UTAH SUPREME COURT ADVISORY COMMITTEE
ON THE RULES OF EVIDENCE

MEETING MINUTES
Tuesday– November 10, 2020
5:15 p.m.-7:15 p.m.
Via Webex

Mr. John Lund, Presiding

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

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1. WELCOME AND APPROVAL OF MINUTES:

Mr. Lund welcomed everyone to the meeting. The following corrections were made to the minutes concerning Ed Havas and Judge Jones's votes on URE 404. They both voted 'no' and their votes should not be counted in the final tally; making the final vote 7 'no', 6 'yes,' and 1 undeclared.

***Motion:* Judge McKelvie made a motion to approve the corrected minutes from the Evidence Advisory Committee meeting held on October 13, 2020. Dallas Young seconded and the motion carried unanimously.**

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

Mr. Lund thanked Judge Welch, John Nielsen, Dallas Young, and Tenielle Brown for drafting the majority and minority reports.

Chris Hogle: The arguments on the Doctrine of Chances (DoC) in the majority and minority reports seem to contradict each other. The majority report says the DoC can come into play and will resolve some of the issues, the minority report insinuates that the DoC is intellectually bankrupt. Part of the charge from the Supreme Court is to address the DoC. If the Committee intends to recommend a rule on the DoC, waiting and sending them both at the same time may help convince the Justices on the position in the majority. Unless the Court is expecting the Committee to deal with these piecemeal, I recommend that we table the majority report and start working on the DoC. It seems like the issues are interrelated. If we reached a consensus on the DoC rule, it could have an impact on where people stand and strengthen the position of the majority.

Mr. Lund: The Court didn't give the Committee a hard deadline or ask that the issues be divided. I think we were trying to get out ahead of the legislative session because there appears to be some interest in this issue.

John Nielsen: I don't think we need to wait to resolve the DoC issue because the only thing we're really addressing with the DoC is how or whether to outline exactly what the DoC is in the rule, or whether to let caselaw define it. I think 404 is more of a policy decision that is separate from the more technical decision of whether to put the DoC into a rule.

Judge Welch: I believe the issues are distinct because the Rule 404(d) issue asks whether or not a Rule 413 provision should be incorporated into Rule 404, allowing propensity evidence to come in specifically for sexual assault cases. In contrast, the DoC is not a propensity inference, it's a probability inference. The difference is that the DoC is a doctrine that allows the jury to do probability reasoning. The charge given to the Committee by the Justices is whether or not the DoC should be put in a rule. They've already told us they don't want the elements of the DoC to be put in the rule. They asked the question, "Could the applicability of the Doctrine of Chances be put into the rule?" Both issues came to the committee together because of the cases we were asked to look at. I don't have a preference about whether to send the issues to the Court piecemeal or all together.

Tenielle Brown: I disagree. Incorporating 412 into 404(d) is really an exception to 404(a), whereas 404(b) and the DoC is not an exception but an inference that does not require propensity evidence. They are related because they are both types of character evidence, but one is an actual exception acknowledging that it's okay to make propensity reasoning like Judge Welch mentioned. I think of them as distinct, but they're obviously related in that many judges use sexual assault past acts. They may try it under the DoC, but it's probably also used for

propensity inferences, which wouldn't be appropriate unless 404(d) passed.

John Lund: The Committee could acknowledge in the memo or informally during the conference that the Committee is still working on the DoC, but wanted to submit its work on 404(d) in advance of the Legislative session. I got the sense at our last meeting that if the Court doesn't address it, the legislature might. I recommend condensing the reports into a single memo that addresses both sides of the conversation, but leads with the majority statement.

Dallas Young: I have a concern with the statement in the majority report that propensity evidence is extremely probative. I'm not sure I agree with that because if we're looking strictly at the elements of the offense for which a person is charged, and if the evidence is received purely for propensity purposes, it doesn't have much to do with the elements. I struggle with the idea that it's highly probative, although I agree that it's highly prejudicial. Whether you think that's a fair or unfair prejudice is probably driven by which side of the issue you're on. That's not included in the addition I sent today.

Judge Welch: The quote I included in the majority report was from the *Lane* case. It says that because of the probative value, the evidence was excluded. Propensity evidence is so prejudicial that it needed to be excluded. The majority report reflects that, but if Mr. Young wants to add more sections highlighting that, once people hear propensity evidence, the conviction may be based on the propensity evidence, there is caselaw addressing that issue and it could be added.

Tenielle Brown: Michael Saks wrote a paper showing that even when a jury does not hear about past acts, they still predict conviction, especially in sexual assault cases. Even if you don't let the jury hear about past acts, the fact that it occurred is still predictive of outcomes. I would be careful about falling into the trap of saying, because it hurts the party it's prejudicial. We want to make sure we're defining prejudice. If it actually increases the probability that the victim is telling the truth, which I think it does in certain cases like serial rape, I think it's highly probative of the credibility of the victim and the version they're telling. I think we have to be very specific about what it means to be prejudicial, that it's an unfair or irrational reliance on the evidence as opposed to just that it hurts the defendant.

Dallas Young: I'm not sure I understand prejudice the same way Ms. Brown is describing it. It has negative connotations in other contexts and it's easy for those connotations to bleed over here. I've heard judges say, of course it's prejudicial, that's the point. It's not relevant if it's not prejudicial. That's why I think rule 403 is careful to use the phrase 'unfair prejudice' as opposed to just 'prejudice.' The question is whether the connotation we associate with prejudice in other contexts carries over here. I've understood that it doesn't necessarily, although in common use that's certainly how people will understand it when they hear it.

Matt Hansen: I disagree that this evidence can't be probative. I think it's quite probative, especially in sexual assault cases when you can show that these assaults happen in similar ways

and that the pattern was repeated.

John Lund: I recommend consolidating the report and circulating it to the Committee members for final review via email before sending to the Supreme Court.

<u>Motion:</u> Teneille Brown made a motion to combine the reports and circulate a draft for review prior to submission to Supreme Court. John Nielsen seconded the motion. The motion passed unanimously.

3. Doctrine of Chances

Judge Welch: The Supreme Court recently published *State v. Argueta.* In that case, the Supreme Court brought up several issues concerning the Doctrine of Chances (see paragraphs 33 and 34). The Court said that one necessary clarification concerns the articulation of the rare misfortune that triggers the doctrine's application. Care and precision are necessary to distinguish permissible and impermissible uses of the evidence of prior bad acts, and to limit the fact finder's use of the evidence to the uses allowed by rule. The care and precision begin with the party seeking to admit prior bad acts under the DoC. Without a clear articulation of what event is being evaluated, it is difficult to make sure that a prior bad act is admissible under the doctrine for a permissible inference.

The case highlights what the Justices are looking for in terms of what should be done by rule and what should be done by caselaw. Originally, the Committee recommended to the Court that it put the four foundational requirements found in caselaw into a rule. The Justices responded that incorporating the foundational requirements in a rule wasn't helpful, that it would be helpful if the rule articulated when the Doctrine of Chances should apply and when it should not apply. The *Lane* and *Murphy* cases lay out the arguments. Ms. Brown sent an email to Professor Imwinkleried asking whether changing the URE in some way would help address current problems with the DoC. He responded that caselaw, and more importantly, jury instructions can help understand how to apply the DoC, not necessarily a rule change. I agree. I believe a model jury instruction would go a long way to helping understand the DoC.

John Lund: The draft rule in the packet seems to attempt not to categorize the types of rare misfortunes when the doctrine may apply, but rather give it sort of a governing principle about a certain amount of statistical validity to the inference being available to support the use of the DoC. What is the instruction we're getting from the Court?

Deborah Bulkeley: I agree with Judge Welch. It seems like a mushy standard. Trying to incorporate into the rule all of the circumstances that should be included or excluded would be difficult.

Jennifer Parrish: I think the court wants the Committee to look into when the DoC applies and

when it does not apply. I don't see *Argueta* changing the charge as Judge Welch explained it. They're still focused on when it should and shouldn't apply.

Teneille Brown: I think the Court is asking two things. Their response seems to be getting at how rare does the thing need to be so that it's so special and unique that it goes to probability, as opposed to propensity. They want a clear articulation of kinds of cases where using rare misfortune doesn't require propensity inferences. For example, cases where it's used to prove identify, or to prove intent or self-defense. It sounds like they want to know how to apply it. There is a frustration with inconsistent application.

John Nielsen: Maybe it's just a matter of making a list, much like 404(b), that categorizes common uses and then says when it is appropriate and not appropriate to use probability reasoning to prove certain things.

John Lund: We seem to be furthering the confusion when we treat both propensity and probability principles in 404. We may need to use the words "an inference based on probability" or "an inference based on propensity" to keep that clear.

Judge Welch: That's exactly right. 404(b) is all about allowing propensity evidence and the DoC is all about probability. Judge Welch reviewed 404(b)(3) in her draft rule on page 5. Right before the sentence saying 'prior act evidence may not be admitted under the DoC to rebut a self-defense claim or to rebut a defense of fabrication,' we could add a sentence that says something like, 'prior act evidence may be admitted under the DoC to prove mens rea.' Does the Court want us to decide what is still undecided in caselaw? For example, whether or not the DoC can be used to prove identify?

Jennifer Parrish: We could recommend to the Court that we should not incorporate all of that into the rule, but provide a list of when it applies or doesn't apply in an advisory committee note.

John Lund: The Court might accept a note that talked about the distinction between propensity and probability evidence, and explained that in these types of circumstances if someone is using that evidence there should be a jury instruction.

Judge Welch: Imwinkelreid drafted some rules that we could start with, talking about advising the jury about the permissive and verboten uses.

Matt Hansen: I disagree with using jury instructions. There are often errors in jury instructions that result in appeals. I recommend a rule because the issue is difficult and often contested. In addition, different judges take different approaches to addressing the issue.

Ed Havas: I prefer a combined approach of having jury instructions and adding something to the

rule. We need to address admissibility. The current rule draft seems to be more of an explanation of the DoC and the rationale behind it, as opposed to guidance for when and how to apply it. I recommend a rule that says to permit prior act evidence there have to be findings of a threshold showing of a rare misfortune befalling an individual so that it is improbable that is doesn't occur by chance. We should also provide guidance to the Court on the elements for admissibility under the Doctrine of Chances, and then the jury instruction would build on that, explaining how to apply the evidence if it's admissible.

Nicole Salazar-Hall: I agree with Mr. Havas's approach.

John Neilsen: Maybe we could do all three things. Rather than a 4-5 sentence explanation of what the DoC is, we could just include in the permitted uses in 404(b)(2), a sentence between 'lack of accident' and 'on request,' something like 'in cases involving rare misfortunes, a proper purpose may also be probability reasoning.' In the committee note, we can say probability reasoning in those cases is called the DoC. Then we can ask the jury instruction committee to draft an instruction.

Chris Hogle: I think a jury instruction might embolden the prosecution to say, 'judge you don't need to worry about the admissibility, that's why we have a jury instruction endorsed by the Supreme Court.' I don't see how that resolves the problem. I think it might exacerbate the problem.

Teneille Brown: The main issue is that 404(b) is not being applied correctly in most cases. If we take 404(b) seriously and we're going to make any changes, it has to be under 404(b)(2) because it's not necessary to specify every non-propensity use if the DoC is really non-propensity. We don't need to say anything about admissibility because the DoC is allowed as long as it doesn't require propensity reasoning.

John Lund: The Court puts the burden on the proponent to make it clear what exactly the rare misfortune is that is now occurring. After the sentence that ends 'lack of accident,' you could say 'this evidence may also be admissible if the proponent establishes X as to a particular instance.' It might warrant a separate sentence.

Dallas Young: There is a change to Federal Rule 404 that takes place December 1, 2020. It doesn't directly affect the Doctrine of Chances, but it might provide some guidance. The change enhances prosecution's disclosure requirements.

The Committee conducted a vote about how to address the Doctrine of Chances:

1. Attempt to address the Doctrine of Chances in the rule and add other things like a comment and jury instruction, or
2. Not address the Doctrine of Chances in the rule?

The Committee voted unanimously for #1. The subcommittee will work on drafting minor amendments to the rule, a brief committee note, and a memo explaining the Committee's recommendations.

4. URE 106. Remainder of or related statements or recorded statements

Judge Welch: The subcommittee created three different versions of Rule 106. Mr. Lund made edits to Version 3. URE 106 is identical to FRE 106. The Federal Rules committee is scheduled to meet November 13th and FRE 106 is on the agenda. Their notes for the meeting say the proposed changes would allow hearsay evidence (trumping rule), and they are looking at expanding the rule to cover oral statements not just written or recorded statements.

In Version 1, hearsay evidence won't be allowed. In Version 3, it will be allowed. The last time the Committee discussed 106, we voted for a trumping rule. Version 3 fits that the best.

John Lund: The Court seems to want to know the best way to word this. In Version 3, there needs to be some qualifier about what additional information is needed to put the evidence that has already been received into fair context. The qualifiers give the judge an objective basis for either allowing or not allowing the evidence to come in.

Ed Havas: I like Mr. Lund's edits. The fairness consideration is an important element of the rule.

Dallas Young: I agree with Mr. Havas. The notion of fairness is encapsulated in whether it's necessary or reasonably necessary.

Chris Hogle: I like Mr. Lund's version. The language about reasonably and fairly gives trial court judges more discretion and flexibility to deal with different circumstances and situations as they come up.

The Committee discussed the language of "fairness" in the rule. If "fairness" is taken out, it will diverge from the federal rule. After further discussion, the Committee agreed to wait until the Federal Rules Committee meets before they vote on a final version of Rule 106.

5. URE 512. Victim Communications

Judge Bates: The URE 512 subcommittee reached out to Representative Snow asking for feedback following the Supreme Court conference, but he hasn't responded. The Court's comments addressed the waiver sections in (d)(2) and (d)(3). The rule draft has been edited to account for the Court's questions. I recommend sending the edited version of the rule to the Supreme Court for consideration. The rule in effect now isn't clear to judges, prosecutors, and defense attorneys exactly how all of the exceptions in the rule apply and whether or not the privilege applies or does not apply.

After further discussion, the Committee will vote on Judge Bates' recommendation at the next meeting.

6. Other Business: None

Next Meeting: January 12, 2021
5:15 p.m.
Via Webex