AGENDA

Utah Supreme Court Advisory Committee / Rules of Evidence

February 9, 2021 / 5:15 p.m. – 7:15 p.m.

Meeting held via WEBEX

Approval of Minutes • *January 12, 2021*	Action	Tab 1	John Lund
Legislative Rapid Response Subcommittee Update • URE 507.1 (NEW) • HJR 009	Discussion	Tab 2	Chris Hogle John Lund
Supreme Court Memos & rule drafts (for committee approval)**:** • URE 512 • URE 1101 • URE 106	Action	Tab 3	John Lund
Doctrine of Chances	Action	Tab 4	Judge Welch
URE 504 Subcommittee • LPPs & Regulatory Sandbox	Discussion		John Lund

Queue:

- Ongoing Project: Law Student Rule Comment Review

2021 Meeting Dates:
April 13, 2021
June 8, 2021
September 14, 2021
October 12, 2021
November 9, 2021

Rule Status:
URE 512 – Memo & rule draft ready for approval by committee.
URE 106 – Memo & rule draft ready for approval by committee.
URE 1101 – Memo & rule draft ready for approval by committee.
URE 404(b) – On hold. Combine work with DoC

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Tab 1

UTAH SUPREME COURT ADVISORY COMMITTEE
ON THE RULES OF EVIDENCE

MEETING MINUTES
DRAFT
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 Melinda Bowen 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	Mathew Hansen Hon. Vernice Trease		Keisa Williams Minhvan Brimhall

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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 Changes: 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.

Tab 2

MEMORANDUM

TO:	THE UTAH SUPREME COURT
FROM:	THE RAPID RESPONSE SUBCOMMITTEE OF THE ADVISORY COMMITTEE ON THE RULES OF EVIDENCE (HON. RICHARD MCKELVIE, CHRISTOPHER R. HOGLE, AND DALLAS YOUNG)
RE:	SENATE BILL RE: BEHAVIORAL EMERGENCY SERVICES AMENDMENTS
DATE:	FEBRUARY 5, 2021

On November 30, 2020, the Rapid Response Subcommittee was asked to discuss with Senator Daniel Thatcher his proposed Behavioral Emergency Services Amendments, to be introduced during the 2021 General Session of the Utah Legislature. This subcommittee previously prepared and forwarded to the Supreme Court proposed amendments to Utah R. Evid. 506 to accomplish objectives stated in a memorandum to the Court dated December 9, 2020.

After reviewing the proposed changes and the accompanying memorandum, the Court indicated a general inclination to adopt the proposal, but posed two questions to the subcommittee, *viz*, (1) how would the rule work in the absence of previously promulgated standards from the Department of Health; and (2) is the Department of Health in the loop on the proposal?

Following the receipt of those questions, the members of this subcommittee, along with Michael Dreschel (Assistant State Court Administrator), reached out to Senator Thatcher, Guy Dansie (EMS Program Director of the Utah Department of Health, Bureau of Emergency Medical Services and Preparedness), and Brittany Huff (Assistant Attorney General assigned to the Department of Health), to address the Court's questions.

The subcommittee was informed that the Department of Health has been in the loop on this proposal for some time, and that it is supportive of the proposed privilege. The Department had not yet, at that point, undertaken to have formal guidelines drafted for the function and scope of the Behavioral Emergency Services Technician (BEST) position. It was suggested that the effective dates of the guidelines, once prepared, and an evidentiary rule should be the same. All participants in the teleconference indicated approval of this approach. Members of the subcommittee indicated to Senator Thatcher and Mr. Dansie that the subcommittee would recommend that approach to the Court. Inquiry was recently made on where the Department of Health stands on drafting the guidelines referenced in proposed Rule 507.1(a)(2)(A). The subcommittee will update the Court on this when it has received an answer to this inquiry.

More fundamentally, Senator Thatcher, Mr. Dansie, and Ms. Huff expressed their view that a stand-alone rule, such as Rule 507 for First Responder Peer Support, would be a better model for their proposed rule. They also indicated that exceptions stated in Rule 507 (and absent from Rule 506) for child neglect or abuse situations and when the patient is a danger to himself/herself or others seemed appropriate for a first responder privilege rule. The subcommittee concurs. Given that Rule 506 currently does not have those exceptions, creating an exception within Rule 506 that applies to BESTs and not physicians and mental health therapists would unduly complicate Rule 506.

Accordingly, the members of the subcommittee drafted a proposed stand-alone rule patterned after the first responder peer support privilege stated in Rule 507. The scope of the privilege in the new proposal (Rule 507.1) is substantially similar to the scope of the December 9, 2020 proposal, but differs in the following respects:

- The privilege would apply not only to communications with BESTs, but also to communications with emergency medical service providers. (507.1(a)(2)(A).) The subcommittee saw no principled reason to afford behavioral health communications greater protection than medical health communications. Furthermore, given the scenarios in which BEST services will likely be dispatched, the scenario will often call for both medical and behavioral interventions.

- The exceptions from the privilege stated in Rule 507 for child neglect or abuse, and danger to patients or others, were included. These exceptions did not appear in the December 9, 2020 proposal. The two other exceptions from Rule 507 (communications that indicate a person receiving services is "mentally or emotionally unfit for duty" or "has committed a crime, plans to commit a crime, or intends to conceal a crime") were not included because they do not seem to fit the context and purpose of a first responder/patient privilege.

Otherwise the scope of the privilege does not differ from the scope stated in the December 9, 2020 proposal.

The new proposal has been circulated to Senator Thatcher and Mr. Dansie, and both have expressed their approval of this draft.

Rule 507.1. Behavioral Or Medical Emergency Services Technician-Patient

(a) Definitions

(a)(1) "Patient" means a person who consults or is examined or interviewed by a behavioral or medical emergency services technician.

(a)(2) "Behavioral or medical emergency services technician" means a person who

(a)(2)(A) is or is reasonably believed by the patient to be delivering medical, mental or emotional health services in an emergency context within a scope and in accordance with guidelines established by the Utah Department of Health as a behavioral emergency services technician, paramedic, or emergency medical services technician; and

(a)(2)(B) is engaged in the diagnosis or treatment of a mental, emotional, or medical condition.

(a)(3) "Physician" means a person licensed, or reasonably believed by the patient to be licensed, to practice medicine in any state.

(a)(4) "Mental health therapist" means a person who

(a)(4)(A) is or is reasonably believed by the patient to be licensed or certified in any state as a physician, psychologist, clinical or certified social worker, marriage and family therapist, advanced practice registered nurse designated as a registered psychiatric mental health nurse specialist, or professional counselor; and

(a)(4)(B) is engaged in the diagnosis or treatment of a mental or emotional condition, including alcohol or drug addiction.

(b) Statement of the Privilege. A patient has a privilege, during the patient's life, to refuse to disclose and to prevent any other person from disclosing information that is communicated in confidence to a medical or behavioral emergency services technician for the purpose of diagnosing or treating the patient. The privilege applies to:

(b)(1) diagnoses made, treatment provided, or advice given by a medical or behavioral emergency services technician;

(b)(2) information obtained by a behavioral or medical emergency services technician through examination of the patient; and

(b)(3) information transmitted among a patient and a behavioral or medical emergency services technician and other persons who are participating in the diagnosis or treatment under the direction of a physician or mental health therapist. Such other persons include guardians or members of the patient's family who are present to further the interest of the patient because they are reasonably necessary for the transmission of the communications,

or participation in the diagnosis and treatment under the direction of the physician or mental health therapist.

(c) Who May Claim the Privilege. The privilege may be claimed by the patient, or the guardian or conservator of the patient. The person who was the physician, mental health therapist, or behavioral or medical emergency services technician at the time of the communication is presumed to have authority during the life of the patient to claim the privilege on behalf of the patient.

(d) Exceptions. No privilege exists under paragraph (b) in the following circumstances:

(d)(1) Child Neglect or Abuse. For communications to a behavioral or medical emergency services technician that is evidence of actual or suspected child neglect or abuse.

(d)(2) Danger to Patient or Others. For communications to a behavioral or medical emergency services technician that is evidence a patient is a clear and immediate danger to the patient or others.

(d)(3) Condition as Element of Claim or Defense. For communications relevant to an issue of the physical, mental, or emotional condition of the patient:

(d)(3)(A) in any proceeding in which that condition is an element of any claim or defense, or

(d)(3)(B) after the patient's death, in any proceedings in which any party relies upon the condition as an element of the claim or defense.

(d)(4) Hospitalization for Mental Illness. For communications relevant to an issue in proceedings to hospitalize the patient for mental illness, if the mental health therapist in the course of diagnosis or treatment has determined that the patient is in need of hospitalization; and

(d)(5) Court Ordered Examination. For communications made in the course of, and pertinent to the purpose of, a court-ordered examination of the physical, mental, or emotional condition of a patient, whether a party or witness, unless the court in ordering the examination specifies otherwise.

LEGISLATIVE GENERAL COUNSEL
₵ Approved for Filing: J. Carlton ₵
₵ 02-02-21 9:05 AM ₵

H.J.R. 9

JOINT RESOLUTION AMENDING RULES OF EVIDENCE ON ADMISSIBILITY OF EVIDENCE OF CRIMES OR OTHER ACTS

2021 GENERAL SESSION

STATE OF UTAH

Chief Sponsor: Stephen G. Handy

Senate Sponsor: _____

LONG TITLE

General Description:

This resolution amends the Utah Rules of Evidence, Rule 404, on the admissibility of evidence of crimes or other acts.

Highlighted Provisions:

This resolution:

- amends the Utah Rules of Evidence, Rule 404, on evidence of crimes or other acts to allow for the admission of evidence of similar crimes of sexual assault; and
- makes technical and conforming changes.

Special Clauses:

This resolution provides a special effective date.

Utah Rules of Evidence Affected:

AMENDS:

Rule 404, Utah Rules of Evidence

Be it resolved by the Legislature of the state of Utah, two-thirds of all members elected to each of the two houses voting in favor thereof:

As provided in Utah Constitution Article VIII, Section 4, the Legislature may amend rules of procedure and evidence adopted by the Utah Supreme Court upon a two-thirds vote of all members of both houses of the Legislature:

H.J.R. 9

Section 1. **Rule 404**, Utah Rules of Evidence is amended to read:

Rule 404. Character Evidence; Crimes or Other Acts.

(a) Character Evidence.

(a) (1) Prohibited Uses. Evidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in conformity with the character or trait.

(a) (2) Exceptions for a Defendant or Victim in a Criminal Case. The following exceptions apply in a criminal case:

(a) (2) (A) a defendant may offer evidence of the defendant's pertinent trait, and if the evidence is admitted, the prosecutor may offer evidence to rebut it;

(a) (2) (B) subject to the limitations in Rule 412, a defendant may offer evidence of an alleged victim's pertinent trait, and if the evidence is admitted, the prosecutor may:

(a) (2) (B) (i) offer evidence to rebut it; and

(a) (2) (B) (ii) offer evidence of the defendant's same trait; and

(a) (2) (C) in a homicide case, the prosecutor may offer evidence of the alleged victim's trait of peacefulness to rebut evidence that the victim was the first aggressor.

(a) (3) Exceptions for a Witness. Evidence of a witness's character may be admitted under Rules 607, 608, and 609.

(b) Crimes, Wrongs, or Other Acts.

(b) (1) Prohibited Uses. Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in conformity with the character.

(b) (2) Permitted Uses; Notice in a Criminal Case. This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. On request by a defendant in a criminal case, the prosecutor must:

(b) (2) (A) provide reasonable notice of the general nature of any such evidence that the prosecutor intends to offer at trial; and

(b) (2) (B) do so before trial, or during trial if the court excuses lack of pretrial notice on good cause shown.

(c) Evidence of Similar Crimes in Child-Molestation Cases.

(c) (1) Permitted Uses. In a criminal case in which a defendant is accused of child molestation, the court may admit evidence that the defendant committed any other acts of child molestation to prove a propensity to commit the crime charged.

(c) (2) Disclosure. If the prosecution intends to offer this evidence it shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown.

(c) (3) For purposes of this rule "child molestation" means an act committed in relation to a child under the age of 14 which would, if committed in this state, be a sexual offense or an attempt to commit a sexual offense.

(c) (4) Rule 404(c) does not limit the admissibility of evidence otherwise admissible under Rule 404(a), 404(b), 404(d), or any other rule of evidence.

(d) Evidence of Similar Crimes in Sexual Assault Cases.

(d) (1) Permitted Uses. In a criminal case in which a defendant is accused of sexual assault, the court may admit evidence that the defendant committed another act of sexual assault to prove a propensity to commit the crime charged. Evidence that the defendant committed another act of sexual assault may be considered on any matter to which the evidence is relevant.

(d) (2) Disclosure to the Defendant. If the prosecution intends to offer evidence that the defendant committed another act of sexual assault, the prosecution must disclose the evidence to the defendant, including any witness statement and summary of the expected testimony.

(d) (3) Definition of "Sexual Assault." As used in this paragraph (d), "sexual assault" means any crime under federal or state law that would, if committed in this state, be a sexual offense, or an attempt to commit a sexual offense.

(d) (4) Effect on Other Rules. This rule does not limit the admissibility of evidence otherwise admissible under Rule 404(a), 404(b), 404(c), or any other rule of evidence.

Section 2. **Effective date.**

This resolution takes effect upon approval by a constitutional two-thirds vote of all members elected to each house.

Tab 3

URE 512

UTAH SUPREME COURT ADVISORY COMMITTEE

RULES OF EVIDENCE
JOHN R. LUND
CHAIR

February 6, 2021

URE 512. Victim Communications

At the conclusion of the 2019 general session, the Utah legislature adopted House Joint Resolution 3 (H.J.R 3), creating a new rule of evidence regarding confidential communications made by victims, in conjunction with House Bill 53 (now 77-38-401, et seq). The Committee worked with the Sponsor, Representative Lowry Snow, throughout the 2019 session providing feedback and recommendations. Representative Snow agreed to include a delayed effective date of July 31, 2019, allowing the Court to adopt its own version of the rule no later than July 30, 2019, at which point the resolution would not take effect.

The Committee presented a proposed draft to the Court on July 17, 2019 (**Version 1**). Representative Snow sent a letter to Mike Drechsel and Cathy Dupont expressing his dissatisfaction with Version 1 and asking the Court not to adopt it. The Court felt it was important for the Committee to take time to carefully consider the Court's feedback and Rep. Snow's concerns. Rather than rush that work, the Court allowed H.J.R 3 to go into effect.

The Committee worked closely with Rep. Snow on a second draft (**Version 2**). Rep. Snow expressed his approval of Version 2, stating that he believed it comported with the Legislature's intent. Specifically, Rep. Snow felt strongly that all of the disclosures allowed under (d)(4) were good policy because defendants would have access to *Brady* material under (e)(1)(B)(i). In presenting Version 2 to the Court, the Committee expressed the following two concerns:

1) The Utah Constitution seems to reserve the right to create rules of evidence to the Judiciary, with the right of the legislature limited to amendment of those rules. By creating a rule out of whole cloth, the legislature appears to be running afoul of the Constitution. The Court's adoption of URE 512 may set a dangerous precedent.

2) The breadth of the disclosures allowed under the rule that exclude the defendant without judicial review is not good policy. Under subsection (d)(4), victim advocates may disclose confidential victim communications to a long list of individuals, with the exception of the defendant. Nothing prevents the individuals to whom the advocate discloses from further disclosing those communications to third parties, and yet the privilege is maintained.

On February 19, 2020, the Court made one grammatical change to Version 2 and approved it for public comment. However, the Court shared the Committee's concerns with the breadth of the disclosures in (d)(4) and posed a question about the procedures for filing a motion under (e)(2).

After a 45-day comment period, the Court received two comments (attached). After careful consideration, the Committee made the following changes:

- Incorporated Mr. Drechsel's recommendation *(line 46)*;
- Changed the title of (e) to "exceptions that waive the privilege" to maintain consistency with the language in URE 507 and URE 504 *(line 57)*
- Added a reference to clarify that URE 510 applies to this rule *(line 59);*
- Moved three disclosures from paragraph (d) to paragraph (e) *(lines 76-83)*; and
- Added a reference to the rules of criminal procedure in (e)(2) *(line 101)*.

Since April 2020, the Committee has reached out to Representative Snow a number of times for feedback on the changes contemplated in **Version 3**. Unfortunately, the Committee has yet to receive a response. The Committee continues to have the same concerns that it expressed in February 2020, but if the Court determines that adoption of a new rule on victim communications is in the best interest of the Judiciary, the Committee feels that **Version 3** of Rule 512 is the best version.

Rule 512. Victim communications.

(a) Definitions.

(a)(1) "Advocacy services" means the same as that term is defined in UCA § 77-38-403.

(a)(2) "Confidential communication" means a communication that is intended to be confidential between a victim and a victim advocate for the purpose of obtaining advocacy services as defined in UCA § 77-38-403.

(a)(3) "Criminal justice system victim advocate" means the same as that term is defined in UCA § 77-38-403.

(a)(4) "Health care provider" means the same as that term is defined in UCA § 78B-3-403.

(a)(5) "Mental health therapist" means the same as that term is defined in UCA § 58-60-102.

(a)(6) "Victim" means an individual defined as a victim in UCA § 77-38-403.

(a)(7) "Victim advocate" means the same as that term is defined in UCA § 77-38-403.

(b) Statement of the Privilege. A victim communicating with a victim advocate has a privilege during the victim's life to refuse to disclose and to prevent any other person from disclosing a confidential communication.

(c) Who May Claim the Privilege. The privilege may be claimed by:

(c)(1) the victim;

(c)(2) ~~engaged in a confidential communication, or~~ the guardian or conservator of the victim ~~engaged in a confidential communication~~ if the guardian or conservator is not the accused; and~~.~~

(c)(3) ~~An individual who is a~~the victim advocate ~~at the time of a confidential communication is presumed to have authority~~ during the life of the victim ~~to claim the privilege on behalf of the victim~~.

(d) Disclosures That Do Not Waive the Privilege. The confidential communication may be disclosed in the following circumstances without waiving the privilege in paragraph (b):

(d)(1) the confidential communication is disclosed by a criminal justice system victim advocate for the purpose of providing advocacy services, and the disclosure is to a

law enforcement officer, health care provider, mental health therapist, domestic violence shelter employee, an employee of the Utah Office for Victims of Crime, a member of a multidisciplinary team assembled by a Children's Justice Center or law enforcement agency, or a parent or guardian if the victim is a minor and the parent or guardian is not the accused;

(d)(2) the confidential communication is with a criminal justice system victim advocate, and the criminal justice system victim advocate must disclose the confidential communication to a prosecutor under UCA § 77-38-405.

(e) Exceptions That Waive the Privilege.

(e)(1) In addition to waivers under URE 510, the following disclosures waive the privilege in paragraph (b):

(e)(1)(A) the victim, or the victim's guardian or conservator, if the guardian or conservator is not the accused, provides written, informed, and voluntary consent for the disclosure, and the written disclosure contains:

(e)(1)(A)(i) the specific confidential communication subject to disclosure;

(e)(1)(A)(ii) the limited purpose of the disclosure;

(e)(1)(A)(iii) the name of the individual or party to which the specific confidential communication may be disclosed; and

(e)(1)(A)(iv) a warning that the disclosure will waive the privilege;

(e)(1)(B) the confidential communication is required to be disclosed under Title 62A, Chapter 4a, Child and Family Services, or UCA § 62A-3-305;

(e)(1)(C) the confidential communication is evidence of a victim being in clear and immediate danger to the victim's self or others;

(e)(1)(D) the confidential communication is evidence that the victim has committed a crime, plans to commit a crime, or intends to conceal a crime;

(e)(1)(E) the confidential communication is with a criminal justice system victim advocate, and a court determines, after the victim and the defense attorney have been notified and afforded an opportunity to be heard at an in camera review, that:

(e)(1)(E)(i) the probative value of the confidential communication and the interest of justice served by the admission of the confidential communication substantially outweigh the adverse effect of the

admission of the confidential communication on the victim or the relationship between the victim and the criminal justice system victim advocate; or

(e)(1)(E)(ii) the confidential communication is exculpatory evidence, including impeachment evidence.

(e)(2) A request for a hearing and in camera review under paragraph (e)(1)(B) may be made by any party by motion, pursuant to the Rules of Criminal Procedure. The court shall give all parties and the victim notice of any hearing and an opportunity to be heard.

~~(d) **Exceptions.** An exception to the privilege exists in the following circumstances:~~

~~(d)(1) when the victim, or the victim's guardian or conservator if the guardian or conservator is not the accused, provides written, informed, and voluntary consent for the disclosure, and the written disclosure contains:~~

~~(d)(1)(A) the specific confidential communication subject to disclosure;~~

~~(d)(1)(B) the limited purpose of the disclosure; and~~

~~(d)(1)(C) the name of the individual or party to which the specific confidential communication may be disclosed;~~

~~(d)(2) when the confidential communication is required to be disclosed under Title 62A, Chapter 4a, Child and Family Services, or UCA § 62A-3-305;~~

~~(d)(3) when the confidential communication is evidence of a victim being in clear and immediate danger to the victim's self or others;~~

~~(d)(4) when the confidential communication is evidence that the victim has committed a crime, plans to commit a crime, or intends to conceal a crime;~~

~~(d)(5) if the confidential communication is with a criminal justice system victim advocate, the criminal justice system victim advocate may disclose the confidential communication to a parent or guardian if the victim is a minor and the parent or guardian is not the accused, or a law enforcement officer, health care provider, mental health therapist, domestic violence shelter employee, an employee of the Utah Office for Victims of Crime, or member of a multidisciplinary team assembled by a Children's Justice Center or law enforcement agency for the purpose of providing advocacy services;~~

~~(d)(6) if the confidential communication is with a criminal justice system victim advocate, the criminal justice system victim advocate must disclose the confidential communication to a prosecutor under UCA § 77-38-405;~~

~~(d)(7) if the confidential communication is with a criminal justice system victim advocate, and a court determines, after the victim and the defense attorney have been notified and afforded an opportunity to be heard at an in camera review, that:~~

~~(d)(7)(A) the probative value of the confidential communication and the interest of justice served by the admission of the confidential communication substantially outweigh the adverse effect of the admission of the confidential communication on the victim or the relationship between the victim and the criminal justice system victim advocate; or~~

~~(d)(7)(B) the confidential communication is exculpatory evidence, including impeachment evidence.~~

Effective May/November 1, 20__

~~Effective July 31, 2019, pursuant to 2019 UT H.J.R. 3 "Joint Resolution Adopting Privilege Under Rules of Evidence."~~

URE 512 Victim Communications

Evidence Advisory Committee Minutes

April 14, 2020

Keisa Williams: A draft of URE 512 was presented to the Supreme Court. They made a grammatical change and sent it out for public comment. The rule received one comment and is now back with the Committee for feedback and any necessary revisions.

John Lund: The public comment addressed unintentional disclosures and asked whether the rule only addresses intentional disclosures. The question for the Evidence Advisory Committee is: Are waivers treated the same in this privilege as they are in other privileges?

Judge Bates: After reading the comment, I compared the way we drafted exceptions to the rule in 512 (as far as what waived and didn't waive privilege) to the other rules of evidence. It might be more consistent with the way we've structured exceptions in other rules, to move subsections (d)(2) and (d)(3) down to subsection (e) so that those circumstances do waive the privilege. In other rules, when the holder of the privilege does something that requires somebody else to disclose the confidential communication because of a public safety threat, that disclosure functions as a waiver of the privilege.

John Lund: The right of an attorney to disclose information if he/she is concerned a crime may be committed by a client is set up as a waiver rather than an exception to a privilege.

Judge Bates: I agree. In that situation, the disclosed communication becomes admissible in court and a privilege no longer exists in regard to that communication. If a victim does something that poses a public safety threat and an advocate is required to disclose the communication, then it ought to waive the privilege as it would in other rules.

Dallas Young: Under the attorney/client privilege it's called an exception. The net result is the same, but it's called an exception as opposed to a waiver.

John Lund: In subsection (a) of URE 510 (Miscellaneous Matters), the privilege is waived if the holder of the privilege fails to take reasonable precautions against inadvertent disclosure or voluntarily discloses or consents to the disclosure. That's the broader treatment of waivers that I think would apply to the 512 privilege like all the rest.

Ed Havas: Is there a legitimate distinction between an exception and a waiver? Judge Bates noted in the attorney/client rule that there are exceptions to the privilege allowing the communication to be disclosed without waiving the privilege. That seems to be preferable language. The rest of the privilege ought not simply evaporate because of some conduct that might follow the exception.

Dallas Young: It makes more sense to carve out the communication in terms of an exception as opposed to a waiver. Criminal law in regard to waivers requires knowledge of a criminal right and an intentional relinquishment of that right. That doesn't seem to match up with what's described in (d)(2) and (d)(3).

Judge Bates: The reason the subcommittee structured the rule the way it did was because the original legislation was unclear about whether a disclosure would function as an exception or a waiver of the privilege. What I'm hearing is that maybe some of the disclosures in (d) are more appropriately couched not as disclosures that do not waive the privilege, but as disclosures that are exceptions to the privilege. If there is no known relinquishment of a right, maybe we ought to call (d)(2) and (d)(3) exceptions.

John Lund: (d)(1) should also be included. Dallas Young: Suggested changing the language in line 42 to read, "these are the exceptions to the privilege."

Ed Havas: That strikes me as consistent with the intent of the draft. If we're saying these disclosures don't waive the privilege, in essence we're saying the disclosures are excepted from the privilege but it doesn't mean the privilege is waived if you take advantage of that exception.

Chris Hogle: In the attorney/client privilege rule (URE 504), under subsection (d) the first exception to the privilege is the crime/fraud exception. I don't know that we want to borrow that phraseology for 512 because in the lawyer/client context, exceptions are things that don't apply regardless of the intent of the holder of the privilege. I like the way things are now. I don't see a need to change the phraseology of 512 because "disclosures that do not waive the privilege" means that those disclosures do not affect the applicability of the privilege.

John Lund: On balance, I'm leaning the way Chris is for substantive reasons and because "disclosures that do not waive the privilege" is phrased the way the drafters preferred. Unless we can provide the Court with an important reason not to keep that phraseology, then we ought to leave it the way it is. We need a reason to warrant another round of revisions.

Judge Bates: In my mind the Committee is discussing two issues:

1. Has the Committee correctly identified waivers and exceptions in (d) and (e)? And what is the effect of the disclosures?
2. Do (d)(1), (d)(2), and (d)(3) belong under (d) or (e)?

I agree with Chris that the language structure should stay the way it is. And I think subsections (d)(1), (d)(2), and (d)(3) should be moved to (e). Example: A victim communicates to a victim advocate that they are going to commit or have committed a crime. The advocate now has to disclose that under (d)(2) or (d)(3). If the disclosure does not result in a waiver or revocation of the privilege, it loses some of its effect. A law enforcement officer might act on it and go talk to the victim, but the disclosure still can't be used in any evidentiary proceeding in court. Part of the reason we would want to call that a waiver and stick it down under (e) is so that if the prosecutor charges the victim with a crime or a civil action is filed related to what the victim was intending to do, the statement to the victim advocate can be used as evidence. The way the rule is structured

right now, the statement couldn't be used as evidence because the disclosure didn't waive the privilege.

John Lund: There may be a fundamental problem with that construct. Doctors are required to disclose a certain amount of information, evidence of sexual abuse for example, but those scenarios aren't included in the privilege rule itself. None of the other rules include specific disclosures that waive the privilege and specific disclosures that don't.

Judge Bates: Isn't subsection (d)(2) in the physician/patient rule (communications relevant to proceedings to hospitalize patients for mental illness), similar to 512? Those communications are exceptions to the privilege and no privilege exists.

Tenielle Brown: The child abuse mandatory reporter statutes specify the minimum amount of disclosure so as not to waive the privilege. Sometimes if it's not in the statute itself it will be in common law interpreting the statute. In certain circumstances, there's no waiver even if some amount was disclosed pursuant to the child abuse mandatory reporting requirements.

Deborah Bulkeley: I tend to agree with Judges Bates, but didn't the Supreme Court reject a previous draft of 512 that made some of those disclosures waivers?

Judge Bates: Rep. Snow was more worried about the stuff in (e) and (d)(4) and (5). URE 507 is similar to URE 512 in that we drafted it out of whole cloth at the request of the legislature. In 507, the exceptions under subsection (d) waive the privilege. Those exceptions are very similar to (d)(1)-(3) in 512, but the way we have 512 structured the privilege still exists under those same circumstances.

Chris Hogle: Should there be a distinction about where the privilege applies? When a victim tells an advocate they are going to commit crime, maybe that disclosure ought to be admissible in a case against the victim, but not admissible in a case against the perpetrator.

Judge Jones: From a rule construction standpoint my concern is articulating one privilege differently than the other privileges (exception vs. waiver). If we do, the question becomes whether the catchall waiver in URE 510 applies to 512? If 510 is intended to apply to all privileges across the board, then we need to use "exception" in 512 so that we aren't sending a message that waivers apply differently in that context.

John Lund: I agree. (d) = exceptions. (e) = things that waive the privilege. We could include an intro to subsection (e) that says, "in addition to a waiver that occurs under the auspices of URE 510, the following are things that waive the privilege." That would provide some coordination between the rules.

Judge Bates: Suggest getting Rep. Snow's input about (d)(1), (d)(2), and (d)(3) before the subcommittee redrafts Rule 512 to find out how strongly he feels about protecting them. In addition, I agree that we should include John's suggested intro to (e).

Chris Hogle: I think the exception language in URE 507 is a good model. When we go back to Rep. Snow we should also address whether he thought about the application of the privilege in a case against the victim rather than the perpetrator.

Mike Drechsel: Rep. Snow's version of 512 in the joint resolution structured (d)(1), (d)(2), and (d)(3) as exceptions so I think we know where he stands on that. But I do think the question of whether it applies in a case involving a different perpetrator or criminal action is interesting.

Motion: ***John Neilsen made a motion to table redrafting the rule for 30 days to get Rep. Snow's feedback. Judge Jones seconded the motion. The motion passed unanimously.***

November 10, 2020

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.

UTAH STATE COURTS

Keisa Williams <keisaw@utcourts.gov>

Rule 512

4 messages

Judge Matthew Bates <mbates@utcourts.gov> Tue, Apr 21, 2020 at 3:33 PM
To: vlsnow@le.utah.gov
Cc: Keisa Williams <keisaw@utcourts.gov>, Michael Drechsel <michaelcd@utcourts.gov>

Representative Snow,

I hope this email finds you healthy and well. I'm reaching out to you for some help with our draft amendment to Rule 512. As you hopefully remember, you and I met several weeks ago to review the amendment to the Rule, and you provided some input that was very helpful to us in adhering to the legislative intent of the privilege. After that meeting, the Supreme Court reviewed the draft, made a small grammatical change, and sent it out for public comment. The proposed amendment received one public comment.

The committee discussed that comment last week and then asked me to contact you with a question about the scope of the privilege and the effect of disclosures under subsections (d)(2) and (d)(3) of our amendment. Those sections permit disclosure of the communication when the communication is evidence of the "victim being in clear and immediate danger to the victim's self or others" or when the communication is evidence that "the victim has committee a crime, plans to commit a crime, or intends to conceal a crime." But subsection (2) states that such disclosures do not waive the privilege, meaning the communications still would not be admissible in any court proceeding.

This is inconsistent with how other rules of privilege treat such disclosures. For example, the peer-support privilege, Rule 507, which was created by the legislature a few years ago, does not apply in the circumstances described in subsections (d)(2) and (d)(3) of our proposed amendment. The attorney-client privilege, Rule 504, does not apply if the services of the lawyer were sought or obtained to enable or anyone to commit or plan to commit a crime or fraud. And, the husband-wife privilege, Rule 502, does not apply to any communication made to enable or aid anyone to commit, plan, or conceal a crime or tort. Given the scope of these other privileges, the committee felt that to be consistent that subsections (d)(2) and (d)(3) should be moved to subsection (e), which would make any communications disclosed under those subsections admissible in court, just like the other privilege rules.

But because this is a privilege that was created by the legislature, it is important to us that we honor the legislative intent, and we would appreciate your input. Should the communications described in subsections (d)(2) or (d)(3) be admissible in court? I attached a copy of the draft amendment just in case you don't have one handy.

I imagine you probably did not expect to still be involved in this more than a year after your bill passed. But this is an unusual circumstance where the Supreme Court has asked us to revise a rule created by the legislature. And your input has been extremely helpful. So please know that we value your time and attention to help us get this right. I'd be happy to chat by phone or video conference if that's easier.

Matthew Bates
Judge, Utah Third District Court
801-842-69369

URE-512-Redlined-for-comment-2-20-20.pdf
56K

Keisa Williams <keisaw@utcourts.gov> Tue, May 5, 2020 at 2:36 PM
To: jcarlton@le.utah.gov, Michael Drechsel <michaelcd@utcourts.gov>

Jacqueline,

Below is an email from Judge Bates to Rep. Snow with the latest information on URE 512. Let me know if this doesn't answer the questions you sent me in that separate email or if you need more information.

Thanks,
Keisa
[Quoted text hidden]
--
Keisa Williams
Associate General Counsel
Administrative Office of the Courts
450 South State Street
P.O. Box 140241
Salt Lake City, UT 84114-0241
Work Cell: 385-227-1426
Email: keisaw@utcourts.gov

URE-512-Redlined-for-comment-2-20-20.pdf
56K

Lowry Snow <vlsnow@le.utah.gov> Tue, May 5, 2020 at 3:16 PM
To: Judge Matthew Bates <mbates@utcourts.gov>
Cc: Keisa Williams <keisaw@utcourts.gov>, Michael Drechsel <michaelcd@utcourts.gov>

Judge Bates,
Thank you for your email. I apologize for not responding sooner. Somehow in the press of dealing with multiple matters, your email escaped my attention. I'm working on the issues raised in your email now with legislative counsel and will respond shortly. Thank you for your patience.
Rep Snow

Representative V. Lowry Snow
vlsnow@le.utah.gov
435-703-3688
912 West 1600 South, Suite 200
St. George, UT 84770

From: Judge Matthew Bates <mbates@utcourts.gov>
Sent: Tuesday, April 21, 2020 3:33 PM
To: Lowry Snow <vlsnow@le.utah.gov>
Cc: Keisa Williams <keisaw@utcourts.gov>; Michael Drechsel <michaelcd@utcourts.gov>
Subject: Rule 512

[Quoted text hidden]

Mbates <mbates@utcourts.gov> Thu, May 7, 2020 at 3:06 PM
To: Lowry Snow <vlsnow@le.utah.gov>
Cc: Keisa Williams <keisaw@utcourts.gov>, Michael Drechsel <michaelcd@utcourts.gov>

Representative, no need to apologize. I am certain that you and your colleagues are very busy dealing with the issues created by the current global pandemic on top of your other responsibilities that keep Utah functioning. We are grateful to have such capable and attentive leaders in our legislature. And I appreciate your attention to this rule amendment whenever you have time.

Matt
[Quoted text hidden]

Rules of Evidence – Comment Period Closed April 10, 2020

URE 512. Victim Communications (AMEND). Clarifies which disclosures do and do not waive the privilege.

Public Comments:

AL - February 25, 2020 at 10:31 am

On brief review, this only addresses intentional waiver? What about unintential disclosure resulting in waiver? They should not have more protection that attorneys or doctors. If the VA or Victim is negligent and discloses information, then they have wavied priv.

Mike Drechsel – February 25, 2020 at 8:19 am

The second line of paragraph (d)(4) makes it sound like the victim advocacy services are being provided to a law enforcement officer, et al. Perhaps that paragraph should read:

> "(d)(4) the confidential communication is disclosed by a criminal justice system victim advocate for the purpose of providing advocacy services, and the disclosure is to a law enforcement officer . . . "

It think it is a strange disconnect that (d)(1) (abuse), (d)(2) (danger), and (d)(3) (crime) do not waive the privilege in 512, but are exceptions to the privilege in Rule 502 (crime), 504 (crime), and 507 (abuse, danger, and crime).

URE 1101

UTAH SUPREME COURT ADVISORY COMMITTEE

RULES OF EVIDENCE
JOHN R. LUND
CHAIR

February 6, 2021

Introduction

The proposed amendments to URE 1101 clarify that the rules of evidence do not apply in restitution hearings, in accordance with *State v. Weeks*, and do apply in probation revocation hearings, in accordance with Utah Code §77-18-1(12)(d)(iii). At its October 21, 2019 meeting, the Court asked the Advisory Committee to: 1) clarify that the rule does not interfere with judicial discretion and balancing, 2) research legislative history and rules in other states, 3) make a recommendation as to whether this is good policy, and 4) consider any issues concerning the practical application of the rule. The majority of the Committee recommends adoption of URE 1101, as amended.

Should URE 1101 be changed to conform with §77-18-1? Is a defendant entitled to identical pre-trial constitutional rights at a probation revocation hearing?

I. Review under Federal Case Law

In *Williams v. New York*, 337 U.S. 241, 69 S.Ct. 1079, 93 L.Ed. 1337 (1949), the United States Supreme Court weighed how the rules of evidence are applicable to the manner in which a judge may obtain information to guide the imposition of sentence upon an already convicted defendant. In *Williams*, the Judge used a pre-sentence report that included uncross-examined hearsay evidence. *Id.* at 244. The defendant argued that he should have been afforded the right to examine adverse witnesses. *Id.* The Court noted the historical practice of proceeding without examination by stating:

> [B]oth before and since the American colonies became a nation, courts in this country and in England practiced a policy under which a sentencing judge could exercise a wide discretion in the sources and types of evidence used to assist him in determining the kind and extent of punishment to be imposed within limits fixed by law.

*Id.*at 246.

In addition to historical tradition, the Court reviewed the practical purpose of treating defendants differently at trial versus later hearings. *Id.* at 246-247. The Court noted that there are sound practical purposes for the distinction. It stated:

> In a trial before verdict the issue is whether a defendant is guilty of having engaged in certain criminal conduct of which he has been specifically accused. Rules of evidence have been fashioned for criminal trials which narrowly confine the trial contest to evidence that is strictly relevant to the particular offense charged. These rules rest in part on a necessity to prevent a time consuming and confusing trial of collateral issues. They were also designed to prevent tribunals concerned solely with the issue of guilt of a particular offense from being influenced to convict for that offense by evidence that the defendant had habitually engaged in other misconduct. A sentencing judge, however, is not confined to the narrow issue of guilt. His task within fixed statutory or constitutional limits is to determine the type and extent of punishment after the issue of guilt has been determined. Highly relevant—if not essential—to his selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant's life and characteristics. And modern concepts individualizing punishment have made it all the more necessary that a sentencing judge not be denied an opportunity to obtain pertinent information by a requirement of rigid adherence to restrictive rules of evidence properly applicable to the trial.

Id.

The Court noted that modern practices of determining sentencing and probation require an increase in discretion for judges. *Id.* at 240. This discretion draws upon every aspect of a defendant's life and it would be "totally impractical if not impossible [to have] open court testimony with cross-examination. Such a procedure could endlessly delay criminal administration in a retrial of collateral issues." *Id.* at 250.

Williams does have some limitations to the analysis for Rule 1101. *Williams* involved a challenge under the Due Process Clause at sentencing, not the confrontation clause. It was also decided before the confrontation clause became applicable to the states. See *Pointer v. Texas*, 85. S.Ct. 1065. However, *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, did not overrule *Williams*. See *United States v. Littlesun*, 444 F.3d 1196, 1200 (9th Cir. 2006)(stating that *Crawford* does not explicitly overrule *Williams* and the law on hearsay at sentencing is still what it was before *Crawford*: hearsay is admissible at sentencing, so long as it is "accompanied by some minimal indicia of reliability." The same conclusion has been reached by the First, Second, Sixth, Seventh, Eighth, and Eleventh Circuits, and none of our sister circuits have reached a contrary conclusion. And we have previously held that "[f]ederal law is clear that a judge may consider hearsay information in sentencing a defendant.")[1]

[1] Federal Courts have found that the right to confrontation applies in a capital sentencing context. See *U.S. v. Mills*, 446 F.Supp 2d 1115. See also *People v. Monge*, 16 Cal. 4th 826, 833, 941 P.2d 1121, 1125–26 (1997), *aff'd sub nom. Monge v. California*, 524 U.S. 721, 118 S. Ct. 2246, 141 L. Ed. 2d 615 (1998)(the high court has broadly described *Williams* as holding "that the Due Process Clause of the Fourteenth Amendment [does] not require a judge to have hearings and to give a convicted person an opportunity to participate in those hearings when he [comes] to determine the sentence to be imposed." (*Specht v. Patterson* (1967) 386 U.S. 605, 606, 87 S.Ct. 1209, 1210, 18

In *Black v. Romano*, 471 U.S. 606, 105 S.Ct. 2254, 85 L.Ed.2d 636 (1985), the United States Supreme Court held that a probation revocation proceeding by a preponderance standard involves two distinct steps: "(1) a retrospective factual question whether the probationer has violated a condition of probation; and (2) a discretionary determination by the sentencing authority whether violation of a condition warrants revocation of probation." *Id.* at 611. In some limited areas, a preponderance standard for revocation is not adequate.[2]

Federal Courts have found that denying a releasee his right to confrontation in a revocation hearing depends on the circumstance. See *United States v. Comito*, 177 F.3d 1166, 1172 (9th Cir. 1999)(stating that [w]hether a particular reason is sufficient cause to outweigh the right to confrontation will depend on the strength of the reason in relation to the significance of the releasee's right. In some instances, mere inconvenience or expense may be enough; in others, much more will be required.)

The United States Supreme Court held in *Morrissey v. Brewer*, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972), that certain minimal due process requirements are needed for parole revocation. The Court quickly extended these protections to probation revocation. See *Gagnon v. Scarpelli*, 411 U.S. 778, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973). Fed.R.Crim.P. 32.1, which applies to supervised release revocation, incorporates these same minimal due process requisites.[3]

L.Ed.2d 326.) Moreover, though the high court has retreated from *Williams* in capital cases (*Gardner v. Florida* (1977) 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393), *U.S. v. Watts* (1997) 519 U.S. 148, ——, 117 S.Ct. 633, 635, 136 L.Ed.2d 554; see also *Witte v. U.S.* (1995) 515 U.S. 389, 397–399, 115 S.Ct. 2199, 2205, 132 L.Ed.2d 351 ["[T]he Due Process Clause [does] not require 'that courts throughout the Nation abandon their age-old practice of seeking information from out-of-court sources to guide their judgment toward a more enlightened and just sentence.' "].) Additionally, the Supreme Court of Arkansas found that the right to confrontation be extended at sentencing hearings for non-death penalty cases. See *Vankirk v. State*, 2011 Ark. 428, 10, 385 S.W.3d 144, 151 (2011)(stating we are convinced that the right of confrontation, guaranteed by both the Sixth Amendment and article 2, section 10, extends to Appellant's sentencing proceeding before a jury.)

[2] *United States v. Haymond*, 139 S. Ct. 2369, 2382, 204 L. Ed. 2d 897 (2019), Recently, the United States Supreme Court held that the preponderance standard is not adequate when applied to pre-trial release actions under §3583 (k) ("[where parole and probation violations generally exposed a defendant only to the *remaining* prison term authorized for his crime of conviction, as found by a unanimous jury under the reasonable doubt standard, supervised release violations subject to § 3583(k) can, at least as applied in cases like ours, expose a defendant to an additional mandatory minimum prison term well *beyond* that authorized by the jury's verdict—all based on facts found by a judge by a mere preponderance of the evidence. In fact, § 3583(k) differs in this critical respect not only from parole and probation; it also represents a break from the supervised release practices that Congress authorized in § 3583(e)(3) and that govern most federal criminal proceedings today. Unlike all those procedures, § 3583(k) alone requires a substantial increase in the minimum sentence to which a defendant may be exposed based only on judge-found facts under a preponderance standard. And, as we explained in *Alleyne* and reaffirm today, that offends the Fifth and Sixth Amendments' ancient protections.)

[3] **Rule 32.1 Revoking or Modifying Probation or Supervised Release (Relevant Portions)(Highlights added)**
(2) Upon a Summons. When a person appears in response to a summons for violating probation or supervised release, a magistrate judge must proceed under this rule.
(3) Advice. The judge must inform the person of the following:
(A) the alleged violation of probation or supervised release;
(B) the person's right to retain counsel or to request that counsel be appointed if the person cannot obtain counsel; and
(C) the person's right, if held in custody, to a preliminary hearing under Rule 32.1(b)(1).
(b) Revocation.
(1) Preliminary Hearing.

II. Review under Utah Case Law

Utah does not have a comparable criminal procedure rule to Fed.R.Crim P. 32.1. The closest rule being analogue is Utah Code Ann. § 77-18-1. Historically, the Utah Code provided wide latitude to courts when sentencing.[4, 5] Regarding capital sentencing, "[a]ny evidence the court considers to have probative force may be received regardless of its admissibility under the exclusionary rules of evidence. The state's attorney and the defendant shall be permitted to present argument for or against the sentence of death." See Utah Code Ann. § 76-3-207 (West).

Rules on sentencing become applicable to our question if probation hearings are considered part of the sentencing process. In *State v. Snyder*, the court relied on emails to revoke probation that were attached to an AP&P's amended probation report which was submitted with its AP&P's order to show cause affidavit to support its decision to revoke probation in support of an order to show cause. *Snyder*, 2015 UT App 172, ¶ 18, 355 P.3d 246, 252. The Utah Court of Appeals stated,

> We have previously recognized that "sentencing and probation hearings are relatively informal. Most rules of evidence do not apply." *State v. Hodges*, 798 P.2d 270, 279 (Utah Ct.App.1990). Indeed, rule 1101 of the Utah Rules of Evidence states that other than the rules regarding privileges, the rules of evidence do not apply to "sentencing, or granting or revoking probation." Utah R. Evid. 1101(c)(3). "While evidence presented at such hearings is certainly subject to challenge on the basis of the traditional reliability concerns

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(A) In General. If a person is in custody for violating a condition of probation or supervised release, a magistrate judge must promptly conduct a hearing to determine whether there is probable cause to believe that a violation occurred. The person may waive the hearing.
(B) Requirements. The hearing must be recorded by a court reporter or by a suitable recording device. The judge must give the person:
(i) notice of the hearing and its purpose, the alleged violation, and the person's right to retain counsel or to request that counsel be appointed if the person cannot obtain counsel;
(ii) an opportunity to appear at the hearing and present evidence; and
(iii) upon request, an opportunity to question any adverse witness, unless the judge determines that the interest of justice does not require the witness to appear.
(C) Referral. If the judge finds probable cause, the judge must conduct a revocation hearing. If the judge does not find probable cause, the judge must dismiss the proceeding.
(2) Revocation Hearing. Unless waived by the person, the court must hold the revocation hearing within a reasonable time in the district having jurisdiction. The person is entitled to:
(A) written notice of the alleged violation;
(B) disclosure of the evidence against the person;
(C) an opportunity to appear, present evidence, and question any adverse witness unless the court determines that the interest of justice does not require the witness to appear;
(D) notice of the person's right to retain counsel or to request that counsel be appointed if the person cannot obtain counsel; and
(E) an opportunity to make a statement and present any information in mitigation.

[4] "Utah Code Ann. § 76-3-201 (West)—Changed in Utah 2002 Session 35 (H.B. 190)(highlights added)
(7)(c) In determining whether there are circumstances that justify imposition of the highest or lowest term, the court may consider the record in the case, the probation officer's report, other reports, including reports received under Section 76-3-404, statements in aggravation or mitigation submitted by the prosecution or the defendant, and any further evidence introduced at the sentencing hearing.

[5] Utah Code Ann. § 76-3-404(1)(b)—Repealed by Laws 2009, c. 81, § 4, eff. May 12, 2009

> underlying evidentiary rules, the overall informality suggests a standard of proof that is comprehensible and relatively simple." *Hodges*, 798 P.2d at 279. See also *Gagnon v. Scarpelli*, 411 U.S. 778, 782 & n. 5, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973) (stating that courts may rely on "conventional substitutes for live testimony, including affidavits, depositions, and documentary evidence" in deciding whether to revoke probation); *Morrissey v. Brewer*, 408 U.S. 471, 489, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972) (stating that in parole and probation revocation proceedings, "the process should be flexible enough to consider evidence including letters, affidavits, and other material that would not be admissible in an adversary criminal trial").

Id. at 251–52.

Clearly, the rules of evidence are treated differently at probation revocation hearings than at trial. For example, even evidence gathered as a result of an illegal search can be admissible at a probation revocation hearing even though it would not be admissible in a criminal trial to determine guilt.[6] However, there are examples where judges used the Rules of Evidence at probation hearings. Utah R.Evid. 803 has been employed to admit evidence in a probation hearing.[7] Utah R. Evid. 801 has been found to have incorrectly restricted hearsay if it was used to provide evidence of why officers responded to a probationer's house as opposed to whether the defendant actually committed a new assault.[8]

Arguably, if probation hearings are part of the sentencing process, the formal rules are inapplicable to these proceedings.[9] However, "such proceedings must nonetheless be fundamentally fair so as to satisfy the Due Process Clause of the Federal Constitution."[10] The Utah Supreme Court has stated:

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[6] *See, e.g., U.S. ex rel. Lombardino v. Heyd*, 318 F.Supp. 648 (E.D.La.1970), *aff'd* 438 F.2d 1027 (5th Cir.), *cert. denied* 404 U.S. 880, 92 S.Ct. 195, 30 L.Ed.2d 160 (1971); *Ex parte Caffie*, 516 So.2d 831 (Ala.1987); *State v. Alfaro*, 127 Ariz. 578, 623 P.2d 8 (1980); *McGhee v. State*, 25 Ark.App. 132, 752 S.W.2d 303 (1988); *People v. Willis*, 149 Cal.App.3d Supp. 56, 197 Cal.Rptr. 281 (1983); *People v. Ressin*, 620 P.2d 717 (Colo.1980); *Bernhardt v. State*, 288 So.2d 490 (Fla.1974); *People v. Swanks*, 34 Ill.App.3d 794, 339 N.E.2d 469 (1975); *Dulin v. State*, 169 Ind.App. 211, 346 N.E.2d 746 (1976); *Tiryung v. Commonwealth*, 717 S.W.2d 503 (Ky.Ct.App.1986); *State v. Caron*, 334 A.2d 495 (Me.1975); *Chase v. State*, 309 Md. 224, 522 A.2d 1348 (1987); *State v. Thorness*, 165 Mont. 321, 528 P.2d 692 (1974); *Lemire v. Bouchard*, 113 N.H. 174, 304 A.2d 647 (1973); *State v. Ray*, 41 Or.App. 763, 598 P.2d 1293 (1979); *Commonwealth v. Davis*, 234 Pa.Super. 31, 336 A.2d 616 (1975); *State v. Spratt*, 120 R.I. 192, 386 A.2d 1094 (1978); *State v. Kuhn*, 7 Wash.App. 190, 499 P.2d 49, *aff'd* 81 Wash.2d 648, 503 P.2d 1061 (1972).

[7] *Layton City v. Peronek*, 803 P.2d 1294, 1298 (Utah Ct. App. 1990) (holding that a jail incident report that neither satisfied the business records hearsay exception (803(6)), nor the public records hearsay exception (803(8)), was inadmissible as a matter of due process).

[8] *State v. Martinez*, 811 P.2d 205, 210 (Utah Ct. App. 1991).

[9] *Id.* at 205 (Utah Ct. App. 1991) (rejecting a hearsay objection on appeal both because the statement was not offered to prove the truth of the matter asserted, and therefore was not hearsay, and because under Rule 1101(b)(3) the rules of evidence do not apply to probation revocation hearings).

[10] *United States v. Simmons*, 812 F.2d 561, 564 (9th Cir.1987), Although not all of the procedural and evidentiary protections required in a criminal case are available in probation revocation proceedings, such proceedings must nonetheless be fundamentally fair so as to satisfy the Due Process Clause of the Federal Constitution. See *U.S. v. Holland*, 850 F.2d 1048, 1050 (5th Cir.1988) ("The revocation of probation implicates a probationer's fundamental liberty interest and hence entitles him to procedural due process.").

> [I]n a probation modification proceeding, a probationer is entitled only to the "minimum requirements of due process." These requirements include
>
> (a) written notice of the claimed violations of [probation]; (b) disclosure to the [probationer] of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a neutral and detached hearing body ...; and (f) a written statement by the factfinders as to the evidence relied on and reasons for revoking [probation]. *Gagnon v. Scarpelli*, 411 U.S. 778, 786, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973) (internal quotation marks omitted). The probationer also has the right to the assistance of counsel in some circumstances. *Black v. Romano*, 471 U.S. 606, 612, 105 S.Ct. 2254, 85 L.Ed.2d 636 (1985).

State v. Orr, 2005 UT 92, ¶ 20, 127 P.3d 1213, 1218.[11]

The Utah Court of Appeals addressed the application of Utah Code Ann. §77-18-1(12)(d)(iii) and the right to confront witnesses in a probation revocation hearing. See Exhibit 1. In *State v. Tate*, Adult Probation and Parole filed an affidavit in support of an order to show cause alleging Tate had violated his probation by committing aggravated assault and forgery. *State v. Tate*, 1999 UT App 302, ¶ 3, 989 P.2d 73, 74. The State presented only hearsay evidence. *Id.* at ¶ 4 and ¶5. The *Tate* court held:

> ¶ 12 In this case, although Tate denied violating the terms of his probation, he was not provided an opportunity to cross-examine the individuals with personal knowledge of the alleged violations. Rather than calling individuals with personal knowledge of the alleged incidents which formed the basis of the probation violation, the State chose to make its case solely through the hearsay statements of Officers Boddy, Salazar and Kent. Although hearsay statements can be admissible in probation revocation proceedings, see *State v. Martinez*, 811 P.2d 205, 210 (Utah Ct.App.1991), the trial court, before admitting hearsay, must determine there is good cause for not permitting the probationer to cross-examine the out-of-court declarant whose statement is sought to be introduced as evidence. See Utah Code Ann. § 77–18–1(12)(d)(iii) (Supp.1999). In this case, the prosecution did not seek to show good cause and the trial court failed to meaningfully address the issue, to make a specific finding that good cause existed for not allowing confrontation, or to evaluate the reliability of the hearsay statements used by the State. Also, there is no evidence in the record suggesting there was good cause for denying Tate's right of confrontation.

Id. at 75.

[11] This is similar to *Morrissey v. Brewer*, at 2604 ("…at a minimum, due process requires that the probationer be given: 1) written notice of the claimed violation of probation; 2) disclosure of the evidence against him; 3) an opportunity to be heard in person and to present witnesses and documentary evidence; 4) the right to confront and cross-examine adverse witnesses, unless the hearing officer specifically finds good cause for not allowing confrontation; 5) a neutral and detached hearing body; and 6) a written statement by the factfinder of the evidence relied on and reasons for revoking the probation.)

III. Tate Raises Several Questions

The Utah Supreme Court has not outlined what would be considered good cause in this context. Would that Court allow for the delay and expense arguments raised in *Williams* to be good cause? Without Utah Code Ann. §77-18-1, would *Tate* have been different? If so, does Utah Code Ann. §77-18-1 establish a rule of evidence?

Additionally, if a court admits hearsay evidence from the state but allows the defendant to call witnesses does that satisfy the requirement? For example, in a bail hearing, the state can present proof in affidavit form.[12] However, the defendant can call witnesses to rebut that evidence, if desired. See *Chynoweth v. Larson*, 572 P.2d 1081, 1082–83 (Utah 1977).

Similarly, would rigid application of *Tate* and Utah Code Ann. §77-18-1 hinder judicial discretion? Traditionally in Utah courts, judges exercise wide discretion in applying the rules of evidence to probation revocation hearings.[13]

IV. Legislative History

Utah Code Ann. § 77-18-1 repealed UT ST § 64-13b-101. Some minor changes to the relevant language have occurred over time. Legislative intent prior to 1990 would require additional research.

Effective 5/14/2019 (Relevant portions)	2019 Legislative Changes
77-18-1. Suspension of sentence -- Pleas held in abeyance--Probation -- Supervision -- Presentence investigation -- Standards -- Confidentiality -- Terms and conditions -- Termination, revocation, modification, or extension -- Hearings -- Electronic monitoring. (12)(d) (i) At the hearing, the defendant shall admit or deny the allegations of the affidavit or unsworn written declaration. (ii) If the defendant denies the allegations of the affidavit or unsworn written declaration, the prosecuting attorney shall present evidence on the allegations. (iii) The persons who have given adverse information on which the allegations are based shall be presented as witnesses subject to questioning by the defendant unless the court for good cause otherwise orders. (iv) The defendant may call witnesses, appear and speak in the defendant's own behalf, and present evidence.	12(a)(ii) Probation may not be revoked except upon a hearing in court and a finding that the conditions of probation have been violated." Laws 2019, c. 28, § 1, in subsec. (12)(b)(i), inserted "or an unsworn written declaration executed in substantial compliance with Section 78B-5-705,"; in subsecs. (12)(b)(i), (12)(b)(ii), (12)(d)(i), and (12)(d)(ii), inserted "or unsworn written declaration"; in subsec. (14)(d), deleted "or" from the end of the subsection; in subsec. (14)(e), substituted "; or" for a period at the end of the subsection; and added subsec. (14)(f). Laws 2019, c. 429, § 1, in subsec. (1), deleted "Title 77," preceding "Chapter 2a"; in subsecs. (5)(b)(ii) and (8)(g), deleted "Title 77," preceding "Chapter 38a"; in subsec. (10)(c)(i), deleted "sentencing" preceding "court"; and in subsec. (12)(b)(i), deleted "that authorized probation" following "the court". Composite section by the Office of Legislative Research and General Counsel of Laws 2019, c. 28, § 1 and Laws 2019, c. 429, § 1.

[12] Utah Code Ann. §77-20-1(5).

[13] *State v. Sanwick*, 713 P.2d 707, 709 (Utah 1986)(Defendant's arguments with respect to the admission of hearsay evidence are equally rationally flawed. The rules of evidence in general, and the rules on hearsay exclusions in particular, are inapplicable in sentencing proceedings.)

UT ST § 77–18–1—Effective April 23, 1990	UT ST § 77–18–1—Effective April 23, 1992
(9)(a) Probation may not be modified or extended except upon waiver of a hearing by the probationer or upon a hearing and a finding in court that the probationer has violated the conditions of probation. Probation may not be revoked except upon a hearing in court and a finding that the conditions of probation have been violated. (b) Upon the filing of an affidavit alleging with particularity facts asserted to constitute violation of the conditions of probation, the court that authorized probation shall determine if the affidavit establishes probable cause to believe that revocation, modification, or extension of probation is justified. If the court determines there is probable cause, it shall cause to be served on the defendant a warrant for his arrest or a copy of the affidavit and an order to show cause why his probation should not be revoked, modified, or extended. (c) The order to show cause shall specify a time and place for the hearing, and shall be served upon the defendant at least five days prior to the hearing. The defendant shall show good cause for a continuance. The order to show cause shall inform the defendant of a right to be represented by counsel at the hearing and to have counsel appointed for him if he is indigent. The order shall also inform the defendant of a right to present evidence. (d) At the hearing, the defendant shall admit or deny the allegations of the affidavit. If the defendant denies the allegations of the affidavit, the prosecuting attorney shall present evidence on the allegations. The persons who have given adverse information on which the allegations are based shall be presented as witnesses subject to questioning by the defendant unless the court for good cause otherwise orders. The defendant may call witnesses, appear and speak in his own behalf, and present evidence.	(10)(a)(i) Probation may not be modified or extended except upon waiver of a hearing by the probationer or upon a hearing and a finding in court that the probationer has violated the conditions of probation. (ii) Probation may not be revoked except upon a hearing in court and a finding that the conditions of probation have been violated. (b)(i) Upon the filing of an affidavit alleging with particularity facts asserted to constitute violation of the conditions of probation, the court that authorized probation shall determine if the affidavit establishes probable cause to believe that revocation, modification, or extension of probation is justified. (ii) If the court determines there is probable cause, it shall cause to be served on the defendant a warrant for his arrest or a copy of the affidavit and an order to show cause why his probation should not be revoked, modified, or extended. (c)(i) The order to show cause shall specify a time and place for the hearing and shall be served upon the defendant at least five days prior to the hearing. (ii) The defendant shall show good cause for a continuance. (iii) The order to show cause shall inform the defendant of a right to be represented by counsel at the hearing and to have counsel appointed for him if he is indigent. (iv) The order shall also inform the defendant of a right to present evidence. (d)(i) At the hearing, the defendant shall admit or deny the allegations of the affidavit. (ii) If the defendant denies the allegations of the affidavit, the prosecuting attorney shall present evidence on the allegations. (iii) The persons who have given adverse information on which the allegations are based shall be presented as witnesses subject to questioning by the defendant unless the court for good cause otherwise orders. (iv) The defendant may call witnesses, appear and speak in his own behalf, and present evidence. (e)(i) After the hearing the court shall make findings of fact.

V. State By State Comparison

We could not find any rules of evidence that incorporate language similar to §77-18-1.[14]

[14] The table includes a sample of some, but not all states.

Rule 1101 State by State Comparison (highlights added)		
Federal Rule	**Utah Rule**	**Notes**
Rule 1101. Applicability of the Rules **(a) To Courts and Judges.** These rules apply to proceedings before: • United States district courts; • United States bankruptcy and magistrate judges; • United States courts of appeals; • the United States Court of Federal Claims; and • the district courts of Guam, the Virgin Islands, and the Northern Mariana Islands. **(b) To Cases and Proceedings.** These rules apply in: • civil cases and proceedings, including bankruptcy, admiralty, and maritime cases; • criminal cases and proceedings; and • contempt proceedings, except those in which the court may act summarily. **(c) Rules on Privilege.** The rules on privilege apply to all stages of a case or proceeding. **(d) Exceptions.** These rules--except for those on privilege--do not apply to the following: **(1)** the court's determination, under Rule 104(a), on a preliminary question of fact governing admissibility; **(2)** grand-jury proceedings; and **(3)** miscellaneous proceedings such as: • extradition or rendition; • issuing an arrest warrant, criminal summons, or search warrant; • a preliminary examination in a criminal case; • sentencing; • granting or revoking probation or supervised release; and • considering whether to release on bail or otherwise. **(e) Other Statutes and Rules.** A federal statute or a rule prescribed by the Supreme Court may provide for admitting or	**Rule 1101. Applicability of rules.** (a) *Courts and magistrates.* These rules apply to all actions and proceedings in the courts of this state except as otherwise provided in Subdivision (b) and (c). (b) *Rules inapplicable.* The rules (other than with respect to privileges) do not apply in the following situations: (b)(1) Preliminary questions of fact which are to be determined under Rule 104(a); (b)(2) Grand jury proceedings; (b)(3) Miscellaneous proceedings for extradition, sentencing or granting or revoking probation, issuance of warrants for arrest, criminal summonses and search warrants and proceedings with respect to release on bail or otherwise; (b)(4) Contempt proceedings in which the court may act summarily; (c) In a criminal preliminary examination, reliable hearsay shall be admissible as provided under Rule 1102.	The most significant difference is that under the Federal Rule of Evidence 1101(d)(3) (but not Utah Rule of Evidence 1101(d)(3)), the rules of evidence are inapplicable to "preliminary examinations in criminal cases."

excluding evidence independently from these rules.		
Arizona	**Utah Rule**	**Notes**
Rule 1101. Applicability of Rules (a) Courts and magistrates. These rules apply to all courts of the State and to magistrates, and court commissioners and justices of the peace, masters and referees in actions, cases, and proceedings and to the extent hereinafter set forth. The terms "judge" and "court" in these rules include magistrates, court commissioners and justices of the peace. (b) Proceedings generally. These rules apply generally to civil actions and proceedings, to contempt proceedings except those in which the court may act summarily, and to criminal cases and proceedings except as otherwise provided in the Arizona Rules of Criminal Procedure. (c) Rule of privilege. The rule with respect to privileges applies at all stages of all actions, cases, and proceedings. (d) Rules inapplicable. The rules (other than with respect to privileges) do not apply to proceedings before grand juries.	**Rule 1101. Applicability of rules.** (a) *Courts and magistrates.* These rules apply to all actions and proceedings in the courts of this state except as otherwise provided in Subdivision (b) and (c). (b) *Rules inapplicable.* The rules (other than with respect to privileges) do not apply in the following situations: (b)(1) Preliminary questions of fact which are to be determined under Rule 104(a); (b)(2) Grand jury proceedings; (b)(3) Miscellaneous proceedings for extradition, sentencing or granting or revoking probation, issuance of warrants for arrest, criminal summonses and search warrants and proceedings with respect to release on bail or otherwise; (b)(4) Contempt proceedings in which the court may act summarily; (c) In a criminal preliminary examination, reliable hearsay shall be admissible as provided under Rule 1102.	Federal Rule 1101 has been supplanted by one which conforms to Arizona state practice. See also Rule 19.3, Arizona Rules of Criminal Procedure. Former Arizona Rule of Criminal Procedure 19.3, which set forth the rules of evidence applicable in criminal proceedings, was abrogated as unnecessary in light of the adoption of the Arizona Rules of Evidence, including Arizona Rules of Evidence 801(d)(1)(A) and 804(b)(1).
Arkansas	**Utah Rule**	**Notes**
RULE 1101. RULES APPLIC ABLE **(a)** Except as otherwise provided in subdivision (b), these rules apply to all actions and proceedings in the [courts of this State].* **(b) Rules Inapplicable.** The ru les other than those with respect to privileges do not apply in the following situations: (1) *Preliminary Questions of Fact.* The determination of questions of fact preliminary to	**Rule 1101. Applicability of rules.** (a) *Courts and magistrates.* These rules apply to all actions and proceedings in the courts of this state except as otherwise provided in Subdivision (b) and (c). (b) *Rules inapplicable.* The rules (other than with respect to privileges) do not apply in the following situations:	

admissibility of evidence when the issue is to be determined by the court under Rule 104(a). (2) *Grand Jury.* Proceedings before grand juries. (3) *Miscellaneous Proceedings.* Proceedings for extradition or rendition; [preliminary examination]* detention hearing in criminal cases; sentencing, or granting or revoking probation; issuance of warrants for arrest, criminal summonses, and search warrants; and proceedings with respect to release on bail or otherwise. (4) Contempt proceedings in which the court may act summarily. HISTORICAL NOTES Uniform Law • This rule is similar to Rule 1101 of the Uniform Rules of Evidence (1974). See Volumes 13A to 13F Uniform Laws Annotated, Master Edition, or Uniform Laws Annotated on Westlaw.	(b)(1) Preliminary questions of fact which are to be determined under Rule 104(a); (b)(2) Grand jury proceedings; (b)(3) Miscellaneous proceedings for extradition, sentencing or granting or revoking probation, issuance of warrants for arrest, criminal summonses and search warrants and proceedings with respect to release on bail or otherwise; (b)(4) Contempt proceedings in which the court may act summarily; (c) In a criminal preliminary examination, reliable hearsay shall be admissible as provided under Rule 1102.	
Michigan	**Utah Rule**	**Notes**
MI Rules MRE 1101 **Rule 1101. Applicability** Currentness **(a) Rules Applicable.** Except as otherwise provided in subdivision (b), these rules apply to all actions and proceedings in the courts of this state. **(b) Rules Inapplicable.** The ru les other than those with respect to privileges do not apply in the following situations and proceedings: (1) *Preliminary Questions of Fact.* The determination of questions of fact preliminary to admissibility of evidence when the issue is to be determined by the court under Rule 104(a). (2) *Grand Jury.* Proceedings before grand juries. (3) *Miscellaneous Proceedings.* Proceedings for	**Rule 1101. Applicability of rules.** (a) *Courts and magistrates.* These rules apply to all actions and proceedings in the courts of this state except as otherwise provided in Subdivision (b) and (c). (b) *Rules inapplicable.* The rules (other than with respect to privileges) do not apply in the following situations: (b)(1) Preliminary questions of fact which are to be determined under Rule 104(a); (b)(2) Grand jury proceedings; (b)(3) Miscellaneous proceedings for extradition, sentencing or granting or	MRE 1101 is identical with Rule 1101 as recommended by the National Conference of Commissioners on Uniform State Laws in its Uniform Rules of Evidence (1974) except that in MRE 1101(b)(3) the words "[preliminary examination] detention hearing in criminal cases" are deleted, and MRE 1101(b)(5) is added, there being no equivalent in the Uniform Rule.

extradition or rendition; sentencing, or granting or revoking probation; issuance of warrants for arrest, criminal summonses, and search warrants; and proceedings with respect to release on bail or otherwise. (4) *Contempt Proceedings.* Contempt proceedings in which the court may act summarily. (5) *Small Claims.* Small claims division of the district court. (6) *In Camera Custody Hearings.* In camera proceedings in child custody matters to determine a child's custodial preference. (7) *Proceedings Involving Juveniles.* Proceedings in the family division of the circuit court wherever MCR subchapter 3.900 states that the Michigan Rules of Evidence do not apply. (8) *Preliminary Examinations*. At preliminary examinations in criminal cases, hearsay is admissible to prove, with regard to property, the ownership, authority to use, value, possession and entry. (9) *Domestic Relations Matters*. The court's consideration of a report or recommendation submitted by the friend of the court pursuant to MCL 552.505(1)(g) or (h). (10) *Mental Health Hearings*. In hearings under Chapters 4, 4A, 5, and 6 of the Mental Health Code, MCL 330.1400 *et seq.*, the court may consider hearsay data that are part of the basis for the opinion presented by a testifying mental health expert.	revoking probation, issuance of warrants for arrest, criminal summonses and search warrants and proceedings with respect to release on bail or otherwise; (b)(4) Contempt proceedings in which the court may act summarily; (c) In a criminal preliminary examination, reliable hearsay shall be admissible as provided under Rule 1102.	
Alabama	**Utah Rule**	**Notes**
Rule 1101. Rules Applicable Currentness **(a) General Applicability.** Except as otherwise provided by constitutional provision, statute, this rule, or other rules of the Supreme Court of Alabama, these rules of evidence apply in all proceedings in the courts of	**Rule 1101. Applicability of rules.** (a) *Courts and magistrates.* These rules apply to all actions and proceedings in the courts of this state except as otherwise provided in Subdivision (b) and (c). (b) *Rules inapplicable.* The rules	**ADVISORY COMMITTEE'S NOTE** Sentencing, or Granting or Revoking Probation. Traditionally, rules of evidence have been held not to govern sentencing and probation proceedings except as otherwise provided by statute or rule of court. Rule 1101, except as to the assertion of privileges, is intended to continue that principle of inapplicability. See Ala. Code 1975, § 13A-5-45(d) (providing that any evidence that has probative value and that is relevant to sentencing shall be received at the sentence hearing regardless of its admissibility under the exclusionary rules of evidence,

Alabama, including proceedings before referees and masters. **(b) Rules Inapplicable.** These rules, other than those with respect to privileges, do not apply in the following situations: (1) *Preliminary Questions of Fact.* The determination of questions of fact preliminary to admissibility of evidence when the issue is to be determined by the court under Rule 104. (2) *Grand Jury.* Proceedings before grand juries. (3) *Miscellaneous Proceedings.* Proceedings for extradition or rendition; preliminary hearings in criminal cases; sentencing, or granting or revoking probation; issuance of warrants for arrest, criminal summonses, and search warrants; and proceedings with respect to release on bail or otherwise. (4) *Contempt Proceedings.* Contempt proceedings in which the court may act summarily.	(other than with respect to privileges) do not apply in the following situations: (b)(1) Preliminary questions of fact which are to be determined under Rule 104(a); (b)(2) Grand jury proceedings; (b)(3) Miscellaneous proceedings for extradition, sentencing or granting or revoking probation, issuance of warrants for arrest, criminal summonses and search warrants and proceedings with respect to release on bail or otherwise; (b)(4) Contempt proceedings in which the court may act summarily; (c) In a criminal preliminary examination, reliable hearsay shall be admissible as provided under Rule 1102.	provided that the defendant is accorded a fair opportunity to rebut any hearsay statements); Ala. R. Crim. P. 26.6(b)(2) (outlining guiding principles of evidence to be used in sentencing hearing, with ending proviso that the court may receive any evidence it deems probative "regardless of its admissibility under the rules of evidence"); Ala. Code 1975, § 15-22-50 (dealing with a court's power to suspend sentence and grant probation); Ala. Code 1975, § 15-22-54 (regarding the power to extend or terminate probation). See also *Williams v. New York*, 337 U.S. 241 (1949) (observing that due process does not require confrontation or cross-examination in sentencing or passing on probation; trial judge characterized as possessing broad discretion as to the sources and types of information relied upon); *Chandler v. United States*, 401 F.Supp. 658 (D.N.J.1975), aff'd, 546 F.2d 415 (3d Cir.1976), cert. denied, 430 U.S. 986 (1977); *United States v. Francischine*, 512 F.2d 827 (5th Cir.), cert. denied, 423 U.S. 931 (1975) (except for evidentiary privileges, rules of evidence are inapplicable to probation revocation proceedings).
Delaware	**Utah Rule**	**Notes**
D.R.E., Rule 1101 **RULE 1101. APPLICABILITY OF RULES AND DEFINITIONS** **(a) Rules applicable.** Except as otherwise provided in paragraph (b) and (c) of this Rule, these Rules apply to all actions and proceedings in all the courts of this State. **(b) Rules inapplicable.** The Ru les - except for those on privilege - do not apply to the following: (1) the court's determination under Rule 104(a), on a preliminary question of fact governing admissibility; (2) grand jury proceedings; (3) in preliminary hearings in criminal cases; and **(4)** miscellaneous proceedings such as: extradition or rendition; issuing an arrest warrant, criminal summons or search warrant; sentencing;	**Rule 1101. Applicability of rules.** (a) *Courts and magistrates.* These rules apply to all actions and proceedings in the courts of this state except as otherwise provided in Subdivision (b) and (c). (b) *Rules inapplicable.* The rules (other than with respect to privileges) do not apply in the following situations: (b)(1) Preliminary questions of fact which are to be determined under Rule 104(a); (b)(2) Grand jury proceedings; (b)(3) Miscellaneous proceedings for extradition, sentencing or granting or revoking probation, issuance of warrants for arrest, criminal summonses	

granting or revoking probation; detention hearing in criminal hearings; considering whether to release on bail or otherwise; and contempt proceedings in which the court may act summarily. **(c) Definition.** As used throughout these Rules, the term "writing" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.	and search warrants and proceedings with respect to release on bail or otherwise; (b)(4) Contempt proceedings in which the court may act summarily; (c) In a criminal preliminary examination, reliable hearsay shall be admissible as provided under Rule 1102.	
Minnesota	**Utah Rule**	**Notes**
RULE 1101. RULES APPLIC ABLE **(a)** Except as otherwise provided in subdivisions (b) and (c), these rules apply to all actions and proceedings in the courts of this state. **(b) Rules inapplicable.** The rul es other than those with respect to privileges do not apply in the following situations: (1) *Preliminary questions of fact.* The determination of questions of fact preliminary to admissibility of evidence when the issue is to be determined by the court under Rule 104(a). (2) *Grand jury.* Proceedings before grand juries. (3) *Miscellaneous proceedings.* Proceedings for extradition or rendition; probable cause hearings; sentencing, or granting or revoking probation; issuance of warrants for arrest, criminal summonses, and search warrants; proceedings with respect to release on bail or otherwise; and criminal expungement proceedings. (4) Contempt proceedings in which the court may act summarily. **(c) Restitution hearings.** For restitution hearings held under Minn. Stat. § 611A.045, subd. 3(b), these rules apply except that the foundation for admission of documentary evidence offered under Rule 803(6) may be provided by affidavit, or statements signed under penalty of perjury pursuant to	**Rule 1101. Applicability of rules.** (a) *Courts and magistrates.* These rules apply to all actions and proceedings in the courts of this state except as otherwise provided in Subdivision (b) and (c). (b) *Rules inapplicable.* The rules (other than with respect to privileges) do not apply in the following situations: (b)(1) Preliminary questions of fact which are to be determined under Rule 104(a); (b)(2) Grand jury proceedings; (b)(3) Miscellaneous proceedings for extradition, sentencing or granting or revoking probation, issuance of warrants for arrest, criminal summonses and search warrants and proceedings with respect to release on bail or otherwise; (b)(4) Contempt proceedings in which the court may act summarily; (c) In a criminal preliminary examination, reliable hearsay shall be admissible as provided under Rule 1102.	COMMITTEE COMMENT--2019 Rule 1101 has been amended to clarify the applicability of the Rules of Evidence to criminal restitution and expungement hearings. In State v. Willis, 898 N.W.2d 642 (Minn. 2017), the Minnesota Supreme Court held that the Rules of Evidence apply to criminal restitution hearings held under Minn. Stat. § 611A.045. It then referred the matter to the advisory committee for review. The advisory committee determined that the Rules of Evidence should continue to apply to restitution hearings, but that the standards for admissibility of hearsay should be relaxed. This approach is intended to ease the burden on victims presenting receipts for expenses, while also ensuring fair and accurate restitution awards. The rule was also amended to clarify that the Rules of Evidence do not apply to criminal expungement proceedings held under Minn. Stat. ch. 609A. This amendment is consistent with existing practice in Minnesota.

Minnesota Statutes, section 358.116, in lieu of testimony.		
North Dakota	**Utah Rule**	**Notes**
Rule 1101. Applicability of Rules **(a) To Courts and Magistrates.** These rules apply to all courts and magistrates of this State. **(b) To Cases and Proceedings.** These rules apply in: (1) civil cases and proceedings, (2) special proceedings, (3) criminal cases and proceedings, and (4) contempt proceedings, except those in which the court may act summarily. **(c) Rules on Privilege.** The rules on privilege apply to all stages of a case or proceeding. **(d) Exceptions.** These rules, except for those on privilege, do not apply to the following: (1) the court's determination, under Rule 104(a), on a preliminary question of fact governing admissibility; (2) grand-jury proceedings; and (3) miscellaneous proceedings, such as: (A) extradition or rendition; (B) issuing an arrest warrant, criminal summons, or search warrant; (C) preliminary examination in a criminal case; (D) sentencing; (E) granting or revoking probation or parole; (F) considering whether to release on bail or otherwise; (G) detention and shelter care hearings; (H) transfer and dispositional hearings in juvenile court. **(e) Other Rules.** A rule prescribed by the Supreme Court may provide for admitting or excluding evidence independently from these rules.	**Rule 1101. Applicability of rules.** (a) *Courts and magistrates.* These rules apply to all actions and proceedings in the courts of this state except as otherwise provided in Subdivision (b) and (c). (b) *Rules inapplicable.* The rules (other than with respect to privileges) do not apply in the following situations: (b)(1) Preliminary questions of fact which are to be determined under Rule 104(a); (b)(2) Grand jury proceedings; (b)(3) Miscellaneous proceedings for extradition, sentencing or granting or revoking probation, issuance of warrants for arrest, criminal summonses and search warrants and proceedings with respect to release on bail or otherwise; (b)(4) Contempt proceedings in which the court may act summarily; (c) In a criminal preliminary examination, reliable hearsay shall be admissible as provided under Rule 1102.	This rule is patterned after Rule 1101 of the Federal Rules of Evidence. It was modified by deleting reference to proceedings which are unique to the federal courts, and by adding detention hearings, juvenile court transfer hearings, and dispositional hearings in juvenile court to the list of miscellaneous proceedings exempted from coverage by paragraph (d)(3). Dispositional hearings in juvenile court are the counterpart to sentencing of adults and require the same evidentiary treatment. A juvenile court transfer hearing is equivalent to a preliminary examination in a criminal case which has relaxed standards for admission of evidence.

Colorado	Utah Rule	Notes
RULE 1101. APPLICABILITY OF RULES Currentness **(a) Courts.** These rules apply to all courts in the State of Colorado. **(b) Proceedings Generally.** These rules apply generally to civil actions, to criminal proceedings, and to contempt proceedings, except those in which the court may act summarily. **(c) Rule of Privilege.** The rule with respect to privileges applies at all stages of all actions, cases, and proceedings. **(d) Rules Inapplicable.** The ru les (other than with respect to privileges) do not apply in the following situations: (1) **Preliminary Questions of Fact.** The determination of questions of fact preliminary to admissibility of evidence when the issue is to be determined by the court under Rule 104. (2) **Grand Jury.** Proceedings before grand juries. (3) **Miscellaneous Proceedings.** Proceedings for extradition or rendition; preliminary examinations in criminal cases; sentencing, or granting or revoking probation; issuance of warrants for arrest, criminal summonses, and search warrants; and proceedings with respect to release on bail or otherwise. **(e) Rules Applicable in Part.** In any special statutory proceedings, these rules apply to the extent that matters of evidence are not provided for in the statutes which govern procedure therein.	**Rule 1101. Applicability of rules.** (a) *Courts and magistrates.* These rules apply to all actions and proceedings in the courts of this state except as otherwise provided in Subdivision (b) and (c). (b) *Rules inapplicable.* The rules (other than with respect to privileges) do not apply in the following situations: (b)(1) Preliminary questions of fact which are to be determined under Rule 104(a); (b)(2) Grand jury proceedings; (b)(3) Miscellaneous proceedings for extradition, sentencing or granting or revoking probation, issuance of warrants for arrest, criminal summonses and search warrants and proceedings with respect to release on bail or otherwise; (b)(4) Contempt proceedings in which the court may act summarily; (c) In a criminal preliminary examination, reliable hearsay shall be admissible as provided under Rule 1102.	COMMITTEE COMMENT The Colorado rule is culled from Rule 81 of the Colorado Rules of Civil Procedure and Rule 1101(e) of the Federal Rules of Evidence. Colo. R. Civ. P. 81 As amended through Rule Change 2019(15), effective October 24, 2019 Rule 81 - Applicability in General**(a) Special Statutory Proceedings.** These rules do not govern procedure and practice in any special statutory proceeding insofar as they are inconsistent or in conflict with the procedure and practice provided by the applicable statute. Where the applicable statute provides for procedure under a former Code of Civil Procedure, such procedure shall be in accordance with these rules.**(b) Dissolution of Marriage and Legal Separation.** These rules shall not govern procedure and practice in actions in dissolution of marriage and legal separation insofar as they may be inconsistent or in conflict with the procedure and practice provided by the applicable statutes.**(c) Appeals from County to District Court.** These rules do not supersede the provisions of the statutes of this state now or hereafter in effect relating to appeals from final judgments and decrees of the county court to the district court.
New Mexico	**Utah Rule**	**Notes**
RULE 11-1101. APPLICABILITY OF THE RULES **A. To courts and judges.** These rules apply to proceedings before New Mexico district courts, metropolitan court, magistrate courts, municipal courts,	**Rule 1101. Applicability of rules.** (a) *Courts and magistrates.* These rules apply to all actions and proceedings in the courts of this state except as	**Probation revocation proceedings** The Court of Appeals was not required to review defendant's appellate argument that alleged the photographs contained an exhibit were improperly admitted on the basis that the State failed to properly authenticate them for admission; the rules of evidence did not apply to probation revocation proceedings. State v. Green, 2014, 341 P.3d

and special masters, referees, and child support hearing officers appointed by the court. **B. To cases and proceedings.** These rules apply in civil cases and proceedings, criminal cases and proceedings, and contempt proceedings, except those in which the court may act summarily. **C. Rules on privilege.** The rules on privilege apply to all stages of a case or proceeding. **D. Exceptions.** These rules--except for those on privilege--do not apply to the following: (1) the court's determination, under Rule 11-104(A) NMRA, on a preliminary question of fact governing admissibility; (2) grand jury proceedings, and (3) miscellaneous proceedings, such as (a) extradition or rendition, (b) issuing an arrest warrant, criminal summons, or search warrant, (c) sentencing by the court without a jury, (d) granting or revoking probation or supervised release, (e) considering whether to release on bail or otherwise, (f) dispositional hearings in children's court proceedings, and (g) the following abuse and neglect proceedings: (i) issuing an ex parte custody order; (ii) custody hearings; (iii) permanency hearings; and (iv) judicial review proceedings.	otherwise provided in Subdivision (b) and (c). (b) *Rules inapplicable.* The rules (other than with respect to privileges) do not apply in the following situations: (b)(1) Preliminary questions of fact which are to be determined under Rule 104(a); (b)(2) Grand jury proceedings; (b)(3) Miscellaneous proceedings for extradition, sentencing or granting or revoking probation, issuance of warrants for arrest, criminal summonses and search warrants and proceedings with respect to release on bail or otherwise; (b)(4) Contempt proceedings in which the court may act summarily; (c) In a criminal preliminary examination, reliable hearsay shall be admissible as provided under Rule 1102.	10, certiorari denied 344 P.3d 987. Sentencing and Punishment 2019 The formal rules of evidence do not apply to probation revocation hearings. State v. Guthrie, 2009, 145 N.M. 761, 204 P.3d 1271, certiorari granted 146 N.M. 604, 213 P.3d 508, reversed 150 N.M. 84, 257 P.3d 904. Sentencing And Punishment 2016 Formal rules of evidence do not apply to probation revocation hearings. State v. Phillips, 2005, 138 N.M. 730, 126 P.3d 546, certiorari granted 139 N.M. 273, 131 P.3d 660, certiorari quashed 140 N.M. 543, 144 P.3d 102. Sentencing And Punishment 2016 Statute making the Rules of Evidence inapplicable to probation revocation hearings does not militate against the application of the exclusionary rule in probation revocation hearings. Const. Art. 2, § 10; SCRA 1986, Rule 11-1101, subd. D(2). State v. Marquart, 1997, 123 N.M. 809, 945 P.2d 1027, certiorari denied 123 N.M. 626, 944 P.2d 274. Sentencing And Punishment 2019 **Sentencing proceedings** Rules of evidence do not apply to sentencing proceedings before court without jury. SCRA 1986, Rule 11-1101, subd. D(2). State v. Smith, 1990, 110 N.M. 534, 797 P.2d 984, certiorari denied 110 N.M. 533, 797 P.2d 983. Sentencing And Punishment 303 NMRA, Rule 11-1101, NM R REV Rule 11-1101 State court rules are current with amendments received through September 1, 2019.
Washington	**Utah Rule**	**Notes**
EVIDENCE RULE 1101. APPLICABILITY OF RULES **(a) Courts Generally.** Except as otherwise provided in section (c), these rules apply to all actions and proceedings in the courts of the state of Washington. The terms “judge” and “court” in these rules refer to any judge of any court to which these rules apply or	**Rule 1101. Applicability of rules.** (a) *Courts and magistrates.* These rules apply to all actions and proceedings in the courts of this state except as otherwise provided in Subdivision (b) and (c).	**Sentencing proceedings** **Rules** of **evidence** do not apply at sentencing. State v. Hixson (1999) 94 Wash.App. 862, 973 P.2d 496. Sentencing And Punishment 303 **Evidence rules** do not apply in proceedings to grant or revoke probation, and community supervision is modern equivalent of probation. State v. Anderson (1997) 88 Wash.App. 541, 945 P.2d 1147.

any other officer who is authorized by law to hold any hearing to which these rules apply. **(b) Law With Respect to Privilege.** The law with respect to privileges applies at all stages of all actions, cases, and proceedings. **(c) When Rules Need Not Be Applied.** The rules (other than with respect to privileges, the rape shield statute and ER 412) need not be applied in the following situations: (1) *Preliminary Questions of Fact.* The determination of questions of fact preliminary to admissibility of evidence when the issue is to be determined by the court under rule 104(a). (2) *Grand Jury.* Proceedings before grand juries and special inquiry judges. (3) *Miscellaneous Proceedings.* Proceedings for extradition or rendition; detainer proceedings under RCW 9.100; preliminary determinations in criminal cases; sentencing, or granting or revoking probation; issuance of warrants for arrest, criminal summonses, and search warrants; proceedings with respect to release on bail or otherwise; contempt proceedings in which the court may act summarily; habeas corpus proceedings; small claims court; supplemental proceedings under RCW 6.32; coroners' inquests; preliminary determinations in juvenile court; juvenile court hearings on declining jurisdiction; disposition, review, and permanency planning hearings in juvenile court; dispositional determinations related to treatment for alcoholism, intoxication, or drug addiction under RCW 70.96A; and dispositional determinations under RCW 71.05 and 71.34. (4) *Applications for Protection Orders.* Protection order proceedings under Chapters 7.90, 7.92, 7.94, 10.14, 26.50 and 74.34 RCW. Provided when a judge proposes to consider information from a criminal or civil database, the judge shall disclose the	(b) *Rules inapplicable.* The rules (other than with respect to privileges) do not apply in the following situations: (b)(1) Preliminary questions of fact which are to be determined under Rule 104(a); (b)(2) Grand jury proceedings; (b)(3) Miscellaneous proceedings for extradition, sentencing or granting or revoking probation, issuance of warrants for arrest, criminal summonses and search warrants and proceedings with respect to release on bail or otherwise; (b)(4) Contempt proceedings in which the court may act summarily; (c) In a criminal preliminary examination, reliable hearsay shall be admissible as provided under Rule 1102.	Under ER **1101**, which exempts sentencing proceedings from application of **Rules** of **Evidence**, **rules** do not have to be applied in restitution hearing. State v. Pollard (1992) 66 Wash.App. 779, 834 P.2d 51, review denied 120 Wash.2d 1015, 844 P.2d 436.

information to each party present at the hearing; on timely request, provide each party with an opportunity to be heard; and, take appropriate measures to alleviate litigants' safety concerns. The judge has discretion not to disclose information that he or she does not propose to consider. **(d) Arbitration Hearings.** In a mandatory arbitration hearing under RCW 7.06, the admissibility of evidence is governed by MAR 5.3.		
Oklahoma	**Utah Rule**	**Notes**
§ 2103. Scope of Rules Currentness A. Except as otherwise provided in subsection B of this section, this Code[1] shall apply in both criminal and civil proceedings, conducted by or under the supervision of a court, in which evidence is produced. B. The rules set forth in this Code, other than those applicable to a valid claim of privilege, do not apply in the following situations: 1. The determination of questions of fact preliminary to admissibility of evidence when the issue is to be determined by the judge under subsection A of Section 2105 of this title; and 2. Proceedings for extradition or rendition; sentencing or granting or revoking probation; advancement of deferred judgment; issuance of warrants for arrest, criminal summonses and search warrants; proceedings with respect to release on bail or otherwise; and juvenile emergency show-cause hearings.	**Rule 1101. Applicability of rules.** (a) *Courts and magistrates.* These rules apply to all actions and proceedings in the courts of this state except as otherwise provided in Subdivision (b) and (c). (b) *Rules inapplicable.* The rules (other than with respect to privileges) do not apply in the following situations: (b)(1) Preliminary questions of fact which are to be determined under Rule 104(a); (b)(2) Grand jury proceedings; (b)(3) Miscellaneous proceedings for extradition, sentencing or granting or revoking probation, issuance of warrants for arrest, criminal summonses and search warrants and proceedings with respect to release on bail or otherwise; (b)(4) Contempt proceedings in which the court may act summarily; (c) In a criminal preliminary examination, reliable hearsay shall be admissible as provided under Rule 1102.	In sentencing and granting probation under § 103(B)(2) even though there is vague statutory direction to observe the rules of evidence in hearing testimonial evidence with respect to sentencing (Okl.Stat. 22 §§ 973 to 975), there is at least one late case in which the Court of Criminal Appeals held that the trial court did not abuse its discretion in considering a pre-sentence report of a probation officer without affording the defendant a right to cross-examine the probation officer relative to the matters contained in the report. See Baker v. State, 494 P.2d 355 (Okla.Cr.1972). It has also been held that the granting or denying of probation under Okla.Stat. 22 § 991(a) is solely a matter within the discretion of the trial court, and the appeals court will only reverse in cases of abuse of discretion. See Kordelski v. State, 506 P.2d 1403 (Okla.Cr.1973). With reference to § 103(B) involving proceedings to revoke probation and advance deferred sentence current Oklahoma law is not entirely clear. Okla.Stat. 22 § 991(b) does provide that a suspended sentence "may not be revoked for any cause unless competent evidence ... is presented" and the probationer is "confronted by the witnesses against him." See Brown v. State, 494 P.2d 344 (Okla.Cr.1972) requiring "competent evidence" under the statute and In re Collyer, 476 P.2d 354 (Okla.Cr.1970) requiring that there be sufficient "competent evidence" to support the revocation of the suspended sentence. And, it has been held error to admit the transcript of the testimony of a police officer in a proceeding to revoke a suspended sentence unless there is a showing of the unavailability of the witness to testify personally. See Moore v. State, 507 P.2d 1290 (Okla.Cr.1973). This is an apparent application of the reported testimony exception to the hearsay rule. On the other hand, in Frick v. State, 509 P.2d 135 (Okla.Cr.1973), the Court of Criminal Appeals defined "competent evidence" as evidence "which is relevant and material to the issues to be determined." Although this case involved the acceleration of a deferred sentence under Okla.Stat. 22 § 991 the only place the word

		"competent" is used is in Okla.Stat. 22 § 991(b) dealing with revocation of suspended sentences and the court's definition of "competent evidence" in the Frick case, supra, leaves the door about as wide-open as possible. However, the court did go on to say in the Frick case that the "same standard of proof is not required for an acceleration of a deferred sentence as is required for a conviction or revocation of a suspended." The rule will have a clarifying effect on prior Oklahoma law. Admitting preliminary hearing transcript into **evidence** at hearing to revoke suspended sentence was not abuse of discretion; revocation hearing was not "criminal prosecution," and full panoply of rights due in criminal prosecution are not applicable to revocation proceedings. Gilbert v. State, Okla.Crim.App., 765 P.2d 807 (1988). Sentencing And Punishment 2019 **Sentencing proceedings** Hearsay **rule** does not apply to sentencing hearing. Hunter v. State, Okla.Crim.App., 825 P.2d 1353 (1992). Sentencing And Punishment 317
Mississippi	**Utah Rule**	**Notes**
Rule 1101. Applicability of the Rules **(a) To Courts and Proceedings.** These rules apply to all cases and proceedings in Mississippi courts, except as provided in subdivision (b). **(b) Exceptions.** These rules--except for those on privilege--do not apply to the following: **(1)** the court's determination, under Rule 104(a), on a preliminary question of fact governing admissibility; **(2)** grand-jury proceedings; **(3)** contempt proceedings in which the court may act summarily; and **(4)** these miscellaneous proceedings: • extradition or rendition; • issuing an arrest warrant, criminal summons, or search warrant; • probable cause hearings in criminal cases and youth court cases; • sentencing; • disposition hearings; • granting or revoking probation; and • considering whether to release on bail or otherwise.	**Rule 1101. Applicability of rules.** (a) *Courts and magistrates.* These rules apply to all actions and proceedings in the courts of this state except as otherwise provided in Subdivision (b) and (c). (b) *Rules inapplicable.* The rules (other than with respect to privileges) do not apply in the following situations: (b)(1) Preliminary questions of fact which are to be determined under Rule 104(a); (b)(2) Grand jury proceedings; (b)(3) Miscellaneous proceedings for extradition, sentencing or granting or revoking probation, issuance of warrants for arrest, criminal summonses and search warrants and proceedings with respect to release on bail or otherwise; (b)(4) Contempt proceedings in which the court may act summarily;	**Sentencing proceedings** Circuit court was entitled to sentence defendant in absentia; defendant was remanded to custody of sheriff's department to await sentencing, but he escaped and was still unaccounted for at time of sentencing hearing, and defense was allowed to put on any **evidence**that it had to refute State's claim, but defense presented nothing, and defense counsel admitted to circuit court that he had not had contact with defendant since court entered its judgment, and he was unaware of defendant's location at time of sentencing hearing. West's A.M.C. § 99-17-9; **Rules** of Evid., **Rule 1101**(b)(3). Jenkins v. State, 2008, 997 So.2d 207, rehearing denied, habeas corpus dismissed 2010 WL 5169069. Sentencing And Punishment 345 Report on defendant's prior convictions was admissible in habitual-offender sentencing hearing, although defendant urged that it was hearsay; **rules** of **evidence** did not apply in sentencing hearings. **Probation proceedings** Hearsay is admissible in proceedings to grant or revoke probation. **Rules** of Evid., **Rule 1101**(b)(3). Younger v. State, 1999, 749 So.2d 219.Sentencing And Punishment 1900, 2019

	(c) In a criminal preliminary examination, reliable hearsay shall be admissible as provided under Rule 1102.	
Wyoming	**Utah Rule**	**Notes**
Wyoming Rules of Evidence, Rule 1101 **Rule 1101. Applicability of Rules** Currentness **(a) Rules Applicable.** Except as otherwise provided in subdivision (b), these rules apply to all actions and proceedings in the courts of this state. **(b) Rules Inapplicable.** The rules other than those with respect to privileges do not apply in the following situations: (1) *Preliminary Questions of Fact.* The determination of questions of fact preliminary to admissibility of evidence when the issue is to be determined by the court under Rule 104(a). (2) *Grand Jury.* Proceedings before grand juries. (3) *Miscellaneous Proceedings.* Proceedings for extradition or rendition; preliminary examination in criminal cases; sentencing, granting or revoking probation other than adjudicatory hearings; juvenile proceedings other than adjudicatory hearings; issuance of warrants for arrest, criminal summonses, and search warrants; and proceedings with respect to release on bail or otherwise. (4) Contempt proceedings in which the court may act summarily.	**Rule 1101. Applicability of rules.** (a) *Courts and magistrates.* These rules apply to all actions and proceedings in the courts of this state except as otherwise provided in Subdivision (b) and (c). (b) *Rules inapplicable.* The rules (other than with respect to privileges) do not apply in the following situations: (b)(1) Preliminary questions of fact which are to be determined under Rule 104(a); (b)(2) Grand jury proceedings; (b)(3) Miscellaneous proceedings for extradition, sentencing or granting or revoking probation, issuance of warrants for arrest, criminal summonses and search warrants and proceedings with respect to release on bail or otherwise; (b)(4) Contempt proceedings in which the court may act summarily; (c) In a criminal preliminary examination, reliable hearsay shall be admissible as provided under Rule 1102.	1977 Committee Note This is the uniform rule with the deletion from subsection (b)(3) of "detention hearings", and the addition of "juvenile proceedings other than adjudicatory hearings;". Although the terminology in juvenile proceedings is deliberately made different from that in criminal proceedings, the resemblance to criminal procedure is obvious and constitutional guarantees of due process apply. Adjudicatory hearings are the equivalent of trial so the Rules of Evidence apply. Detention hearings and dispositional hearings are equivalents of bail hearings, preliminary hearings and sentencing hearings, and as in criminal cases, the Rules of Evidence do not apply. "Transfer hearings" to determine whether the defendant should be tried as a juvenile or as an adult are often critical, but the Committee recommends that the matter be left to the discretion of the judge without restricting all cases to the Rules of Evidence.
Nevada	**Utah Rule**	**Notes**
47.020. Scope of title 4 of NRS 1. This title governs proceedings in the courts of this State and before magistrates, except: (a) To the extent to which its provisions are relaxed by a statute or procedural rule applicable to the specific situation; and (b) As otherwise provided in subsection 3.	**Rule 1101. Applicability of rules.** (a) *Courts and magistrates.* These rules apply to all actions and proceedings in the courts of this state except as otherwise provided in Subdivision (b) and (c). (b) *Rules inapplicable.* The rules	

2. Except as otherwise provided in subsection 1, the provisions of chapter 49 of NRS with respect to privileges apply at all stages of all proceedings. 3. The other provisions of this title, except with respect to provisions concerning a person with limited English proficiency, do not apply to: (a) Issuance of warrants for arrest, criminal summonses and search warrants. (b) Proceedings with respect to release on bail. (c) Sentencing, granting or revoking probation. (d) Proceedings for extradition. 4. As used in this section, "person with limited English proficiency" has the meaning ascribed to it in NRS 1.510.	(other than with respect to privileges) do not apply in the following situations: (b)(1) Preliminary questions of fact which are to be determined under Rule 104(a); (b)(2) Grand jury proceedings; (b)(3) Miscellaneous proceedings for extradition, sentencing or granting or revoking probation, issuance of warrants for arrest, criminal summonses and search warrants and proceedings with respect to release on bail or otherwise; (b)(4) Contempt proceedings in which the court may act summarily; (c) In a criminal preliminary examination, reliable hearsay shall be admissible as provided under Rule 1102.	
Iowa	**Utah Rule**	**Notes**
Rule 5.1101. Applicability of the rules Currentness a. *To courts and judges.* The Iowa Rules of Evidence apply to proceedings before the courts of this state, including proceedings before magistrates and court-appointed referees and masters, except as Iowa Supreme Court rules otherwise provide. b. *Rules on privilege.* The rules on privilege apply to all stages of a case or proceeding. c. *Exceptions.* The Iowa Rules of Evidence--except for those on privilege--do not apply to the following: (1) The court's determination, under rule 5.104(a), on a preliminary question of fact governing admissibility. (2) Grand-jury proceedings. (3) Contempt proceedings in which an adjudication is made without prior notice and a hearing.	**Rule 1101. Applicability of rules.** (a) *Courts and magistrates.* These rules apply to all actions and proceedings in the courts of this state except as otherwise provided in Subdivision (b) and (c). (b) *Rules inapplicable.* The rules (other than with respect to privileges) do not apply in the following situations: (b)(1) Preliminary questions of fact which are to be determined under Rule 104(a); (b)(2) Grand jury proceedings; (b)(3) Miscellaneous proceedings for extradition, sentencing or granting or revoking probation, issuance of warrants for arrest, criminal summonses and search warrants and	

(4) Miscellaneous proceedings such as: extradition or rendition; issuing an arrest warrant, criminal summons, or search warrant; a preliminary examination in a criminal case; sentencing; granting or revoking probation or supervised release; and considering whether to release on bail or otherwise.	proceedings with respect to release on bail or otherwise; (b)(4) Contempt proceedings in which the court may act summarily; (c) In a criminal preliminary examination, reliable hearsay shall be admissible as provided under Rule 1102.	
New Hampshire	**Utah Rule**	**Notes**
RULE 1101. APPLICABILITY OF RULES Currentness **(a) Courts.** These rules apply to the proceedings in the district and probate divisions of the circuit court, the superior court, and the supreme court. **(b) Proceedings Generally.** These rules apply generally to all civil and criminal proceedings unless otherwise provided by the constitution or statutes of the State of New Hampshire or these rules. **(c) Rule of Privilege.** The rules with respect to privileges applies at all stages of all actions, cases, and proceedings. **(d) Rules Inapplicable.** The ru les (other than with respect to privileges) do not apply in the following situations: (1) *Preliminary Questions of Fact.* The determination of questions of fact preliminary to admissibility of evidence when the issue is to be determined by the court under Rule 104. (2) *Grand Jury.* Proceedings before grand juries. (3) *Miscellaneous Proceedings.* Proceedings for extradition or rendition; preliminary examinations in criminal cases; juvenile certification proceedings under RSA 169-B:24; sentencing, or granting or revoking probation; issuance of warrants for arrest, criminal summonses, and search warrants; proceedings with respect to release on bail or otherwise; contempt proceedings in which the court may act summarily;	**Rule 1101. Applicability of rules.** (a) *Courts and magistrates.* These rules apply to all actions and proceedings in the courts of this state except as otherwise provided in Subdivision (b) and (c). (b) *Rules inapplicable.* The rules (other than with respect to privileges) do not apply in the following situations: (b)(1) Preliminary questions of fact which are to be determined under Rule 104(a); (b)(2) Grand jury proceedings; (b)(3) Miscellaneous proceedings for extradition, sentencing or granting or revoking probation, issuance of warrants for arrest, criminal summonses and search warrants and proceedings with respect to release on bail or otherwise; (b)(4) Contempt proceedings in which the court may act summarily; (c) In a criminal preliminary examination, reliable hearsay shall be admissible as provided under Rule 1102.	Current New Hampshire law appears to indicate that the Rules of Evidence are not strictly applicable in the following instances: 1. Preliminary examination (probable cause) *State v. St. Arnault*, 114 N.H. 216, 317 A.2d 789 (1974). 2. Grand jury *State v. St. Arnault*, 114 N.H. 216, 317 A.2d 789 (1974); *State v. Blake*, 113 N.H. 115, 305 A.2d 300 (1973). See also, e.g., *State v. Walsh*, 76 N.H. 581, 84 A. 42 (1912). 3. Arrest warrants *State v. Greely*, 115 N.H. 461, 344 A.2d 12 (1975); *State v. St. Germain*, 114 N.H. 608, 325 A.2d 803 (1974). 4. Bail hearings McNamara, *Criminal Practice and Procedure*, § 341 (1980) 5. Search warrants *State v. Beaulieu*, 119 N.H. 400, 402 A.2d 178 (1979); *State v. Spero*, 117 N.H. 199, 371 A.2d 1155 (1977); *State v. Titus*, 106 N.H. 219, 212 A.2d 458 (1965), cert. den. 385 U.S. 941, 87 S.Ct. 311, 17 L.Ed.2d 221 (1966). 6. Juvenile proceedings RSA 169-B (probably also CHINS, neglect, etc.) strict evidentiary rules may be relaxed provided juveniles' right to confront witnesses is not compromised. McNamara, § 1104; See, *In re Gault*, 387 U.S. 1, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967). 7. Parole revocation Probably also probation violation. *Morrissey v. Brewer*, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972). 8. Recommittal hearings *State v. Hesse*, 117 N.H. 329, 373 A.2d 345 (1977). 9. Divorce cases *Pflug v. Pflug*, 92 N.H. 247, 29 A.2d 422 (1942). 10. Extradition *Reeves v. Cox*, 118 N.H. 271, 385 A.2d 847 (1978). 11.

proceedings with respect to parole revocation or probation violations; recommittal hearings; domestic relations cases within the jurisdiction of the Family Division of the Circuit Court; civil domestic violence and stalking proceedings.		Contempt *Town of Nottingham v. Cedar Waters, Inc.*, 118 N.H. 282, 385 A.2d 851 (1978). 12. Domestic violence Proceedings pursuant to RSA 173-B.

URE 1101. Applicability of Rules.

(a) **Proceedings Generally.** These rules apply to all actions and proceedings in the courts of this state except as otherwise provided in subsections (c) and (d). They apply generally to civil actions and proceedings, criminal cases and contempt proceedings except those in which the court may act summarily.

(b) **Rule of Privilege.** The rule with respect to privileges applies at all stages of all actions, cases and proceedings.

(c) **Rules Inapplicable.** The rules (other than with respect to privileges) do not apply in the following situations:

(c)(1) **Preliminary Questions of Fact.** The determination of questions of fact preliminary to admissibility of evidence when the issue is to be determined by the court under URE 104.

(c)(2) **Grand Jury.** Proceedings before grand juries.

(c)(3) **Revoking Probation.** Proceedings for revoking probation, unless the court for good cause otherwise orders.

(c)(~~3~~4) **Miscellaneous Proceedings.** Proceedings for extradition or rendition; sentencing~~,~~ ~~or granting or revoking probation~~; issuance of warrants for arrest, criminal summonses, and search warrants; and proceedings with respect to release on bail or otherwise.

(d) **Reliable Hearsay in Criminal Preliminary Examinations.** In a criminal preliminary examination, reliable hearsay shall be admissible as provided under URE 1102.

Effective ~~December 1, 2011~~May/November 1, 20__

2019 Advisory Committee Note: Regarding subsection (c)(3)(B): In *State v. Weeks*, 2002 UT 98, 61 P.3d 1000, the Utah Supreme Court explained the "wisdom" of not applying the evidence rules to sentencing and restitution hearings. *Id.* at ¶ 17. The breadth of information available at such hearings has always been wide. *See Williams v. New York*, 337 U.S. 241, 246 (1949) ("[B]oth before and since the American colonies became a nation, courts . . . practiced a policy under which a sentencing judge could exercise a wide discretion in the sources and types of evidence used to assist him in determining the kind and extent of punishment to be imposed within limits fixed by law."). Granting flexibility allows trial courts to fashion just sentences—including court-ordered restitution—based on the facts of a given case. It benefits defendants because one form of punishment (restitution) may allow them to avoid a greater fine, incarceration, or both. Finally, it benefits victims by ensuring that they don't endure a "mini-trial" on restitution, and fines that might have gone to the State may instead go to the victim in the form of restitution. *Weeks*, 2002 UT 98, ¶¶ 17-19.

2011 Advisory Committee Note. The language of this rule has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

~~**Original Advisory Committee Note.** This rule is the federal rule, verbatim, and is substantially the same as Rule 70(2), Utah Rules of Evidence (1971).~~

URE 106

UTAH SUPREME COURT ADVISORY COMMITTEE

RULES OF EVIDENCE
JOHN R. LUND
CHAIR

February 6, 2021

Introduction

In *State v. Sanchez*, 2018 UT 31, n.4, the Utah Supreme Court asked the Advisory Committee on the Utah Rules of Evidence (Committee) to examine issues regarding Utah Rule of Evidence 106 (URE 106). The Committee formed a Subcommittee to research all pertinent materials, and the Subcommittee reported their work and findings to the Committee. Over the course of many months, the Committee discussed relevant Federal and Utah rules, law review articles, a 50-state survey, and proposed draft rules. On January 12, 2021, the Committee discussed and voted on the following proposed draft rule (*see also* attached Addendum):

> **Rule 106. Remainder of or related writings or recorded statements.**
>
> 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 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.

The result of the Committee's January 2021 vote indicates that a majority of the Committee members (7-5) propose that the Utah Rules of Evidence incorporate this proposed draft rule. This Memorandum outlines the reasons for the Committee's vote (i.e., the majority view). This

Memorandum also outlines the reasons for why some of the Committee members disagree with the majority view (i.e., the minority view).

Pertinent URE 106 Issues

The two pertinent issues that the Utah Supreme Court Justices initially asked the Committee to consider regarding URE 106 are as follows:

1. **How does URE 106 operate—i.e., does it have a trumping function, or only a timing function?**

If rule 106 has a *trumping function*, the rule would prevail over other rules of evidence that would preclude admissibility. For example, a trumping function would allow rule 106 to admit otherwise inadmissible hearsay if the hearsay statement is necessary to explain or to put into context a portion of a statement already introduced. By contrast, the *timing function* of rule 106 allows a party to interrupt the proceedings to have the curative evidence immediately introduced. Admitting curative evidence at a later time may not adequately remedy the effect of the misleading impression of the already introduced partial statement. Importantly, jurisdictions across the nation are split on whether rule 106 has a trumping function or only a timing function.

2. **What are the necessary and sufficient conditions for triggering URE 106?**

To trigger rule 106, is it a requirement that the recorded statement be admitted into evidence as a trial exhibit, or is it sufficient that the pertinent statement be referred to extensively at trial but not actually admitted. This is also a split jurisdiction issue as noted by paragraph 21 of the *Sanchez* decision, which states: "Some courts have said that reading a writing or recorded statement into the record or directly quoting it on cross examination is enough, while other courts require actual introduction of the evidence before rule 106 applies." *State v. Sanchez*, 2018 UT 31, ¶21.

Decisions and Additional Issues

In 2019, the Evidence Advisory Committee met, discussed, and decided these two issues. The Committee decided the following:

(1) URE 106 has a trumping function so that it admits otherwise inadmissible hearsay if the hearsay statement is necessary to qualify, explain, or place into context the partial statement already introduced. In reaching this decision, the Committee relied on and

deferred to the court of appeals decision in *State v. Sanchez,* 2016 UT App 189, wherein the Utah Court of Appeals outlined various reasons for why URE rule 106 should operate as having a trumping function.

(2) For Rule 106 to trigger, it is ***not*** a requirement that the pertinent written statement be admitted as evidence at trial. It is therefore sufficient for the parties to refer to the statement at trial to trigger rule 106 issues.

John Lund and Keisa Williams then met with the Utah Supreme Court Justices to discuss proposed changes to URE 106. The Justices requested additional information from the Committee, including (1) a discussion/explanation of the interplay between URE 106 and URE 403, (2) an answer to whether there is a need to create a new Committee Advisory Note since the proposed draft rule would deviate from the federal rule, and (3) a request to hear what other scholars and states are saying about Rule 106 issues. The answers to these questions are provided in this Memorandum.

URE 106 and URE 403

Utah Rule of Evidence 106 is a rule of inclusion. By contrast, Utah Rule of Evidence 403 is a rule of exclusion. Thus, under the proposed draft rule, URE 106 would permit the introduction of an excluded statement that "in fairness is reasonably necessary to qualify, explain, or place into context any portion already introduced." *See* January 2021 Proposed Draft URE rule 106. Importantly, the proposed draft rule provides a backstop, or limitation, that constrains the trumping function of the rule. That is, the proposed rule provides a mechanism whereby a trial court judge can decide that in applying Utah Rule of Evidence 403, a hearsay statement should be excluded rather than admitted because of prejudice concerns. The pertinent language in the proposed draft rule that constrains the trumping function of the rule is as follows:

> 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*.

January 12, 2021 Proposed Draft URE rule 106 (emphasis added).

The Advisory Committee Note to URE 106

Currently, URE 106 is the federal rule verbatim, and this is reflected in a current Advisory Committee Note to the rule. Thus, if Utah adopted the proposed draft rule, a new

Committee note would be required. The proposed 2020 Advisory Committee Note to accompany the proposed draft rule is as follows (see also attached Addendum):

> **2020 Advisory Committee Note.** The 2020 amendments clarify two things: first, that the rule applies to testimony of a written or recorded statement's contents, not just the writing or recording itself; and second, that the rule is an exception to other rules, such as hearsay. Prior cases left these issues unresolved. *See, e.g., State v. Sanchez*, 2018 UT 31, ¶¶ 50-60, 422 P.3d 866; *State v. Jones*, 2015 UT 19, ¶ 41 n.56, 345 P.3d 1195. Its terms now differ from the federal version.
>
> Admissibility under this rule does not absolve a party of the duty to ensure an adequate record for appellate review.

It is worth noting that the Advisory Committee for the Federal Rules of Evidence has been examining (for the past couple of years) whether Federal Rule of Evidence 106 (FRE 106) should be changed. Specifically, the Committee for FRE 106 is examining (1) whether FRE 106 should be changed so that the plain language of the rule admits otherwise inadmissible hearsay, and (2) whether FRE 106 should be changed to that it also addresses oral statements. The Advisory Committee for FRE 106 recently met, on November 13, 2020, to discuss proposed changes to FRE 106. Although the meeting notes that were prepared in advance of the November 2020 meeting were posted online, the minutes and results of that meeting have not yet been posted. See https://www.uscourts.gov/sites/default/files/agenda_book_for_evidence_rules_committee_meeting_november_13_2020final.pdf.

It is also worth noting that in *State v. Cruz-Meza*, 2003 UT 32, the Utah Supreme Court held that oral statements (those that are not transcribed) are ***not*** treated under rule 106, but are instead evaluated by the trial court judge under Utah R. Evid. 611. And for an oral statement to be admitted under Rule 611, the party seeking to admit the statement must prove the trustworthiness of the statement. *See id.* Trustworthiness is a consideration that is absent from the plain language of URE 106.

Rule 106 Issues: Majority View

In *State v. Sanchez*, 2016 UT App 189, the Utah Court of Appeals outlined various reasons for why URE rule 106 should be interpreted as having a trumping function so that the rule operates to admit otherwise inadmissible hearsay. The reasons provided by the Utah Court of Appeals coincide with views taken by various courts across the nation for how rule 106 should operate. *See* Andrea N. Kochert, *The Admission of Hearsay Through Rule 106: And Now You*

Know the Rest of the Story, 46 Ind. L. Rev. 499; *see also* Michael A. Hardin, *The Space Intentionally Left Blank: What to do When Hearsay and Rule 106 Completeness Collide*, 82 Fordham L. Rev. 1283. A brief summary of three arguments that courts across the nation have provided to support why URE 106 should operate as a trumping rule to admit otherwise inadmissible hearsay are as follows: (1) the plain language of the rule, (2) the placement of the rule, and (3) the purpose of the rule.

First, the plain language of URE 106 supports the conclusion that the rule is a trumping rule that permits otherwise inadmissible hearsay. *See Sanchez*, 2016 UT App 189, ¶25. According to the current rule, "if a party introduces all or part of a writing or recorded statement, an adverse party may require the *introduction*, at that same time, of any other part… that in fairness ought to be considered at the same time." Utah R. Evid. 106. (emphasis added). "The key term is introduction," and as emphasized by the court of appeals, to "introduce [is] to admit." *Sanchez*, 2016 UT App 189, ¶25; *see also State v. Vessey*, 957 P.2d 1239, 1240 (Utah Ct. App. 1998) ("Utah courts have consistently held that [a] rule's plain language must be followed.). "Other [Utah] rules [of evidence] of admissibility similarly use the phrase *introduce into evidence* to mean *introduce and have admitted into evidence*." *Sanchez*, 2016 UT App 189, ¶25 (emphasis in the original); *see also* Utah R.Evid. 401. Moreover, "a contrary reading of the word introduce would allow the adverse party to require merely that the additional portion of the statement be offered, but would not require the court to admit it, rendering the right granted by the rule all by illusory." *Sanchez*, 2016 UT App 189, ¶25.

The plain language of Rule 106 also lacks a restrictive provision stating "'if the evidence is otherwise admissible under these rules.'" *Sanchez*, 2016 UT App 189, ¶¶26-27; Utah R. Evid. 106. "Every major rule of exclusion in the [] Rules of Evidence contains the proviso, 'except as otherwise provided by these rules,' which indicates 'that the draftsmen knew of the need to provide for relationships between rules and were familiar with a technique for doing this.' There is no such proviso in [r]ule 106, which indicates that [the rule] should not be so restrictively construed." United States v. *Sutton*, 801 F.2d 1346, 1368 (D.C. Cir. 1986); *see also Sanchez*, 2016 UT App 189, ¶26.

Second, the placement of URE 106 supports the conclusion that the rule is a trumping rule that permits otherwise inadmissible hearsay. *See Sanchez*, 2016 UT App 189, ¶¶26-27. Rule 106 is found in the "General Provisions" section of Article I of the Utah Rule of Evidence, and not in

rule 611, which pertains to the "'mode and order of examining witnesses and presenting evidence.'" *Sanchez*, 2016 UT App 189, ¶27. Furthermore, Article I "generally restrict[s] the manner of applying the exclusionary rules." *Id.* ¶¶26-27; *see also Sutton*, 801 F.2d at 1368. "By allowing the admission of otherwise inadmissible evidence, a trumping function under [r]ule 106 would restrict the manner of applying exclusionary rules such as [r]ule 802-the rule against hearsay." Andrea N. Kochert, 46 Ind. L. Rev. 499, at 512.

Third, the purpose of rule 106 supports the conclusion that the rule is a trumping rule that permits otherwise inadmissible hearsay. *See Sanchez*, 2016 UT App 189, ¶28. "Rule 106 can adequately fulfill its function only by permitting the admission of some otherwise inadmissible evidence when the court finds in fairness that the proffered evidence should be considered contemporaneously. A contrary construction raises the specter of distorted and misleading trials, and creates difficulties for both litigants and the trial court." *Sutton*, 801 F.2d at 1368. In other words, the rules of evidence are aimed at "ascertaining the truth and securing a just determination." Utah R. Evid. 102. "No one has ever explained how these [goals] would be met by a construction [of rule 106] that would allow a party to present evidence out of context so as to mislead a jury, and then assert an exclusionary rule to keep the other side from exposing his deception." Andrea N. Kochert, 46 Ind. L. Rev. 499, at 512 (citation omitted).

The following hypothetical explains why the purpose of rule 106 supports the conclusion that URE 106 should be a trumping rule that permits otherwise inadmissible hearsay. Assume that a suspect told an arresting officer "I shot him, because he was about to shoot me." Then at a later jury trial, the prosecution introduced evidence that the defendant told the officer "I shot him," but the prosecutor did *not* admit the evidence that the defendant also said "because he was about to shoot me." Applying URE 106, because the defendant properly meets the requirements for admitting the excluded statement—i.e., the statement is reasonably necessary to qualify, explain, or place into context any portion already introduced — the hearsay statement "because he was about to shoot me" should be admitted for the truth of the matter asserted, and the defendant should not be required to testify in lieu of admitting the hearsay statement. In other words, the defendant in this hypothetical scenario should not be required to give up his constitutional right to not testify as a means of addressing the damage caused by the already admitted misleading statement. *See United States v. Sutton*, 801 F.2d 1346, 1370 (D.C. Cir. 1986) ("Since this was a criminal case [the defendant] had a constitutional right not to testify, and it was thus necessary for [defendant] to

rebut the government's inference with the excluded portions of these recordings.") (citations omitted).

In short, for the above reasons, courts across the nation have held that URE 106 should operate as a trumping rule to admit otherwise inadmissible hearsay because of (1) the plain language of the rule, (2) the placement of the rule, and (3) the purpose of the rule.

Rule 106 Issues Minority View

As the court of appeals recognized in its now-vacated *Sanchez* opinion, courts "are about equally divided on whether rule 106 operates to admit otherwise inadmissible hearsay." *Sanchez*, 2016 UT App 189, ¶24 & n.4 (citing cases). Many federal circuit courts have that federal rule 106 does not render admissible otherwise inadmissible hearsay. *See United States v. Verdugo*, 617 F.3d 565 (1st Cir. 2010), *cert. denied*, 131 S.Ct. 954 (2011); *United States Football League v. Nat'l Football League*, 842 F.2d 1335 (2d Cir. 1988); *United States v. Wilkerson*, 84 F.3d 692 (4th Cir. 1996); *United States v. Branch*, 91 F.3d 699 (5th Cir. 1996); *United States v. Holden*, 557 F.3d 698 (6th Cir. 2009); *United States v. Velasco*, 953 F.2d 1467 (7th Cir. 1992); *United States v. Woolbright*, 831 F.2d 1390 (8th Cir. 1987); *United States v. Collicott*, 92 F.3d 973 (9th Cir. 1996); *United States v. Wright*, 826 F.2d 938 (10th Cir. 1987); *cf. Williamson v. United States*, 512 U.S. 594, 594 (1994) (holding self-serving portion of co-defendant's statement inadmissible under rule 804(b)(3), even though made "within a broader narrative that [was] generally self-inclupatory").

And many state courts have agreed under their rules. *See Sipary v. State*, 91 P.3d 296, 300 (Alaska Ct. App. 2004); *Banther v. State*, 823 A.2d 467, 487 (Del. 2003); *Hawkins v. State*, 884 N.E.2d 939, 948 (Ind. Ct. App. 2008); *Schrimsher v. Commonwealth*, 190 S.W.3d 318, 331 (Ky. 2006); *Simmons Oil Corp. v. Wells Fargo Bank, N.A.*, 1998 MT 129, ¶ 30, 289 Mont. 119, 960 P.2d 291; *State v. Wesson*, 999 N.E.2d 557, 573-74 (Ohio 2013); *State v. Tooley*, 265 Or.App. 30, 333 P.3d 348, 357–58 (2014); *State v. Vaughan*, 144 S.W.3d 391, 407 (Tenn. Crim. App. 2003); *State v. McDaniels*, 2002 WL 31648777, *4 (Wash. Ct. App. 2002); *State v. Eugenio*, 579 N.W.2d 642, 650-51 (Wis. 1998); *see also People v. Davis*, 218 P.3d 718, 731 (Colo. Ct. App. 2008) ("[s]elf-serving hearsay declarations made by a defendant may [still] be excluded" under the rule of completeness "because there is nothing to guarantee their trustworthiness"); *McAtee v. Commonwealth*, 413 S.W.3d 608, 630-31 (Ky. 2013) (explaining that rule 106 is not a means by which a defendant can "thwart hearsay rules and admit his entire statement without being subject to cross-examination," and that fairness standard "does not mean that by introducing a portion of

a defendant's confession in which the defendant admits the commission of the criminal offense, the [prosecution] opens the door for the defendant to use the remainder of that out-of-court statement for the purpose of asserting a defense without subjecting it to cross-examination"); *cf. State v. Cruz-Meza*, 2003 UT 32, ¶¶10-11, 14, 76 P.3d 1165 (upholding exclusion of hearsay notwithstanding rule 611(a)(1)—which governs completeness of oral statements through the court's power to control evidence in determining the truth—and allows a trial court "much greater latitude" than rule 106).

This committee is likewise closely divided. A sizeable minority of courts have held—like this Court has held under rule 611 in *State v. Cruz-Meza*—that rule 106 incorporates considerations such as the hearsay nature of the statements into its "fairness" analysis. The two premises of those decisions are that (1) hearsay is inherently unreliable and should not be admissible for its truth absent circumstances showing reliability; and (2) it is unfair to let criminal defendants offer what amounts to their testimony without being subject to cross-examination. *See Hawkins v. State*, 884 N.E.2d 939, 948 (Ind. Ct. App. 2008) ("Fairness does not require that the trial court allow admission of otherwise inadmissible hearsay"; upholding exclusion of inadmissible hearsay under rule 106 where defendant did not testify and "admission of the excluded conversations would be unfair since the State could not question [defendant] as to their contents"); *accord United States v. Hassan*, 742 F.3d 104, 134 (4th Cir. 2014); *United States v. Collicott*, 92 F.3d 973, 983 (9th Cir. 1996); *United States Football League v. Nat'l Football League*, 842 F.2d 1335, 1375-76 (2d Cir. 1988); *State v. Eugenio*, 579 N.W.2d 642, 650-51 (Wis. 1998); *McAtee v. Commonwealth*, 413 S.W.3d 608, 630-31 (Ky. 2013); *see also United States v. Hassan*, 742 F.3d 104, 134 (4th Cir. 2014) (rule 106 does not require the blind "admission of self-serving, exculpatory statements made by a party which are being sought for admission by that same party"); *State v. Wesson*, 999 N.E.2d 557, 573-74 (Ohio 2013) (non-testifying defendant "is precluded from introducing his own inadmissible hearsay repudiation as a substitute for that testimony"); *cf. Cruz-Meza*, 2003 UT 32, ¶¶16-17 (excluding defendant's unreliable exculpatory hearsay—and thus forcing defendant "to choose between not presenting evidence of a defense or waiving his privilege against self-incrimination"—does not violate defendant's due process rights);

Admitting untested, and hence unreliable, evidence for its truth does not serve the truth-finding process. Utah R. Evid. 102 ("These rules should be construed so as to administer every proceeding fairly, eliminate unjustifiable expense and delay, and promote the development of

evidence law, to the end of ascertaining the truth and securing a just determination."). But admitting it for an impeachment purpose might. Just as in the hearsay context, a statement might be admissible for something other than its truth. By definition, a statement offered for something other than its truth is not hearsay and would be admissible under rule 106 even if rule 106 were not a trumping rule. *See State v. Olsen*, 860 P.2d 332, 335 (Utah 1993). This includes using the statements to explain a witness's actions, such as a police officer's investigation. *See State v. Collier*, 736 P.2d 231, 233-34 (Utah 1987) (affirming admission of officer's testimony of what a confidential informant told him as "not hearsay" and relevant "to explain the conduct of the police in setting up an armed stakeout of the home where defendant was found"); *see also State in Interest of G.Y.*, 962 P.2d 78, 85 (Utah Ct. App. 1998) (holding that hearsay statements made to DCFS caseworker were relevant to show why caseworker did what she did); *see generally* Christopher B. Mueller & Laird C. Kirkpatrick, Federal Evidence, § 8:20, *Non-hearsay uses—Effect on listener or reader* (4th ed.) (Westlaw 2020) (discussing course-of-investigation exception); 2 Wharton's Criminal Evidence § 6:2, *Verbal acts distinguished* (15th ed.) (Westlaw 2020) (same). The minority has no quarrel with admitting the statements for something other than their truth. *See, e.g., United States v. Bucci*, 525 F.3d 116, 133 (1st Cir. 2008) (explaining that defendant sought to introduce statements merely for impeachment and that hearsay rule prevented him "from independently offering these statements for substantive purposes"). The problem—as with any hearsay—is considering such statements for their truth without meeting an exception.

And it undermines fairness to let a defendant push his defense through untested, out-of-court statements. If a defendant wants to offer exculpatory testimony, he should have to take the stand and be subject to cross-examination, "the greatest legal engine ever invented for the discovery of truth." 3 Wigmore, *Evidence* § 1367, p. 27 (2d ed. 1923). While it is true that a defendant has a right to *not* testify under the Fifth Amendment, putting him to the hard choice of either testifying to support his defense or not testifying to avoid impeachment is not unfair.

For an example, look no further than *Sanchez.* Sanchez brutally murdered his supposed girlfriend and then said in the police interview that she was having an affair. *Sanchez*, 2016 UT App 189, ¶4. Had that statement come in under the now-proposed rule 106, the jury would be able to consider that statement for its truth, and the deceased victim would not be able to refute it. If this Court is going to make rule 106 a hearsay exception, let the opposing party refute that evidence with other hearsay. In *Sanchez* (though it's not in the opinion) the State had evidence that the

girlfriend was not even Sanchez's girlfriend—she was his *brother*'s girlfriend, who was letting Sanchez stay at her house as a favor to his brother. At best (from Sanchez's view), she was cheating *with* him, not *on* him. If the jury can consider Sanchez's self-serving hearsay statements, it should be able to consider what the deceased victim had to say about it. If rule 106 is a hearsay exception, it should also be subject to rule 806.

The Utah Rules of Evidence view inculpatory admissions of a party opponent as inherently reliable. *See* Utah R. Evid. 801(d)(2); *see also* 1972 Advisory Committee Note, Fed. R. Evid. 801(d)(2); *accord State v. Parker*, 2000 UT 51, ¶¶14-15, 4 P.3d 778. Those are thus properly admitted for their truth. In contrast, a defendant's exculpatory hearsay statements are "presumptive[ly] unreliabl[e]," because "'[o]ne of the most effective ways to lie is to mix falsehood with truth, especially truth that seems particularly persuasive because of its self-inculpatory nature.'" *Lily v. Virginia*, 527 U.S. 116, 133 (1999) (*quoting Williamson*, 512 U.S. at 599-601), *overruled on other grounds by Crawford v. Washington*, 541 U.S. 36 (2004). Self-serving statements are just that. And because they do not expose the defendant to any of the risks that admissions do, they do not deserve the same cloak of reliability given such admissions: "When a party offers his own out-of-court declaration for its truth, it is not an admission, and must satisfy the hearsay rule." Edward L. Kimball & Ronald N. Boyce, *Utah Evidence Law* 742 (1996); *see also* Utah R. Evid. 804(b)(3) (distinguishing between "statements against penal interest," which are inculpatory, and those offered to "exculpate the accused"); *Parker*, 2000 UT 51, ¶16 (distinguishing a defendant's exculpatory hearsay statements from his inculpatory non-hearsay admissions). Hearsay is—or at least, ought to be—inadmissible unless it falls within an exception. *See* Kimball & Boyce, 718. Rule 106 should not be made an exception without, at a minimum, passing through the reliability rules that the common law has built up over the centuries.

Proposed Draft Utah Rule of Evidence Rule 106 (as Voted on by the Evidence Advisory Committee on January 12, 2021).

Rule 106. Remainder of or related writings or recorded statements.

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 ought to be considered at the same time~~ 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.

2020 Advisory Committee Note. The 2020 amendments clarify two things: first, that the rule applies to testimony of a written or recorded statement's contents, not just the writing or recording itself; and second, that the rule is an exception to other rules, such as hearsay. Prior cases left these issues unresolved. *See, e.g.*, *State v. Sanchez*, 2018 UT 31, ¶¶ 50-60, 422 P.3d 866; *State v. Jones*, 2015 UT 19, ¶ 41 n.56, 345 P.3d 1195. Its terms now differ from the federal version.

Admissibility under this rule does not absolve a party of the duty to ensure an adequate record for appellate review.

Original Advisory Committee Note. This rule is the federal rule, verbatim. Utah Rules of Evidence (1971) was not as specific, but Rule 106 is otherwise in accord with Utah practice

Tab 4

UTAH STATE COURTS

Keisa Williams <keisaw@utcourts.gov>

Updated Doctrine of Chances Material from URE 404 Subcommittee

1 message

Judge Teresa Welch <twelch@utcourts.gov> Tue, Feb 2, 2021 at 10:07 AM
To: Keisa Williams <keisaw@utcourts.gov>, "JLund@parsonsbehle.com" <JLund@parsonsbehle.com>, John Nielsen <johnnielsen@agutah.gov>, Teneille Brown <Teneille.Brown@utah.edu>, Dallas Young <dallasyounglegal@gmail.com>, Sarah Carlquist <scarlquist@sllda.com>

Hello John and Keisa,

The URE 404 Subcommittee has been working on a draft rule and draft note regarding the doctrine of chances. Please note that the Subcommittee members are not in agreement about what the draft rule/note should look like, but the Subcommittee has narrowed things down so that we have two (2) proposed rules/notes to take back to the Committee for a vote. The two proposed rules/notes are attached to this e-mail.

In addition, we have a proposal to take to the Committee regarding the jury instruction issue. The proposal is: For our Committee to recommend to the Justices that they ask the pertinent Advisory Committee for Jury Instructions to explore whether a Model Jury Instruction regarding the application of the doctrine of chances would be helpful to address some of the problems that have arisen in doctrine of chances cases. This recommendation is supported by what Judge Harris and Professor Imwinkelwried have written on this issue (see below: excerpts taken from the Subcommittee's previous outline/materials).

After the Committee votes on these proposed draft rules/notes and the jury instruction proposal, our Subcommittee can then prepare a memorandum for the Justices that outlines the pertinent issues, proposed rule/note, reasons for the vote, jury instruction proposal, etc.

Please let us (the URE 404 Subcommittee) know if you need anything else from us.

Thanks,
Teresa

The Doctrine of Chances and Jury Instructions:

Judge Harris's comments regarding doctrine of chances jury instructions: *State v. Lane,* 2019 UT App 86 ¶¶36,48 (J. Harris concurring opinion). Judge Harris expresses "reservation about the manner in which the doctrine of chances [] is being used in Utah[,]" and that the jury was given an inadequate limiting jury instruction because it did not adequately articulate the purposes for which the doctrine of chances evidence "could and could not be used."

Professor Imwinkelwried's views regarding doctrine of chances jury instructions: Professor Imwinkelried published a 2017 article wherein he expressed a concern that trial courts are shirking their responsibilities in admitting evidence under the Doctrine of Chances. *See* Edward J. Imwinkelried, *Criminal Minds: The Need to Refine the Application of the Doctrine of Objective Chances as a Justification for Introducing Uncharged Misconduct Evidence to Prove Intent*, 45 Hofstra L. Rev. 851 (2017). Imwinkelried chastises appellate courts for not mandating "that trial judges read the jury limiting instructions specifically tailored to the doctrine of chances." Imwinkelried, Hofstra L. Rev. (2017) at 857. Specifically, because of the "intolerable" and "lax practices [that are] currently followed in many, if not most jurisdictions," trial judges that admit doctrine of chances evidence "ought to give the jury a limiting instruction sharply differentiating between character reasoning and the use of evidence according to the doctrine." *Id*. Moreover, "[a] complete, properly worded limiting instruction [would contain] two prongs." *Id*. at 873. "The negative prong forbids the jury from using the evidence for the verboten purpose. In contrast, the affirmative prong explains how the jury is permitted to reason about this evidence." *Id*. Specifically, when doctrine of chances evidence is admitted, the jury should be instructed that they are to determine whether the prior acts were unlikely to happen in unusual frequency given the circumstances. *See id*. at 878. For example, if prior acts are admitted under the Doctrine in a drug possession case, the jury should be instructed that "[y]ou may not reason: [Defendant] intended to possess cocaine once before, that shows that he is a bad man, and that therefore he had that intent again in the [currently charged] incident." *Id*. In addition, the jury should be instructed to use their "common sense and decide whether it is likely that [having cocaine in one's trunk] would happen to an innocent person twice." *Id*.

Draft of URE 404 with a Doctrine of Chances provision (Example #1).

Rule 404. Character Evidence; Crimes or Other Acts.

(a) Character Evidence.

(a)(1) Prohibited Uses. Evidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in conformity with the character or trait.

(a)(2) Exceptions for a Defendant or Victim in a Criminal Case. The following exceptions apply in a criminal case:

(a)(2)(A) a defendant may offer evidence of the defendant's pertinent trait, and if the evidence is admitted, the prosecutor may offer evidence to rebut it;

(a)(2)(B) subject to the limitations in Rule 412, a defendant may offer evidence of an alleged victim's pertinent trait, and if the evidence is admitted, the prosecutor may:

(a)(2)(B)(i) offer evidence to rebut it; and

(a)(2)(B)(ii) offer evidence of the defendant's same trait; and

(a)(2)(C) in a homicide case, the prosecutor may offer evidence of the alleged victim's trait of peacefulness to rebut evidence that the victim was the first aggressor.

(a)(3) Exceptions for a Witness. Evidence of a witness's character may be admitted under Rules 607, 608, and 609.

(b) Crimes, Wrongs, or Other Acts.

(b)(1) Prohibited Uses. Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in conformity with the character.

(b)(2) Permitted Uses; Notice in a Criminal Case. This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. **Evidence involving rare events occurring with unusual frequency may also be admitted under a doctrine of chances theory.** On request by a defendant in a criminal case, the prosecutor must:

(b)(2)(A) provide reasonable notice of the general nature of any such evidence that the prosecutor intends to offer at trial; and

(b)(2)(B) do so before trial, or during trial if the court excuses lack of pretrial notice on good cause shown.

(c) Evidence of Similar Crimes in Child-Molestation Cases.

(c)(1) Permitted Uses. In a criminal case in which a defendant is accused of child molestation, the court may admit evidence that the defendant committed any other acts of child molestation to prove a propensity to commit the crime charged.

(c)(2) Disclosure. If the prosecution intends to offer this evidence it shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown.

(c)(3) For purposes of this rule "child molestation" means an act committed in relation to a child under the age of 14 which would, if committed in this state, be a sexual offense or an attempt to commit a sexual offense.

(c)(4) Rule 404(c) does not limit the admissibility of evidence otherwise admissible under Rule 404(a), 404(b), or any other rule of evidence.

Effective April 1, 2008

2020 Advisory Committee Note. The 2020 amendment ~~incorporates~~explicitly permits ~~-~~the Doctrine of Chances into the rule. The Doctrine of Chances provides a means of admitting prior act evidence for a proper, non-character statistical inference purpose. See *State v. Verde*, 2012 UT 60, ¶¶47-63. The Doctrine "is a theory of logical relevance that 'rests on the objective improbability of the same rare misfortune befalling one individual over and over.'" *Id.* ¶47. "As the number of improbable occurrences increases, the probability of coincidence decreases, and the likelihood that the defendant committed one or more of the actions increases." *Id.* ¶49. Doctrine of Chances "cases involve rare events happening with unusual frequency." *State v. Lopez*, 2018 UT 5, ¶52. Utah case law establishes the doctrine, its application under rules 404(b), 402, and 403, and its four foundational requirements: (1) materiality, (2) similarity, (3) independence, and (4) frequency. *See* Utah R. Evid. 404(a)&(b),402,403; *see also State v. Lowther*, 2017 UT 34; *State v. Verde*, 2012 UT 60, ¶¶47-63; *State v. Argueta*, 2020 UT 41, ¶¶33-45; *State v. Murphy*, 2019 UT App 64, ¶¶45-65, 441 P.3d 787; *State v. Lane*, 2019 UT App 86, ¶¶36-50, 444 P.3d 553. In *State v. Lowther*, the Utah Supreme Court clarified that the foundational requirements of the Doctrine of Chances is an elemental test to be applied within the framework of rule 404(b), and not a balancing test under rule 403. *State v. Lowther*, 2017 UT 34, ¶¶32-48. The Utah Supreme Court has also emphasized that a party must initially and sufficiently articulate the "rare misfortune" that triggers the doctrine's application, because without a clear articulation of the rare event, it is difficult to ensure that a prior bad act is admissible for a permissible inference. *See Argueta*, 2020 UT 41, ¶34. And even if the Doctrine's foundational requirements are met under rule 404(b), prior act evidence may still be excluded under rules 402 and 403. *See Lowther*, 2017 UT 34, ¶¶32-48

2011 Advisory Committee Note. The language of this rule has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Original Advisory Committee Note. Rule 404(a)-(b) is now Federal Rule of Evidence 404 verbatim. The 2001 amendments add the notice provisions already in the federal rule, add the amendments made to the federal rule effective December 1, 2000, and delete language added to the Utah Rule 404(b) in 1998. However, the deletion of that language is not intended to reinstate the holding of State v. Doporto, 935 P.2d 484 (Utah 1997). Evidence sought to be admitted under Rule 404(b) must also conform with Rules 402 and 403 to be admissible.

The 2008 amendment adds Rule 404(c). It applies in criminal cases where the accused is charged with a sexual offense against a child under the age of 14. Before evidence may be admitted under Rule 404(c), the trial court should conduct a hearing out of the presence of the jury to determine: (1) whether the accused committed other acts, which if committed in this State would constitute a sexual offense or an attempt to commit a sexual offense; (2) whether the evidence of other acts tends to prove the accused's propensity to commit the crime charged; and (3) whether under Rule 403 the danger of unfair prejudice substantially outweighs the probative value of the evidence, or whether for other reasons listed in Rule 403 the evidence should not be admitted. The court should consider the factors applicable as set forth in State v. Shickles, 760 P.2d 291, 295-96 (Utah 1988), which also may be applicable in determinations under Rule 404(b).

Upon the request of a party, the court may be required to provide a limiting instruction for evidence admitted under Rule 404(b) or (c).

Draft of URE 404 with a Doctrine of Chances provision: Example #2- (Sarah).

Rule 404. Character Evidence; Crimes or Other Acts.

(a) Character Evidence.

(a)(1) Prohibited Uses. Evidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in conformity with the character or trait.

(a)(2) Exceptions for a Defendant or Victim in a Criminal Case. The following exceptions apply in a criminal case:

(a)(2)(A) a defendant may offer evidence of the defendant's pertinent trait, and if the evidence is admitted, the prosecutor may offer evidence to rebut it;

(a)(2)(B) subject to the limitations in Rule 412, a defendant may offer evidence of an alleged victim's pertinent trait, and if the evidence is admitted, the prosecutor may:

(a)(2)(B)(i) offer evidence to rebut it; and

(a)(2)(B)(ii) offer evidence of the defendant's same trait; and

(a)(2)(C) in a homicide case, the prosecutor may offer evidence of the alleged victim's trait of peacefulness to rebut evidence that the victim was the first aggressor.

(a)(3) Exceptions for a Witness. Evidence of a witness's character may be admitted under Rules 607, 608, and 609.

(b) Crimes, Wrongs, or Other Acts.

(b)(1) Prohibited Uses. Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in conformity with the character.

(b)(2) Permitted Uses; Notice in a Criminal Case. This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.

(b)(3) **Doctrine of Chances:** When this evidence involves rare events occurring with unusual statistical frequency, it may be admitted under a doctrine of chances theory.

(b)(4) On request by a defendant in a criminal case, the prosecutor must:

(b)(4)(A) provide reasonable notice of the general nature of any evidence that the prosecutor intends to offer at trial under this rule; and

(b)(4)(B) do so before trial, or during trial if the court excuses lack of pretrial notice on good cause shown.

(c) Evidence of Similar Crimes in Child-Molestation Cases.

(c)(1) Permitted Uses. In a criminal case in which a defendant is accused of child molestation, the court may admit evidence that the defendant committed any other acts of child molestation to prove a propensity to commit the crime charged.

(c)(2) Disclosure. If the prosecution intends to offer this evidence it shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown.

(c)(3) For purposes of this rule "child molestation" means an act committed in relation to a child under the age of 14 which would, if committed in this state, be a sexual offense or an attempt to commit a sexual offense.

(c)(4) Rule 404(c) does not limit the admissibility of evidence otherwise admissible under Rule 404(a), 404(b), or any other rule of evidence.

Effective April 1, 2008

2020 Advisory Committee Note. The 2020 amendment incorporates the Doctrine of Chances into the rule. Evidence may not be admitted under the Doctrine of Chances unless the proponent of the evidence can articulate the rare misfortune that triggers the rule and unless the evidence satisfies each of the doctrine's four foundational requirements: (1) materiality; (2) similarity; (3) independence; and (4) frequency. The evidence may not be admitted to rebut a claim of self-defense or to rebut a claim of fabrication. As with other evidence admitted under rule 404(b)(2), evidence that may be admissible under the doctrine of chances remains subject to rules 402 and 403.

2011 Advisory Committee Note. The language of this rule has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Original Advisory Committee Note. Rule 404(a)-(b) is now Federal Rule of Evidence 404 verbatim. The 2001 amendments add the notice provisions already in the federal rule, add the amendments made to the federal rule effective December 1, 2000, and delete language added to the Utah Rule 404(b) in 1998. However, the deletion of that language is not intended to reinstate the holding of State v. Doporto, 935 P.2d 484 (Utah 1997). Evidence sought to be admitted under Rule 404(b) must also conform with Rules 402 and 403 to be admissible.

The 2008 amendment adds Rule 404(c). It applies in criminal cases where the accused is charged with a sexual offense against a child under the age of 14. Before evidence may be admitted under Rule 404(c), the trial court should conduct a hearing out of the presence of the jury to determine: (1) whether the accused committed other acts, which if committed in this State would constitute a sexual offense or an attempt to commit a sexual offense; (2) whether the evidence of other acts tends to prove the accused's propensity to commit the crime charged; and (3) whether under Rule 403 the danger of unfair prejudice substantially outweighs the probative value of the evidence, or whether for other reasons listed in Rule 403 the evidence should not be admitted. The court should consider the factors applicable as set forth in State v. Shickles, 760 P.2d 291, 295-96 (Utah 1988), which also may be applicable in determinations under Rule 404(b).

Upon the request of a party, the court may be required to provide a limiting instruction for evidence admitted under Rule 404(b) or (c).