

# AGENDA

## Utah Supreme Court Advisory Committee/Rules of Evidence

October 12, 2021 / 5:15 p.m. - 7:15 p.m.

Meeting held via WEBEX

<b>Approval of Minutes</b> <ul style="list-style-type: none"><li>September 14, 2021</li></ul>	Action	Tab 1	Chris Hogle
<b>John Lund Farewell</b>			Chris Hogle
<b>URE 506 rule draft</b>	Action	Tab 2	Subcommittee
<b>URE 504 rule draft</b>	Action	Tab 3	Subcommittee

Queue:

- Ongoing Project: Law Student Rule Comment Review

**2021 Meeting Dates:**

November 9, 2021

**2022 Meeting Dates:**

January 11, 2022

February 8, 2022

April 12, 2022

June 14, 2022

October 11, 2022

November 8, 2022

**Rule Status:**

URE 106 - Ready for SC (public comment)

URE 404(b) & (d) - Back to Committee/Special SC conference planning

URE 504 - Committee

URE 506 - Committee

URE 507.1 - Waiting on DoH guidelines

URE 512 - Ready for SC (final approval)

URE 1101 - Ready for SC (final approval)

# **Tab 1**

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

**MEETING MINUTES**

**DRAFT**

**September 14, 2021**

**5:15 p.m.-7:15 p.m.**

**Via Webex**

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

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

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

Chris Hogle welcomed everyone to the meeting. The June meeting was John Lund's last meeting. Mr. Hogle expressed appreciation for Mr. Lund's dedication and service to the committee. Mr. Hogle has been appointed as Chair, with Nicole Salazar-Hall appointed as Vice-chair.

Mr. Hogle asked for any corrections to the June 18, 2021 meeting minutes. With one minor correction, Tony Graf moved to approve the minutes. Sarah Carlquist seconded the motion and it passed unanimously.

**2. Change in leadership and terms:**

- CJA 11-101 Amendments.

The Supreme Court amended Code of Judicial Administration rule 11-101. Member terms were reduced from 4 to 3 years and a Vice-Chair position was created. Chairs and vice-chairs may serve one term in each leadership position, not to exceed two additional terms.

### **3. Rules back from public comment:**

- URE 504. Lawyer-Client

The public comment period for rule 504 closed on July 22, 2021, having received four comments. The committee reviewed comments submitted by Mr. Douglas Crapo. Mr. Crapo recommends removing “shall” from subsection (a)(2) as “shall” does not add value to the drafted language. Mr. Crapo also recommends modification to the second sentence in the same section. As currently drafted, the language suggests another governmental entity is the authorizing entity in determining who can provide legal services in the state. The committee agreed with Mr. Crapo’s recommendations.

The committee also discussed comments submitted by Dean Collinwood, Samantha Smith, and Georganna Petry. All three commenters expressed concerns with expanding the definition of “lawyer” to include Licensed Paralegal Practitioners and other non-lawyers. After further discussion, the subcommittee agreed to prepare a draft of a separate rule addressing the privilege for LPPs and the other non-lawyers identified in the current draft, or to amend the definition of “lawyer” throughout URE 504. The subcommittee will provide an update at the next meeting.

### **4. Supreme Court Conference update:**

- URE 404. Special Conference Planning

The subcommittee has not had a chance to meet with the Supreme Court yet. Ms. Williams will coordinate with the subcommittee and Nick Stiles to schedule a date for the conference, confirm the presenters, compile materials, and submit the questions at issue to the Supreme Court for approval. The Subcommittee will provide an update at a future meeting.

Judge Welch stated that the Supreme Court recently issued an opinion in *State v. Richards* addressing the Doctrine of Chances. Professor Brown noted that during the last meeting with the Supreme Court, the Justices asked the committee to “think big” about what makes the most sense, including a world in which the DoC doesn't exist.

### **5. URE 506 Subcommittee update:**

The URE 506 subcommittee is working on developing a standard process for access to a victim’s psychiatric records by the defense, balancing a victim’s need for treatment with the defendant’s constitutional right to due process. The subcommittee intends to use the process outlined in URE 505 as the basis for the procedure in 506 and will present a draft at the next committee meeting.

**6. Rapid Response Legislative Subcommittee:**

Due to his appointment as Chair, Mr. Hogle is no longer able to serve on the rapid response legislative subcommittee. Matt Hansen will replace Mr. Hogle. Dallas Young, Judge McKelvie, and Ms. Salazar-Hall will continue to serve on the subcommittee with Mr. Hansen.

**7. Additional business: URE 106**

At the June meeting, the majority of the committee voted in favor of adopting the federal version of URE 106, incorporating oral statements. Mr. Nielsen prepared a minority report. The question is whether the rule of completeness would apply to oral statements or be confined to written and recorded statements. Rather than preparing a majority statement, the committee will submit Professor Capra's memo in support of the majority's position.

**Adjourn:**

With no further items for discussion, Mr. Hogle moved to adjourn the meeting. The next meeting will be held on Tuesday, October 12, 2021 at 5:15 pm, via Webex video conferencing.

# Tab 2

1 **Rule 506. Physician and Mental Health Therapist-Patient.**  
2

3 **(a) Definitions.**

4 **(a)(1)** "Patient" means a person who consults or is examined or interviewed by a  
5 physician or mental health therapist.  
6

7 **(a)(2)** "Physician" means a person licensed, or reasonably believed by the patient to be  
8 licensed, to practice medicine in any state.  
9

10 **(a)(3)** "Mental health therapist" means a person who  
11

12 **(a)(3)(A)** is or is reasonably believed by the patient to be licensed or certified in  
13 any state as a physician, psychologist, clinical or certified social worker, marriage  
14 and family therapist, advanced practice registered nurse designated as a  
15 registered psychiatric mental health nurse specialist, or professional counselor;  
16 and  
17

18 **(a)(3)(B)** is engaged in the diagnosis or treatment of a mental or emotional  
19 condition, including alcohol or drug addiction.  
20

21 **(b) Statement of the Privilege.** A patient has a privilege, during the patient's life, to refuse to  
22 disclose and to prevent any other person from disclosing information that is communicated in  
23 confidence to a physician or mental health therapist for the purpose of diagnosing or treating the  
24 patient. The privilege applies to:  
25

26 **(b)(1)** diagnoses made, treatment provided, or advice given by a physician or mental  
27 health therapist;  
28

29 **(b)(2)** information obtained by examination of the patient; and  
30

31 **(b)(3)** information transmitted among a patient, a physician or mental health therapist,  
32 and other persons who are participating in the diagnosis or treatment under the direction  
33 of the physician or mental health therapist. Such other persons include guardians or  
34 members of the patient's family who are present to further the interest of the patient  
35 because they are reasonably necessary for the transmission of the communications, or  
36 participation in the diagnosis and treatment under the direction of the physician or  
37 mental health therapist.  
38

39 **(c) Who May Claim the Privilege.** The privilege may be claimed by the patient, or the  
40 guardian or conservator of the patient. The person who was the physician or mental health  
41 therapist at the time of the communication is presumed to have authority during the life of the  
42 patient to claim the privilege on behalf of the patient.  
43

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

45 **(d)(1) Condition as Element of Claim or Defense.** For communications relevant to an  
46 issue of the physical, mental, or emotional condition of the patient:  
47

48 **(d)(1)(A)** in any proceeding in which that condition is an element of any claim or  
49 defense, or

50 (d)(1)(B) in a criminal proceeding, if it appears from the evidence in the case or  
51 from another showing by a party that the communication is necessary to a fair  
52 determination of guilt or innocence, or

53  
54 (d)(1)(BC) after the patient's death, in any proceedings in which any party relies  
55 upon the condition as an element of the claim or defense;

56  
57 (d)(2) **Hospitalization for Mental Illness.** For communications relevant to an issue in  
58 proceedings to hospitalize the patient for mental illness, if the mental health therapist in  
59 the course of diagnosis or treatment has determined that the patient is in need of  
60 hospitalization; and

61  
62 (d)(3) **Court Ordered Examination.** For communications made in the course of, and  
63 pertinent to the purpose of, a court-ordered examination of the physical, mental, or  
64 emotional condition of a patient, whether a party or witness, unless the court in ordering  
65 the examination specifies otherwise.

66  
67 **(e) Effect of Claiming an Exception**

68 (e)(1) the party claiming an exception under (d)(1) has the burden of establishing, to a  
69 reasonable probability, that the exception may apply;

70  
71 (e)(2) the judge may make any such reasonable orders regarding the procedure to be  
72 followed when a party claims an exception applies under (d)(1);

73  
74 (e)(3) if the party claiming an exception makes the showing required under (e)(1), the  
75 judge shall conduct an in camera review of the communications to determine whether  
76 the exception applies;

77  
78 (e)(4) if the judge finds that an exception applies, the judge shall disclose only those  
79 portions meeting an exception; records reviewed by the district court but not disclosed  
80 under an exception shall be sealed, and cannot be accessed without a court order.

81  
82 (e)(54) all counsel and parties shall be permitted to be present at every stage of the  
83 proceedings under paragraph (e), except a showing in camera at which no counsel or  
84 party shall be permitted to be present;

85  
86 (e)(64) the communications submitted to the judge for in camera review shall be sealed  
87 and preserved to be made available to the appellate court in the event of an appeal. The  
88 appellate court may review those records and decide whether they meet an exception,  
89 following the procedure in subsection (4). ~~and the communications may not be~~  
90 disclosed outside of the appeal.

91  
92 **2021 Advisory Committee Note.** The language of this rule has been amended in light of the  
93 Utah Supreme Court's decision in *State v. Bell*, 2020 UT 38, 469 P.3d 929. There, the supreme  
94 court noted "that Mr. Bell raises important constitutional and policy concerns regarding a  
95 criminal defendant's access to records that may contain exculpatory evidence." *Id.* ¶ 1. The  
96 amendments therefore are intended to protect a criminal defendant's constitutional rights while  
97 maintaining the important privacy and policy considerations underlying the privilege.  
98

99 **2011 Advisory Committee Note.** The language of this rule has been amended as part of the  
100 restyling of the Evidence Rules to make them more easily understood and to make style and  
101 terminology consistent throughout the rules. These changes are intended to be stylistic only.  
102 There is no intent to change any result in any ruling on evidence admissibility.

103  
104 **Original Advisory Committee Note.** Rule 506 is modeled after Rule 503 of the Uniform Rules  
105 of Evidence, and is intended to supersede Utah Code §§ 78-24-8(4) and 58-25a-8. There is no  
106 corresponding federal rule. By virtue of Rule 501, marriage and family therapists are not  
107 covered by this Rule.

108  
109 The differences between existing Utah Code § 78-24-8 and Rule 506 are as follows:

110  
111 (1) Rule 506 specifically applies to psychotherapists and licensed psychologists, it being the  
112 opinion of the Committee that full disclosure of information by a patient in those settings is as  
113 critical as and as much to be encouraged as in the "physician" patient setting. The Utah  
114 Supreme Court requested that Rule 506 further apply to licensed clinical social workers. To  
115 meet this request, the Committee included such individuals within the definition of  
116 psychotherapists. Under Utah Code § 58-35-2(5), the practice of clinical social work "means the  
117 application of an established body of knowledge and professional skills in the practice of  
118 psychotherapy. . . ." Section 58-35-6 provides that "[n]o person may engage in the practice of  
119 clinical social work unless that person: (1) is licensed under this chapter as a certified social  
120 worker," has the requisite experience, and has passed an examination. Section 58-35-8(4)  
121 refers to licenses and certificates for "clinical social worker[s]." As a result of including clinical  
122 social workers, Rule 506 is intended to supplant Utah Code § 58-35-10 in total for all social  
123 workers.

124  
125 (2) Rule 506 applies to both civil and criminal cases, whereas Utah Code § 78-24-8 applies only  
126 to civil cases. The Committee was of the opinion that the considerations supporting the privilege  
127 apply in both.

128  
129 (3) In the Committee's original recommendation to the Utah Supreme Court, the proposed Rule  
130 506 granted protection only to confidential communications, but did not extend the privilege to  
131 observations made, diagnosis or treatment by the physician/psychotherapist. The Committee  
132 was of the opinion that while the traditional protection of the privilege should extend to  
133 confidential communications, as is the case in other traditional privileges, the interests of society  
134 in discovering the truth during the trial process outweigh any countervailing interests in  
135 extending the protection to observations made, diagnosis or treatment. However, the Supreme  
136 Court requested that the scope of the privilege be broadened to include information obtained by  
137 the physician or psychotherapist in the course of diagnosis or treatment, whether obtained  
138 verbally from the patient or through the physician's or psychotherapist's observation or  
139 examination of the patient. The Court further requested that the privilege extend to diagnosis,  
140 treatment, and advice. To meet these requests, the Committee relied in part on language from  
141 the California evidentiary privileges involving physicians and psychotherapists. See Cal. Evid.  
142 Code §§ 992 and 1012. These features of the rule appear in subparagraphs (a)(4) and (b). The  
143 Committee also relied on language from Uniform Rule of Evidence 503.

144  
145 Upon the death of the patient, the privilege ceases to exist.

146  
147 The privilege extends to communications to the physician or psychotherapist from other persons  
148 who are acting in the interest of the patient, such as family members or others who may be  
149 consulted for information needed to help the patient.

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The privilege includes those who are participating in the diagnosis and treatment under the direction of the physician or psychotherapist. For example, a certified social worker practicing under the supervision of a clinical social worker would be included. See Utah Code § 58-35-6.

The patient is entitled not only to refuse to disclose the confidential communication, but also to prevent disclosure by the physician or psychotherapist or others who were properly involved or others who overheard, without the knowledge of the patient, the confidential communication. Problems of waiver are dealt with by Rule 507.

The Committee felt that exceptions to the privilege should be specifically enumerated, and further endorsed the concept that in the area of exceptions, the rule should simply state that no privilege existed, rather than expressing the exception in terms of a "waiver" of the privilege. The Committee wanted to avoid any possible clashes with the common law concepts of "waiver."

The Committee did not intend this rule to limit or conflict with the health care data statutes listed in the Committee Note to Rule 501.

Rule 506 is not intended to override the child abuse reporting requirements contained in Utah Code § 62A-4-501 et seq.

The 1994 amendment to Rule 506 was primarily in response to legislation enacted during the 1994 Legislative General Session that changed the licensure requirements for certain mental health professionals. The rule now covers communications with additional licensed professionals who are engaged in treatment and diagnosis of mental or emotional conditions, specifically certified social workers, marriage and family therapists, specially designated advanced practice registered nurses and professional counselors.

Some mental health therapists use the term "client" rather than "patient," but for simplicity this rule uses only "patient."

The committee also combined the definition of confidential communication and the general rule section, but no particular substantive change was intended by the reorganization.

*Effective May/November 1, 2021*

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(e)(4) all counsel and parties shall be permitted to be present at every stage of the proceedings under paragraph (e), except a showing in camera at which no counsel or party shall be permitted to be present;

(e)(5) the communications submitted to the judge for in camera review shall be sealed and preserved to be made available to the appellate court in the event of an appeal, and the communications may not be disclosed outside of the appeal.

**2021 Advisory Committee Note.** The language of this rule has been amended in light of the Utah Supreme Court's decision in *State v. Bell*, 2020 UT 38, 469 P.3d 929. There, the supreme court noted "that Mr. Bell raises important constitutional and policy concerns regarding a criminal defendant's access to records that may contain exculpatory evidence." *Id.* ¶ 1. The amendments therefore are intended to protect a criminal defendant's constitutional rights while maintaining the important privacy and policy considerations underlying the privilege.

**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 506 is modeled after Rule 503 of the Uniform Rules of Evidence, and is intended to supersede Utah Code §§ 78-24-8(4) and 58-25a-8. There is no

**Commented [SC1]:** I'm not sure we actually need this language but see what you think

**Commented [SC2]:** Do you think this exception is necessary where the statement of the privilege provides "A patient has a privilege, during the patient's life"? My two cents, it seems unnecessary.

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102 covered by this Rule.

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149

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178 section, but no particular substantive change was intended by the reorganization.

179  
180 [Effective May/November 1, 2021](#)

# Tab 3

**Rule 504. Lawyer - Client.****(a) Definitions.**

**(a)(1)** "Client" means a person, public officer, corporation, association, or other organization or entity, either public or private, who is rendered legal services ~~by a lawyer or who consults a lawyer or a lawyer referral service to obtain legal services.~~

**(a)(2)** "Lawyer" means a person authorized, or reasonably believed by the client to be authorized, to practice law in any state or nation.

**(a)(3)** "Licensed paralegal practitioner" means a person authorized by the Utah Supreme Court to provide legal services under Rule 15-701 of the Supreme Court Rules of Professional Practice.

**(a)(43)** "Lawyer referral service" means an organization, either non-profit or for-profit that is providing intake or screening services to clients or prospective clients for the purpose of referring them to legal services.

**(a)(5)** "Other legal services provider" means a licensed paralegal practitioner, a lawyer referral service, or any other person or entity authorized in the State of Utah to provide legal services.

**(a)(64)** "Legal services" means the provision by a lawyer or ~~lawyer referral service~~ other legal services provider of:

**(a)(64)(A)** professional counsel, advice, direction or guidance on a legal matter or question;

**(a)(64)(B)** professional representation on the client's behalf on a legal matter; or

**(a)(64)(C)** referral to a lawyer.

**(a)(75)** ~~"Lawyer's Legal services provider's representative"~~ "Lawyer's Legal services provider's representative" means a person or entity employed to assist the lawyer or other legal services provider in the rendition of legal services.

**(a)(86)** "Client's representative" means a person or entity authorized by the client to:

**(a)(86)(A)** obtain legal services for or on behalf of the client;

**(a)(86)(B)** act on advice rendered pursuant to legal services for or on behalf of the client;

**(a)(86)(C)** provide assistance to the client that is reasonably necessary to facilitate the client's confidential communications; or

42  
43 (a)(86)(D) disclose, as an employee or agent of the client, confidential  
44 information concerning a legal matter to the lawyer or other legal services  
45 provider.

46  
47 (a)(97) "Communication" includes:

48 (a)(97)(A) advice, direction or guidance given by the lawyer, other legal services  
49 provider, or the legal services provider lawyer's representative ~~or a lawyer referral~~  
50 ~~service~~ in the course of providing legal services; and

51  
52 (a)(97)(B) disclosures of the client and the client's representative to the lawyer,  
53 other legal services provider, or the legal service provider lawyer's representative  
54 ~~or a lawyer referral service~~ incidental to the client's legal services.

55  
56 (a)(108) "Confidential communication" means a communication not intended to be  
57 disclosed to third persons other than those to whom disclosure is in furtherance of  
58 rendition of legal services to the client or to those reasonably necessary for the  
59 transmission of the communication.

60  
61 (b) **Statement of the Privilege.** A client has a privilege to refuse to disclose, and to prevent  
62 any other person from disclosing, confidential communications if:

63 (b)(1) the communications were made for the purpose or in the course of obtaining or  
64 facilitating the rendition of legal services to the client; and

65  
66 (b)(2) the communications were:

67 (b)(2)(A) between (i) the client or the client's representative and (ii) the lawyer,  
68 the other legal services provider, lawyer's the legal services provider's  
69 representatives, or a lawyer representing others in matters of common interest;  
70 or

71  
72 (b)(2)(B) between clients or clients' representatives as to matters of common  
73 interest but only if each clients' lawyer, other legal services provider, or legal  
74 services provider lawyer's representatives was also present or included in the  
75 communications;

76 ~~(b)(2)(C) between (i) the client or the client's representatives and (ii) a~~  
77 ~~lawyer — referral service; or~~

78 ~~(b)(2)(D) between (i) the client's lawyer or lawyer's representatives and (ii) the~~  
79 ~~client's lawyer referral service.~~

80  
81 (c) **Who May Claim the Privilege.** The privilege may be claimed by:

82 (c)(1) the client;

83  
84 (c)(2) the client's guardian or conservator;

85  
86 (c)(3) the personal representative of a client who is deceased;

87  
88 (c)(4) the successor, trustee, or similar representative of a client that was a corporation,  
89 association, or other organization, whether or not in existence; and

90  
91 (c)(5) the lawyer or the other legal services provider ~~or the lawyer referral service~~ on  
92 behalf of the client.

93  
94 (d) **Exceptions to the Privilege.** Privilege does not apply in the following circumstances:

95 (d)(1) **Furtherance of the Crime or Fraud.** If the services of the lawyer or other legal  
96 services provider were sought or obtained to enable or aid anyone to commit or plan to  
97 commit what the client knew or reasonably should have known to be a crime or fraud;

98  
99 (d)(2) **Claimants through Same Deceased Client.** As to a communication relevant to  
100 an issue between parties who claim through the same deceased client, regardless of  
101 whether the claims are by testate or intestate succession or by inter vivos transaction;

102  
103 (d)(3) **Breach of Duty by Lawyer or ~~Client~~Other Legal Services Provider.** As to a  
104 communication relevant to an issue of breach of duty by the lawyer or other legal  
105 services provider to the client;

106  
107 (d)(4) **Document Attested by Lawyer or Other Legal Services Provider.** As to a  
108 communication relevant to an issue concerning a document to which the lawyer or other  
109 legal services provider was an attesting witness; or

110  
111 (d)(5) **Joint Clients.** As to the communication relevant to a matter of common interest  
112 between two or more clients if the communication was made by any of them to a lawyer  
113 or other legal services provider retained or consulted in common, when offered in an  
114 action between any of the clients.

Effective ~~November 1, 2018~~2021

2021 Advisory Committee Note. These amendments are intended to extend the lawyer-client communications privilege to other legal services providers.

**2018 Advisory Committee Note.** These amendments are limited to the scope of the attorney-client privilege. Nothing in the amendments is intended to suggest that for other purposes, such as application of the Utah Rules of Professional Conduct or principles of attorney liability, an attorney forms an attorney-client relationship with a person merely by making a referral to another lawyer, even if privileged confidential communications are made in the process of that referral.