UTAH SUPREME COURT ADVISORY COMMITTEE
ON THE RULES OF EVIDENCE

MEETING MINUTES
Tuesday– February 11, 2020
5:15 p.m.-7:15 p.m.
Council Room

Mr. Chris Hogle, Presiding

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

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1. WELCOME AND APPROVAL OF MINUTES:

Mr. Hogle welcomed everyone to the meeting. The following corrections were made to the January 14, 2020 meeting minutes:

- Page 2 item 2, the title should read, Committee Note Drafting Principles
- Page 2 item 2, second to last sentence should read, when the committee sends a revised committee note to the Supreme Court
- Page 7 Item 6, correct the spelling of Justice Pearce's name
- Note that Deb Bulkeley attended the Evidence Advisory Committee meeting

***Motion:* Tony Graf made a motion to approve the amended minutes from the Evidence Advisory Committee meeting held on January 14, 2020. John Nielsen seconded the motion and the motion carried unanimously.**

2. Supreme Court Meeting Re Legislation:

The Utah Supreme Court and Mike Drechsel met with legislative leadership about the legislature's concerns regarding the Court's rule-making process. The legislature feels that the advisory committees are not being responsive to legislative inquiries regarding rule changes. Mr. Hogle and Judge Jones attended a meeting with the Supreme Court and the chairs of all of the Court's advisory committees to address those concerns. The Supreme Court asked each committee to form a Rapid Response Legislative Subcommittee with the authority to coordinate with Mike Drechsel in order to address possible legislation when there is not an opportunity to meet as a full committee.

An amendment to Rule 11-102 is necessary. The new language in 11-102 requires that all Supreme Court Advisory Committees adopt expedited procedures for addressing time sensitive issues when there is no opportunity to meet with the full committee. In addition, the Supreme Court asked every advisory committee to be respectful of and extend the "royal treatment" to all legislators and legislative staff when they attend an advisory committee meeting. Mr. Hogle explained the process and authority of the rapid response subcommittee: When a proposal is made by a legislator that implicates the rules of evidence, the subcommittee is empowered to make recommendations directly to the Supreme Court, but the subcommittee will notify all members of the Committee of those recommendations. Committee members can provide input if they wish, provided they can do so in a timely manner. When time and circumstances permit, the subcommittee will involve the entire Committee before making recommendations to the Court, with the understanding that such involvement will not delay the response effort.

Ms. Bulkeley: Can we request that legislators notify the Committee before February regarding potential legislation? Mr. Hogle: Mike Drechsel is the Council's Legislative Liaison. Part of his work is keeping ahead of those issues and connecting legislators with the appropriate advisory committee as soon as possible. Judge Jones: The Court is aware of that timing issue, but their message to the Committees was equally clear. We have to use diplomacy. The Court and the Legislature are both sovereign countries and when sovereign countries come together, people have to be diplomatic. Obviously it would be better if they brought it to us quickly, but out of respect for the legislature, the Court is choosing to change its practices to be more responsive. Mr. Hogle: Justice Lee said advisory committees should be getting input from Mike Drechsel and using him as the conduit between the committee and the legislature. If we need to go directly to specific legislators we can, but Mike is the chief diplomat for the Court.

Ms. Brown: Would the Court be satisfied if the subcommittee's response to a legislative request was that the time constraint doesn't allow for a thoughtful or carefully crafted rule amendment? Ms. Bulkeley: Could the response be that we need more time? Mr. Hogle: It will necessarily be a fluid response depending upon the urgency expressed by the legislator. The Court said that the subcommittee's recommendation to the Court could be that we not adopt an amendment or make any changes to the rules. Judge Bates: How does the Court want the subcommittee to respond if they think what the legislator is proposing is bad policy? Judge Jones: The Supreme Court is asking for more communication from advisory committees. If the advisory committee feels more time is needed or no changes should be made in regard to a particular request or that something is bad policy, the Court wants to hear about it, at which point they can provide guidance. What's

important is that those exchanges of information between the advisory committee and the Court happen quickly.

Mr. Hogle: Subcommittee members may reach out to specific Committee members for feedback on a particular request if none of the subcommittee members have expertise in a particular area. Every member of the Committee should send an email to the subcommittee outlining their subject area of expertise.

Rapid Response Subcommittee procedures:

- Meet with key people (Justices, legislators, Mike Drechsel, expert Committee members, etc.)
- Keep Evidence Committee apprised of all requests, articulating the scope of the task
- When needed, seek direction from the Court as soon as possible and throughout the process. Conduit to the Court.
- Make recommendations to the Court, with notice to the full Committee and an opportunity for members to provide feedback when time permits
- Urgency is the priority
- Communication with the Supreme Court:
    - Email to all of the Justices, cc'ing Mike Drechsel, Keisa Williams, and John Lund
    - Can also request a meeting or call with the Justices. Keisa can help facilitate.

The members of Rapid Response Subcommittee of the Advisory Committee on the Rules of Evidence are: Chris Hogle, Judge McKelvie, and Dallas Young.

Body Camera Joint Subcommittee Update:
Mr. Graf and Mr. Young are currently working on a request related to pending body camera legislation. Mr. Young: We met with Doug Thompson, chair of the Advisory Committee on the Rules of Criminal Procedure. What the legislation is really looking for is a remedy when an officer fails to record or preserve body camera evidence through an adverse inference instruction. The legislation won't affect the rules of evidence; it will be handled through the rules of criminal procedure committee and the criminal jury instructions committee. The rapid response process is still very fluid and it's not yet clear what we're supposed to be giving them advice on. The main takeaway is that this truly is a rapid response. There were fairly substantial issues and within four calendar days of the request, we received word that legislators were upset that we hadn't gotten back to them yet. Mr. Graf: The process went well and we were able to collaborate, but it is a heavy lift so subcommittee members need to make sure that they actually have the time to participate fully.

3. URE 512. Victim Communications:

Judge Bates reviewed the history of Rule 512. The Evidence Committee's first amended version of Rule 512 that substantially narrowed the scope of the privilege. Representative Snow wrote a letter to the Court objecting to what he felt was a rule that ran afoul of the legislature's intent. The Supreme Court rejected the Committee's proposal, so the legislature's version of Rule 512 went into effect. The Court asked the Evidence Committee to take another shot at it. This second

proposed amendment is faithful to all of the policy decisions that the legislature made in the statue, with minor amendments primarily to more clearly outline when the disclosures do and do not waive the privilege. Representative Snow supports this second version. He made one edit. In subsection (a)(2) the definition of confidential communication was changed to match the statutory definition.

The breadth of the privilege is troubling to the Committee because it allows the prosecution and victim advocate to disclose information to almost anyone but the defendant. The Committee discussed whether to send the Rule to the Supreme Court with a positive or negative recommendation. Judge Welch suggested sending the rule along with a statement noting that it is an improvement on the existing rule, but also voice the Committee's concerns. The Committee agreed that the proposed rule is the best version that they can come up with that satisfies Representative Snow, but they have strong reservations about the policy behind it.

The Committee discussed sending the rule to the Supreme Court with the following three caveats:

1. By creating a rule out of whole cloth, the legislature appears to be running afoul of the Constitution. The Court's adoption of URE 512 may set a dangerous precedent.

2. The breadth of the disclosures allowed under the rule that exclude the defendant without judicial review is not good policy. Under subsection (d)(4), victim advocates may disclose confidential victim communications to a long list of individuals, with the exception of the defendant. Nothing prevents the individuals to whom the advocate discloses from further disclosing those communications to third parties, and yet the privilege is maintained.

3. If the Court determines that adoption of a new rule on victim communications is in the best interest of the Judiciary, the Committee feels that this version of Rule 512 is the best version that will satisfy Rep. Snow's concerns.

Motion: Deborah Bulkeley made a motion to recommend amended Rule 512 to the Supreme Court with the three caveats outlined above. Nicole Salazar Hall seconded the motion. Matt Hansen and Tony Graf opposed caveat #2. The motion passed by majority vote.

4. Committee Note Review/Approval:

Mr. Hogle: The Committee needs to address several revised committee notes. Mr. Havas: The question is whether notes should include cases, commentary, or nothing at all. The subcommittee feels that the note in Rule 407 should be deleted in its entirety. The subcommittee fleshed out the note in Rule 406. The changes aren't substantive necessarily, it just reads better. Rule 409 includes case citations. Mr. Hogle recommended that the Committee decide what format it thinks the notes should take and then send a few rules up to the Supreme Court to see what format the Court prefers before working on the rest of the rules.

The Committee reviewed its drafting principles. Mr. Havas: It would be helpful to get guidance from the Supreme Court about the purpose of committee notes, the intended audience of the

notes, and clarification about who owns the note. Can the Committee make changes to notes without the Court's approval or does the Supreme Court want to approve any changes? Ms. Parrish suggested sending the Committee's drafting principles to the Court for guidance. The Committee discussed whether the Committee should eliminate outdated committee notes when new notes are added, or whether the new notes should be stacked on top of the old ones and left in the rule.

Ms. Steele: In the federal annotated rules, each committee's subsequent notes are preserved in the rule no matter how the rule changes. We shouldn't eliminate older notes. Mr. Graf: If the old note is wrong or something has changed substantially, it seems nonsensical to keep the old note if the value is to provide something useful. What is our focus? If our focus is to maintain the history I see the value, but if it's to provide something useful then old notes should be removed. Mr. Nielsen: Rule 404(b) is the perfect example of that because it still talks about *State v. Shickles*. I had a case involving one of the privilege rules where I went back to territorial days to try to find the roots. If you really want to know the history, you have to delve into the history. We aren't trying to trick people into thinking this is one-stop shopping for the history of the rule.

Ms. Bulkeley suggested keeping historic notes in a public place where anyone can access them, but not include them in the rule itself. Ms. Williams: Every rule draft is publicly available on the Court's Approved Rules webpage. You can click on each individual rule and see the rule draft and the date it was published. Historical notes would be captured there, but it might be a little onerous. I could create a separate link on the Evidence Committee webpage to track historical committee notes, but our webpage is public right now. Ms. Steele: There are annotated versions of the rule that I've used to teach how the rule has evolved, but that's not handy for practitioners. Judge Welch: For practitioners, the most recent version of the note is more helpful, but there should be one place where the entire history of the rule is available to anyone. Mr. Havas: I've always viewed the purpose of the note as an aide for the proper application of the rule for practitioners and the courts. If the notes are only meant to be of historical interest as opposed to current application, that informs our approach in the terms of drafting principles. Ms. Parrish: For me, the longer the note the less helpful it is.

After further discussion, the Committee decided to send Rules 406, 407 and 409 and the drafting principles to the Supreme Court for feedback.

- **URE 406. Habit; routine practice**
  A note is needed. The proposed amendments distill *Lister* into what is pertinent to how rule 406 has been interpreted and applied. Most importantly, how habit evidence was used, what it was able to be used for, and what it could be used for. The rule hasn't changed and it's not a new case. The *Lister* case goes back to 1994.

- **URE 407. Subsequent Remedial Measure**
  No note is needed.

- **URE 409. Payment of medical and similar expenses; expressions of apology**
  The rule is relatively new and hasn't been interpreted much. A note would be beneficial for future application by elaborating on how the rule was recently interpreted and applied.

The Committee agreed to send the amended committee notes for Rules 406, 407, and 409 to the

Supreme Court along with the drafting principles for feedback.

5. URE 1101. Applicability of Rules:

Mr. Hansen reviewed the following draft versions of URE 1101:

- VERSION 1 - This version does not provide the defendant with an opportunity to present adverse witnesses, unless the judges for good cause otherwise orders.

- VERSION 2 - This version uses language from the bail statute, 77-20-1(6)(c), and gives the defendant the opportunity to present adverse witnesses.

Mr. Hansen: My purpose in both rule drafts was to provide the judge with as much discretion as possible. In Order to Show Cause hearings, the individuals have pled guilty, the judge has seen a presentence report with their history, and the judge may have seen them multiple times already. If adverse witnesses are required, these will turn into mini trials, when judges have a good idea when evidence is necessary.

Mr. Young: I agree with Mr. Hansen that the majority of the time these hearings don't result in an evidentiary hearing because one or more of the allegations in the report are admitted. But when there is a bona fide dispute over whether probation was violated, and there's a possibility of prison time, the individual ought to retain the right to dispute the allegations. I see this as analogous to sentencing. The rules of evidence don't apply at sentencing, pretty much anything goes. If that can happen at the original sentencing, I don't see any principled reason why it shouldn't happen here. The granting of probation creates an expectation that probation won't be revoked unless they violate the terms of the agreement. Where the State needs to prove the factual predicate that the probationer did in fact violate the terms of probation, an individual should at least have the opportunity to contest it at an evidentiary hearing before probation is revoked. My concern is preserving the right to an evidentiary hearing if he or she chooses to exercise it.

The Committee amended subsection (c)(3) in Version 1 to read: "Proceedings for revoking probation, unless the court for good cause otherwise orders."

Motion: Mr. Hogle made a motion to adopt version 1 with an amendment including the language, "unless the court for good cause otherwise orders." Ms. Salazar-Hall seconded the motion. Mr. Young and Mr. Hansen opposed. The motion passed by majority vote.

6. Update: URE 106. Character Evidence; Crimes or Other Acts

Judge Welch proposed postponing the discussion on URE 106 until the next meeting.

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

The Committee did not address URE 404(b).

8. Update: Body Camera Joint Subcommittee

The Body Camera Joint Subcommittee update was addressed in section 2 above.

9. Other Business:

<u>Motion:</u> Matt Hansen made a motion to adjourn the meeting. John Nielsen seconded and the motion passed unanimously.

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