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

**MEETING MINUTES**

**January 12, 2021**
**5:15 p.m.-7:15 p.m.**
**Via Webex**

***Mr. John Lund, Presiding***

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

---

**1. WELCOME AND APPROVAL OF MINUTES:**

Mr. Lund welcomed committee members to the meeting, including new member, Sarah Carlquist. Mr. Lund asked for any corrections to the November 10 meeting minutes. ***With no corrections, Chris Hogle moved to approve the minutes. Adam Alba seconded the motion. The motion passed unanimously.***

**2. Legislative rapid response subcommittee:**

- URE 506. Physician, Mental Health Therapist and Behavioral Emergency Services Technician-Patient

Mr. Hogle: The rapid response subcommittee received an email in December regarding a bill sponsored by Sen. Daniel Thatcher. His goal is to decriminalize mental and emotional health issues. Currently, when 911 is called on someone suffering from mental health issues, violent confrontations can occur because police officers aren't always trained for those situations. A person with mental health training may be a better fit to respond. The bill would create a new class of first responders, Behavioral Emergency Services Technicians (BESTs). In order for those services to be effective, Sen. Thatcher feels there should be a privilege attached to communications between the provider and the individuals they serve. The legislation was flagged because of a provision that said something like, "in accordance with the Rules of Evidence, these communications will be privileged," but no such privilege currently exists. The closest thing is a mental health patient privilege in URE 506, but Utah hasn't answered the question of whether that rule applies to EMTs or behavioral variants of an EMT.

Judge McKelvie, Mr. Young, and myself were deployed to work with Sen. Thatcher and the Department of Health. We thought the best way to accomplish this was to augment a section in URE 506 to make it clear that the rule applies to those communications. Sen. Thatcher doesn't think the proposed changes are going to be enough because police officers, paramedics, and EMTs will have to fill the void. The privilege needs to apply not only to the BESTs, but also to folks having those kinds of interactions right now as first responders. We sent a proposed amendment to URE 506 to the Court. The Justices were positive about the modification, but they had one question. They pointed out that the rule refers to standards established by the Health Department, but the "BEST" is a new category of provider. They asked how the rule would work if we do not yet have Health Department standards, and asked whether the Health Department was in the loop.

I forwarded those questions to Sen. Thatcher and the representative from the Health Department. They responded that this might need to be a standalone rule similar to URE 507 and they'd really like the privilege to apply not only to behavioral health communications, but also to any other medical communication. In response, I created a new standalone rule modeled after URE 507 that incorporates the provision from URE 506 and expands the protections to medical communications. I think the EMT patient privilege ought to be broader or have fewer exceptions than the physician patient privilege. I included the exceptions that made sense to me from the first responder peer support privilege, including exceptions for child abuse or neglect and when a statement indicates that the patient is a danger to himself or others. I just finished the draft so Judge McKelvie and Mr. Young haven't had a chance to look at it yet.

Judge McKelvie: During the conversation yesterday with Sen. Thatcher and others, including some folks in the technical field, we talked about nuanced issues and learned that it isn't uncommon for police officers to also act as an EMT. They may respond to an emergency situation involving someone with a mental health issue, including someone who may have committed a crime as a result of that mental health issue. The 5th and 6th Amendments kind of go hand in hand here. For example, a police officer is acting as an EMT and the person is in

immediate distress, but the officer doesn't know about the crimes. The officer goes to assist the person and the person makes a statement that they have committed a crime. Even though they are a certified provider, they obtain information that a prosecutor would want to use. Under other circumstances, a law enforcement officer would almost certainly mirandize the individual and afford them the right to an attorney before taking a statement.

Mr. Havas: I'm not taking a position for or against, but the other privilege rules are designed to encourage and foster candor and communication for whatever purpose, communication with an attorney or a health care provider for example. I am wondering if that same policy applies under these circumstances? Is there any data to suggest that communication with the BEST is going to have an adverse impact, or that someone who is having a psychological or emotional crisis is actually going to be thinking about whether or not they want to say something to an interventionist in that circumstance?

Judge McKelvie: We discussed that yesterday. Another common example of something a provider might run into is someone in mental distress, and the mental distress is either created by, or exacerbated by, the use of illegal controlled substances. Whether a physician or a technician is treating the person, it is critical to know if they've taken a controlled substance that is immediately dangerous to them. If the individual believes that he is going to get in trouble for acknowledging that he just shot up heroin or took methamphetamine, and chooses not to share that information, that is obviously a concern. It's probably not in the forefront of his mind, but he may at least be thinking that he could get in trouble. With regard to policy considerations, there are circumstances under which a treating technician needs accurate information and the individual needs some assurances that the information is going to be held in confidence.

Ms. Bulkeley: I am wondering about the definition of a BEST. My main concern would be blurring the lines. If police officers and firefighters will sometimes be classified as one of these first responders and other times not, are they going to have to identify the role they're playing? What if someone spills their guts to a responding officer, only to find out that the officer didn't consider himself to be in that role. At the time, the officer considered himself to be in more of an investigative role?

Mr. Hogle: In the draft, the definition of a BEST is similar to how physicians and mental health providers are defined in URE 506. It talks about whether the person was acting as a BEST, paramedic, or emergency medical services technician engaged in the diagnosis or treatment of a mental, emotional, or medical condition, in accordance with guidelines established by the Utah Department of Health. It's structured to distinguish this kind of person from law enforcement, but that is a good point.

Mr. Young: The Department of Health will be working on administrative rules to identify what people are operating as BESTs and what people are operating purely as EMTs, in an attempt to prevent the type of line blurring you're talking about. It's a work in progress, but that issue is on

our radar.

Ms. Carlquist: A lot of these calls originate as a 911 call. That's where most of the testimonial comes from and can we use that testimonial. We probably don't intend the 911 dispatcher to be covered by this privilege, but it seems like whatever gets told to the BEST after the fact is going to be largely duplicative of the 911 call. We would be applying a privilege to something that may come in through other means.

Mr. Young: Sen. Thatcher sees this as part of a broader imitative. It sounds like they are getting pretty close to launching a new process that would replace the suicide hotline with a 988 number. They would start diverting some of the behavioral intervention calls from the 911 line to the 988 line. I think the long game is, once the public becomes more educated on dialing 988 in those situations, then it gets routed to somebody who would fall under the BEST privilege.

Mr. Lund: The way the rapid response process is set up, these things can move ahead without a vote or the committee's feedback. It sounds like this is a moving target. Is this an information only item for the committee at this point? Is there anything you need from us?

Mr. Hogle: The Court's direction last year was to move expeditiously, but when possible, we can proceed normally with the whole committee. Depending on the timetable we're given by the legislator, we may just email the committee a rule draft and ask for a response immediately. I envision doing it that way here. Sen. Thatcher's bill is numbered. He wants to get it through the House before changing anything, so it will probably stay as it is with no reference to the rule we're working on, and maintaining the privilege in the statue itself. After he gets through the House, he will substitute the language. Pending a positive reaction from the Court, he will trust the Court's process. The Court can adopt a rule and he will move forward with his legislation without the privilege.

Mr. Lund: This is our third go around with a new privilege. First, it was the first responder peer support privilege, and then the victims advocate privilege. That's probably not the end of it. I'm worried that the general design of our privilege rules are getting weighed down a bit. I see a bigger project here to try to maintain some order in the privilege rules if we get a few more of these.

Mr. Hogle: I agree. I thought adding it to URE 506 was a more streamlined approach because these are so close to physician and mental health therapists, but Sen. Thatcher didn't like that. If we had more time, I still think the better approach would be to put this in URE 506 and just add those exceptions. Maybe later on we can undertake an effort to consolidate those.

Mr. Nielsen: The larger question is what the legislature has the authority to do. The Constitution says they can "amend" the rules of evidence. I suppose a broad reading is that "to amend" includes creating a new rule, but I wonder if the Court can draw a line about how far they are

willing to go. There may be a time when the Court says creating a rule goes beyond the legislature's authority, and that might be needed to stop the proliferation of these privileges.

Mr. Lund: There is legal authority for where that line is. When Rick Schwermer was here it was hammered into us, and he worked hard to make it clear to the legislature that they can't create new rules of evidence, they can only amend an existing rule. In order for the legislature to create a new rule of evidence from whole cloth, as they've done with the victim advocate rule, it requires a joint resolution passed by a 2/3 vote. I think Mike Drechsel understands that and we are just trying to get ahead of a 2/3 vote situation.

Mr. Hogle: It probably makes sense to send the draft to Sen. Thatcher and the AG representing the Department of Health as soon as we can. If the committee wants to see it, I'm happy to circulate it. We will take everyone's input into consideration and incorporate what we can.

Mr. Young: Sen. Thatcher was very appreciative of our help. He has been working on this for a long time. Unless we give them a product that they absolutely can't support, I don't think we are going to get a lot of push back from the legislature on how it's drafted.

Mr. Lund: Thank you for the work and hustle in getting this out. Just use your best judgment about whether you feel like you need more input or if what you have is ready to go.

**3. URE 512. Victim Communications:**

Mr. Lund: The version included in the packet was created in February 2020. Most of 2020 was spent trying to get input from Rep. Snow and legislative counsel on the proposed revisions, but we never received a meaningful response from them. At the November 10th meeting, Judge Bates recommended sending the edited version to the Supreme Court for consideration because how the current rule applies isn't clear to judges, prosecutors, or defense attorneys. The main difference in the proposed draft is the way it's structured. The confusing part in the current rule is how the exceptions work. That has been fixed by separating (d) and (e). The question for the Committee is whether to send the draft up to the Court for consideration.

Ms. Bulkeley: Mr. Young and I were on the subcommittee and I recall sending the last draft up with a caveat related to the constitutional issue of creating a rule out of whole cloth, and that we didn't think it was a great rule, but it's better than what the legislature came up with. The Court sent it back because they didn't like how something was worded. My recommendation is to send it up with the same caveats, reminding the court of our prior reservations. This might be more in line with what the legislature wanted, but it's still not a rule we would necessarily endorse, absent the legislative mandate.

Mr. Lund: In (d)(4), the victim advocate can disclose confidential communications to a large group of people without waiving the privilege. Everyone except for the defense attorney gets to

hear the confidential communication. At the very least, that is one of the substantive issues we had with the legislature's version.

Ms. Salazar-Hall: I agree with Ms. Bulkeley's recommendation. The breadth of disclosures is problematic to me as well. I don't like the rule. I think the BEST privilege is far better, but this is better than the legislature's version.

Ms. Carlquist: Under (d)(5), the criminal justice victim advocate has to disclose to the prosecutor. Wouldn't that make anything Brady material that they do have to disclose? As a public defender, I would want that. That makes me wonder if this is an effective privilege.

Mr. Lund: That's the heart of the problem. The advocate is going to tell a victim that everything they say is privileged, but is it?

Mr. Havas: Part of this is a policy question, is it a good privilege? But the privilege already exists and the point of the draft is to try to improve upon what the legislature did. Maybe we send this to the Court as an improvement over what the legislature did, but recommend eliminating the privilege altogether? The Court has the authority to do that. I don't think there is anything in our constitution that would preclude the Court from stepping in to exercise its rule-making and rule-amending authority to repeal a rule.

Mr. Lund: It sounds like the committee's recommendation is to forward this on to the Court with two caveats. We have attempted to engage the legislatures about the latest version, but haven't received a response. We still aren't crazy about the rule. The Court's options are to do nothing, to adopt our latest version of the rule, or to eliminate the rule.

***Ms. Bulkeley motioned to adopt Mr. Lund's recommendation. Mr. Hogle seconded. Mr. Graf opposed, with a comment that he supports sending the rule, but disagrees with the recommendation that the rule be repealed. Ms. Bulkeley's motion passed with a majority vote.***

**4. URE 106. Remainder of or related writings or recorded statements:**

Judge Welch: In November, the subcommittee presented the committee with three different versions of proposed changes to URE 106. The committee spent quite a bit of time editing Version 3. The Federal rules committee was supposed to meet on November 13th. The agenda and materials were posted online, including proposed changes to rule 106, but I can't find anything posted about what decisions were made at that meeting. Right now, the Utah rule parallels the federal rule, but the proposed changes to the federal rule are broader than what we're working on. The biggest change is that the federal rule would apply to oral arguments, not just written statements. The question now is whether we continue to wait to see what happens with the federal rule, or do we finish what we have and send a proposal to the Supreme Court?

The Court's directive to the Committee was in footnote 4 of the *Sanchez* case. I think that opinion was issued a couple of years ago. The appellate court decision in the *Sanchez* case was that URE 106 is a trumping rule. The Supreme Court decided the case based on prejudice without reaching the decision of whether or not URE 106 was a trumping rule or merely a timing rule, and then gave the issue to our committee. This issue has been debated in law review articles and case law for years. It's before the federal committee because it's a split jurisdiction issue. I don't get the sense that there is a rush from the Supreme Court, but this issue has been percolating for some time.

Mr. Lund: The federal rules committee doesn't move quickly. Looking at their current draft, my inclination is to move forward and leave it to the Supreme Court to decide if they want to wait.

Mr. Nielsen: I agree that we should move forward. *Jones* was my case and this issue has been unsettled in Utah for a long time. I think the Bar is very interested in the answer to this question. As far as the oral statement, I think it's something we can address if and when the feds get to it because Utah law has treated oral statements and written statements differently for many years. I don't think that issue is pressing or as interesting to litigants right now.

Judge Welch: If the federal rule incorporates oral statements, our committee would probably need to address it. We can send a memo to the Court recommending this as the best version of the rule, but provide an update about what the federal committee is working on.

Mr. Lund: Is there any appetite for trying to address the oral statement question at this junction before we send something to the Court?

Judge Welch: Utah case law tackled that issue in *Cruz-Meza* and decided that oral statements are not covered under URE 106, but are covered under URE 611. Under URE 611, you have to look at the trustworthiness of the statement. The Supreme Court's feedback the last time we presented on URE 106 was that they wanted a response to how URE 403 reacts with URE 106. To summarize version 3, it's a trumping rule with a 403 backstop. It allows inadmissible hearsay. URE 106 is a rule of inclusion, URE 403 is a rule of exclusion. The subcommittee could not agree on one version. I am advocating for version 3. Mr. Nielsen is advocating for version 1.

Mr. Nielsen: The main difference between version 1 and version 3 is a philosophical one. Do we let juries consider inadmissible evidence to help them understand admissible evidence? I think the committee should adopt version 1. The jury shouldn't be able to consider inadmissible evidence for its substantive truth. A lot of these are going to be hearsay questions. This comes up often in criminal cases with a defendant's statement to the police. The prosecution admits some of the defendant's statement and then defense counsel wants to admit everything else the person said, essentially permitting the defense to testify without being subject to cross-examination. The rules of evidence exist to ensure the reliability of evidence and when the rules exclude evidence, it is for good reason. It is primarily because it is unreliable. If evidence is

unreliable for one purpose, it shouldn't be rendered reliable and admissible for the truth of the matter asserted under URE 106. That doesn't mean it is absolutely inadmissible, it just can't be admitted for the truth of the matter asserted.

Version 1 limits the jury's consideration of that context evidence to things other than the truth of the matter asserted. That perfectly aligns with how we treat evidence under the hearsay rule. It is not fair for somebody to be able to put on their entire defense without having to take the stand and be subject to cross examination. It is unreliable because the person isn't sitting there telling their side.

Version 2 is the same approach as version 1, with the exception that the court, for good cause otherwise ordered, can order that the evidence be admitted for the truth of the matter asserted. Perhaps the witness died. It's almost like a residual hearsay rule built into the rule of completeness.

Judge Welch: There are good points on both sides. In *Sanchez*, the Court of Appeals went into why the rule is a trumping rule. Among other things, they looked at the plain language and placement of the rule. The Supreme Court didn't say those grounds weren't good, they asked the Rules of Evidence Committee to look at those factors. The rule is a rule about fairness. The fairness argument from a defense perspective is that it is not fair that a prosecutor should be able to put in only parts of a statement. By only putting in part of a statement, it forces the defendant to give up their fundamental right to not have to testify at trial. Version 3 starts where the Court of Appeals left off, and it does more by adding a 403 backstop.

Mr. Nielsen: The Court of Appeals did decide that, but the Supreme Court vacated the opinion. Version 1 shows why the police investigated the way they did based on the defendant's statement.

The committee voted on their preferred version:

- Version 1 = 5
- Version 3 = 7

Judge Welch: Because the vote is so close and there are good points on both sides, I would recommend sending a memo to the court stating that the vote was close and presenting both arguments.

Ms. Parrish: I recommend making the same edits to version 1 that were made to version 2, such as removal of the word "misleading," etc.

***Mr. Hogle motioned to adopt Judge Welch's and Ms. Parrish's recommendations. Ms. Salazar-Hall seconded and the motion passed unanimously.***

Mr. Nielsen offered to write the dissent and clean up version 1. Judge Welch will write the majority. The final memo will be distributed to the committee via email for feedback before it is presented to the Court.

**5. Create URE 504 Subcommittee:**

The committee did not address this item.

**6. URE 404. Supreme Court Summary:**

Mr. Lund: We presented the URE 404 memo to the Court. The Court wants the committee to think carefully about propensity evidence in the context of the doctrine of chances. They don't want to move forward until the full package is ready. There was concern about the significance of this evidence in sexual assault cases, but there is definitely some interest in exploring it. The concern that a line has to be drawn somewhere otherwise everybody can make the argument that this evidence is important evidence to their case wasn't particularly compelling to the Court. I think they were comfortable with the idea that you would allow this evidence in certain types of cases because of distinct reasons in those cases and not necessarily open the door to everything. The question is about the appropriateness of the evidence. This continues to be an issue that bubbles up at the court level. There is no presumption that they will follow our recommendation, they are going to wait to make a decision when we've completed our work on the doctrine of chances. They want to see a full package of recommendations.

**7. Doctrine of Chances: Subcommittee update:**

Judge Welch: The subcommittee needs more time. We are working on minor changes to the rule, a note that would accompany the rule, and a memo that addresses the committee's stance as to any jury instructions on the doctrine of chances. We plan to have something for the next meeting. We are working on URE 106 right now, so we will probably need longer than the February meeting.

Ms. Carlquist will join the doctrine of chances subcommittee.

**Next Meeting: February 9, 2021, 5:15 pm, Webex video conferencing** - Mr. Lund noted that the February meeting may be canceled or rescheduled sometime in early March, depending on the subcommittee's need for time and any legislative work during the session.