

**UTAH SUPREME COURT ADVISORY COMMITTEE
ON THE RULES OF EVIDENCE**

**MEETING MINUTES
Tuesday – October 13, 2020
5:15 p.m.-7:15 p.m.
WebEx**

Mr. John Lund, Presiding

<u>MEMBERS PRESENT</u>	<u>MEMBERS EXCUSED</u>	<u>GUESTS</u>	<u>STAFF</u>
Adam Alba Melinda Bowen Teneille Brown Deb Bulkeley Tony Graf Mathew Hansen Ed Havas Chris Hogle Hon. Linda Jones John Lund, Chair Hon. Richard McKelvie John Nielsen Jennifer Parrish Nicole Salazar-Hall Michalyn Steele Hon. Vernice Trease Hon. Teresa Welch Hon. David Williams Dallas Young	Lacey Singleton	Chris Williams, Leg. Research Prof. Paul Cassell Dr. Kelly Socia Heidi Nestel	Keisa Williams Nancy Merrill

1. Welcome and Approval of Minutes:

Mr. Lund welcomed everyone to the meeting and introduced Melinda Bowen, the newest member of the Evidence Advisory Committee.

Motion: John Nielsen made a motion to approve the minutes from the Evidence Advisory Committee meeting held on June 9, 2020. Dallas Young seconded the motion and the motion carried unanimously.

2. URE 404(d). Character Evidence; Crimes or Other Acts:

Professor Cassell summarized his testimony and materials included in the packet. Utah should amend its rules of evidence to follow the approach of all federal courts and many state courts, to make similar crimes evidence presumptively admissible in sexual assault cases. There are shockingly high levels of sexual violence in the country and in Utah, particularly violence against women, and at the same time shockingly low levels of prosecution of that violence, especially in Utah. He reported the following data to the Committee for consideration:

- Nationally 18% to 25% of all women will be sexually assaulted or raped during their adult lifetime.
- In Utah, according to the Commission on Criminal and Juvenile Justice (CCJJ), 29% of women will be sexually assaulted or raped during their adult lifetime. CCJJ reports that rape is the only crime in Utah that has a higher than national average (approximately 20% higher according to the FBI).
- The United States Supreme Court said that, short of homicide, rape is the ultimate violation of self.
- Female rape victims have a lifetime prevalence of post-traumatic stress syndrome, somewhere between 32% and 80%, so the prevalence of harm of sexual assault and rape is very well established.
- According to national figures, 80% of all rapes and sexual assaults go unreported.
- According to CCJJ, in Utah, 88% of all rapes and sexual assaults go unreported. The prosecution rate is also low in Utah. Of the cases brought forward to policing agencies and prosecutors, the filing rate is 44%.
- The overall prosecution rate in Utah for rape and sexual assault is right around 5%.

Against the backdrop of low prosecution rates, it's important to provide juries with complete information about any other crimes of a sexual nature that the defendant may have committed. Sexual assault crimes are most often committed in private places, which means there is a general unavailability of witnesses, leaving the case dependent on contradictory testimonies. That makes it almost impossible for a prosecutor to meet a burden of proof beyond a reasonable doubt. This is a particular problem in acquaintance rapes. Frequently, defendants will claim consent, at which point any DNA or other physical evidence becomes essentially irrelevant. That immediately distinguishes sexual assault cases from other crimes in which consent is rarely offered as a defense. Providing evidence to the jury is critical to assess competing claims.

In 404(c), juries are allowed to hear evidence about defendants' other similar acts for children 13 years old and younger. The same principle that supports 404(c), supports adopting 404(d), extending the rule to victims 14 years and older.

Recidivism is the wrong subject of inquiry for the committee. Recidivism is conventionally defined in terms of an offender being convicted of crime, maybe serving time, and then being released, who maybe goes on to commit a repeat offense. But if you look at rules 404(c) and

proposed 404(d), they don't rest on a proposition involving recidivism, they rest on the well-supported, empirical proposition of serial perpetration. Sexual assaults are committed by serial perpetrators.

Professor Cassell referred to a March 2020 study by John Colbert looking at sexual assault prosecution, particularly on-campus sexual assaults involving alcohol. The study found that 87% of those sexual assaults were committed by serial perpetrators, suggesting that serial perpetrators should be the primary focus for these kinds of rules. Professor Cassell referenced recent, high profile cases such as the Bill Cosby and Harvey Weinstein cases. When considering whether a jury should hear from one victim or multiple victims, it's not a question of recidivism, it's a question of serial perpetration. Adopting 404(d) wouldn't be introducing a novel concept into the law. Propensity evidence in these cases was upheld by the Utah Supreme Court in 1900, just four years after we became a state.

In *State v. Hilberg*, the court held that prior bad acts of a sexual nature made it more probable that the charged crime had been committed by the defendant. In *State v. Williams*, the Supreme Court clearly describes the prevailing law in the country, to allow sexual misconduct evidence. Today, the majority of states admit propensity evidence in sexual assault cases and in 1994, the federal rules were amended to incorporate FRE 413 and FRE 414.

If 404(d) were adopted, the language would look very similar to 404(c), extending it to include sexual assaults of victims who are fourteen years of age and older. Some argue that this is a policy decision, but the Utah Supreme Court resolved that policy question for those 13 years and under. The same considerations of policy apply here and I think you have an even stronger mandate to do so. We have 12 years of experience with 404(c) and I haven't heard any complaints about how that rule is operating. I think it's fair to say that it's brought clarity to the law. Because 404(b) does not specifically address the problems he previously discussed, it would lead to conflicting interpretations.

Judge Welch: Wouldn't the argument for 404(d) be the same for domestic violence cases, making 404(e) the next logical step or do you think domestic violence cases are categorically different than sexual violence cases?

Professor Cassell: Enacting a 404(d) is codifying a prevailing law that has existed in the country for more than a century. A case could be made that, historically, domestic violence cases have been under-prosecuted and a 404(e) could be investigated, but for now 404(d) is the next logical step.

Professor Brown: What are the benefits of creating a rule 404(d) through the Evidence Advisory Committee and the Supreme Court as opposed to going through the legislature and getting someone from the legislature to sponsor something similar?

Professor Cassell: Addressing the 404(d) issues through the legislature is an option that Professor Cassell and Heidi Nestel discussed before presenting to the Evidence Advisory Committee. They have identified appropriate partners if the Evidence Advisory Committee defers. Ms. Nestel noted no strong opinion on which route is better. They are presenting today with the hope that the Evidence Advisory Committee will recommend adopting 404(d) to the Supreme Court.

Ms. Nestel: Professionally, she was a prosecutor for ten years and for the last fifteen years she has been the Director and staff attorney for the Utah Crime Victims Legal Clinic; a non-profit organization that serves victims statewide. Ms. Nestel has extensive experience in representing sexual assault victims in the majority of counties statewide. She has a deep appreciation and understanding for the importance of these types of cases and the evidentiary issues for all of the parties involved.

The adoption of 404(d) will result in a higher sexual assault reporting rate. The more serious sexual assault perpetrators will be held accountable, and most importantly, the serial sexual assault perpetrators will get help through rehabilitation and supervision. I foresee 404(d) only being invoked in cases where there is evidence of repeated sexual perpetration. The consequence for repeat sexual perpetration is that their previous behavior will be known to the jury. The testimony anticipated to come in under 404(d) would be subject to rigorous cross-examination. Federal Rule 413 and 404(c) process of having a pretrial hearing on whether the evidence is credible by a preponderance of the evidence. That process would inherently provide safeguards that protect defendants. Ms. Nestel highlighted the following points:

- The nature of sexual crimes is unique and severe. The impact of sexual assault is a lifelong sentence.
- Negative consequences include mental health issues, extreme stress, and life disruption that never goes away. Once it takes root in the victim's brain, their life is changed forever.
- Sexual assault crimes are under-reported and kept in the dark. Without a lot of physical evidence and independent witnesses, it comes down to the victim's word against the defendant's. That is often not enough to take a case to trial.
- Countless sexual assault cases are declined or dismissed because the victim's word is challenged by the defendant's account, which usually comes down to consent.
- Proposed 404(d) is so critical because it gives support and credibility to the victim's experience.
- Serial sex offenders pose unique dangers to our society.
- The adoption of 404(d) is consistent with the effort to balance the scales of justice and ensure a fair process based on current research and what we know about sexual assault.

The Committee discussed specific cases that excluded or allowed prior sex offense testimony, and whether 404(b) covers the issues.

Dr. Kelly Socia: Associate Professor at the University of Massachusetts School of Criminology and Justice Studies, presented on sex offender recidivism rates and FRE 413. Dr. Socia does not believe that Utah should adopt 404(d). He discussed the following topics:

- **Estimating Sexual Recidivism.** Estimating recidivism rates for sex offenders depends on what is being measured. What is the type of recidivism event? Is it an arrest, charge, or conviction? Other considerations include the type of crime. Are you just looking at sex crimes, or is it any crime crimes? Do violations count? What is the population sample? Are you looking at everyone on the registry, or just a certain subset (child molesters, rapists, child pornographers, voyeurs, etc.). What is the follow-up period? Are they using 3, 5, or 25 year estimates? Charges yield a higher percentage, but there are also more false positives. Convictions yield a lower percentage, but you'll miss people and get more false negatives. Re-arrests are the most common measure of recidivism. The more specific the population sample, the more precise the estimates are, but they are also less generalizable. Dr. Socia discussed several studies using official records to estimate recidivism rates. You can cherry-pick a study that tells you what you want. The data concludes that the longer the person convicted of a sex offense goes without re-arrest, the less chance of recidivism for a new sex crime.
- **Public Perceptions of Recidivism.** Studies show that the general public and justice and judicial officials view sex offenders as a homogeneous group, consisting of untreatable sexual predators and pedophiles with stranger victims that are extremely high risk for recidivism. They do not believe that the recidivism rate is only 7.7% after 9 years. Most would guess 70, 80, or 90%. Dr. Socia pointed to studies highlighting the public's perception of sex offenders and noted that the public will make up the juries. A frequently misused quote about sex offender statistics in court cases comes from Justice Anthony Kennedy. He wrote that the recidivism rate for untreated sex offenders has been estimated to be as high as 80%. In a follow-up case, Kennedy wrote that the risk of recidivism posed by sex offenders is "frightening and high." That "frightening and high" 80% statistic was taken from a Department of Justice user manual (not a peer-reviewed study), which in turn took that statistic from an article in Psychology Today. That article quoted Dr. Freeman Longo. His actual quote was, "estimates of the recidivism rate among untreated sex offenders ranges between 35% to 80%" and he was specifically referring to a group of offenders that he worked with at a very high-risk facility. When asked about that quote in a recent interview, he said, "that [80% statistic] got taken to say that all sex offenders recidivate at 80%. That is absolutely incorrect. It's wrong. It's untrue." Dr. Socia has conducted research that shows using the term "sex offender" increases the public's fear. The public is using the label "sex offender" as an either-or category, leading to another quote, "once a sex offender always a sex offender". Dr. Socia noted research showing that past criminal history also influences the likelihood that police will arrest again compared to a person with no past criminal history. When questioning whether a defendant's prior conviction makes them a high risk to re-offend, other factors need to be considered. Some of the factors include, the number of prior sexual offense convictions, employment or stable housing, and the number of years since

release. He concluded that presenting any evidence of any prior sex offense will likely result in the jury viewing the defendant as a part of the “sex offender” category, and thus will make them more likely to see the defendant as guilty of the current crime, regardless of the evidence.

- **Recommendations Regarding FRE 413.** Because of labeling, public perception, and stigmatism, adopting and incorporating FRE 413 into Utah’s rules will create a lot of problems. Adoption could result in undue stigma assigned to the defendant without the safeguards offered by the traditional rules of evidence. The public, including jurors and judges, do not easily distinguish different risk levels among sex offenders. Dr. Socia shared a list of sources and noted that to protect the individual’s right to defend themselves in court, the only prior acts admitted should be those proven in the court of law.

Mr. Lund to Professor Cassell: If recidivism rates are not used to predict a tendency for committing the act again, then what data is should be used?

Professor Cassell: It is useful to look at propensity evidence given the high rate of serial perpetration.

Mr. Lund: Is there data available in other jurisdictions, or possibly in the federal system, showing that when evidence of prior crimes has been admitted, the recidivism rate is lower?

Professor Cassell: No, because you cannot control all the other factors involved. The one data point that we can use is a set of opinions showing that 404(c) has worked well in Utah for the last twelve years.

Deborah Bulkeley: Is there any evidence that shows in states that have adopted this rule or even federally that victims are more likely to report if this rule is adopted?

Heid Nestel: There are a number of resources that I can forward to the Committee backing up the suggestion that if 404(d) were adopted, it would reduce the victim’s hesitation to report because the jury will be more likely to believe their testimony.

Judge Welch: Is it cleaner to look at propensity evidence through the lens of 404(b) to get to the same desired outcome of proposed 404(d)?

Professor Cassell: Going through 404(b) would add confusion for the jury about what evidence they can use. He provided several examples. What is the rational for saying, if the victim is over fourteen years of age, propensity evidence is not allowed?

Mr. Graf: If these are under-reported crimes, wouldn’t recidivism be affected as well?

Dr. Socia: The public believes that the recidivism rate is 70%-90%, even allowing for the under-reporting of sexual crimes. I don't believe the real statistics would be anywhere close to that. The problem is identifying how high the recidivism rate really is for sex offenders, and that rate isn't measured.

Professor Cassell: I agree that the exact recidivism rate isn't measured, but the Committee should look at the data showing that sexual assaults are a problem, as is serial perpetration.

Nicole Salazar-Hall: Can all of this evidence be presented at sentencing? Dallas Young: Yes.

Professor Cassell: There may never be a sentencing if the case gets dismissed. The problem lies in under-reporting and under-prosecuting.

Mr. Lund: Is there evidence that adopting 404(d) has one way or another changed the experience for victims? Is there any conviction rate data in jurisdictions where propensity evidence is permitted?

Professor Cassell: I have not seen quantitative data, but there are qualitative examples. Utah has one of the lowest prosecution rates, which leads to low conviction rates. The problem with using conviction rate figures is that the data is not considered to be reliable because it depends on whether prosecutors push for convictions in challenging cases.

The Committee discussed the two perspectives presented at the meeting.

Dallas Young: I do not think 404(d) is necessary. There are procedures in place that allow for propensity evidence.

John Nielsen: Adopting 404(d) is good policy to increase disclosure and encourage victims to report.

Professor Brown presented social science information to the Committee. Based on human behavior research, people will make character references and judgments whether they have past act information or not. It isn't possible to provide propensity evidence for a limited purpose. Jurors will react to propensity evidence whether 404(d) is incorporated or not. That's human nature.

The Committee voted on whether 404(d) should be adopted.

- 6 members voted yes, recommend adopting Rule 404(d)
- 7 members voted no, do not adopt Rule 404(d)
- 1 member was undeclared
- 2 emeritus members recommend not adopting Rule 404(d)

The Committee discussed the rationale for not adopting 404(d) when the standard was adopted in 404(c) for younger people, whether 404(a) and 404(b) are all that's needed to address propensity evidence, and whether adopting 404(d) would result in the exceptions swallowing the rule.

The Committee voted to recommend that the Supreme Court not adopt rule 404(d) and to draft a memo outlining the reasons discussed. The Supreme Court should also know that the decision wasn't unanimous, and they should be provided with the opposite view.

- John Nielsen and Professor Brown will write the minority
- Dallas Young and Judge Welch will write the majority

The Committee will review the draft memos at the November 10th meeting.

2. URE 106. Remainder of or related writings or recorded statements

Will be addressed at the November meeting.

3. URE 512. Victim Communications

Will be addressed at the November meeting.

4. Other Business: None

The meeting adjourned without a motion.

Next Meeting:
November 10, 2020
5:15 p.m.
Via WebEx