Statements.
"If a party introduces all or part of a writing or recorded statement, an opposing party may require the introduction, at that time, of any other part, or any other writing or recorded statement, that in fairness ought to be considered at the same time."

EXPLANATORY NOTE
Rule 106 is not a rule of admissibility, but rather one dealing with order of proof and, as such, may be considered to be but a specific application of the general dictates of Rule 611.

The standard of fairness gives the trial court wide discretion under this rule, which accords with the powers of a trial court to regulate the mode and order or proof, generally, granted by Rule 611. Thus, the court need not admit all evidence that may be related to the evidence sought to be introduced. Rules of relevancy, and other rules of admissibility, generally, should guide the trial court's decision.

Rule 106 was amended, effective March 1, 2014, in response to the December 1, 2011, revision of the Federal Rules of Evidence. The language and organization of the rule were changed to make the rule more easily understood and to make style and terminology consistent throughout the rules. There is no intent to change ny result in any ruling on evidence admissibility.

35) **Ohio:** Ohio Evid. R. 106. Remainder of or Related Writings or Recorded Statements.
"When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part of any other writing or recorded statement which is otherwise admissible and which ought in fairness to be considered contemporaneously with it."

STAFF NOTES
1980:

Rule 106, like Federal Evidence Rule 106, states that when a party introduces a writing or recording, or a part of either, into evidence, the adverse party may require him "At that time" to introduce any other recording or writing, or remainder of the part introduced into evidence, which in fairness places the writing or recorded introduced into proper context. The rule is a rule of timing which avoids the need for the adverse party to wait until later to place the writing or recording introduced into proper perspective through cross-examination or rebuttal evidence. The rule merely codifies the better common law tradition. See McCormick § 56 (2d ed. 1972).

The rule is limited to writings and recordings; it does not apply to conversations. Rule 106 is similar to Civ. R. 32(a)(4), which provides that when a party of a deposition is introduced into evidence, "An adverse party may require him to introduce all of it which is relevant to the part introduced."

In contrast to the Federal Rule, Rule 106 explicitly provides that it does not make admissible a writing or a part thereof that is otherwise inadmissible.

36) **Oklahoma:** Okla. Stat. Ann. tit. 12, § 2107 (West). Remainder of record.
"When a record or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other record that should in fairness be considered contemporaneously with it."

EVIDENCE SUBCOMMITTEE'S NOTE
This section is identical to Rule 106 of the Federal Rules. A more all-inclusive rule will be found in the Evidence Code of California (c. 4, § 356, 1965) which extends the principle of the rule beyond writings and recorded statements to "acts," "declarations," "conversations," writings" or "answers to letters." The rule, unlike § 356 of the California Code is limited for "practical considerations." No Oklahoma authority was found which deals with the substance contained in this section and thus has a clarifying effect.

37) **Oregon:** Or. Rev. Stat. Ann. § 40.040 (West). When part of transaction proved, whole admissible. "When part of an act, declaration, conversation or writing is given in evidence by one party, the whole on the same subject, where otherwise admissible, may at that time be inquired into by the other; when a letter is read, the answer may at that time be given; and when a detached act, declaration, conversation or writing is given in evidence, any other act, declaration, conversation or writing which is necessary to make it understood may at that time also be given in evidence."

EDITORS' NOTES
1981 CONFERENCE COMMITTEE COMMENTARY
Oregon Rule of Evidence 106 states the rule on admissibility of the whole where part of a transaction is proved. It replaces ORS 41.880, which is repealed, with language intended to reflect the actual case-law interpretation of that statute. The text of ORS 41.880 is amended (1) to allow contemporaneous as well as later introduction of the remainder of a writing or event, (2) but only, in either event, if the remaining evidence is otherwise admissible. See *Black v. Nelson*, 246 Or. 161, 424 P.2d 251 (1967) (remainder excluded as irrelevant), and *Myers v. Cessna Aircraft Corp.*, et al., 275 Or. 501, 553 P.2d 355 (1976) (remainder excluded as hearsay).

38) **Pennsylvania:** Pa.R.E.106. Remainder of or Related Writings or Recorded Statements.
"If a party introduces all or part of a writing or recorded statement, an adverse party may require the introduction, at that time, of any other party—or any other writing or recorded statement—that in fairness ought to be considered at the same time."

Comment: This rule is identical to F.R.E. 106. A similar principle is expressed in Pa.R.C.P. No. 4020(a)(4), which states: "if only part of a deposition is offered in evidence by a party, any other party may require the offering party to introduce all of it which is relevant to the part introduced, and any party may introduce any other parts."

The purpose of Pa.R.E. 106 is to give the adverse party an opportunity to correct a misleading impression that may be created by the use of a part of a writing or recorded statement that may be taken out of context. This rule gives the adverse party the opportunity to correct the misleading impression at the time that the evidence is introduced. The trial court has discretion to decide whether other parts, or other writings or recorded statements, ought in fairness to be considered contemporaneously with the proffered part.

39) **Rhode Island:** R.I.R. Evid. 106. Remainder of or Related Writings or Recorded Statements
"When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require him or her at that time to introduce any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it."

40) **South Carolina:** S.C.R.E. 106. Remainder of or Related Writings or Statements
"When a writing, or recorded statement, or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it."

41) **South Dakota:** SD ST§ 19-19-106. Remainder of Writings or Recorded Statements. "If a party introduces all or part of a writing or recorded statement, an adverse party may require the introduction, at that time, of any other part--or any other writing or recorded statement--that in fairness ought to be considered at the same time"

42) **Tennesee:** Tenn. R. Evid. 106. Writings or Recorded Statements – Completeness. "When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it."

Advisory Commission Comment**:** The Rule restates settled law. Notable Annotations: *State v. Vaughn*, 144 S.W.3d 391 (Ct. Crim. App. 2003) in which the Court allowed a police report containing hearsay and hearsay within hearsay pursuant to Rule 106. Court noted that Tennessee had adopted the Federal Rule and that and indicated that Rule 106 was a "rule of timing rather than admissibility."

43) **Texas:** TX R. Evid. 106. Remainder of or Related Writings or Recorded Statements. "If a party introduces all or part of a writing or recorded statement, an adverse party may introduce, at that time, any other part--or any other writing or recorded statement--that in fairness ought to be considered at the same time. "Writing or recorded statement" includes depositions."

Notable Annotations:
Generally, self-serving statements are not admissible in evidence to prove the matter asserted; exceptions to this rule apply where the excluded evidence is part of a statement or conversation previously introduced by state and is necessary to explain part of statement previously admitted, or the excluded evidence in fairness should be considered contemporaneously with the statement. Lawson v. State (App. 3 Dist. 1993) 854 S.W.2d 234, rehearing overruled, petition for discretionary review refused.

Under the doctrine of optional completeness, letter written by defendant alleging compliance with law in response to letter from police chief providing notice that defendant was operating gambling devices in her place of business should not have been excluded on ground of hearsay; letter completed the communication between defendant and police chief, and exclusion of letter gave rise to strong possibility that jury could form false impression regarding defendant's intent. Elmore v. State (App. 2 Dist. 2003) 116 S.W.3d 801, petition for discretionary review refused.

Witness' entire written statement to police was admissible in capital murder prosecution after defense counsel read portion of witness' statement to place statement into proper context so as to alleviate possibility of misapprehension by jury. Livingston v. State (Cr.App. 1987) 739 S.W.2d 311,

44) **Utah:** Utah R. Evid. 106. Remainder of or Related Writings or Recorded Statements. "If a party introduces all or part of a writing or recorded statement, an adverse party may require the introduction, at that time, of any other part--or any other writing or recorded statement--that in fairness ought to be considered at the same time."

ADVISORY COMMITTEE NOTES: This rule is the federal rule, verbatim. Utah Rules of Evidence (1971) was not as specific, but Rule 106 is otherwise in accord with Utah practice.

2011 Advisory Committee Notes: The language of this rule has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility. This rule is the federal rule, verbatim.

45) **Vermont:** VT R. Evid. 106. "When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require him at that time to introduce any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it"

Reporter's Notes: This rule is identical to Federal Rule 106 and virtually identical to the Uniform Rule. Its language is derived from Federal Civil Rule 32(a)(4), which is identical to V.R.C.P. 32(a)(4), providing that, when part of a deposition is introduced, the proponent may be required "to introduce any other part which ought in fairness to be considered with the part introduced, and any party may introduce any other parts." See also V.R.Cr.P. 15(e) (proponent may be required to introduce "all parts ... relevant to the part offered, and any party may offer other parts"); Rule 410 (statements in plea discussions).

For writings other than depositions, the Vermont cases have recognized the right of the adverse party to offer other parts that are related to the issue for which the part first in evidence was offered, but no case has been found that required the original proponent of part of a document to introduce the remainder at the time of his own offer. See Hendrickson v. International Harvester Co., 100 Vt. 161, 167-68, 135 A. 702, 704-05 (1927) (successive paragraphs of letter); Enos v. Owens Slate Co., 104 Vt. 329, 336-37, 160 A. 185, 188-89 (1932) (where defendant put dates of bills of lading in evidence, plaintiff not thereby entitled to put in bills in their entirety); State v. Williams, 94 Vt. 423, 436, 111 A. 701, 708 (1920) (only that part of banking commissioner's report relevant to audit in controversy need be admitted). Vermont law has also taken a similar position regarding conversations. Hutchinson v. Knowles, 108 Vt. 195, 200-02, 184 A. 705, 707-08 (1936)(recognizing rule, but excluding testimony that person who took statement was insurance company representative as irrelevant to statement); Perry v. Moore, 66 Vt. 519, 520-21, 29 A. 806, 806-07 (1894) (where conversations of testatrix tending to show undue influence were admitted, contemporaneous conversations tending to show lack thereof were admissible).
The rule permits the adverse party to require immediate introduction of remaining parts or related documents in the case of a writing in order to prevent the misleading impression given by an out-of-context presentation from taking root. Conversations are not accorded similar treatment, because of the cumbersomeness of presenting testimonial evidence of related parts in the middle of proponent's case. The adverse party may, however, present related parts of conversations by way of cross-examination or as part of his own case. He may, of course, also present the remainder of a writing in the same fashion if he wishes. See generally Federal Advisory Committee's Note to Rule 106; McCormick, supra § 56 at 130-31.
Under the broad “fairness” standard of the rule, the adverse party should be permitted to require introduction of other parts of the writing or related writings that help to explain the original writing even when they are incompetent as hearsay or otherwise. “Fairness,” however, should be understood as giving the court discretion, consistent with Rule 403, to exclude all or part of such remainder or related writings when the degree of incompetence is such that the jury would be misled, or when the prejudicial effect would outweigh the probative value.Although the rule is silent as to this point, the necessary implication of the right to require introduction of such incompetent evidence during the proponent's case is that the adverse party may introduce such evidence, subject to Rule 403, as part of his own case. See generally McCormick, supra § 56 at 131.

46) **Virginia**: VA R. S Ct Rule 2:106. Remainder of a Writing or Recorded Statement (Rule 2:106(b) derived from Code §8.01-417.1).
   - Related Portions of a Writing in Civil and Criminal Cases. When part of a writing or recorded statement is introduced by a party, upon motion by another party the court may require the offering party to introduce any other part of the writing or recorded statement which ought in fairness to be considered contemporaneously with it, unless such additional portions are inadmissible under the Rules of Evidence.
   - Lengthy Documents in Civil Cases. To expedite trials in civil cases, upon timely motion, the court may permit the reading to the jury, or the introduction into evidence, of relevant portions of lengthy and complex documents without the necessity of having the jury hear or receive the entire document. The court, in its discretion, may permit the entire document to be received by the jury, or may order the parties to edit from any such document admitted into evidence information that is irrelevant to the proceedings.

47) **Washington:** WA R. Evid (ER) 106. Remainder of or Related Writings or Recorded Statements. "When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the party at that time to introduce any other part, or any other writing or recorded statement, which ought in fairness to be considered contemporaneously with it."

48) **West Virginia:** WVRE 106. Remainder of or Related Writings or Recorded Statements. "If a party introduces all or part of a writing or recorded statement, an adverse party may request the introduction, at that time, of any other part--or any other writing or recorded statement--that in fairness ought to be considered at the same time."

COMMENT ON RULE 106
Rule 106 is taken verbatim from its federal counterpart, except for the use of the term "request" instead of "require" in the first sentence. The trial court should limit the introduction, by an adverse party, of any other part of a writing or recorded statement to information that is relevant or assists the jury in placing the writing or recorded statement in context. The adverse party does not have the absolute right to place the entire writing or recorded statement in evidence.

Notable Annotations: Defendant was not entitled to offer his grand jury testimony during his criminal trial relating to investment fraud scheme on basis of rule of completeness, although government offered parts of his grand jury testimony, parts that government offered were admissions by defendant and parts that defendant sought to offer were hearsay. Fed.Rules Evid.Rules 106, 801(c), (d)(2), 28 U.S.C.A. U.S. v. Bollin, 2001, 264 F.3d 391, certiorari denied 122 S.Ct. 303, 534 U.S. 935, 151 L.Ed.2d 225, certiorari denied 122 S.Ct. 1544, 535 U.S. 989, 152 L.Ed.2d 469, post-conviction relief denied 2006 WL 1455690, post-conviction relief denied 2006 WL 5811898.

Defendant who had police sergeant read a portion of his notes regarding drug transaction into the record was not prejudiced by admission of the remainder of notes into evidence, even assuming that notes were inadmissible hearsay, in light of other evidence of transaction at issue and the defendant's involvement therein, in prosecution for delivery of a controlled substance. Rules of Evid., Rule 106. State v. Gray, 1998, 511 S.E.2d 873, 204 W.Va. 248.

Evidence rule providing that, when a writing or recorded statement is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously, did not require admission of driver's statement to police officer about driver's argument with passenger in action brought by estate of passenger, who died after she jumped from driver's vehicle while arguing with him; driver's statement did not lack clarity and there was no danger that the statement would be taken out of context. Beachum v. White, 2013, 2013 WL 3185152, Unreported.

49) **Wisconsin**: Wash. St. Ann. 901.07. "When any part of a writing or statement, whether recorded or unrecorded, is introduced by a party, an adverse party may require the party at that time to introduce any other part or any other writing or statement which ought in fairness to be considered contemporaneously with it to provide context or prevent distortion."

JUDICIAL COUNCIL NOTE: This amendment is consistent with State v. Eugenio, 219 Wis. 2d 391, 410, 579 N.W.2d 642, 651 (1998), which acknowledged that the rule of completeness is applicable to oral testimony, and with State v. Anderson, 230 Wis. 2d 121, 600 N.W.2d 913 (Ct.

App. 1999), review denied, 230 Wis. 2d 275, 604 N.W.2d 573 (1999), which provided guidance on how, and when, to apply the rule of completeness.

"The rule of completeness, however, should not be viewed as an unbridled opportunity to open the door to otherwise inadmissible evidence. Under the rule of completeness the court has discretion to admit only those statements which are necessary to provide context and prevent distortion. The circuit court must closely scrutinize the proffered additional statements to avert abuse of the rule ... '[A]n out-of-court statement that is inconsistent with the declarant's trial testimony does not carry with it, like some evidentiary Trojan Horse, the entire regiment of other out-of-court statements that might have been made contemporaneously."' Eugenio, 219 Wis. 2d at 412 (citations omitted).

JUDICIAL COUNCIL COMMITTEE'S NOTE—1974: This section is consistent with Merlino v. Mutual Service Cas. Ins. Co., 23 Wis.2d 571, 127 N.W.2d 741 (1964), dealing with writings and expands its ruled to "recorded statements."

Notable Annotations:

Rule of completeness may allow admission of testimony even if testimony is hearsay and would not be admissible as prior consistent statement on grounds that it did not precede alleged recent fabrication. State v. Sharp (App. 1993) 511 N.W.2d 316, 180 Wis.2d 640, review denied 515 N.W.2d 714.

50) **Wyoming**: Wy R. Evid. 106. "When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require him at that time to introduce any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it."

Tab 7

URE 404/Doctrine of Chances Subcommittee (Utah Supreme Court Advisory Committee for the Rules of Evidence): Formed January, 14, 2020.

URE 404/Doctrine of Chances Subcommittee Members: Judge Teresa Welch (Chair), Tenielle Brown, John Nielsen, Dallas Young.

Tasks: "On January 2, 2020, the Utah Supreme Court directed the Advisory Committee on the Utah Rules of Evidence to 'consider the possibility of proposed amendments to rule 404(b) that may help advance the law' regarding the application of the Doctrine of Chances and possible adoption of Rule 413 of the Federal Rules of Evidence." *See* Judge Derek Pullan's 1/14/2020 materials.

Pursuant to the Advisory Committee's meeting and discussion held on January 14, 2020, a URE 404 Subcommittee was formed and tasked to address the following issues:

1. URE 404 and the Doctrine of Chances: Review whether Judge Harris's concerns regarding the Doctrine of Chances should be addressed by amending URE 404 or other rules. These concerns are expressed in *State v. Lane*, 2019 UT App 86, and *State v. Murphy*, 2019 UT App 64.

   -*State v. Lane*, 2019 UT App 86 ¶¶36,48 (J. Harris concurring opinion) (expressing "reservation about the manner in which the doctrine of chances [] is being used in Utah[,]" and that the jury was given an inadequate limiting jury instruction because it did not adequately articulate the purposes for which the doctrine of chances evidence "could and could not be used.")

   -*State v. Murphy*, 2019 UT App 64, ¶¶45-65 (J. Harris concurring opinion) (expressing concerns about how, why, and when Utah trial courts are admitting doctrine of chances evidence).

2. URE 404(c): Review Judge Mortensen's concurring opinion in *State v. Frederick*, 2019 UT App 152 (noting that the advisory committee note to Rule 404 is not presently the law).

   -"[R]egrettably, the advisory committee note still states: 'Before evidence may be admitted under Rule 404(c), the trial court should [among other things] . . . consider the factors applicable as set forth in State v. Shickles, 760 P.2d 291, 295–96 (Utah 1988).' Utah R. Evid. 404 advisory committee note. That is simply not presently the law. I would hope our trial courts would ignore this misdirection." *State v. Frederick*, 2019 UT App 152, ¶53 (J. Mortensen concurring opinion).

3. Review FRE 413 and determine whether a similar URE should be enacted.

   -"In 2008, Utah enacted a version of rule 414 of the Federal Rules of Evidence, and now categorically allows propensity evidence in child molestation cases, regardless of whether that evidence meets the requirements of rule 404(b)(2). *See* Utah R. Evid. 404(c) (stating that, "[i]n a criminal case in which a defendant is accused of child molestation, the court may admit evidence that the defendant committed any other acts of child molestation to prove a propensity to commit the crime charged"). However, Utah has not enacted any version of rule 413 of the Federal Rules of Evidence, nor has it ever adopted any version of the "lustful disposition" exception, meaning that in cases where the defendant stands accused of sexually assaulting anyone who is fourteen years of age or older, there is no categorical rule allowing admission of that defendant's prior acts of sexual assault. Prosecutors attempting to introduce such evidence in adult sexual assault cases must demonstrate that the evidence they proffer meets the requirements of rule 404(b)(2)." *State v. Murphy*, 2019 UT App 64, ¶50 (J. Harris concurring opinion).

-"Decisions about whether to reexamine *Verde*, or to enact a version of rule 413 of the Federal Rules of Evidence—two very divergent pathways—will be made above my pay grade. But I have concerns about whether we can or should continue down our current path, in which we routinely 'allow[] character evidence to reach the jury while maintaining the pious fiction that we follow the character evidence rule.'" *State v. Murphy*, 2019 UT App 64, ¶65 (J. Harris concurring opinion).

Summary of the Doctrine of Chances: The Doctrine of Chances provides a means of admitting prior act evidence for a proper, non-character statistical inference purpose. *See State v. Verde*, 2012 UT 60, ¶¶47-63. The Doctrine "is a theory of logical relevance that 'rests on the objective improbability of the same rare misfortune befalling one individual over and over.'" *Id.* ¶47. "As the number of improbable occurrences increases, the probability of coincidence decreases, and the likelihood that the defendant committed one or more of the actions increases." *Id.* ¶49. Thus, "doctrine of chances cases involve rare events happening with unusual frequency." *State v. Lopez*, 2018 UT 5, ¶52.

The Doctrine of Chances is not found in the text of the Utah Rules of Evidence. Rather, Utah case law establishes the Doctrine, its application under rules 404(b), 402, and 403, and its four foundational requirements: (1) materiality, (2) similarity, (3) independence, and (4) frequency. *See* Utah R. Evid. 404(a)&(b),402,403; *see also State v. Lowther*, 2017 UT 34; *State v. Verde*, 2012 UT 60, ¶¶47-63.

In *State v. Lowther*, the Utah Supreme Court clarified that the Doctrine is an elemental test that is to be applied within the framework of URE rule 404(b), not a balancing test under URE 403. *State v. Lowther*, 2017 UT 34, ¶¶32-48.

URE404(b): (Doctrine of Chances Foundational Requirements)

(1) Materiality: "The issue for which the uncharged misconduct evidence is offered must be in *bona fide dispute*." *State v. Verde*, 2012 UT 60, ¶57.
(2) Similarity: To establish similarity, "*[e]ach incharged incident must be roughly similar to the charged crime…* [and] "there must be some *significant* similarity between the charged and uncharged incidents to suggest a decreased likelihood of coincidence—and thus an increased probability that the defendant committed all such acts." *State v. Verde*, 2012 UT 60, ¶58.
(3) Independence: "[E]ach accusation must be independent of the others… [T]he existence of collusion among various accusers would render ineffective the comparison with chance repetition." *State v. Verde*, 2012 UT 60, ¶58.
(4) Frequency: "The defendant must have been accused of the crime or suffered an unusual loss '*more frequently than the typical person endures such losses accidentally.*'" *State v. Verde*, 2012 UT 60, ¶58.

Importantly, even if the foundational requirements of rule 404(b) are met, prior act evidence may still be excluded if it runs afoul of rules 402 and 403. *See Lowther*, 2017 UT 34, ¶¶32-42. In short, the rigorous and multiple requirements of the Doctrine of Chances are safeguards aimed at preventing the improper admission of propensity/character evidence. *See id.*

Imwinkelried's scholarly articles: In fleshing out the logistics of how and why the doctrine operates so as to not admit improper character evidence, Utah case law incorporates various principles about the Doctrine as described in Edward J. Imwinkelried's scholarly articles. *See e.g. Verde*, 2012 UT 60, ¶57; *State v. Lomu*, 2014 UT App 41, ¶29; *Lowther*, 2015 UT App 180, ¶13; Edward J. Imwinkelried, *The Use of Evidence of an Accused's Uncharged Misconduct to Prove Mens Rea: The Doctrines Which Threaten to Engulf the Character Evidence Prohibition*, 51 Ohio St. L.J. 575 (1990); Edward J. Imwinkelried, *An Evidentiary Paradox: Defending the Character Evidence Prohibition by Upholding a Non-Character*

Theory of Logical Relevance, The Doctrine of Chances, 40 U.Rich L. Rev. 419 (2006). Recently, in 2017, Imwinkelried published an article wherein he expressed a concern that in many cases, trial courts are shirking their responsibilities in admitting evidence under the Doctrine. *See* Edward J. Imwinkelried, *Criminal Minds: The Need to Refine the Application of the Doctrine of Objective Chances as a Justification for Introducing Uncharged Misconduct Evidence to Prove Intent*, 45 Hofstra L. Rev. 851 (2017). Imwinkelried's 2017 article chastises trial courts for their "shallow" doctrine of chances analyses. *See id*. at 871. He states that "courts do not pause to inquire whether the prosecution has satisfied the foundational requirements for the doctrine. . . they rarely demand that the prosecution demonstrate a baseline frequency or incidence for the type of event involved in the instant case to support the inference that cumulatively, the charged and uncharged incidents establish an extraordinary coincidence. . ." *Id*. at 871. Imwinkelried also notes that, rather than "inquiring whether the prosecution has satisfied the doctrine's requirements, the courts advance the broad generalization that similar misdeeds are admissible to prove intent." *Id*. at 857. Imwinkelried admonishes that, "when a [trial] court is content with conclusory analysis in a doctrine of chances case, there is a grave risk that the end result will be the introduction of inadmissible bad character evidence." *Id*. at 872. Moreover, "[e]ven in the cases where the doctrine's technical requirements are satisfied, many courts do little to ensure that the jury focuses on the objective improbability of multiple, similar inadvertent acts rather than engaging in forbidden character reasoning." *Id*. According to Imwinkelried, "[i]t is axiomatic that the jurors may not reason that the other act shows the accused's bad character and that "'if he did it once, he did it again.'" *Id*. at 856; *see also* Utah R. Evid. 404(a).

Doctrine of Chances Limiting Instructions: Imwinkelried's 2017 article chastises appellate courts for not mandating "that trial judges read the jury limiting instructions specifically tailored to the doctrine of chances." Imwinkelried, Hofstra L. Rev. (2017) at 857. Specifically, because of the "intolerable" and "lax practices [that are] currently followed in many, if not most jurisdictions," trial judges that admit doctrine of chances evidence "ought to give the jury a limiting instruction sharply differentiating between character reasoning and the use of evidence according to the doctrine." *Id*. Moreover, "[a] complete, properly worded limiting instruction [would contain] two prongs." *Id*. at 873. "The negative prong forbids the jury from using the evidence for the verboten purpose. In contrast, the affirmative prong explains how the jury is permitted to reason about this evidence." *Id*. Specifically, when doctrine of chances evidence is admitted, the jury should be instructed that they are to determine whether the prior acts were unlikely to happen in unusual frequency given the circumstances. *See id*. at 878. For example, if prior acts are admitted under the Doctrine in a drug possession case, the jury should be instructed that "[y]ou may not reason: [Defendant] intended to possess cocaine once before, that shows that he is a bad man, and that therefore he had that intent again in the [currently charged] incident." *Id*. In addition, the jury should be instructed to use their "common sense and decide whether it is likely that [having cocaine in one's trunk] would happen to an innocent person twice." *Id*.

Resources and Materials to Review to Complete Tasks:

1) Materials submitted by Judge Derek Pullan at the January 14, 2020 Advisory Committee Meeting.

Articles:

1) Edward J. Imwinkelried, *Criminal Minds: The Need to Refine the Application of the Doctrine of Objective Chances as a Justification for Introducing Uncharged Misconduct Evidence to Prove Intent*, 45 Hofstra L. Rev. 851, 873 (2017).
2) Edward J. Imwinkelried, *An Evidentiary Paradox: Defending the Character Evidence Prohibition by Upholding a Non-Character Theory of Logical Relevance, The Doctrine of Chances*, 40 U.Rich L. Rev. 419 (2006).

3) Edward J. Imwinkelried, *The Use of Evidence of an Accused's Uncharged Misconduct to Prove Mens Rea: The Doctrines Which Threaten to Engulf the Character Evidence Prohibition*, 51 Ohio St. L.J. 575 (1990).
4) Andrea J. Garland, *Beyond Probability: The Utah Supreme Court's Doctrine of Chances in State v. Verde Encourages Admission of Irrelevant Evidence*, 3 Utah J. Crim. L. 6, 27 (2018).

Pertinent Cases:

Utah Supreme Court:

State v. Verde, 2012 UT 60, ¶¶47-63: Doctrine of Chances evidence must meet the four foundational requirements of materiality, similarity, independence, and frequency.

State v. Lowther, 2017 UT 34, ¶¶32-48: The Doctrine is an elemental test that is to be applied within the framework of URE rule 404(b), not a balancing test under URE 403.

State v. Lopez, 2018 UT 5, ¶57: The Doctrine's similarity and frequency requirements interact with each other so as to safeguard against the improper admission of propensity evidence. S*ee also State v. Argueta*, 2018 UT App 142, ¶¶35-40 (cert granted). In *Lopez*, the trial court correctly precluded prior act evidence under the Doctrine because gun pointing is too dissimilar from gun shooting.

Utah Court of Appeals:

State v. Lomu, 2014 UT App 41: Bad acts evidence of the defendant's subsequent participation in another convenience store robbery was relevant and properly admitted under the Doctrine of Chances for the non-character purpose of proving the defendant's intent to commit aggravated robbery of convenience store.

State v. Rackham, 2016 UT App 167: The trial court properly excluded prior act evidence under the Doctrine where the independence requirement was not met.

State v. Lane, 2019 UT App 86: The Court of Appeals assumed without deciding that prior act evidence met the requirements of Utah R. Evid. 404(b) for admission under the Doctrine. *Id*. ¶21. Nevertheless, the court decided that under rule 403, the prior act evidence was improperly admitted because its prejudicial impact outweighed the "proffered justifications for admitting the evidence." *Id*. ¶23. The court noted that "[m]erely stating that evidence is not being offered for propensity purposes does not mean that the evidence does not present an improper propensity inference." *Id*. ¶24. The court decided that the prior act evidence "presented a prejudicial propensity inference" because the prosecution sought to use the evidence of the priors to show that the defendant acted in conformity with his dubious character. *Id*. ¶¶25-26. Moreover, "the prior act evidence took up a significant portion of the trial" and the evidence supporting the charged incident was weak and limited. *Id*. ¶27. The court reversed because "it was possible that [the defendant's] conviction 'reflected the jury's assessment of his character, rather than the evidence of the crime he was charged with.'" *Id*. Also, Judge Harris's concurring opinion expresses concerns about how, why, and when Utah trial courts are admitting doctrine of chances evidence.

State v. Murphy, 2019 UT App 64, ¶45 (J. Harris concurring opinion): "I have concerns about the propriety of admitting, pursuant to rule 404(b) of the Utah Rules of Evidence, evidence of a defendant's prior bad acts under the "doctrine of chances" to rebut a defense of fabrication, and I wonder whether our law should either reconsider the conclusions reached in *State v. Verde*, 2012 UT 60, 296 P.3d 673, *abrogated on other grounds by State v. Thornton*, 2017 UT 9, 391 P.3d 1016, or consider adoption of a categorical rule (akin to rule 413 of the Federal Rules of Evidence) that simply admits, in a more up-front way, evidence of similar crimes in sexual-assault cases that is typically being admitted anyway."

State v. Heath, 2019 UT App 186, ¶¶31-36: The trial court did not abuse its discretion in determining that the prosecution had proven the foundational requirement of frequency for admitting evidence under the Doctrine.

Questions:

1. Has any state/jurisdiction amended rule 404 (or any other rule) to address/incorporate the doctrine of chances?
2. Has any state/jurisdiction enacted a version of FRE 413? *See State v. Murphy*, 2019 UT App 64, ¶49 (J. Harris concurring opinion) (addressing other jurisdictions that categorically allow the admission of prior bad acts in sexual assault cases).

Proposed course of action for URE 404/Doctrine of Chances Subcommittee:

1. Review all of the pertinent materials, cases, and articles.
2. Research other states/jurisdictions to see (1) whether state rules have been enacted/amended to incorporate the DOC and its requirements, and (2) whether/what state rules have enacted a version of FRE 413.
3. Propose various amended URE 404 drafts to incorporate the DOC requirements (Ideally, these should be drafted in a manner to address Judge Harris's concerns regarding the DOC).
4. Discuss whether Utah should enact a version of FRE 413 (or perhaps changes/additions to 404(c)). If so, propose various rule drafts.
5. Discuss whether URE 104's conditional relevance standard should be amended/elevated to 'clear and convincing' for DOC evidence. *See* Judge Derek Pullan's 1/14/2020 materials.
6. Discuss whether any Advisory Notes should be omitted/changed/added to URE 404.
7. Discuss whether other Utah Supreme Court Committees might assist in addressing DOC issues/concerns. For example, perhaps a Model Jury Instruction regarding DOC evidence would be beneficial?