UTAH SUPREME COURT ADVISORY COMMITTEE
ON THE RULES OF EVIDENCE

MEETING MINUTES
June 8, 2021
5:15 p.m.-7:15 p.m.
Via Webex

Mr. John Lund, Presiding

MEMBERS PRESENT	MEMBERS EXCUSED	GUESTS	STAFF
Adam Alba	Teneille Brown	Christopher Williams	Keisa Williams
Deb Bulkeley	Melinda Bowen		Minhvan Brimhall
Sarah Carlquist			
Tony Graf			
Mathew Hansen			
Ed Havas			
Chris Hogle			
Hon. Linda Jones			
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:

The committee considered the April 13, 2021 meeting minutes. With no modifications, John Nielsen moved to approve the minutes. Dallas Young seconded and the motion passed unanimously.

2. Rules back from public comment:

- URE 512. Victim Communications.
- URE 1101. Applicability of Rules.

Ms. Carlquist: With respect to the public comment from Nathalie Skibine, I believe her concern is that it's confusing to lean on *Weeks* so much when there are more cases to suggest that restitution hearings may not be such simple matters.

Mr. Lund: The public comment about rule 512 underscores the committee's ongoing concerns.

After further discussion, Ms. Parrish moved to approve rule 512 as drafted, with a note to the Supreme Court that there is nothing in the public comments indicating that the rule cannot be approved as final. Mr. Graf seconded and the motion passed unanimously.

3. Supreme Court Conference update:

- URE 504 (approved for comment)
- URE 404 (back to committee)

Ms. Williams: The Supreme Court did not have any comments on Rule 507.1. It is on hold until the Department of Health publishes its guidelines. Several members were reappointed for a second term. Rule 504 went out for public comment.

Mr. Lund: The Court appreciated having both sides of the Rule 106 issue summarized in a memo. With respect to Rule 404, the Court said that the committee should not feel restrained by caselaw. They are open to all ideas, even a recommendation that the doctrine of chances not exist at all. Professor Brown's recent law review article is included in the packet.

The Court is interested in studying the issue in more detail. They've asked the committee to compile a reading file for them on all sides of this topic and to present the issues at a special conference dedicated to URE 404 and the doctrine of chances. The Court is looking to the Committee to present the information they need and help guide them through this decision-making process.Tentatively, the plan is to schedule a special 404 conference in October. So far, the presenters are Professor Brown, Professor Imwinkelried, Judge Welch, and Judge Harris. A small subcommittee is working on putting materials together and scheduling presenters.

The Committee discussed Professor Brown's law review article and whether any committee members held the opinion that the doctrine of chances should be gutted entirely. The committee will set aside time at the next meeting to finalize the conference materials, issues, and presentations.

4. URE 106 Subcommittee update:

Judge Welch: The federal rules committee met on April 30th and voted to approve proposed federal rule 106 and the accompanying committee note. It should now go out for public comment. The subcommittee met and addressed a few questions brought up at the last

meeting. The proposed federal rule covers oral statements, not just written statements. The question for the committee is whether Utah should adopt the new federal rule?

Ms. Carlquist: I like it when our rules match the federal rules. You can draw on more authority to make your arguments. The federal rule is pretty close to what we proposed, but without the rule 403 backstop, which I felt added more confusion than clarity.

Judge Welch: I think it's important that the Utah rule define what it means to "introduce."

Mr. Hogle: I think we should strive to adhere to the federal rules as much as possible. Defining "introduce" is an important issue, but I don't think it's so important that we deviate from the federal rule. We can explain it in the note.

After further discussion, the committee agreed to follow the federal language about fairness and the hearsay objection, specifically the last sentence in the federal rule. The committee was divided on how to address oral statements.

> **Federal Rule:** If a party introduces all or part of a written or oral statement, an adverse party may require the introduction, at that time, of any other part — or any other written or oral statement — that in fairness ought to be considered at the same time. The adverse party may do so over a hearsay objection.
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> **Committee proposal:** If a party introduces all or part of a writing or recorded statement, or testimony of the contents thereof, an adverse party may require the introduction, at that time, or on cross-examination of that same witness, of any other part — or any other writing or recorded statement — that in fairness is reasonably necessary to qualify, explain, or place into context any portion already introduced. If the other part, writing, or recorded statement is otherwise inadmissible under these rules, it may be admitted for the truth of the matter asserted, unless the court decides otherwise under rule 403.

Mr. Lund took a poll on the oral statement issue: 7 members voted in favor of following the language in the federal rule. 5 members voted to stick with the language proposed by committee. Ms. Carlquist moved to recommend the federal version of rule 106 to the Supreme Court, with a minority statement expressing concerns over including oral statements, along with suggested alternative language. Ms. Salazar-Hall seconded the motion and it passed unanimously.

Mr. Nielsen will write the minority statement for the Supreme Court memo and send it to Mr. Hogle for review.

5. URE 506 Subcommittee:

Ms. Carlquist: In *State v. Bell*, the Supreme Court raised some concerns about rule 506 and asked the committee to consider the importance of maintaining a strong privilege rule, while more clearly defining what is required to qualify for an exception. In Utah, the standard to overcome a rule 506 privilege in criminal cases is to establish that the elements of the exception are met to a reasonable degree of certainty. The Court seems to want the standard by which you have to meet the elements of the privilege incorporated into the rule and thinks that "reasonable certainty" is too high. Mr. Nielsen conducted a 50-state survey. Standards in some of the other states were "reasonably necessary," "probable cause," "good faith," and "reasonable probability."

Ms. Salazar-Hall: We focused on balancing a victim's right to privacy with a defendant's constitutional right to due process. We don't want to prevent victims from seeking mental health treatment, but we also don't want to prevent defendants from discovering critical evidence.

Mr. Lund: Does this belong better in Rule 510? It isn't necessarily limited to the physician-patient privilege. Ms. Salazar-Hall: This is applicable in family law and child welfare cases.

Mr. Hogle: There is some relationship to Rule 35 of the Rules of Civil Procedure. Under Rule 35, you can get a court-ordered physical or mental examination. It doesn't explain what "controversy" means, but I suspect it's similar to federal rule 35. There might be some case law to flesh it out.

Judge Trease: Criminal cases primarily involve victims of sexual abuse and victims are not necessarily parties. The considerations under those circumstances should be different than in most civil cases. We may want to get input from victim advocates.

The subcommittee will continue its work and bring something back to the committee at the next meeting.

6. URE 412. Admissibility of Victim's Sexual Behavior or Predisposition:

Mr. Neilsen recommended a minor change to rule 412. A number of attorneys in juvenile cases have successfully argued that rule 412 doesn't apply in juvenile cases because the rule says "in criminal proceedings." In juvenile court, these are civil proceedings. The victims' interest in privacy and the need to encourage this sort of reporting applies equally to juvenile proceedings. The proposed amendment explicitly includes juvenile delinquency proceedings.

Mr. Neilsen moved to approve URE 412 as drafted for a recommendation to the Supreme Court that it be sent out for public comment. Judge McKelvie seconded and the motion passed unanimously.

Next Meeting: September 14, 2021, 5:15 pm, Webex video conferencing