AGENDA

Utah Supreme Court Advisory Committee / Rules of Evidence

April 14, 2020 / 5:15 p.m. – 7:15 p.m.

WEBEX: Meeting number (access code): 962 502 065

Meeting password: d6pQeq9MA?2 (36773796 from phones and video systems)

Call: 1-408-418-9388 or click on link below (also in calendar invite)

https://utcourts.webex.com/utcourts/j.php?MTID=m6386e0a288f29289a9b572070d796ca8

Welcome and Approval of Minutes • *February 11, 2020*	Action	Tab 1	John Lund
URE 512. Victim Communications • *Supreme Court discussion* • *Public Comment*	Action	Tab 2	John Lund
URE 106. Remainder of or related writings or recorded statements	Discussion	Tab 3	Judge Welch
URE 404(b). Character Evidence; Crimes or Other Acts.	Discussion	Tab 4	Judge Welch

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:
June 9, 2020
October 13, 2020
November 10, 2020

Rule Status:
URE 512 – Back from Public Comment
URE 106 – Subcommittee
URE 404(b) – Subcommittee
URE 1101 – Approved. Subcommittee drafting memo for SC

Tab 1

UTAH SUPREME COURT ADVISORY COMMITTEE
ON THE RULES OF EVIDENCE

MEETING MINUTES
DRAFT
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 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

Tab 2

URE 512. Victim Communications
Supreme Court Feedback
February 19, 2020

The Committee's second draft of Rule 512 was presented to the Supreme Court on February 19th, along with the Committee's three caveats. The Court made one minor grammatical change in (d)(4), but otherwise left the rule as is and approved it for public comment. The Court discussed the Committee's concern in caveat #2 regarding the breadth of the disclosure and had some thoughts on (e).

Summary of the Court's discussion:

- The victim advocate needs to protect the confidential communication even when disclosed to others on the team. The advocate should take adequate measures to protect disclosures.
- The privilege belongs to the victim, but it can be claimed by others. How does that work?
- Is there a parallel to the attorney/client privilege? The A/C privilege says "claimed."
- Can a victim advocate override the wishes of a victim?
- A victim is often not in the courtroom, but the advocate is. Advocates may assert the privilege on behalf of the victim, but the victim controls.
- Is Rep. Snow okay with telling advocates and the list of people in (d)(4) that they are prohibited from further disclosures?
- The (d)(4) people have a professional responsibility to prevent further disclosures, like attorneys in a law firm.
- There was some reluctance to impose prohibitions on disclosures in the Rules of Evidence
- In regard to (e):
    - What does the motion look like?
    - This seems to pre-suppose an existing case. What happens if no case has been filed yet?
    - Does it make sense to discuss the waiver of issues outside a case?
    - Maybe add "in the event an action is pending"?
    - Does this create an issue with the rules of civil procedure?
    - Should there be a reference to the civil rules?
    - Is this creating a procedure without explaining civil issues? Is there a cross-pollination of procedural rules?

The Evidence Committee's charge is to:

- Consider the Court's thoughts on the breadth of the disclosure and the issues in (e)
- Review public comments
- Make any necessary amendments
- Seek feedback from Rep. Snow (keep Mike Drechsel informed)
- Present the rule unchanged with an explanation as to why, or present another proposed draft

Rules of Evidence – Comment Period Closes April 10, 2020

URE0512. Victim Communications (AMEND). Clarifies which disclosures do and do not waive the privilege.

AL - February 25, 2020 at 10:31 am

On brief review, this only addresses intentional waiver? What about unintential disclosure resulting in waiver? They should not have more protection that attorneys or doctors. If the VA or Victim is negligent and discloses information, then they have wavied priv.

Mike Drechsel – February 25, 2020 at 8:19 am

The second line of paragraph (d)(4) makes it sound like the victim advocacy services are being provided to a law enforcement officer, et al. Perhaps that paragraph should read:

> "(d)(4) the confidential communication is disclosed by a criminal justice system victim advocate for the purpose of providing advocacy services, and the disclosure is to a law enforcement officer . . . "

It think it is a strange disconnect that (d)(1) (abuse), (d)(2) (danger), and (d)(3) (crime) do not waive the privilege in 512, but are exceptions to the privilege in Rule 502 (crime), 504 (crime), and 507 (abuse, danger, and crime).

Rule 512. Victim communications.

(a) Definitions.

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

(a)(2) "Confidential communication" means a communication that is intended to be confidential between a victim and a victim advocate for the purpose of obtaining advocacy services as defined in UCA § 77-38-403.

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

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

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

(a)(6) "Victim" means an individual defined as a victim in UCA § 77-38-403.

(a)(7) "Victim advocate" means the same as that term is defined in UCA § 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) ~~engaged in a confidential communication, or~~ the guardian or conservator of the victim ~~engaged in a confidential communication~~ if the guardian or conservator is not the accused; and~~.~~

(c)(3) ~~An individual who is a~~the victim advocate ~~at the time of a confidential communication is presumed to have authority~~ during the life of the victim ~~to claim the privilege on behalf 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 UCA § 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) the confidential communication is disclosed by a criminal justice system victim advocate for the purpose of providing advocacy services 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, 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 UCA § 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)(1)(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)(1)(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)(1)(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.

~~**(d) Exceptions.** An exception to the privilege exists in the following circumstances:~~

~~**(d)(1)** when 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:~~

~~**(d)(1)(A)** the specific confidential communication subject to disclosure;~~

~~**(d)(1)(B)** the limited purpose of the disclosure; and~~

~~**(d)(1)(C)** the name of the individual or party to which the specific confidential communication may be disclosed;~~

~~**(d)(2)** when the confidential communication is required to be disclosed under Title 62A, Chapter 4a, Child and Family Services, or UCA § 62A-3-305;~~

~~**(d)(3)** when the confidential communication is evidence of a victim being in clear and immediate danger to the victim's self or others;~~

~~**(d)(4)** when the confidential communication is evidence that the victim has committed a crime, plans to commit a crime, or intends to conceal a crime;~~

~~**(d)(5)** 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 parent or guardian if the victim is a minor and the parent or guardian is not the accused, or a law enforcement officer, health care provider, mental health therapist, domestic violence shelter employee, an employee of the Utah Office for Victims of Crime, or member of a multidisciplinary team assembled by a Children's Justice Center or law enforcement agency for the purpose of providing advocacy services;~~

~~**(d)(6)** if the confidential communication is with a criminal justice system victim advocate, the criminal justice system victim advocate must disclose the confidential communication to a prosecutor under UCA § 77-38-405;~~

~~**(d)(7)** if 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:~~

~~**(d)(7)(A)** 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~~

~~**(d)(7)(B)** the confidential communication is exculpatory evidence, including impeachment evidence.~~

~~Effective July 31, 2019, pursuant to 2019 UT H.J.R. 3 "Joint Resolution Adopting Privilege Under Rules of Evidence."~~

Tab 3

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.

4/6/2020 Update: The next meeting for the Advisory Committee on (Federal) Evidence Rules will take place on May 8, 2020. See https://www.federalregister.gov/documents/2020/03/10/2020-04893/advisory-committee-on-evidence-rules-meeting-of-the-judicial-conference

Tab 4

Draft of URE 404 with two additions: (1) a Doctrine of Chances provision, and (2) A FRE 413 type provision.

Rule 404. Character Evidence; Crimes or Other Acts.

(a) Character Evidence.

(a)(1) Prohibited Uses. Evidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in conformity with the character or trait.

(a)(2) Exceptions for a Defendant or Victim in a Criminal Case. The following exceptions apply in a criminal case:

(a)(2)(A) a defendant may offer evidence of the defendant's pertinent trait, and if the evidence is admitted, the prosecutor may offer evidence to rebut it;

(a)(2)(B) subject to the limitations in Rule 412, a defendant may offer evidence of an alleged victim's pertinent trait, and if the evidence is admitted, the prosecutor may:

(a)(2)(B)(i) offer evidence to rebut it; and

(a)(2)(B)(ii) offer evidence of the defendant's same trait; and

(a)(2)(C) in a homicide case, the prosecutor may offer evidence of the alleged victim's trait of peacefulness to rebut evidence that the victim was the first aggressor.

(a)(3) Exceptions for a Witness. Evidence of a witness's character may be admitted under Rules 607, 608, and 609.

(b) Crimes, Wrongs, or Other Acts.

(b)(1) Prohibited Uses. Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in conformity with the character.

(b)(2) Permitted Uses; Notice in a Criminal Case. This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. On request by a defendant in a criminal case, the prosecutor must:

(b)(2)(A) provide reasonable notice of the general nature of any such evidence that the prosecutor intends to offer at trial; and

(b)(2)(B) do so before trial, or during trial if the court excuses lack of pretrial notice on good cause shown.

(b)(3) Permitted Uses; Doctrine of Chances. The court may admit prior act evidence for a proper, non-character statistical inference under the Doctrine of Chances. This Doctrine is a theory of logical relevance that rests on the objective improbability of the same rare misfortune befalling one individual over and over. Doctrine of Chances evidence involves rare events happening with unusual frequency.

(b)(3)(A) Evidence admitted under the Doctrine of Chances must meet the following four foundational requirements, and the trial court shall make specific findings with respect to each of these.

(b)(3)(A)(1) Materiality. The issue for which the uncharged misconduct evidence is offered must be in bona fide dispute.

(b)(3)(A)(2) Similarity. Each uncharged 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.

(b)(3)(A)(3) Independence. Each accusation must be independent of the others. The existence of collusion among various accusers would render ineffective the comparison with chance repetition.

(b)(3)(A)(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.

(b)(3)(B) The trial court shall determine by a preponderance of the evidence whether the prior acts occurred.

(b)(3)(C) Evidence admitted under the Doctrine of Chances is subject to admission under Rule 403.

(b)(3)(D) In all cases in which Doctrine of Chances evidence is admitted, the trial court shall instruct the jury as to the proper use of such evidence. The jury shall be instructed on both the permitted and prohibited uses of the Doctrine of Chances evidence.

(b)(3)(E) The notice requirements in 404(b)(2) apply to Doctrine of Chances evidence.

(c) Evidence of Similar Crimes in Child-Molestation Cases.

(c)(1) Permitted Uses. In 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.

(c)(2) Disclosure. If the prosecution intends to offer this evidence it shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown.

(c)(3) For purposes of this rule "child molestation" means an act committed in relation to a child under the age of 14 which would, if committed in this state, be a sexual offense or an attempt to commit a sexual offense.

(c)(4) Rule 404(c) does not limit the admissibility of evidence otherwise admissible under Rule 404(a), 404(b), or any other rule of evidence.

(d) Evidence of Similar Crimes in Sexual Assault Cases.

(d)(1) Permitted Uses. In a criminal case in which a defendant is accused of sexual assault, the court may admit evidence that the defendant committed any other acts of sexual assault to prove a propensity to commit the crime charged.

(d)(2) Disclosure. If the prosecution intends to offer this evidence it shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown.

(d)(3) For purposes of this rule "sexual assault" means an act committed under state law as defined in [Utah Code Section 76-5-405; insert other pertinent code sections].

(d)(4) Rule 404(d) does not limit the admissibility of evidence otherwise admissible under Rule 404(a), 404(b), or any other rule of evidence.

Effective April 1, 2008

2011 Advisory Committee Note. 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.

Original Advisory Committee Note. Rule 404(a)-(b) is now Federal Rule of Evidence 404 verbatim. The 2001 amendments add the notice provisions already in the federal rule, add the amendments made to the federal rule effective December 1, 2000, and delete language added to the Utah Rule 404(b) in 1998. However, the deletion of that language is not intended to reinstate the holding of State v. Doporto, 935 P.2d 484 (Utah 1997). Evidence sought to be admitted under Rule 404(b) must also conform with Rules 402 and 403 to be admissible.

The 2008 amendment adds Rule 404(c). It applies in criminal cases where the accused is charged with a sexual offense against a child under the age of 14. Before evidence may be admitted under Rule 404(c), the trial court should conduct a hearing out of the presence of the jury to determine: (1) whether the accused committed other acts, which if committed in this State would constitute a sexual offense or an attempt to commit a sexual offense; (2) whether the evidence of other acts tends to prove the accused's propensity to commit the crime charged; and (3) whether under Rule 403 the danger of unfair prejudice substantially outweighs the probative value of the evidence, or whether for other reasons listed in Rule 403 the evidence should not be admitted. The court should consider the factors applicable as set forth in State v. Shickles, 760 P.2d 291, 295-96 (Utah 1988), which also may be applicable in determinations under Rule 404(b).

Upon the request of a party, the court may be required to provide a limiting instruction for evidence admitted under Rule 404(b) or (c).

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?

Fifty (50) State Survey: This survey identifies any states that have incorporated the Doctrine of Chances or the substance of FRE 413 in their state's rules of evidence or statutes.

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

1) **Alabama:** No pertinent DOC or 413 provisions.

2) **Alaska:**

AK Rule 404(b). Other Crimes, Wrongs, or Acts.
(1) Evidence of other crimes, wrongs, or acts is not admissible if the sole purpose for offering the evidence is to prove the character of a person in order to show that the person acted in conformity therewith. It is, however, admissible for other purposes, including, but not limited to, proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

(2) In a prosecution for a crime involving a physical or sexual assault or abuse of a minor, evidence of other acts by the defendant toward the same or another child is admissible if admission of the evidence is not precluded by another rule of evidence and if the prior offenses
(i) are similar to the offense charged; and
(ii) were committed upon persons similar to the prosecuting witness.

(3) In a prosecution for a crime of sexual assault in any degree, evidence of other sexual assaults or attempted sexual assaults by the defendant against the same or another person is admissible if the defendant relies on a defense of consent. In a prosecution for a crime of attempt to commit sexual assault in any degree, evidence of other sexual assaults or attempted sexual assaults by the defendant against the same or another person is admissible.

(4) In a prosecution for a crime involving domestic violence or of interfering with a report of a crime involving domestic violence, evidence of other crimes involving domestic violence by the defendant against the same or another person or of interfering with a report of a crime involving domestic violence is admissible. In this paragraph, "domestic violence" and "crime involving domestic violence" have the meanings given in AS 18.66.990.

3) **Arizona:**

AZ Rule 404(c) Character evidence in sexual misconduct cases.
In a criminal case in which a defendant is charged with having committed a sexual offense, or a civil case in which a claim is predicated on a party's alleged commission of a sexual offense, evidence of other crimes, wrongs, or acts may be admitted by the court if relevant to show that the defendant had a character trait giving rise to an aberrant sexual propensity to commit the offense charged. In such a case, evidence to rebut the proof of other crimes, wrongs, or acts, or an inference therefrom, may also be admitted.
(1) In all such cases, the court shall admit evidence of the other act only if it first finds each of the following:

(A) The evidence is sufficient to permit the trier of fact to find that the defendant committed the other act.
(B) The commission of the other act provides a reasonable basis to infer that the defendant had a character trait giving rise to an aberrant sexual propensity to commit the crime charged.
(C) The evidentiary value of proof of the other act is not substantially outweighed by danger of unfair prejudice, confusion of issues, or other factors mentioned in Rule 403. In making that determination under Rule 403 the court shall also take into consideration the following factors, among others:
(i) remoteness of the other act;
(ii) similarity or dissimilarity of the other act;
(iii) the strength of the evidence that defendant committed the other act;
(iv) frequency of the other acts;
(v) surrounding circumstances;
(vi) relevant intervening events;
(vii) other similarities or differences;
(viii) other relevant factors.
(D) The court shall make specific findings with respect to each of (A), (B), and (C) of **Rule 404**(c)(1).

(2) In all cases in which evidence of another act is admitted pursuant to this subsection, the court shall instruct the jury as to the proper use of such evidence.
(3) In all criminal cases in which the state intends to offer evidence of other acts pursuant to this subdivision of **Rule 404**, the state shall make disclosure to the defendant as to such acts as required by Rule 15.1, Rules of Criminal Procedure, no later than 45 days prior to the final trial setting or at such later time as the court may allow for good cause. The defendant shall make disclosure as to rebuttal evidence pertaining to such acts as required by Rule 15.2, no later than 20 days after receipt of the state's disclosure or at such other time as the court may allow for good cause. In all civil cases in which a party intends to offer evidence of other acts pursuant to this subdivision of **Rule404**, the parties shall make disclosure as required by Rule 26.1, Rules of Civil Procedure, no later than 60 days prior to trial, or at such later time as the court may allow for good cause shown.
(4) As used in this subsection of **Rule 404**, the term "sexual offense" is as defined in A.R.S. Sec. 13-1420(C) and, in addition, includes any offense of first-degree murder pursuant to A.R.S. Sec. 13-1105(A)(2) of which the predicate felony is sexual conduct with a minor under Sec. 13-1405, sexual assault under Sec. 13-1406, or molestation of a child under Sec. 13-1410.

4) **Arkansas:** No pertinent DOC or 413 provisions.

5) **California:** A pertinent statute applies (see below):

§ 1101. Evidence of character to prove conduct

(a) Except as provided in this section and in Sections 1102, 1103, 1108, and 1109, evidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion.
(b) Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent,

preparation, plan, knowledge, identity, absence of mistake or accident, or whether a defendant in a prosecution for an unlawful sexual act or attempted unlawful sexual act did not reasonably and in good faith believe that the victim consented) other than his or her disposition to commit such an act.
(c) Nothing in this section affects the admissibility of evidence offered to support or attack the credibility of a witness.

6) **Colorado:** A pertinent statute applies (see below):

C.R.S.A. § 16-10-301

§ 16-10-301. Evidence of similar transactions--legislative declaration

(1) The general assembly hereby finds and declares that sexual offenses are a matter of grave statewide concern. These frequently occurring offenses are aggressive and assaultive violations of the well-being, privacy, and security of the victims, are severely contrary to common notions of proper behavior between people, and result in serious and long-lasting harm to individuals and society. These offenses often are not reported or are reported long after the offense for many reasons, including: The frequency with which the victims are vulnerable, such as young children who may be related to the perpetrator; the personal indignity, humiliation, and embarrassment involved in the offenses themselves; and the fear of further personal indignity, humiliation, and embarrassment in connection with investigation and prosecution. These offenses usually occur under circumstances in which there are no witnesses except for the accused and the victim, and, because of this and the frequent delays in reporting, there is often no evidence except for the conflicting testimony. Moreover, there is frequently a reluctance on the part of others to believe that the offenses occurred because of the inequality between the victim and the perpetrator, such as between the child victim and the adult accused, or because of the deviant and distasteful nature of the charges. In addition, it is recognized that some sex offenders cannot or will not respond to treatment or otherwise resist the impulses which motivate such conduct and that sex offenders are extremely habituated. As a result, such offenders often commit numerous offenses involving sexual deviance over many years, with the same or different victims, and often, but not necessarily, through similar methods or by common design. The general assembly reaffirms and reemphasizes that, in the prosecution of sexual offenses, including in proving the corpus delicti of such offenses, there is a greater need and propriety for consideration by the fact finder of evidence of other relevant acts of the accused, including any actions, crimes, wrongs, or transactions, whether isolated acts or ongoing actions and whether occurring prior to or after the charged offense. The general assembly finds that such evidence of other sexual acts is typically relevant and highly probative, and it is expected that normally the probative value of such evidence will outweigh any danger of unfair prejudice, even when incidents are remote from one another in time.
(2) This section applies to prosecution for any offense involving unlawful sexual behavior as defined in section 16-22-102(9), or first degree murder, as defined in section 18-3-102(1)(d), C.R.S., in which the underlying felony on which the first degree murder charge is based is the commission or attempted commission of sexual assault, as described in section 18-3-402, C.R.S., sexual assault in the first or second degree as those offenses were described in sections 18-3-402 and 18-3-403, C.R.S., as they existed prior to July 1, 2000, or the commission of a class 3 felony for sexual assault on a child as defined in section 18-3-405(2), C.R.S.

(3) The prosecution may introduce evidence of other acts of the defendant to prove the commission of the offense as charged for any purpose other than propensity, including: Refuting defenses, such as consent or recent fabrication; showing a common plan, scheme, design, or modus operandi, regardless of whether identity is at issue and regardless of whether the charged offense has a close nexus as part of a unified transaction to the other act; showing motive, opportunity, intent, preparation, including grooming of a victim, knowledge, identity, or absence of mistake or accident; or for any other matter for which it is relevant. The prosecution may use such evidence either as proof in its case in chief or in rebuttal, including in response to evidence of the defendant's good character.
(4) If the prosecution intends to introduce evidence of other acts of the defendant pursuant to this section, the following procedures shall apply:
(a) The prosecution shall advise the trial court and the defendant in advance of trial of the other act or acts and the purpose or purposes for which the evidence is offered.
(b) The trial court shall determine by a preponderance of the evidence whether the other act occurred and whether the purpose is proper under the broad inclusionary expectations of this section.
(c) The trial court may determine the admissibility of other acts by an offer of proof.
(d) The trial court shall, at the time of the reception into evidence of other acts and again in the general charge to the jury, direct the jury as to the limited purpose or purposes for which the evidence is admitted and for which the jury may consider it.
(e) The court in instructing the jury, and the parties when making statements in the presence of the jury, shall use the words “other act or transaction” and at no time shall refer to “other offense”, “other crime”, or other terms with a similar connotation.
(5) The procedural requirements of this section shall not apply when the other acts are presented to prove that the offense was committed as part of a pattern of sexual abuse under section 18-3-405(2)(d), C.R.S.

7) **Connecticut:** No pertinent DOC or 413 provisions.

8) **Delaware:** Pursuant to case law, if DOC evidence is admitted, the trial court is required to instruct the jury of its purpose under DRE 105. *See State v. Ashley*, No. 9605003410, 1998 WL 731568, at *2 (Del. Super. Ct. Aug. 24, 1998).

D.R.E., Rule 105
RULE 105. LIMITING EVIDENCE THAT IS NOT ADMISSIBLE AGAINST OTHER PARTIES OR FOR OTHER PURPOSES

If the court admits evidence that is admissible against a party or for a purpose-- but not against another party or for another purpose -- the court, on timely request, must restrict the evidence to its proper scope and instruct the jury accordingly.

9) Florida:

90.404. Character evidence; when admissible

(2) Other crimes, wrongs, or acts.--
(a) Similar fact evidence of other crimes, wrongs, or acts is admissible when relevant to prove a material fact in issue, including, but not limited to, proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, but it is inadmissible when the evidence is relevant solely to prove bad character or propensity.
(b) 1. In a criminal case in which the defendant is charged with a crime involving child molestation, evidence of the defendant's commission of other crimes, wrongs, or acts of child molestation is admissible and may be considered for its bearing on any matter to which it is relevant.
2. For the purposes of this paragraph, the term "child molestation" means conduct proscribed by s. 787.025(2)(c), s. 787.06(3)(g), former s. 787.06(3)(h), s. 794.011, excluding s. 794.011(10), s. 794.05, former s. 796.03, former s. 796.035, s. 800.04, s. 827.071, s. 847.0135(5), s. 847.0145, or s. 985.701(1) when committed against a person 16 years of age or younger.
(c) 1. In a criminal case in which the defendant is charged with a sexual offense, evidence of the defendant's commission of other crimes, wrongs, or acts involving a sexual offense is admissible and may be considered for its bearing on any matter to which it is relevant.
2. For the purposes of this paragraph, the term "sexual offense" means conduct proscribed by s. 787.025(2)(c), s. 787.06(3)(b), (d), (f), or (g), former s. 787.06(3)(h), s. 794.011, excluding s. 794.011(10), s. 794.05, former s. 796.03, former s. 796.035, s. 825.1025(2)(b), s. 827.071, s. 847.0135(5), s. 847.0145, or s. 985.701(1).
(d) 1. When the state in a criminal action intends to offer evidence of other criminal offenses under paragraph (a), paragraph (b), or paragraph (c), no fewer than 10 days before trial, the state shall furnish to the defendant or to the defendant's counsel a written statement of the acts or offenses it intends to offer, describing them with the particularity required of an indictment or information. No notice is required for evidence of offenses used for impeachment or on rebuttal.
2. When the evidence is admitted, the court shall, if requested, charge the jury on the limited purpose for which the evidence is received and is to be considered. After the close of the evidence, the jury shall be instructed on the limited purpose for which the evidence was received and that the defendant cannot be convicted for a charge not included in the indictment or information.
(3) Nothing in this section affects the admissibility of evidence under s. 90.610.

10) Georgia: A pertinent statute applies (see below):

§ 24-4-413. Prior offenses in criminal sexual assault proceedings

(a) In a criminal proceeding in which the accused is accused of an offense of sexual assault, evidence of the accused's commission of another offense of sexual assault shall be admissible and may be considered for its bearing on any matter to which it is relevant.
(b) In a proceeding in which the prosecution intends to offer evidence under this Code section, the prosecutor shall disclose such evidence to the accused, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least ten days in

advance of trial, unless the time is shortened or lengthened or pretrial notice is excused by the judge upon good cause shown.
(c) This Code section shall not be the exclusive means to admit or consider evidence described in this Code section.
(d) As used in this Code section, the term "offense of sexual assault" means any conduct or attempt or conspiracy to engage in:
(1) Conduct that would be a violation of Code Section 16-6-1, 16-6-2, 16-6-3, 16-6-5.1, 16-6-22, 16-6-22.1, or 16-6-22.2;
(2) Any crime that involves contact, without consent, between any part of the accused's body or an object and the genitals or anus of another person;
(3) Any crime that involves contact, without consent, between the genitals or anus of the accused and any part of another person's body; or
(4) Any crime that involves deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on another person.

11) Hawaii: No pertinent DOC or 413 provisions.

12) Idaho: No pertinent DOC or 413 provisions.

13) Illinois:

IL Rule 404(b) Other Crimes, Wrongs, or Acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith except as provided by sections 115-7.3, 115-7.4, and 115-20 of the Code of Criminal Procedure (725 ILCS 5/115-7.3, 725 ILCS 5/115-7.4, and 725 ILCS 5/115-20). Such evidence may also be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.
(c) In a criminal case in which the prosecution intends to offer evidence under subdivision (b), it must disclose the evidence, including statements of witnesses or a summary of the substance of any testimony, at a reasonable time in advance of trial, or during trial if the court excuses pretrial notice on good cause shown.

§ 115-7.3. Evidence in certain cases.
(a) This Section applies to criminal cases in which:
(1) the defendant is accused of predatory criminal sexual assault of a child, aggravated criminal sexual assault, criminal sexual assault, aggravated criminal sexual abuse, criminal sexual abuse, child pornography, aggravated child pornography, criminal transmission of HIV, or child abduction as defined in paragraph (10) of subsection (b) of Section 10-5 of the Criminal Code of 1961 or the Criminal Code of 2012;
(2) the defendant is accused of battery, aggravated battery, first degree murder, or second degree murder when the commission of the offense involves sexual penetration or sexual conduct as defined in Section 11-0.1 of the Criminal Code of 2012;[1] or
(3) the defendant is tried or retried for any of the offenses formerly known as rape, deviate sexual assault, indecent liberties with a child, or aggravated indecent liberties with a child.
(b) If the defendant is accused of an offense set forth in paragraph (1) or (2) of subsection (a) or the defendant is tried or retried for any of the offenses set forth in paragraph (3) of subsection (a), evidence of the defendant's commission of another offense or offenses set forth in paragraph (1),

(2), or (3) of subsection (a), or evidence to rebut that proof or an inference from that proof, may be admissible (if that evidence is otherwise admissible under the rules of evidence) and may be considered for its bearing on any matter to which it is relevant.
(c) In weighing the probative value of the evidence against undue prejudice to the defendant, the court may consider:
(1) the proximity in time to the charged or predicate offense;
(2) the degree of factual similarity to the charged or predicate offense; or
(3) other relevant facts and circumstances.
(d) In a criminal case in which the prosecution intends to offer evidence under this Section, it must disclose the evidence, including statements of witnesses or a summary of the substance of any testimony, at a reasonable time in advance of trial, or during trial if the court excuses pretrial notice on good cause shown.
(e) In a criminal case in which evidence is offered under this Section, proof may be made by specific instances of conduct, testimony as to reputation, or testimony in the form of an expert opinion, except that the prosecution may offer reputation testimony only after the opposing party has offered that testimony.
(f) In prosecutions for a violation of Section 10-2, 11-1.20, 11-1.30, 11-1.40, 11-1.50, 11-1.60, 12-3.05, 12-4, 12-13, 12-14, 12-14.1, 12-15, 12-16, or 18-5 of the Criminal Code of 1961 or the Criminal Code of 2012,[2] involving the involuntary delivery of a controlled substance to a victim, no inference may be made about the fact that a victim did not consent to a test for the presence of controlled substances.

14. <u>Indiana</u>:

a. Case law: There doesn't appear to be any significant development of DOC, although one case cites an Imwinkelreid article. *Lannan v. State*, 600 N.E.2d 1334, 1340 (Ind. 1992). There, they abandoned a common law exception to propensity evidence, the "depraved sexual instinct" exception, in favor of the 404(b) scheme.

b. Rules: 404(b) is essentially identical to Utah's. There is no analogue to Fed. R. Ev. 413.

15. <u>Iowa</u>

Case law: Only reference to DOC is in connection with life expectancy tables. *In re Estate of Schnepp*, 138 N.W.2d 886 (Iowa 1965).

Rules: 404(b) is essentially the federal rule. No analogue to Fed. R. Ev. 413.

16. <u>Kansas</u>

Case law: One case mentions DOC in passing, but it doesn't appear to be the DOC as we're discussing it today. *Horne v. State*, 1 Kan. 42 (1862).

Rules: Their rules have a totally different structure to them than the fed rules, although the substance doesn't appear to differ much. Their rule 60-455 is substantially similar to 404(b). They don't appear to have a 413 analogue.

17. Kentucky

Case law: DOC only mentioned once, and not really for the same meaning. Mentioning the probability of a gun powder house exploding, according to DOC, in a suit to abate a nuisance. *Dumesnil v. Dupont*, 57 KY 800 (1857).

Rules: No rule 413. 404(b) is essentially the same as feds.

18. Louisiana

Case law: *State v. Vail,* 150 So.3d 576 (2014). Trial court did not err by admitting evidence of two of D's wives disappearing under suspicious circumstances in his prosecution for murdering his first wife decades earlier. Admitted on the issue of intent.

State v. Galliano, 839 So.2d 932 (2003). Allowed admission of prior instance of a radial fracture to infant's femur in shaken baby syndrome prosecution. Dissenting opinion took exception to the similarity of the two instances, and the lack of showing of particular animas toward children (isn't that propensity evidence?).

Daigle v. Costal Marine, Inc., 482 So.2d 749 (1985). Trial court erred in allowing defense counsel in a personal injury lawsuit to cross examine the plaintiff with evidence of prior injury claims and the amounts recovered because there was no showing of fraud or similarity of the evidence, except that all claims involved injury to the plaintiff's back.

Daigle is cited in a number of other personal injury cases. The issue that comes up tends to be whether prior insurance claims submitted can be admitted in a PI trial, which turns on the similarity of the claimed injuries, as explained in *Daigle*.

State v. Monroe, 364 So.2d 570 (1978). Defendant confessed to two homicides, one on July 31, the other on August 1 of the same year. Defendant claimed he acted in self-defense in both instances. During trial for the July 31 homicide, defendant claimed self-defense and insanity as defenses. Evidence of the subsequent homicide was properly admitted because it spoke to the element of specific intent to kill or cause serious bodily harm, and because it responded to the insanity defense.

Adams v. Canal Indem. Co., 760 So.2d 1197 (2000) This case mentions DOC in a context not unlike *Daigle,* but the evidence that purports to be DOC evidence isn't of a prior or subsequent similar act; it was evidence suggesting they were fudging in this instance to improve their outcome, so the jury found fraud. The decision doesn't have enough facts to analyze this meaningfully.

State v. Stepp, 686 So.2d 76 (1996). The facts of this case are straight out of a movie. Defendant and girlfriend borrow Defendant's mom's car, lying that they're going to visit Defendant's siblings. Girlfriend steals Defendant's mom's .38 snub nose revolver. They go to a gas station. Girlfriend takes a candy bar to the register to buy it. When the gas station attendant turns to Girlfriend to tell her the price, she pulls the gun and demands the money from the register. Attendant gives it to him. Girlfriend runs to the door, but another customer is entering as she tries to exit. While she's trying to navigate around the other customer, Attendant pulls his gun and shoots, hitting Girlfriend in the shoulder. She runs to the car, which Defendant is driving as getaway. Attendant continues to chase her. Defendant realizes she's being chased, so he drives between Attendant and Girlfriend. Before she makes it into the getaway car, Attendant fires again, hitting Girlfriend in the hand. She gets in the car, and they speed away. Attendant keeps firing at the car in an attempt to disable it, hitting the car in the windshield and passenger window. Evidence of another robbery of a gas station admitted in robbery trial because it was relevant to the element of intent. ("The relevancy of other crimes to prove intent stems from the doctrine of chances. The attempt is merely to discover the intent accompanying the act in question; and the prior doing of other similar acts, whether clearly a part of a scheme or not, is useful as reducing the possibility that the act in question was done without innocent intent.").

State v. Blank, 955 So.2d 90 (2007) Appeal from a death penalty sentence. Defendant contended the trial court erred by admitting evidence of a crime spree Defendant confessed to committing, wherein he broke into homes, stole money to fund lavish gambling sprees, and killed an occupant in the home. "The state possesses the burden to prove every element of the crime, including specific intent, beyond a reasonable doubt. That being the case, because defendant maintained that he acted in self-defense in his confession, the state was entitled to present evidence to the contrary in support of its case." The court also relied on defense counsel's *closing argument* that the State failed to prove specific intent to justify admitting prior crimes evidence, since argument showed that that specific intent really was at issue in the case.

State v. Romero, 533 S.2d 1264 (1988) Evidence of prior instances of improper medical billing of non-Medicaid patients was admissible on the question of intent in prosecution for Medicaid fraud because the other bad acts evidence were relevant on the issue of intent to defraud.

State v. Kahey, 436 So.2d 475 (1983) In prosecution of an adult co-habitant of for the homicide of a 12-year-old child, where the defense contended that the acts that lead to the child's death were part of a scheme of discipline and that defendant never intended to harm the child, evidence that the child had suffered severe torture and extreme hunger (scarred body, body weight of 45 pounds, hands and feet had marks indicating he had been bound, severe loss of muscle tone, dehydration, stress ulcers, severe shock, hypotension, faulty clotting

mechanisms in his blood, and damaged capillaries, which conditions lead to his heart failure and death) were admissible to prove specific intent.

State v. Lawrence, 47 So.3d 1003 (2010) Evidence of prior conviction for cruelty to a juvenile, where defendant contested that the injuries were accidental but that he pled to the offense because he felt responsible, the accidental nature of the injury notwithstanding, was admissible in trial for homicide where defendant admitted to "play boxing" with the one-year-old victim on the issue of intent, and where the child's autopsy revealed injuries including extensive bruising to his face, head, chest, abdomen, and thighs, severe lacerations to liver, pancreas, and right adrenal gland, near complete bisection of the liver, severe internal bleeding, severe damage to the spermatic cord, suggesting the victim's scotum had been pulled, drawing the spermatic cord back through the inguinal canal.

There are a few other cases where bad acts evidence was admitted, typically for proof of intent. The passages all read more or less the same and usually cite to McCormick just as the other cases reproduced above.

Rules Their 404(b) is substantially similar to Utah's, although it has more robust disclosure requirements than are on the face of Utah's rule.

19. <u>Maine</u>

Cases: *State v. Silva,* 153 Me. 89 (1957). Evidence of history of several traumatic injuries to child homicide victim properly admitted to prove lack of accident in prosecution for homicide.

Rules: **(a)** Character evidence.

> **(1)** ***Prohibited uses.*** Evidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait.
>
> **(2)** ***Exception for a defendant in a criminal case.*** A defendant may offer evidence of the defendant's pertinent trait, and if the evidence is admitted, the prosecutor may offer evidence to rebut it.
>
> **(3)** ***Exceptions for a witness.*** Evidence of a witness's character may be admitted under Rules 607, 608, and 609.

(b) Crimes, wrongs, or other acts. Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.

20. Maryland

Cases: *Wynn v. State*, 351 Md. 307 (1998). A dissenting opinion expressed the view that evidence of a prior home invasion should have been admitted per DOC, but the majority declined to address the issue because it had not been raised in the trial court or on direct appeal, so they declined to touch it on cert.

Rules: Their rule is substantially similar to our rule 404(b).

Rule 5-413:

In prosecutions for sexually assaultive behavior as defined in Code, Courts Article, §10-923 (a), evidence of other sexually assaultive behavior by the defendant occurring before or after the offense for which the defendant is on trial may be admitted in accordance with §10-923.

§ 10-923(a):

(a) "Sexually assaultive behavior" defined. -- In this section, "sexually assaultive behavior" means an act that would constitute:
(1) A sexual crime under Title 3, Subtitle 3 of the Criminal Law Article;
(2) Sexual abuse of a minor under Section 3-602 of the Criminal Law Article;
(3) Sexual abuse of a vulnerable adult under Section 3-604 of the Criminal Law Article;
(4) A violation of 18 U.S.C. Chapter 109A; or
(5) A violation of a law of another state, the United States, or a foreign country that is equivalent to an offense under item (1), (2), (3), or (4) of this subsection.

21. Massachusetts

Cases: None that involve DOC for our purposes. There are a lot of cases concerning a jury instruction that reads: "[I]t is not sufficient to establish a probability, though a strong one arising from the doctrine of chances. . . ; but the evidence must establish the truth of the fact to a reasonable and moral certainty." *E.g.*, *Commonwealth v. Ferreia*, 77 Mass.App.Ct. 675 (2000). In *Ferreia*, it was given in connection with eyewitness identification, and had to do with the burden of proof in a criminal case.

Rules: Their 404(b) is similar to Utah's, except it provides that evidence is inadmissible if its probative value is outweighed by the risk of unfair prejudice, even if it is not substantially outweighed. It also prohibits other bad acts evidence if the defendant was tried and acquitted on the other bad acts occasion.

22. Michigan

Cases: *People v. Crawford*, 458 Mich. 376 (1998). Evidence of a prior distribution conviction was improperly admitted at trial for another distribution offense. The court determined there was an insufficient factual nexus to the prior. There, he was caught in a sting, selling to an under cover officer. In the current case, a substantial amount of cocaine was found in his car after a pretext traffic stop. The court also noted that 403 analysis would have kept it out even if there was a logical nexus between the two for a non-propensity purpose. A dissenting opinion would have admitted the evidence for proof of intent to distribute.

People v. Mardlin, 487 Mich. 609 (2010). Evidence of prior fires and associated insurance claims were admissible in prosecution for arson and insurance fraud. The majority moved away from the similarity analysis, noting that DOC analysis will vary from one circumstance to another. Noted that the similarity required when used to disprove innocent intent or absence of mistake or accident is lower than is required when using the evidence for proof of modus operundi for identification purposes. The dissenting opinion has a good analysis of the historical development of DOC.

Lots of other cases discussing DOC. At a quick glance, they appear to primarily treat absence of mistake/accident and negating innocent intent. Plenty of citation to Imwinklereid's writing on the subject.

Rules: Their 404(b) is substantially the same as Utah's, with no 413 analogue.

23. Minnesota

Cases: *State v. Owens*, 2008 Minn.App.Unpub.LEXIS 495 (2008) DOC is discussed, and it is noted that MN hadn't previously adopted the DOC. After discussing it, the court ruled that evidence of a subsequent vehicle theft was admissible in vehicle theft prosecution, where both involved stealing a vehicle with the vehicle's keys, and both occurred within a few blocks of each other.

Rules: Substantially the same as Utah's 404(b). Prosecution's notice requirements are more involved, and the other bad act must be proved by clear and convincing evidence, and a finding that the probative value is not outweighed by the potential unfair prejudice.

24. Mississippi

Cases: *Green v. State*, 89 So.3d 543 (2012). The majority of the court relied on 404(b) alone, and a concurring opinion suggested it should be adopted. Testimony from four other females claiming the defendant had digitally penetrated them in an intrafamilial context when they were juveniles, while he was on trial for digitally penetrating his 10-year-old stepdaughter. This evidence was properly accepted as

evidence of pattern or plan. Concurring justice would have used DOC re: probability of being accused under similar circumstances so many times.

There were a few other cases that mention DOC, but they're old cases that use it to refer to probabilities generally, and not in bad acts evidence.

Rules: Their rule 404(b) is substantially the same as ours. No 413 analogue.

25. <u>Missouri</u>

Cases: No mention of DOC in the context we're looking for; only mentions it as another expression of probabilities, as opposed to proof of a fact of consequence.

Rules: They don't have formally codified rules. It's all by case law.

26. <u>Montana</u>

Cases: *State v. Sadowski*, 247 Mont. 63 (1991). They've applied it to illustrate intent in intentional crime cases. "The more often the defendant performs the actus reus, the smaller is the likelihood that the defendant acted with an innocent state of mind. The recurrence or repetition of the act increases the likelihood of a mens rea or mind at fault. In isolation, it might be plausible that the defendant acted innocently or accidentally; a single act could easily be explained on that basis."

State v. Stout, 2010 MT 137 (2010). DOC used to prove intent.

Rules: Their 404(b) is substantially the same as ours. No 413 analogue.

27. <u>Nebraska:</u> Nebraska has rules of evidence that are similar to F.R.E. 413 and 414. The evidentiary rules govern the admissibility of prior sexual misconduct or accusation evidence for criminal or civil cases separately. The two rules are nearly identical. The criminal rule states:

(1) In a criminal case in which the accused is accused of an offense of sexual assault, evidence of the accused's commission of another offense or offenses of sexual assault is admissible if there is clear and convincing evidence otherwise admissible under the Nebraska Evidence Rules that the accused committed the other offense or offenses. If admissible, such evidence may be considered for its bearing on any matter to which it is relevant.
(2) In a case in which the prosecution intends to offer evidence under this section, the prosecuting attorney shall disclose the evidence to the accused, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least fifteen days before the scheduled date of trial or at such later time as the court may allow for good cause.
(3) Before admitting evidence of the accused's commission of another offense or offenses of sexual assault under this section, the court shall conduct a hearing outside the presence of any jury. At the hearing, the rules of evidence shall apply and the court shall apply a section 27-403 balancing and admit the evidence unless the risk of prejudice substantially outweighs the probative value of the evidence. In assessing the balancing, the court may

> consider any relevant factor such as (a) the probability that the other offense occurred, (b) the proximity in time and intervening circumstances of the other offenses, and (c) the similarity of the other acts to the crime charged.

Neb. Rev. Stat. § 27-414. Importantly, the Nebraska Supreme Court expressly noted that this statute allows the prosecution to admit evidence under this rule for propensity purposes. *See State v. Valverde*, 835 N.W.2d 732, 742 (Neb. 2013).

28. **Nevada:** It appears that Nevada does not have any exceptions to its rules of evidence for admission of prior allegations about or charges of a sexual nature. Furthermore, it appears as though the Nevada Supreme Court follows the rule against propensity evidence quite strictly in cases dealing with sexual assault. *See Richmond v. State*, 59 P.3d 1249 (Nev. 2002); *see also Braunstein v. State*, 40 P.3d 413 (Nev. 2002); *but see Farmer v. State*, 405 P.3d 114, 122 (Nev. 2017) (noting in dicta that the doctrine of chances might admit evidence of the low probability that multiple victims would falsely accuse the same defendant of similar crimes).

29. **New Hampshire:** New Hampshire does not have a special rule of evidence with an exception for admitting prior sexual misconduct or accusations. Like Nevada, New Hampshire courts seem to apply Rule 403 quite strictly to sexual assault cases. For example, the New Hampshire Supreme Court in *State v. Melcher*, 140 N.H. 823, 830–31, 678 A.2d 146, 151 (1996), highlighted the importance of not admitting sexual misconduct or accusations for propensity purposes: "This Court is not bereft of compassion for the victims of sexual assault, and we are not without understanding of the often unpleasant aspects of the world in which we all live. Sexual assault is a reprehensible crime, and its perpetrators are quite properly held in public disdain. But it is precisely because evidence of past sexual misconduct is so repugnant that its unbridled admission into evidence would in most cases render impartial jury deliberations all but impossible, as this evidence "diverts the attention of the jury from the question of the defendant's responsibility for the crime charged to the improper issue of his bad character." *United States v. James*, 555 F.2d 992, 1000 (D.C.Cir.1977) (quotation omitted).

30. **New Jersey:** New Jersey does not have any evidentiary rules similar to F.R.E. 413.

31. **New Mexico:** New Mexico does not have a rule of evidence similar to F.R.E. 413. New Mexico does not appear to allow prior accusations or convictions of sexual to be admitted under the doctrine of chances.

32. **New York:** It does not appear that New York has a rule of evidence like F.R.E. 413–414 or allow evidence of sexual history to be admitted under the doctrine of chances.

33. **North Carolina:** It does not appear that North Carolina has a rule of evidence like F.R.E. 413 or allow evidence of sexual history to be admitted under the doctrine of chances.

34. **North Dakota:** It does not appear that North Dakota has a rule of evidence like F.R.E. 413–414 or allow evidence of prior accusations or of charges sexual misconduct to be admitted under the doctrine of chances.

35. **Ohio:** It appears that Ohio has not adopted any rules of evidence like F.R.E. 413. It does appear, however, that Ohio may deem admissible a defendant's prior sexual crimes or accusations of sexual misconduct to be admitted under the doctrine of chances. This application of the doctrine of chances appears to be extremely limited: "[The doctrine of chances] goes to mens rea and intent, when the defendant has *admitted* to certain conduct but defended on the basis of innocent purpose or accidental involvement. For this purpose, the state may present evidence of the frequency with which the defendant unaccountably blundered into a criminal context: Uncharged misconduct evidence is admissible to prove guilty knowledge and disprove any assertion of being 'merely present' or an 'innocent dupe.'. . . Sometimes invoked to argue for the admission of evidence that might be excluded on grounds of relevancy under Evid. R. 403, the rule does not offer blanket exception to relevance and other-acts restrictions, nor can such evidence be invoked to 'tempt the jury to decide the case on an improper basis.'" *State v. Armengau*, 93 N.E.3d 284, 309 (Ohio 2017). Thus, it appears from this one paragraph that Ohio courts would resist the admission of a defendant's prior accusations or charges of sexual misconduct. *Id.* Indeed, the *Armengau* case deals with accusations of prior sexual misconduct but decides the doctrine of chances issue on other grounds. *Id.* (reversing due to the prosecution improperly arguing to the jury about how the doctrine of chances is to be interpreted).

36. **Oklahoma:** Oklahoma has adopted its own rules of evidence that mirror F.R.E. 412–414. *See* Okla. Stat. tit. 12 §§ 2412–2414. Accordingly, Oklahoma courts have not found it necessary to address the doctrine of chances as applied to a defendant's sexual history.

37. **Oregon:** Oregon does allow evidence of a defendant's prior charges of sexual misconduct or accusations of such under the doctrine of chances. *See State v. Leistiko*, 282 P.3d 857, 863, *opinion adhered to as modified on reconsideration*, 292 P.3d 522 (Or. 2012). Leistiko notes the difficulties the Utah Supreme Court observed in applying this doctrine to a defendant's sexual history. *Id.*

38. **Pennsylvania:** Pennsylvania has not adopted any rules of evidence comparable to F.R.E. 413. The caselaw reflects standard exceptions to character evidence. *See, e.g., Commonwealth v. Hicks*, 638 Pa. 444, 464, 156 A.3d 1114, 1125 (2017) (noting the rule against propensity evidence and permissible exceptions to character evidence. It is also of note that the concurring opinion cites with some favorability the use of the doctrine of chances to admit past convictions or accusations of sexual misconduct).

39. **Rhode Island:** Rhode Island does not have rules of evidence similar to F.R.E. 413. The courts have expressly stated that prior sexual misconduct is only admissible under the standard 403 analysis. *See State v. Jalette*, 382 A.2d 526, 533 (R.I. 1978). Additionally, the courts have set out a three-pronged analysis for admitting evidence of prior sexual conduct under the exceptions to character evidence: "It has been recognized that evidence of other sexual behavior is, by its very nature, uniquely apt to arouse the jury's hostility. . . In *Kelley*, after a thorough discussion of all aspects of the admissibility of proof of similar crimes in sex-related cases, the court ruled that (1) evidence of other not too remote sex crimes with the particular person concerned in the crime on trial may be introduced to show the accused's "lewd disposition or * * * intent" towards the person, (2) evidence that the accused committed nonremote similar sexual offenses with persons other than the victim may be admitted to prove the presence of the traditional exceptions to the general rule, such as intent or motive, with a caveat that evidence of other acts with other persons

may be shown on the issue of intent only if it is absolutely necessary, such as instances where the accused admits the act but claims it was an accident or mistake, and (3) any doubt as to the relevancy of such evidence should be resolved in favor of the accused." *Id.* at 533 (1978) (internal citations omitted); *see also State v. Merida*, 960 A.2d 228, 237 (R.I. 2008).

40. **South Carolina:** No pertinent DOC or 413 provisions

41. **South Dakota:** No pertinent DOC or 413 provisions

42. **Tennessee:** No pertinent DOC or 413 provisions

43. **Texas:** No pertinent DOC or 413 provisions

44. **Utah:** We'll see

45. **Vermont:** No pertinent DOC or 413 provisions

46. **Virginia:** No pertinent DOC or 413 provisions (their rule 413 is our 404(c))

47. **Washington:** No pertinent DOC or 413 provisions (their rule 413 deals with immigration status).

48. **West Virginia:** No pertinent DOC or 413 provisions

49. **Wisconsin:**

904.04 Character evidence not admissible to prove conduct; exceptions; other crimes.

(1) CHARACTER EVIDENCE GENERALLY. Evidence of a person's character or a trait of the person's character is not admissible for the purpose of proving that the person acted in conformity therewith on a particular occasion, except:

(a) *Character of accused.* Evidence of a pertinent trait of the accused's character offered by an accused, or by the prosecution to rebut the same;

(b) *Character of victim.* Except as provided in s. 972.11 (2), evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;

(c) *Character of witness.* Evidence of the character of a witness, as provided in ss. 906.07, 906.08 and 906.09.

(2) OTHER CRIMES, WRONGS, OR ACTS.

(a) *General admissibility.* Except as provided in par. (b) 2., evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. This subsection does not exclude the evidence when offered for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

(b) *Greater latitude.*

1. In a criminal proceeding alleging a violation of s. 940.302 (2) [human trafficking] or of ch. 948 [child sex and other abuse], alleging the commission of a serious sex offense, as defined in s. 939.615 (1) (b), or of domestic abuse, as defined in s. 968.075 (1) (a), or alleging an offense that, following a conviction, is subject to the surcharge in s. 973.055 [domestic abuse], evidence of any similar acts by the accused is admissible, and is admissible without regard to whether the victim of the crime that is the subject of the proceeding is the same as the victim of the similar act.
2. In a criminal proceeding alleging a violation of s. 940.225 (1) [sex abuse] or 948.02 (1) [child sexual assault], sub. (1) and par. (a) do not prohibit admitting evidence that a person was convicted of a violation of s. 940.225 (1) [sexual assault] or 948.02 (1) or a comparable offense in another jurisdiction, that is similar to the alleged violation, as evidence of the person's character in order to show that the person acted in conformity therewith.
History: Sup. Ct. Order, 59 Wis. 2d R1, R75 (1973); 1975 c. 184; 1991 a. 32; 2005 a. 310; 2013 a. 362 ss. 20 to 22, 38.

[four pages of caselaw cites omitted—none seemed to deal with these provisions]

Application with adult victim: *State v. Gee*, 931 N.W.2d 287 (Wis. Ct. App. 2019)
"Greater latitude" rule: *Sanford v. State*, 250 N.W.2d 348 (Wis. 1977)

50. Wyoming: No pertinent DOC or 413 provisions

Notes from Rule 404 Subcommittee's March 2020 Meeting:

Committee Members: Judge Teresa Welch (Chair), Tenielle Brown, John Nielsen, Dallas Young.

The Rule 404 Subcommittee met on March 6, 2020 (via phone) and discussed the following questions:

(1) Whether URE 404 should be amended to incorporate FRE 413 (the pros and cons of doing so), and if so, how should this be done?
(2) Whether URE 404 should be amended to incorporate the DOC (the pros and cons of doing so), and if so, how should this be done?

I. Summaries of views on whether URE 404 should be amended to incorporate FRE 413:

Judge Welch: At issue here is whether the Utah Supreme Court seeks to use its rule making authority to permit the admission of a categorical/propensity type of evidence (i.e., sexual assault evidence) in cases, or whether the Court believes that this issue is best decided by the Utah Legislature via any proposed changes/additions to the Utah Code. Knowing the history surrounding Utah's Rule 404(c) would be helpful in addressing this issue. That is, the Utah Supreme Court used its rule making authority via Rule 404(c) to now permit the admission of evidence of a defendant's prior acts of child-molestation to prove the defendant's propensity to commit the crime charged. For similar reasons, the Court may wish to expand 404(c), or promulgate a Rule 404(d), that permits the admission of evidence of a defendant's prior acts of sexual assault. The 50-state survey completed by this subcommittee indicates that this Court Rule approach was taken by Alaska. (Note: Alaska's rule admits sexual assault and domestic violence evidence for propensity purposes). By contrast, the Court may decide that this issue should instead be decided by the Utah Legislature, and that state statutes should indicate the prevailing social views on whether this type of evidence should be admitted. The 50-state survey indicates that this Legislative approach was taken by Illinois, Colorado, and Wyoming.

John Nielsen: Bottom line: I think the rule as it is—with the exception of perhaps requiring the admitting judge to articulate the theory under which it is being admitted—can function well without adding a sexual assault exception. This appears to be how Judge Orme feels. *See e.g., State v. Richins*, 2020 UT App 27, para. 34. But I wouldn't strongly oppose amending the rule. As Dallas said, juries are unpredictable—anyone who has done at least a few jury trials will understand that they often do things they do for weird reasons. All of this is because they are human beings. But we decided a long time ago that having a panel of lay people decide guilt would protect our liberty better than vesting a single expert (judge). If we're going to have jury trials, we need to trust that they will follow the instructions the judge gives them, and avoid peering into the black box of deliberations (because once we could do that, then there would be no more trial by jury, and little to no finality). The 404(b) divide seems to boil down to whether one thinks that juries can handle other acts evidence properly, or whether it's like *Bruton*-type evidence that we don't trust them to parse out. Those who think they can like the rule; those who think they can't don't like it. I don't think either side of the debate among legal professionals is going to convince the other on the fundamental assumption, but the last time the courts tried to limit 404(b) evidence to very narrow circumstances, the legislature geared up to amend the rule. They only backed down after the court decided *State v. Decorso* and agreed with the broader approach. The general public will always see this as highly probative and a necessary consideration in determining guilt, so we need to keep that in mind. Most 404(b) questions really are about 403 balancing anyway, and that's something that trial judges can deal with.

Teneille Brown: The Pros and Cons of amending URE 404 to incorporate FRE 413 are listed below.

Pros of amending Rule 404 to incorporate URE 413:

1. Doctrinal clarity: because there is philosophical and judicial disagreement about whether past acts of sexual assault require propensity reasoning when used to negate fabrication, with some judges saying yes and some no, it leads to unpredictability and many appeals. An explicit exception from 404(a) gets rid of this confusion, and then it's just subject to 403.
2. Intellectual honesty: Because the evidence of past sexual assaults can be so probative, courts often want it to come in. So they will just cite to the "doctrine of chances" or "identity" purposes under 404(b), and permit it to come in, without specifying the non-propensity use. Indeed, much of this evidence likely requires propensity reasoning it the attorneys and judges were required to spell out the inferential chain.
3. Probative value: evidence of certain kinds of past acts can be quite probative, so an absolute ban on a jury hearing this evidence can be quite unfair to victim's rights or justice.
4. Legal realism (related to #2): we are kidding ourselves if we think jurors will use 404(b) evidence for its non-propensity purpose. We might as well not continue to entertain this fiction. (n.b. - I'm doing some empirical work on this with a moral philosopher. It's quite clear from the literature that inferences about character occur spontaneously and even when we're not aware we're doing this. If we aren't allowed to hear about people's past acts, we will still attempt to construct an impression of their character. In the absence of evidence of what they've likely done, jurors will use even more prejudicial cues, like skin color, distance between the eyes, lip position, posture, whether they smile frequently, etc.).

Cons of amending Rule 404 to incorporate FRE 413:

1. Lack of a limiting principle: why stop with sexual assault? The arguments above prove too much. If it's as hard to identify non-propensity uses as I've suggested above, why not permit all evidence of past acts? What's the limiting principle? And if there's no articulated limiting principle, then is this just politics where we go after the unsympathetic rapists? What is to stop us from eviscerating rule 404(a) entirely? (n.b. - I would be ok with this)
2. Will courts apply 403 rigorously, or will they allow in tangential past acts that make the defendant look bad without adding much value to the case? There would likely need to be some guidance on what would make evidence too prejudicial to be admitted. We have some guidance from the case law here. For example, past acts that are sufficiently dissimilar, distant in time, or that reflect a trait that is peripheral to the charged conduct today could argue against admissibility under 403.

Dallas Young: Dallas argued against amending URE 404 to incorporate FRE 413, and he can supplement his views on this at our next Committee Meeting.

II. Summaries of views on whether Rule 404 should be amended to incorporate the DOC:

Judge Welch: The Doctrine of Chances is currently fleshed out in Utah Case law (not rule). It might be best for the requirements of this Doctrine (i.e., materiality, similarity, frequency, independence, etc.) to be listed in URE 404 rather than only being discussed via case law (an argument similar to those reasons given for why Utah's Rule 617 regarding Eyewitness Identification was promulgated). Also, in incorporating Imwinkelried's latest law review article and Judge Harris's concerns as expressed in the *Lane* case, it might be beneficial for URE 404 to require trial judges to issue DOC specific jury instructions when admitting DOC evidence at trial. Perhaps there is a need for a Model Jury Instruction for DOC evidence?

John Nielsen: I think we should keep is as general as possible, but make clear that it is an alternative theory for admission. The details can be fleshed out case-by-case.

Teneille Brown: I am not inclined to include the DOC specifically into our rules of evidence. The more I look into Utah case law, the more I realize that this doctrine has developed in ways that diverge considerably from what the common law intended. Utah courts are using the doctrine of chances as some sort of catch-all for introducing propensity evidence. Even with the 4 elements of materiality, similarity, frequency, independence, I worry that we're creating a broad exception to 404(a), without being explicit about it, and without staying close to the historical doctrine of chances. Utah cases refer to doctrine of chances when discussing fabrication or consent, and that's not what was historically meant by DOC.

Dallas Young: Dallas argued against the DOC generally, and he can supplement his views on this at our next Committee Meeting.

***NOTE: John Nielson went the extra mile with this project and took on the task of reading Imwinklereid's 500 plus page book: "Uncharged Misconduct Evidence." John can summarize the important points at our Committee meeting, and he has also created an outline of the relevant chapters of the book.