UTAH SUPREME COURT ADVISORY COMMITTEE
ON THE RULES OF EVIDENCE

MEETING MINUTES

February 9, 2021
5:15 p.m.-7:15 p.m.
Via Webex

Mr. John Lund, Presiding

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

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1. WELCOME AND APPROVAL OF MINUTES:

Mr. Lund asked for any corrections to the January 12, 2021 meeting minutes. The committee identified a typo, "doctrine of change." Teneille Brown moved to approve the minutes as amended. Sarah Carlquist seconded the motion. The motion passed unanimously.

2. Legislative Rapid Response Subcommittee:

- URE 507.1 (NEW)
- HJR 009

Mr. Hogle: New rule 507.1 is modeled after URE 507, the privilege rule for first responders. BESTs would include individuals who typically respond to calls regarding a potential crime or

disturbance and they may hear something that could be evidence of a crime. We included exceptions to the physician-patient rule because it didn't seem like the BEST privilege should be broader than the physician-patient privilege. We received positive feedback from the director of medical services.

Mr. Hansen: In Davis County, sheriff's deputies are employed and trained as both deputies and EMTs. Under the rule, anything a mentally ill person said on the scene could be considered privileged, but it may also be probable cause for an arrest. How would this rule apply under those circumstances?

Mr. Hogle: It may depend on the reasonableness of the perception of the person making the communication. The Department of Health is creating guidelines. There will need to be some way to differentiate between the two roles. If it's a behavioral health intervention, the communication would likely be covered by the privilege, but that would need to be clearly announced.

Ms. Carlquist: The rule seems to be focused more on the patient's reasonable belief of the role the person is playing to determine whether the privilege is triggered. I like that; it solves part of the problem. Maybe the sheriff/EMT should have an idea about whether they're responding to a crime or a mental health crisis. They could introduce themselves as a BEST and advise the individual that anything they say will be privileged.

Mr. Hogle: A lot of this will be driven by the guidelines. The idea behind the legislation is to prevent the unnecessary escalation of a mental health crises by sending untrained responders. SB 53 passed the Senate, but I'm not sure if it passed the House. The rule won't take effect until the guidelines are in place.

Mr. Young: This is part of Senator Thatcher's broader initiative to establish a 988 mental health crisis number. With time and public education, these concerns will diminish.

Mr. Lund: House Joint Resolution 9 (HJR 9) is circulating at the Legislature. It adds the 404(d) language we've been discussing. I'm not sure where things stand. Our 404(d) work is complete, but we were asked to wait and incorporate the doctrine of chances amendments at the same time.

Ms. Williams: This came from Representative Handy through Mike Drechsel. Mike let him know that the Committee has been engaged in this work for a while. Rep. Handy said that HJR 9 isn't going anywhere this session, he just wanted to get it on the legislature's radar in order to make it a study item during the interim session.

3. Supreme Court Memos and rule drafts:

- URE 512
- URE 1101
- URE 106

URE 512:
Ms. Williams: The changes I incorporated in the rule draft where discussed by the Committee at an earlier meeting. The rule draft and memo are ready for review and approval for presentation to the Supreme Court.

Mr. Nielsen: Does the reference to the rules of criminal procedure in (e)(2) refer to a particular rule of criminal procedure, or should it be Rule 7 of rules of civil procedure?

Ms. Carlquist: Wouldn't this apply to civil cases as well?

After further discussion, the Committee determined that a reference to the rules of procedure is unnecessary. Ms. Williams will refer the issue to the rules of criminal procedure to see if they want to articulate a process for these motions.

Mr. Lund: Elsewhere in the rules, language regarding exceptions to privileges isn't framed as "disclosures that waive" or "disclosures that do not waive" the privilege. I recommend changing the title of (e) to "Exceptions" and mirroring the language in other rules by amending the end of (e)(1) to "…the privilege in paragraph (b) does not apply in the following circumstances..."

The Committee agreed with Mr. Lund's proposed amendments and made a few minor changes to the memo. Mr. Neilsen moved to approve URE 512 and the memo as amended. Mr. Hogle seconded and the motion passed unanimously.

URE 1101:
Mr. Lund: The memo is a great summation of where we are with URE 1101 and it's exactly the kind of work the Court really appreciates. The Committee already approved the rule draft. This is just on for review.

After discussion, the Committee agreed to send the memo and rule draft to the Supreme Court as drafted.

URE 106:
Judge Welch: At the last meeting, the Committee voted to send URE 106 to the Supreme Court with a recommendation that it be published for comment. The memo includes both the majority and minority views and addresses other issues the Court asked the Committee to consider. The Court asked how URE 106 would interplay with URE 403, recommended a new committee note,

and asked what scholars and other states are saying about URE 106 issues. I also noted that the federal rules committee has been looking at amending FRE 106.

Mr. Lund: The Committee voted to approve the rule draft at the last meeting. This is on for a review of the memo.

After further discussion, the Committee cleaned up the formatting in the rule draft to clearly identify the proposed amendments and noted that there were a few typos in the memo. With those changes, the Committee agreed to send the rule and memo to the Court as amended.

4. Doctrine of Chances:

Judge Welch: The subcommittee is divided on the best approach. There are two different rule drafts and committee notes for consideration. We are looking for feedback from the Committee and maybe a vote. The subcommittee can then prepare a memo for the Court and bring it back to the next meeting.

The subcommittee also recommends that the Supreme Court ask the appropriate advisory committee to create a model jury instruction on the application of the Doctrine of Chances. A jury instruction was recommended by Judge Harris in his concurring opinion in *State v. Lane* and by Professor Imwinkelried in a recent law review article.

The first proposed rule draft by Mr. Nielsen includes a short, one-sentence amendment in URE 404(b)(2). The committee note then flushes out the Doctrine of Chances, referring to the four foundational requirements, and references important caselaw.

The second proposed rule draft by Ms. Carlquist includes standalone subsection (b)(3), addressing the Doctrine of Chances. Mr. Young recommended incorporating the word "statistical." The committee note is more succinct and does not include references to caselaw.

Ms. Carlquist: My understanding is that the Supreme Court wants a very simple, clean rule. Every practitioner knows what the 404(b)(2) permitted uses are, so creating a standalone subsection is less of a shock to the system. Admitting something under the Doctrine of Chances is a very different analysis from the traditional 404(b)(2) analysis. The Supreme Court discussed unusual statistical frequency in *State v. Argueta*, saying judges can't rely on their gut because their own personal experience may influence their decision. What a judge thinks is rare may actually be more common.

Mr. Neilsen: I put the Doctrine of Chances language under (b)(2) because that is the "permitted uses" section and the Doctrine of Chances is a permitted use. I understand the *Argueta* position on statistical frequency, but I think there are circumstances where you don't need an expert witness to provide statistics on how many people have been accused of killing brides in

bathtubs. Some things can be intuitive, *Argueta* notwithstanding. There are certainly circumstances where statistical evidence should be required, but I didn't want to give the impression that it's required in every circumstance.

Ms. Parrish: I prefer the body of the rule in example #1 and the committee note in example #2. If we went with example #2, (b)(3) should be under (b)(2) because it is a permitted use.

Mr. Lund: The committee note in example #1 reads like it ought to be in the rule. I'm concerned that the Court would ask why it isn't incorporated in the language of the rule itself.

Judge Williams: I agree. If we start listing a whole host of cases, what do we do when there's a new case or one of those cases gets overruled? Are we going to be policing that?

Judge Welch: The first time this rule proposal went to the Court, they said it wouldn't be helpful to include the four foundational requirements in the rule itself and that it would be more helpful for the rule to address applicability.

Mr. Hogle: I think it's helpful to include case citations. Without those citations in the committee note, if an important case is overruled, it won't be as easy for practitioners to find. Everyone knows (or should know) that you should shephardize a case before relying on it. I prefer the committee note in example #1.

Judge Welch: Normally I wouldn't advocate for a note with a lot of caselaw, but it's so important here. Caselaw really fleshes out how the Doctrine of Chances works. This is a doctrine that was created and developed in caselaw. I recommend a committee note with at least the fundamental cases.

Mr. Lund: Isn't a doctrine and a theory the same thing? I can't think of a rule of evidence that uses the word "theory," much less "doctrine." I think the Doctrine of Chances itself is a pretty discrete, definable element. I'm worried about adding the word "theory" as well. Is it necessary? Also, is it possible to create a new standalone section titled "Doctrine of Chances" and then articulate what it is with either example #1 or #2 language, but not use the term "Doctrine of Chances" again?

Ms. Carlquist: I agree that we could get rid of "theory."

Mr. Young: I agree with Judge Welch. If someone is new to the Doctrine of Chances, it might be hard for them to find the fundamental cases. They may get there by searching "doctrine of chances," but I think this lends itself to an inexperienced practitioner.

Mr. Neilsen: I agree with Mr. Young. I think we need the phrase "Doctrine of Chances" in the rule somewhere.

Mr. Lund: I think the first two sentences in the committee note in example #2 address that issue. I don't think the term "Doctrine of Chances" should be in the body of the rule at all, but I would support making it a heading. I think our job is to articulate how the doctrine can be applied as opposed to just saying, "Doctrine of Chances." Does it do that now? I think explaining the four foundational requirements would be more important for a practitioner than just using the phrase.

Judge Welch: The problem with just including the sentence in (b)(2) in example #1 is that caselaw says that evidence may be admitted only if you meet certain requirements. What we're wrestling with is how to include the foundational requirements. Right now, they are in the committee note. We could make a recommendation and let the Court decide whether they want to move it into the rule. I do think we need the phrase "Doctrine of Chances" in the rule itself because it is the mechanism by which evidence involving rare events can come in.

Mr. Havas: After hearing that the Doctrine of Chances is fleshed out and informed by caselaw, I think we should include case citations in the committee note, especially after the Court told us they don't want all of the foundational requirements in the rule itself. In example #1, I would delete the word "theory" in (b)(2) and keep the more expansive committee note with case citations.

Judge Welch: I agree with Mr. Havas.

Ms. Carlquist: I agree as well, but I wonder if by tacking the sentence onto the end of (b)(2), someone will see it as limiting the other permissible purposes. Do you need multiple incidents just to prove intent?

Mr. Neilsen: I tried to address that by saying, "may also be admitted."

Ms. Carlquist: One of the concerns brought up in *State v. Lane* was that 404(b) prohibits the use of evidence for propensity purposes, so there was some question about whether it's fair to use the Doctrine of Chances. Does that really just give rise to propensity evidence? And then in *State v. Murphy*, Judge Harris said if the goal of 404(b) evidence is to prohibit the, "he did it before, he'll did it again" inference, any statistical or probability evidence you're using about the defendant's character to rebut the truth of an alleged victim's statement can only give rise to a propensity inference, violating the 404(b) purpose of prohibiting propensity reasoning. I agree that the committee note in example #2 feels very rule-like and substantive, but I'm happy to write that portion of the memo. In a footnote in *State v. Richins*, the Court of Appeals said that when Doctrine of Chances evidence is used to rebut claims of fabrication, it's just straight out propensity evidence. That case is before the Supreme Court right now so they're probably going to decide the issue.

Mr. Lund: Can we merge the two committee notes to address some of those issues?

Mr. Neilsen: This is somewhat of a philosophical question. Judge Harris doesn't think it's possible to show a prior act without saying something about who someone is. He said the whole point of the 404 character bar is to say you can't infer that somebody did something based on an inference about the character of who they are. I disagree. I think it's valid to show a pattern of intent without saying they're a bad person - they acted with the same motive, the same state of mind. The committee note in example #2 says the evidence may not be admitted to rebut a claim of self-defense or fabrication, but that is the core 404(b) evidence.

Mr. Havas: I purposely avoided using "statistical frequency" in my proposed language because I think that has the potential to cause confusion or be misleading. I think it should be frequent and rare, but whether it is statistically significant adds a different element than is necessary.

Mr. Hogle: I agree with Mr. Havas. Let's leave that to caselaw.

Mr. Young: I made that suggestion because it was an important consideration in *Argueta*. The assessment of frequency cannot be based solely on intuition, but it gets tricky when you talk about whether something is statistically significant. That term means something entirely different to someone in social sciences or statistics. It seems like the *Argueta* court left the window open for judicial notice that something is sufficiently rare. It doesn't have to be "statistical," but I would prefer having something in the rule to signal that trial courts aren't supposed to just fly by the seat of their pants when making that assessment.

Mr. Havas: I agree with Mr. Young. I was opposed to the term "statistical" because it could be interpreted differently in other fields. I think what the court was talking about is that this is supposed to be based on evidence, not on gut reaction or intuition. I think that could be adequately addressed in a committee note.

Mr. Neilsen: I recommend removing "statistical" and changing (b)(2) in example #1 to read, "Evidence of rare events shown to occur with unusual frequency may also be admitted under the doctrine of chances."

Mr. Young moved to approve the revised version of the rule draft in example #1 and to have the subcommittee further develop the committee note along the lines of the Committee's discussion. Mr. Hogle seconded and the motion passed unanimously. The Committee also agreed to include a recommendation that the Court refer the issue to the appropriate advisory committee to create a model jury instruction.

5. URE 504 Subcommittee:

- **LPPs and Regulatory Sandbox**

Mr. Lund: As a reminder, we have some privilege work to do around the regulatory sandbox and licensed paralegal practitioners. It would likely be a revision to the client privilege rule. Ms.

Parrish, Ms. Salazar-Hall, and Ms. Bowen have agreed to sit on the subcommittee. They will bring something back for the Committee's review at the next meeting.

Next Meeting: April 13, 2021, 5:15 pm, Webex video conferencing