

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

**MEETING MINUTES  
February 8, 2022  
5:15 p.m.-7:15 p.m.  
Via Webex**

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

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**1. WELCOME, INTRODUCTION OF NEW MEMBER, AND APPROVAL OF MINUTES:**

Chris Hogle welcomed everyone to the meeting and introduced Judge Michael Leavitt as a new member to the committee. Mr. Hogle asked for any corrections to the January 11, 2022 meeting. ***Upon one change suggested by Mr. Hogle, Mr. Hogle moved to approve the minutes. Mr. Nielsen seconded the motion and it passed unanimously.***

**2. URE 404/SJR 0002: RAPID RESPONSE SUBCOMMITTEE UPDATE**

Ms. Salazar-Hall addressed Rule 404 and the sexual assault carve out. Ms. Salazar-Hall indicated that an updated draft of the rule has been sent to Justice Petersen, and will next go to the Supreme Court and the Legislature.

Mr. Young and Ms. Carlquist indicated that they have signed up for legislative alerts. As of January 26, 2022, it does not appear that any action has been taken on the draft. Ms. Salazar-Hall expressed that the draft could probably use some more work, and given the

lack of legislative action taken on the draft, there is probably time to update it.

### **3. URE 504**

Mr. Hogle asked if anyone had any suggested edits to the current draft. Judge Linda Jones began a discussion regarding “legal services” and “referral services.” This led to further discussion on whether clarification is needed for “legal referral service” and “legal professional.” Ultimately, the committee decided that Section (a)(5) will now read “clients or prospective clients for legal services.”

Mr. Hogle began a discussion on whether “referral to lawyer” should be changed to “referral to a legal professional” to encompass referrals to non-lawyers in the legal profession. Ms. Carlquist and Mr. Young agreed with this approach. Mr. Hogle additionally identified other provisions of Rule 504 in which language that referenced “lawyers” could be changed to more general language such as “legal professional” or “legal referral service.”

Mr. Havas’s email to the committee prior to the meeting pointed out issues relating to spacing and indentation. Ms. Carlquist then asked whether alphabetization was an issue. Ultimately, the committee decided that alphabetization was not an issue. Ms. Williams agreed to fix the formatting issues.

***Ms. Salazar-Hall moved for the updated copy of Rule 504 draft to be sent to the Supreme Court with a recommendation that it be published for a second round of public comments. Ms. Bulkely seconded the motion, which passed unanimously.***

### **4. URE 506**

Mr. Hogle introduced the subcommittee on Rule 506. Ms. Carlquist spoke on behalf of the subcommittee and provided insight into the subcommittee’s process and remaining questions.

The subcommittee requested feedback on what the burden should be to receive in camera review. The Supreme Court in *State v. Bell*, 2020 UT 38, 469 P.3d 929, indicated that in prior criminal cases, it had adopted the “reasonable certainty” standard to more clearly identify and limit the situations in which criminal defendants can access privileged records, but the petitioner raised the possibility that reasonable certainty may be too high of a burden. The Court decided the case without reaching the petitioner’s arguments, but referred the matter to the committee. The committee discussed whether a preponderance of the evidence standard or reasonable likelihood standard should be used.

Mr. Young advocated for a reasonable likelihood standard, and Mr. Nielsen advocated for the preponderance of the evidence standard.

After a lively discussion, Mr. Hogle suggested taking an informal poll in the chat of the meeting to gauge everyone's preference. Seven members voted for a preponderance of the evidence

standard and six voted for a reasonable likelihood standard. Judge Trease abstained. Mr. Hogle voted only as the tie-breaking vote, and explained that he voted for a preponderance of the evidence standard because this is closer to the reasonable certainty standard laid out in Utah case law on the issue.

Mr. Hogle acknowledged that with the vote being so close, the committee's memo to the Court should include the pros and cons of each standard and an indication that a tie-breaking vote was required.

Judge Jones suggested that the heading of subsection (e) should clarify that "the following provisions apply only in criminal cases." The committee agreed. The committee briefly discussed a variety of comments, questions, and potential changes. However, no final resolutions were reached.

Mr. Hogle acknowledged that the committee is not ready to send anything to the Supreme Court at this time. Subcommittee members will prepare majority and minority statements for the Court.

***Mr. Hogle moved to take a final vote at the April meeting, where members will be free to change their vote. Mr. Young seconded this motion, which passed unanimously.***

**Adjourn:**

With no further items for discussion, Mr. Hogle moved to adjourn the meeting. The next meeting will be April 12, 2022 at 5:15 pm, via Webex video conferencing.