UTAH SUPREME COURT ADVISORY COMMITTEE
ON THE RULES OF EVIDENCE

MEETING MINUTES
Tuesday– June 9, 2020
5:15 p.m.-7:15 p.m.
Council Room

Mr. John Lund, Presiding

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

---

1. Welcome and Approval of Minutes:

Mr. Lund welcomed everyone to the meeting.

***Motion:** Judge McKelvie made a motion to approve the minutes from the Evidence Advisory Committee meeting held on April 14, 2020. Dallas Young seconded the motion and the motion carried unanimously.*

2. URE 512. Victim Communications:

Mr. Lund began the discussion on URE 512 by reviewing the email exchange between Judge Bates and Representative Snow. Judge Bates reached out to Representative Snow in April for feedback on the URE 512 subcommittee's latest draft of the Rule, but Rep. Snow hasn't

responded. Mr. Lund sought the Committee's opinion on how to move forward with URE 512.

Mr. Lund: The rule, as enacted by the legislature, has been in effect for some time now. The committee could seek feedback from victim advocates regarding how the privilege is working. Are victim advocates advising people about the privilege? Is the rule changing how advocates communicate with victims? Is the privilege being relied upon for communication?

Judge McKelvie: The Utah Crime Victims Legal Clinic may be a good group to contact for feedback on how the privilege is affecting communications between victims and victim advocates. Heidi Nestel is the Executive Director.

Mr. Young recommended inviting someone from either the Utah County, or Salt Lake County, public defender offices to ensure the committee has input on both sides of the issue.

Mr. Lund recommended sending Representative Snow another note and to keep him informed that the committee might reach out to interested parties in order to learn more about how the privilege is working. Mr. Lund will work with Ms. Williams on seeking input from others. Ms. Williams will ask Michael Drechsel to contact Jacquelyn Carlton from Legislative Research for more information.

3. URE 106. Remainder of or related writings or recorded statements:

Judge Welch: The Federal Rules Committee did not meet in May as scheduled. In footnote 4 of the 2018 *State v Sanchez* case, the Utah Supreme Court asked the Rules of Evidence Committee to answer two questions regarding Rule 106: 1) does rule 106 have a trumping or timing function, and 2) what are the necessary and sufficient conditions for triggering rule 106? If the Committee decides to move forward with its work on rule 106 now and the federal rule changes in the next couple of years, the committee will have to address rule 106 again.

John Lund: I believe the Supreme Court would prefer to see the Evidence Advisory Committee move forward and make a recommendation about what direction to proceed.

Judge Welch: The Supreme Court asked for feedback on three issues:

1. A discussion or explanation on the interplay between proposed URE 106 and URE 403;
2. An answer to whether there is a need to create a new Committee Advisory Note since the proposed rule would deviate from the federal rule (the answer to that is yes, there would have to be a new Committee Note); and
3. A request to hear what other scholars and states are saying about Rule 106.

Judge Welch discussed her view on the interplay between Rule 106 (a rule of inclusion) and Rule 403 (a rule of exclusion). If Rule 106 is viewed as a trumping rule, it trumps everything including hearsay and Rule 403. The language at the end of the most current version of Rule 106, unless

the court for good cause otherwise orders, could provide a mechanism for Rule 403 to have the last say and trump Rule 106.

The Committee discussed whether the latest version of URE 106 should be presented to the Supreme Court. Mr. Nielsen suggested drafting a second version so that the Committee could consider opposing viewpoints before sending a final draft to the Supreme Court for review. Mr. Young questioned whether the term "necessary" in the original version was too restrictive. Judge Welch discussed why the term "fairness" was replaced with language found in caselaw. Mr. Lund noted that the Supreme Court was struggling with the idea that rule 106 would trump other rules of admissibility. Judge Trease: Did the Supreme Court add the "good cause" language to hold back the trumping power of the rule? Mr. Lund: It may have been added as a qualifier. Mr. Young: The exact verbiage was taken from the probation revocation section of the code (77-18-1).

The Subcommittee agreed to draft an opposing version of Rule 106. The Evidence Advisory Committee will compare and discuss both versions at the next meeting.

4. URE 404(b) Character Evidence; Crimes or Other Acts.

Mr. Lund: The committee's assignment on URE 404(b) is to make a recommendation about how to address the doctrine of chances in the rule. There were quite a few issues raised by the Supreme Court.

Judge Welch summarized the Supreme Court's discussion:

- Whether or not to incorporate 404(d) (which, in effect, adds a FRE 413 provision to URE 404).
    - That would permit evidence of a defendant's prior sexual assault cases to come into evidence at trial for propensity purposes. 404(c) already allows that for child sex abuse cases, 404(d) would expand that to allow prior sex assault cases. The Supreme Court asked the Evidence Advisory Committee to discuss the policy considerations at play and to vote on whether or not 404(d) should be incorporated into Rule 404.
- Whether to incorporate the Doctrine of Chances (DOC) into URE 404.
    - Currently the doctrine of chances is found in caselaw, not in rule. The question raised in the meeting with the Supreme Court was should the requirements of the doctrine of chances be spelled out in the rule? The Justices asked the Committee to discuss whether it would be beneficial to incorporate a provision in Rule 404 that spells out clearly when the doctrine of chances applies, the types of cases in which it would apply, and the types of cases in which it would not apply. Judge Welch discussed Judge Harris' concurrences, explaining that the Doctrine of Chances understandably applies in some contexts but should not apply in others. Specifically, it should not apply in cases to rebut claims of self-defense or to rebut

claims of fabrication.

Mr. Lund asked the Committee to discuss the Rule 413 issue first. Mr. Lund: We asked the Court why Rule 413 wasn't incorporated along with all of the others, but none of the Justices could recall. Judge Welch referenced the law review article included in the materials spelling out the policy considerations on both sides.

Judge Welch clarified three options for consideration:

- Amending 404(d) with no doctrine of chances provision
- Amending 404 with only doctrine of chances provisions, and not including 404(d)
- Recommending that neither or both be adopted into the rule

The Committee discussed specific case types in which propensity evidence is often introduced, primarily sexual assault and domestic violence cases.

Mr. Hansen: If you gear these toward sexual assault cases, I see value in adding Rule 413 without the doctrine of chances provision. Rule 413 has a lot of caselaw behind it.

Mr. Young: In drafting rules of evidence, do we know to what extent criminologists with knowledge of statistics were consulted to identify problems empirically using recidivism rates in sex abuse cases, as opposed to knee jerk reactions?

Judge Welch: That relates to underlying policy considerations when 413 was drafted, going back to the 1990s. My understanding is that the statistics are controversial. There are various studies showing differing recidivism rates in child sex cases.

Judge Trease and Mr. Lund discussed legislative actions and interest in this issue over the years.

Mr. Lund: What is the origin of the language from the April 7th rule draft (line 104)? Judge Welch: I used the exact language in 404(c) to make 404(d); I just changed the language to say sexual assault cases instead of child molestation cases. The Committee discussed how the language compares to Federal Rule 413. The Committee discussed ways to define sexual assault.

Judge Welch: If the Committee agrees to add 404(d), the next question is what is the scope of 404(d)(3)?

Ms. Bulkeley recommended including limiting language similar to Federal Rule 413(d)(1); it must be relevant to the current charge. Judge Welch pointed out that the advisory note makes it clear that 404(b) is subject to Rules 402 and 403. Judge Trease recommended including the actual crimes in (d)(3), rather than trying to define acts that constitute sexual assault. Judge Welch: I agree. Other states included specific code sections in the rule to identify what constitutes sexual assault. Mr. Lund: We should be consistent with how child molestation is defined in (c)(3).

The Committee discussed whether the clarifying language in the Committee Note stating that 404(b) is subject to Rules 402 and 403 should stay in the Note, or should be included in the body of the rule.

Mr. Lund polled Committee members: Should 404(d) be incorporated into the rule?

- 6: No
- 3: Yes
- 4: Undeclared

Mr. Lund asked the six members who voted 'no' why they think 404(d) should not be adopted.

- Mr. Young: It is a distraction for the jury; there is very low, if any, probative value; and it is highly prejudicial.
- Mr. Nielsen: 404(b) is equipped to deal with the evidence
- Judge Welch: 404(b) is sufficient by itself

Mr. Lund: If the Committee's recommendation is not to amend the rule, we need to draft a position statement to support that recommendation. The committee discussed the split vote.

Mr. Hansen proposed inviting interested parties from both sides of the argument to present to the Evidence Advisory Committee on the pros and cons of using propensity evidence in sexual assault cases before making a final decision. After discussion, the committee agreed to invite a broad range of experts, one of which must be knowledgeable about recidivism data, to the October meeting, with guidance to the experts that they avoid expressing political views about propensity evidence.

Mr. Lund recommended focusing on the propensity question that 404(d) creates, and leaving the doctrine of chances question for after the propensity issue has been addressed. Judge Welch asked the committee to consider whether the doctrine of chances should be limited in applicability in the same way Judge Harris recommended. The committee discussed the issue.

Mr. Lund polled committee members: Should the committee draft a rule incorporating the doctrine of chances?

- 7: Yes
- 5: No

The Subcommittee will draft two rules, one in accordance with Judge Harris's concurrences, and another more expansive rule.

5. Other Business:

- **2021 Meeting Dates**

The Committee discussed the 2021 meeting schedule. The proposed schedule was approved with the addition of a September 9, 2021 date.

- **Membership**

  Michalyn Steele's term on the Evidence Advisory Committee ends prior to the next meeting. Mr. Lund thanked her for her participation and valuable input. The Court will appoint a new member.

  The meeting adjourned without a motion.

Next Meeting:
October 13, 2020
5:15 p.m.
AOC, Council Room