

AGENDA

Utah Supreme Court Advisory Committee / Rules of Evidence

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

Meeting held via WEBEX

Approval of Minutes <ul style="list-style-type: none"><i>October 12, 2021</i>	Action	Tab 1	Nicole Salazar-Hall
New Staff Introduction: Gage Hansen	Discussion		Keisa Williams
URE 506 rule draft <ul style="list-style-type: none"><i>Crime Victims Legal Clinic:</i><ul style="list-style-type: none"><i>Bethany Warr</i><i>Crystal Powell</i><i>Defense attorneys</i><ul style="list-style-type: none"><i>Matt Morrise</i><i>Susanne Gustin</i><i>Debbie Hill</i><i>Ann Marie Taliaferro</i>	Action	Tab 2	Subcommittee / Guests
URE 504 rule draft	Action	Tab 3	Subcommittee

Queue:

- Ongoing Project: Law Student Rule Comment Review

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

October 12, 2021

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

Via Webex

Chris Hogle, Chair

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

1. WELCOME AND APPROVAL OF MINUTES:

Chris Hogle welcomed everyone to the meeting. The following corrections were made to the minutes:

- Nicole Salazar-Hall will be the chair of the Rapid Response Legislative subcommittee.
- The case name in item #4 is State v. Richins.

With no other corrections, Judge McKelvie moved to approve the minutes. Ms. Salazar-Hall seconded and the motion passed unanimously.

John Lund joined today's meeting. The committee expressed appreciation to Mr. Lund for his

years of service on the committee and presented him with gifts of appreciation. Mr. Lund was on the committee for 23 years and was Chair for 10-12 years.

2. URE 506 rule draft:

The subcommittee presented two drafts of URE 506 for the committee's consideration. The first was drafted by John Nielsen. The second is modeled after the process outlined in URE 505. The rule is intended to create a standard process for accessing a victim's records by the defense. The subcommittee recommended inviting a representative from a victim advocacy group and a defense attorney to the next meeting to share their views on the two opposing proposals.

After further discussion, the committee agreed to invite presenters to the November 9th meeting. Those invited will be given 10 minutes to speak and will be asked to submit their views in writing prior to the meeting. Mr. Nielsen and Ms. Carlquist will provide Keisa Williams with names and contact information of the speakers.

3. URE 504 rule draft:

The subcommittee presented additional proposed amendments to the language in URE 504. The committee recommended minor language changes to clarify and define the term "legal service provider" to include Licensed Paralegal Practitioners (LPPs) and participants in the regulatory sandbox. The committee discussed the possibility of creating a separate rule for LPPs and other non-lawyers. The committee also recommended removing the citation to rule 15-701 of the Supreme Court Rules of Professional Practice and made minor formatting changes.

After further discussion, the subcommittee will prepare a revised draft and/or a separate rule for the next meeting.

Adjourn:

With no further items for discussion, Mr. Hogle moved to adjourn the meeting. The meeting ended at 6:01 pm. The next meeting will be held on Tuesday, November 9, 2021 at 5:15 pm, via Webex video conferencing.

Tab 2

U.R.E. 506 Policy Overview - Defense Perspective

We strongly encourage the Utah Supreme Court to amend U.R.E. 506 to allow greater access to medical and mental health records of alleged crime victims when such records are relevant to defenses in criminal cases. Access to the medical and mental health records of alleged crime victims is often crucial to such defenses, but the current process for gaining such access is too restrictive. The current process should be amended, but access to any records released under an amended process should be limited to address concerns about breach of privacy and embarrassment to crime victims.

Access to medical and mental health records of alleged crime victims is often crucial to the presentation of defenses in criminal trials. This is particularly true in cases of alleged child or sexual abuse, which tend overwhelmingly to be "he said-she said" cases in which the primary evidence consists of disclosures made by the alleged victim. When disclosures are initially made to doctors or therapists, or are subsequently explored by doctors or therapists, medical and mental health records become the primary source for examining the reliability of the disclosures. The Utah Supreme Court itself has previously called into question the scientific reliability of therapeutic techniques used to extract and explore such disclosures, such as hypnosis¹ and repressed memory recovery.² Defense attorneys have a constitutional duty to expose such unreliability, and cannot do so without access to the relevant medical and mental health records.

Nevertheless, the current process under U.R.E 506 for reviewing such records is constitutionally unworkable. To gain access, the defense must first show that communications between the patient and physician or mental health therapist are "relevant to an issue of the physical, mental, or emotional condition of the patient" and "support any claim or defense."³ While we agree that it is appropriate to limit disclosure of communications to those communications relevant to a defense, the requirement that the defense establish the physical, mental, or emotional condition of the patient is unduly burdensome and unnecessary. The particular medical condition of the alleged victim is not central to the privilege or to the defense: The issue is whether communications made by the alleged victim to a physician or mental health provider tend to demonstrate the innocence of the accused, and this may be the case whether or not the alleged victim suffers from a specific, diagnosable condition. Therefore, the requirement that the defense prove a physical, mental, or emotional condition should be lifted, and instead the defense should be required to prove the relevance of the communications to any defense.

The defense is also presently required to "show to a reasonable certainty that the records sought contain exculpatory evidence,"⁴ a burden not unlike King Nebuchadnezzar's command to Daniel to interpret the King's forgotten dream. It is impossible to demonstrate with certainty what a record contains without access to the record, and therefore this burden should be changed to require the defense to prove only the relevance of records to any defense.

Moreover, even if the "reasonable certainty" standard is somehow satisfied, records are then subject *in camera* review by the trial judge under the constraint that only information the

¹ *State v. Tuttle*, 780 P.2d 1203 (Utah 1989).

² *Franklin v. Stevenson*, 1999 UT 61, 987 P.2d 22.

³ *State v. Cegers*, 2019 UT App 54, ¶ 56, 440 P.3d 924.

⁴ *State v. Worthen*, 2009 UT 79, ¶ 15, 222 P.3d 1144.

judge deems to be exculpatory may be released to the defense.⁵ This is an arduous and awkward task. A trial judge is not an advocate for the defendant. She is typically unaware of the factual intricacies of a criminal case. Furthermore, she is unlikely to be an expert in the fields of medicine or mental health, nor trained to interpret the complex records produced by these disciplines, which rely on a profusion of codes and terms of art. Thus, a trial judge's decision during *in camera* review is necessarily made from a position of ignorance. This ought not to be. The parties and their experts are in the best position to interpret medical and mental health records and determine whether relevant and exculpatory information is contained therein, and the records should be released to them upon a showing that the records are relevant to any defense.

In sum, U.R.E. 506 should be amended to provide expanded access to medical and mental health records. We have attached a proposed amendment to the current rule, outlining a proposed expansion. However, while we firmly believe in the maxim that "it is better for ten guilty people to be set free than for one innocent [person] to be unjustly imprisoned,"⁶ we also recognize the important privacy interests of crime victims. Our proposed amendment addresses these interests by sealing all proceedings related to the disclosure of such records, and by limiting the disclosure of such records to the parties and their designated experts.

⁵ *Id.* at ¶ 43.

⁶ *Furman v. Georgia*, 408 U.S. 238, 368 n. 158, 92 S. Ct. 2726, 33 L. Ed. 2d 346, 1972 U.S. LEXIS 169.

Rule 506. Physician and Mental Health Therapist-Patient.**(a) Definitions.**

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

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

(a)(3) "Mental health therapist" means a person who

(a)(3)(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)(3)(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 physician or mental health therapist for the purpose of diagnosing or treating the patient. The privilege applies to:

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

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

(b)(3) information transmitted among a patient, a physician or mental health therapist, and other persons who are participating in the diagnosis or treatment under the direction of the 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 or mental health therapist 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) Condition as Element of Claim or Defense. For communications relevant to an issue of the physical, mental, or emotional condition of the patient:

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

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

(d)(1)(BC) 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)(2) 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)(3) 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.

(e) Effect of Claiming an Exception

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

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

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

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

(e)(54) 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)(64) 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. The appellate court may review those records and decide whether they meet an exception, following the procedure in subsection (4). ~~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 corresponding federal rule. By virtue of Rule 501, marriage and family therapists are not covered by this Rule.

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

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

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

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

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

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

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

Rule 506. Physician and Mental Health Therapist-Patient.**(a) Definitions.**

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

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

(a)(3) "Mental health therapist" means a person who

(a)(3)(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)(3)(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 physician or mental health therapist for the purpose of diagnosing or treating the patient. The privilege applies to:

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

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

(b)(3) information transmitted among a patient, a physician or mental health therapist, and other persons who are participating in the diagnosis or treatment under the direction of the 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 or mental health therapist 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) Condition as Element of Claim or Defense. For communications relevant to an issue of the physical, mental, or emotional condition of the patient:

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

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

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

(d)(1)(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;

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.

(d)(2) 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)(3) 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.

(e) Effect of Claiming an Exception

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

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

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

(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

corresponding federal rule. By virtue of Rule 501, marriage and family therapists are not covered by this Rule.

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

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

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

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

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

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

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](#)

Tab 3

Rule 504. Lawyer - Client.

(a) Definitions.

(a)(1) “Legal services” means the provision of:

(a)(1)(A) professional counsel, advice, direction or guidance on a legal matter or question;

(a)(2)(B) professional representation on the client’s behalf on a legal matter; or

(a)(3)(C) referral to a lawyer.

(a)(2) "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)(~~3~~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 the Supreme Court Rules of Professional Practice.

(a)(4) “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)(4) "Legal services" means the provision by a lawyer or lawyer referral service of:~~

~~(a)(4)(A) professional counsel, advice, direction or guidance on a legal matter or question;~~

~~(a)(4)(B) professional representation on the client's behalf on a legal matter; or~~

~~(a)(4)(C) referral to a lawyer.~~

(a)(5) "Lawyer's representative means a person or entity employed to assist the lawyer in the rendition of legal services.

-

(a)(6) "Client's representative" means a person or entity authorized by the client to:

(a)(6)(A) obtain legal services for or on behalf of the client;

(a)(6)(B) act on advice rendered pursuant to legal services for or on behalf of the client;

(a)(6)(C) provide assistance to the client that is reasonably necessary to facilitate the client's confidential communications; or

(a)(6)(D) disclose, as an employee or agent of the client, confidential information concerning a legal matter to the lawyer.

(a)(7) "Communication" includes:

(a)(7)(A) advice, direction or guidance given by the lawyer or, the lawyer's representative ~~or a lawyer referral service~~ in the course of providing legal services; and

(a)(7)(B) disclosures of the client and the client's representative to the lawyer or, the lawyer's representative ~~or a lawyer referral service~~ incidental to the client's legal services.

(a)(8) "Confidential communication" means a communication not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of rendition of legal services to the client or to those reasonably necessary for the transmission of the communication.

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

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

(b)(2) the communications were:

(b)(2)(A) between (i) the client or the client's representative and (ii) the lawyer, the lawyer's representatives, or a lawyer representing others in matters of common interest; or

(b)(2)(B) between clients or clients' representatives as to matters of common interest but only if each clients' lawyer or lawyer's representatives was also present or included in the communications;

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

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

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

(c)(1) the client;

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

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

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

(c)(5) the lawyer ~~or the lawyer referral service~~ on behalf of the client.

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

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

(d)(2) Claimants through Same Deceased Client. As to a communication relevant to an issue between parties who claim through the same deceased

client, regardless of whether the claims are by testate or intestate succession or by inter vivos transaction;

(d)(3) Breach of Duty by Lawyer or Client. As to a communication relevant to an issue of breach of duty by the lawyer to the client;

(d)(4) Document Attested by Lawyer. As to a communication relevant to an issue concerning a document to which the lawyer was an attesting witness; or

(d)(5) Joint Clients. As to the communication relevant to a matter of common interest between two or more clients if the communication was made by any of them to a lawyer retained or consulted in common, when offered in an action between any of the clients.

(e) Extension of the Privilege to Certain Non-Lawyers. The privilege may also be claimed where legal services are provided to a client by a licensed paralegal practitioner, a lawyer referral service, any other person or entity authorized in the State of Utah to provide legal services, or a person or entity employed to assist such non-lawyers in the rendition of legal services.

Effective November 1, 2018

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.

Rule 504. Lawyer - Client.

(a) Definitions.

(a)(1) “Legal services” means the provision of:

(a)(1)(A) professional counsel, advice, direction or guidance on a legal matter or question;

(a)(2)(B) professional representation on the client’s behalf on a legal matter; or

(a)(3)(C) referral to a lawyer.

(a)(2) "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)(~~3~~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 the Supreme Court Rules of Professional Practice.

(a)(4) “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)(4) “Legal services” means the provision by a lawyer or lawyer referral service of:~~

~~“(a)(4)(A) professional counsel, advice, direction or guidance on a legal matter or question;~~

~~“(a)(4)(B) professional representation on the client’s behalf on a legal matter; or~~

~~“(a)(4)(C) referral to a lawyer.~~

(a)(5) “Legal services provider” means a lawyer, 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)(6) “Lawyer’s Legal service provider’s representative means a person or entity employed to assist the lawyer legal services provider in the rendition of legal services.

-

(a)(6) “Client’s representative” means a person or entity authorized by the client to:

(a)(6)(A) obtain legal services for or on behalf of the client;

(a)(6)(B) act on advice rendered pursuant to legal services for or on behalf of the client;

(a)(6)(C) provide assistance to the client that is reasonably necessary to facilitate the client’s confidential communications; or

(a)(6)(D) disclose, as an employee or agent of the client, confidential information concerning a legal matter to the ~~lawyer~~legal services provider.

(a)(7) "Communication" includes:

(a)(7)(A) advice, direction or guidance given by the ~~lawyer~~legal services provider or, the lawyer's legal services provider's representative ~~or a lawyer referral service~~ in the course of providing legal services; and

(a)(7)(B) disclosures of the client and the client's representative to the ~~lawyer~~legal services provider or, the lawyer's legal services provider's representative ~~or a lawyer referral service~~ incidental to the client's legal services.

(a)(8) "Confidential communication" means a communication not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of rendition of legal services to the client or to those reasonably necessary for the transmission of the communication.

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

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

(b)(2) the communications were:

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

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

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

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

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

(c)(1) the client;

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

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

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

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

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

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

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

(d)(3) Breach of Duty by Lawyer or Client. As to a communication relevant to an issue of breach of duty by the ~~lawyer~~ legal services provider to the client;

(d)(4) Document Attested by Lawyer. As to a communication relevant to an issue concerning a document to which the ~~lawyer~~ legal services provider was an attesting witness; or

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

Effective November 1, 2018

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.