UTAH SUPREME COURT ADVISORY COMMITTEE
ON THE RULES OF EVIDENCE

MEETING MINUTES
Tuesday– April 14, 2020
5:15 p.m.-7:15 p.m.
VIA WEBEX

Mr. John Lund, Presiding

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

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1. Welcome and Approval of Minutes:

Mr. Lund welcomed everyone to the meeting and thanked Chris Hogle for his willingness to Chair the previous two Evidence Advisory Committee meetings in his absence.
The following amendment was made to the minutes for the meeting held on February 11, 2020:

- Matt Hansen opposed URE Rule 1101

***Motion:** Judge Jones made a motion to approve the minutes from the Evidence Advisory Committee meeting held on February 11, 2020 as amended above. Chris Hogle seconded the motion. The motion carried unanimously.*

2. Legislative Rapid Response Subcommittee

Mr. Hogle provided an overview of the Legislative Rapid Response Subcommittee's work during the session. The only issue brought to the subcommittee was a bill related to body cameras. Mr. Young and Mr. Graf worked with the bill sponsors but the remedy they were looking for didn't

involve the Rules of Evidence. It turned out to be an issue for the Rules of Criminal Procedure Committee. Ms. Williams was contacted the last week of the session about a potential request. The subcommittee responded to the sponsor asking how they could be of assistance but never heard back.

Mike Drechsel: The rapid response process seemed to work pretty well. The Evidence Advisory Committee didn't get called on much during the session other than the body camera matter. That bill passed without Supreme Court action. The Court will continue to work with the sponsors to make changes as things evolve with the Criminal Procedure Committee. The other Supreme Court Advisory Committees reported successful experiences with their Rapid Response Subcommittees and I'm looking forward to continuing that process in upcoming legislative sessions. The chair of the Rules of Civil Procedure Committee went to the Capitol and met with legislators about a proposed joint resolution amending Rule 26. The resolution didn't pass, primarily as a result of that conversation. The sponsor agreed to let the court work on it.

Many legislators are encouraging their colleagues to look to the courts and the advisory committee process first before bringing legislation and it actually played out during the session. A bill passed unanimously in the House without fanfare but when it got to the Senate, Senator Weiler spoke up and encouraged the Senate to give the Court the opportunity to address it through the committee process. The Senate almost unanimously opposed the action largely because of his comments. Hopefully we will start seeing legislators come to the court earlier in the process so that we aren't having to scramble with rapid response teams.

3. URE 512 Victim Communications:

Keisa Williams: A draft of URE 512 was presented to the Supreme Court. They made a grammatical change and sent it out for public comment. The rule received one comment and is now back with the Committee for feedback and any necessary revisions.

John Lund: The public comment addressed unintentional disclosures and asked whether the rule only addresses intentional disclosures. The question for the Evidence Advisory Committee is: Are waivers treated the same in this privilege as they are in other privileges?

Judge Bates: After reading the comment, I compared the way we drafted exceptions to the rule in 512 (as far as what waived and didn't waive privilege) to the other rules of evidence. It might be more consistent with the way we've structured exceptions in other rules, to move subsections (d)(2) and (d)(3) down to subsection (e) so that those circumstances do waive the privilege. In other rules, when the holder of the privilege does something that requires somebody else to disclose the confidential communication because of a public safety threat, that disclosure functions as a waiver of the privilege.

John Lund: The right of an attorney to disclose information if he/she is concerned a crime may be committed by a client is set up as a waiver rather than an exception to a privilege.

Judge Bates: I agree. In that situation, the disclosed communication becomes admissible in court

and a privilege no longer exists in regard to that communication. If a victim does something that poses a public safety threat and an advocate is required to disclose the communication, then it ought to waive the privilege as it would in other rules.

Dallas Young: Under the attorney/client privilege it's called an exception. The net result is the same, but it's called an exception as opposed to a waiver.

John Lund: In subsection (a) of URE 510 (Miscellaneous Matters), the privilege is waived if the holder of the privilege fails to take reasonable precautions against inadvertent disclosure or voluntarily discloses or consents to the disclosure. That's the broader treatment of waivers that I think would apply to the 512 privilege like all the rest.

Ed Havas: Is there a legitimate distinction between an exception and a waiver? Judge Bates noted in the attorney/client rule that there are exceptions to the privilege allowing the communication to be disclosed without waiving the privilege. That seems to be preferable language. The rest of the privilege ought not simply evaporate because of some conduct that might follow the exception.

Dallas Young: It makes more sense to carve out the communication in terms of an exception as opposed to a waiver. Criminal law in regard to waivers requires knowledge of a criminal right and an intentional relinquishment of that right. That doesn't seem to match up with what's described in (d)(2) and (d)(3).

Judge Bates: The reason the subcommittee structured the rule the way it did was because the original legislation was unclear about whether a disclosure would function as an exception or a waiver of the privilege. What I'm hearing is that maybe some of the disclosures in (d) are more appropriately couched not as disclosures that do not waive the privilege, but as disclosures that are exceptions to the privilege. If there is no known relinquishment of a right, maybe we ought to call (d)(2) and (d)(3) exceptions.

John Lund: (d)(1) should also be included. Dallas Young: Suggested changing the language in line 42 to read, "these are the exceptions to the privilege."

Ed Havas: That strikes me as consistent with the intent of the draft. If we're saying these disclosures don't waive the privilege, in essence we're saying the disclosures are excepted from the privilege but it doesn't mean the privilege is waived if you take advantage of that exception.

Chris Hogle: In the attorney/client privilege rule (URE 504), under subsection (d) the first exception to the privilege is the crime/fraud exception. I don't know that we want to borrow that phraseology for 512 because in the lawyer/client context, exceptions are things that don't apply regardless of the intent of the holder of the privilege. I like the way things are now. I don't see a need to change the phraseology of 512 because "disclosures that do not waive the privilege" means that those disclosures do not affect the applicability of the privilege.

John Lund: On balance, I'm leaning the way Chris is for substantive reasons and because "disclosures that do not waive the privilege" is phrased the way the drafters preferred. Unless we can provide the Court with an important reason not to keep that phraseology, then we ought to leave it the way it is. We need a reason to warrant another round of revisions.

Judge Bates: In my mind the Committee is discussing two issues:

1. Has the Committee correctly identified waivers and exceptions in (d) and (e)? And what is the effect of the disclosures?
2. Do (d)(1), (d)(2), and (d)(3) belong under (d) or (e)?

I agree with Chris that the language structure should stay the way it is. And I think subsections (d)(1), (d)(2), and (d)(3) should be moved to (e). Example: A victim communicates to a victim advocate that they are going to commit or have committed a crime. The advocate now has to disclose that under (d)(2) or (d)(3). If the disclosure does not result in a waiver or revocation of the privilege, it loses some of its effect. A law enforcement officer might act on it and go talk to the victim, but the disclosure still can't be used in any evidentiary proceeding in court. Part of the reason we would want to call that a waiver and stick it down under (e) is so that if the prosecutor charges the victim with a crime or a civil action is filed related to what the victim was intending to do, the statement to the victim advocate can be used as evidence. The way the rule is structured right now, the statement couldn't be used as evidence because the disclosure didn't waive the privilege.

John Lund: There may be a fundamental problem with that construct. Doctors are required to disclose a certain amount of information, evidence of sexual abuse for example, but those scenarios aren't included in the privilege rule itself. None of the other rules include specific disclosures that waive the privilege and specific disclosures that don't.

Judge Bates: Isn't subsection (d)(2) in the physician/patient rule (communications relevant to proceedings to hospitalize patients for mental illness), similar to 512? Those communications are exceptions to the privilege and no privilege exists.

Tenielle Brown: The child abuse mandatory reporter statutes specify the minimum amount of disclosure so as not to waive the privilege. Sometimes if it's not in the statute itself it will be in common law interpreting the statute. In certain circumstances, there's no waiver even if some amount was disclosed pursuant to the child abuse mandatory reporting requirements.

Deborah Bulkeley: I tend to agree with Judges Bates, but didn't the Supreme Court reject a previous draft of 512 that made some of those disclosures waivers?

Judge Bates: Rep. Snow was more worried about the stuff in (e) and (d)(4) and (5). URE 507 is similar to URE 512 in that we drafted it out of whole cloth at the request of the legislature. In 507, the exceptions under subsection (d) waive the privilege. Those exceptions are very similar to (d)(1)-(3) in 512, but the way we have 512 structured the privilege still exists under those same circumstances.

Chris Hogle: Should there be a distinction about where the privilege applies? When a victim tells an advocate they are going to commit crime, maybe that disclosure ought to be admissible in a case against the victim, but not admissible in a case against the perpetrator.

Judge Jones: From a rule construction standpoint my concern is articulating one privilege differently than the other privileges (exception vs. waiver). If we do, the question becomes whether the catchall waiver in URE 510 applies to 512? If 510 is intended to apply to all privileges across the board, then we need to use "exception" in 512 so that we aren't sending a message that waivers apply differently in that context.

John Lund: I agree. (d) = exceptions. (e) = things that waive the privilege. We could include an intro to subsection (e) that says, "in addition to a waiver that occurs under the auspices of URE 510, the following are things that waive the privilege." That would provide some coordination between the rules.

Judge Bates: Suggest getting Rep. Snow's input about (d)(1), (d)(2), and (d)(3) before the subcommittee redrafts Rule 512 to find out how strongly he feels about protecting them. In addition, I agree that we should include John's suggested intro to (e).

Chris Hogle: I think the exception language in URE 507 is a good model. When we go back to Rep. Snow we should also address whether he thought about the application of the privilege in a case against the victim rather than the perpetrator.

Mike Drechsel: Rep. Snow's version of 512 in the joint resolution structured (d)(1), (d)(2), and (d)(3) as exceptions so I think we know where he stands on that. But I do think the question of whether it applies in a case involving a different perpetrator or criminal action is interesting.

<u>Motion:</u> John Neilsen made a motion to table redrafting the rule for 30 days to get Rep. Snow's feedback. Judge Jones seconded the motion. The motion passed unanimously.

4. URE 106. Remainder of or Related Writings or Recorded Statements:

Judge Welch reviewed the handout summarizing the history of the rule draft and the subcommittee's work. The subcommittee was charged with addressing the Supreme Court's concerns in the 2018 *Sanchez* case. The Court had the following concerns:

- How does Rule 106 operate? Does it have a trumping function or is it only a timing function?
- What are the necessary and sufficient conditions for triggering Rule106? Is it a requirement that a recorded statement be admitted into evidence as a trial exhibit or is it sufficient that the pertinent statement be referred to extensively at trial?

Judge Welch: Both issues are split jurisdiction issues. In 2019, the Committee decided URE 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 that is already introduced. In reaching that decision the Committee deferred to the Court of Appeals'

interpretation on Rule 106 in the 2016 *Sanchez* case.

The Committee also decided that to trigger Rule 106 it is not a requirement that the pertinent statement be admitted as evidence at trial. It is sufficient for the parties to refer to the statement at trial to trigger the Rule 106 issue. The Committee presented the proposed rule change to the Justices. The Justices made some edits and asked for additional information from the Committee. A subcommittee was created to respond to the following questions and issues from the Court:

- A discussion of the interplay between Rule 106 and Rule 403
- Is there a need to create a new Advisory Committee note for Rule 106?
- Information on what other scholars and states are saying about these issues

Judge Welch: The subcommittee conducted a fifty-state survey. With slight deviations, all states essentially have the same rule as Utah. URE 106 is the same as FRE 106. The Federal Advisory Committee has been meeting to discuss the same issues as this Committee. The next Federal Advisory Rules Committee meeting is on May 8th. Because URE 106 mimics the federal rule, I propose tabling work on URE 106 until after May 8th.

John Lund: Are we sure the May 8th meeting will occur considering COVID-19? Will Rule 106 be on the agenda? The Federal Rules Committee generally doesn't act in a timely manner. I'm concerned that waiting for the federal committee will significantly delay completion of the Committee's assignment from the Supreme Court.

***Motion:** Judge Welch made a motion to table the Committee's work on Rule 106 until after May 8th and then if the federal committee doesn't address it, the Committee should send a draft of URE 106 to the Supreme Court, along with answers to their questions. After discussion, but without a vote, work on URE 106 was tabled.*

5. Update: URE 404(b) Doctrine of Chances

Judge Welch provided an overview of the status of URE 404(b).

Dallas Young: I have concerns about the policy behind adoption of the rule. I don't see any relevance for propensity evidence other than to muddy up the defendant and let the jury know the defendant is an unsavory person. It's not relevant to what the defendant is on trial for right now. Doctrine of Chances (DoC) is more interesting. In a rape case, if the defendant claims consent there is some relevance to showing a history of claiming consent, although you still have the issues raised by Judge Harris. There is a very powerful prejudicial value to this evidence. If the trial is about whether the defendant committed a specific act, why do we care what he/she did 10 years ago?

Judge Welch: In the *Lane* case, Judge Harris questioned whether there should be a clear jury instruction about how to use DoC evidence. What Judge Harris brings up is what Imwinkelried says in his latest law review article. If a trial court judge is going to admit DoC evidence, then the jury should be instructed on the permitted and prohibited uses. That's what is included in the subcommittee's rule draft at 404(b)(3)(d).

John Nielsen: I read Imwinkelried's book. It's noteworthy that he traces the roots of the doctrine as far back as it goes and says DoC does have its uses and he outlines them in great detail. I can see why the Court wanted to say it's a valid theory and if we're going to have it, then we should clarify its use in the rule.

Tenielle Brown: Thinking more in terms of logic and consistency – or lack of consistency – in the use of the DoC, if we're going to have the DoC it's better to put it in the rule rather than leave it to caselaw. My concern is putting it under 404(b) because those are uses that do not require propensity reasoning. It eviscerates 404(a) to allow evidence of past acts to show that the victim wasn't lying. If the victim wasn't lying that means the victim did not consent and that goes right to actus reus and the evidence is used explicitly for propensity purposes. It's hard to use DoC evidence for any purpose other than to show propensity, so it's really an exception to 404(a). Putting it in 404(b) seems misplaced because using it to prove bias, motive, etc. are truly non-propensity uses. When you bring in past acts to show that the victim wasn't lying, the very close indirect inference is that therefore she is telling the truth, which means the defendant did it, which is propensity. If we are continuing with 404(a), we want to be careful about introducing something into 404(b) that is really an exception to 404(a).

Judge Welch: It's in 404(b) because in the *Lowther* case the Court said the fundamental, foundational requirements of the DoC – materiality, similarity, etc. – need to be shown under 404(b). Before, trial judges were doing that under 403. The Court said it should be a step-by-step process. First determine whether the requirements are met under 404(b), and then determine whether the evidence is admissible under 403. The dispute now is whether the jury should be instructed, even if it's admitted after the 403 inquiry. The best argument for keeping it under 404(b) is that it aligns with what the Court directed in *Lowther*.

Judge Jones: The *Lane* case wasn't a sexual assault case and the Court of Appeals ruled that certain evidence shouldn't have been admitted and that the judge applied an improper test. The *Murphy* case was a sexual assault case. My recollection is that if we adopt 404(d), that will take care of almost every instance in which a trial judge would otherwise be tempted to admit 404(b) evidence under the DoC. I agree with John Nielsen that there are still circumstances where DoC evidence will be admissible. One that comes to mind is the officer in Chicago accused of killing his wife and, after looking into it, he may have killed two prior wives as well. That wasn't a sexual assault case but if the DoC was available, it would have been a tool to get the evidence before a jury.

Judge Welch: My understanding from the Court is that there may be a debate about what is and isn't propensity evidence. In the *Lane* case, Harris was saying let's just call this what it is, propensity evidence, and create a rule like 413 that allows propensity evidence of prior sexual assault cases. To him, the problem was putting that evidence through a DoC lens.

As to the underlying policy question, on one hand maybe the Justices want to exercise their rule-making authority to promulgate 404(d) for the same reasons 404(c) was promulgated. On the other hand, they may decide the issue is best left to the legislature like other states did.

John Lund: I would be surprised if the Court feels the legislature should make the call about the admissibility of evidence in court. My view over last few years is that the Court has gone in the other direction.

Judge Welch: In the similarity prong of the DoC in the rule draft I included more words than what ought to be there, but I did that to show what the controversies are. There is a debate about whether the prior acts are "roughly similar" or "significantly similar." The reason for the debate is that our caselaw uses both words.

John Lund: I wouldn't use the term DoC at all. I would change the first sentence to, "The court may admit prior act evidence for a proper, non-character statistical inference if each of the following requirements is met," and delete everything else including (b)(3)(A). The hardest thing to articulate is what makes the evidence a sufficiently strong statistical inference? I understand that the language under (b)(3)(A)(1) through (4) are direct quotes from caselaw, but how something's articulated in a case doesn't necessarily cover the waterfront in a rule.

John Neilsen: The subcommittee discussed how detailed to get in the rule. Imwinkelried said some of those will differ depending on the purpose for which they are offered. Sometimes the cases will say it only needs to be roughly similar if admitted for a mens rea purpose. If it's a modus operandi purpose, it needs to be a lot more similar. That's why we were trying to make it as vanilla as possible so the details could be worked out depending upon the purpose for which the evidence was going to be admitted. I like using the term DoC in the rule because it's helpful for practitioners. Those are key search terms used in other cases nationwide.

Deborah Bulkeley: Should we carve out the notice requirement in 404(b)(3)(E) and make it a standalone section, maybe 404(b)(4), so that it's clear the notice requirement applies to all DoC evidence?

Tenielle Brown: My concern is how the 403 analysis might work. Caselaw suggests the four factors used as threshold requirements under DoC are the very things that might make it prejudicial and therefore excluded under 403. There could be some question about how the 403 analysis works if the same factors are used for both.

Judge Welch: My understanding of how it works is that 404(b) is a binary test. Is similarity there or not? Yes or no. When you get to 403 it becomes a balancing test and other factors in addition to the four in 404(b) are considered.

Tenielle Brown: I worry about the limiting principle here. We are talking about specific case types like sexual assault and sexual abuse. Why not include drug addiction? That's the reason for the character evidence ban. People who commit the crime they are currently charged with (drug possession) are more likely to commit that same crime. It's quite probative, but it's also quite prejudicial.

The Committee engaged in a lengthy discussion about the language in the rule and whether it should mirror the language in caselaw, or whether the rule should be more concise and clear. For

example, what does "bona fide dispute" mean?

John Lund: I recommend providing the Court with a report on the subcommittee's work and the 50-state survey, but not the rule itself. Let the Court know that the Committee has significant questions about the policy underlying this concept and the extent to which it should be broadly worded vs focused on sexual assault cases where it comes up most often. Judge Harris and Judge Pullan made some good points and the rule is something we need to think through carefully.

Judge Welch: I think we should include the rule draft with the report. Not for approval, but they many not want 413 provisions or the DoC in the rule at all. It would be great to get that feedback before the subcommittee wordsmiths another draft.

John Lund: Having been in conferences with the Court, if we put a rule draft in front of them they will use their brainpower to go to work on it. I don't think what we have is ready for that level of scrutiny and I don't think we should take things up and say, "How do you think we're doing so far?" We need to come up with something that we as a group have parsed through and are comfortable with. Using the eyewitness identification rule process as an example, the Court wanted us to think about how phrases from caselaw should be articulated in a rule. That's what they expect of us.

John invited Judge Welch to attend the Supreme Court conference with him to present on 404(b) and asked the Committee members to send any feedback on the rule draft to the subcommittee. The subcommittee will start working on an amended rule draft based on the Committee's discussion today.

Keisa Williams: The next Supreme Court conference is May 13th. I'm not sure if they're still having it, but I'll find out and let everyone know.

The meeting was adjourned.

Next Meeting: June 9, 2020
5:15 p.m.
Via WEBEX