

Utah Supreme Court Advisory Committee
Rules of Evidence
AGENDA

April 12, 2022
5:15 p.m. – 7:15 p.m.

Meeting held via WEBEX

Approval of Minutes • <i>February 8, 2022</i>	Action	Tab 1	Chris Hogle
New Staff Counsel: Bryson King			Keisa Williams
URE 412: Back from public comment	Action	Tab 2	Chris Hogle
URE 404 / S.J.R 2: Did not pass	Discussion		Nicole Salazar-Hall
URE 409 / H.J.R 13: Passed, eff. May 4, 2022 • Related to H.B. 344	Discussion	Tab 3	Nicole Salazar-Hall
URE 506	Action	Tab 4	Subcommittee

Queue:

- Ongoing Project: Law Student Rule Comment Review

2022 Meeting Dates:

June 14, 2022
October 11, 2022
November 8, 2022

Rule Status:

URE 106 - Under consideration by Supreme Court
URE 404 - Under consideration by Supreme Court
URE 412 - Back from public comment
URE 504 - To Supreme Court for public comment
URE 506 - Subcommittee
URE 507.1 - Awaiting DoH guidelines
URE 512 - Approved as final (eff. 5/1/22)
URE 1101 - Approved as final (eff. 5/1/22)

Tab 1

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

MEETING MINUTES

DRAFT

**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

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.

Tab 2

UTAH COURT RULES – PUBLISHED FOR COMMENT

The Supreme Court and Judicial Council invite comments about amending these rules. To view the proposed amendment, click on the rule number.

To submit a comment or view the comments of others, click on “Continue Reading.” To submit a comment, scroll down to the “Leave a Reply” section, and type your comment in the “Comment” field. Type your name and email address in the designated fields and click “Post Comment.”

Comments cannot be acknowledged, but all will be considered. Comments are saved to a buffer for review before publication.

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Posted: January 12, 2022

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Rules of Evidence – Comment Period Closed February 26, 2022

URE0412. Admissibility of Victim’s Sexual Behavior or Predisposition (AMEND). The proposed amendment clarifies that the rule is applicable to juvenile delinquency proceedings.

This entry was posted in [-Rules of Evidence, URE0412.](#)

« [Rules of Juvenile Procedure – Comment Period Closed March 5, 2022](#)

[Code of Judicial Administration – Comment Period Closed February 3, 2022](#) »

To view all comments submitted during a particular comment period, click on the comment deadline date. To view all comments to an amendment, click on the rule number.

CATEGORIES

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UTAH COURTS

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3 thoughts on “Rules of Evidence – Comment Period Closed February 26, 2022”

Ryan Peters
January 12, 2022 at 10:14 am

Thank you for this much needed change. As a juvenile prosecutor I have had to litigate this very issue before and am glad that it is now being considered for clarity in the rules.

Sandi Johnson
January 12, 2022 at 10:29 am

I am grateful to the committee for recommending this change. I have practiced in juvenile court and this protection for all victims of sexual assault/abuse is necessary and important.

Chris Yannelli
February 1, 2022 at 8:47 am

This is a welcomed change to the Rule. It makes it clear that the protections for all extend to juvenile delinquency proceedings. This is very much supported. Thank you.

- -Rules of Appellate Procedure
- -Rules of Civil Procedure
- -Rules of Criminal Procedure
- -Rules of Evidence
- -Rules of Juvenile Procedure
- -Rules of Professional Conduct
- -Rules of Professional Practice
- -Rules of Small Claims Procedure
- ADR101
- ADR103
- Appendix B
- Appendix F
- CJA Appendix F
- CJA01-0201
- CJA01-0204
- CJA01-0205
- CJA01-0205
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- CJA02-0101
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- CJA03-0107
- CJA03-0108
- CJA03-0109
- CJA03-0111
- CJA03-0111.01
- CJA03-0111.02

Rule 412. Admissibility of Victim's Sexual Behavior or Predisposition.

(a) **Prohibited Uses.** The following evidence is not admissible in ~~a~~-criminal or juvenile delinquency proceedings involving alleged sexual misconduct:

(a)(1) evidence offered to prove that a victim engaged in other sexual behavior; or

(a)(2) evidence offered to prove a victim's sexual predisposition.

(b) **Exceptions.** The court may admit the following evidence if the evidence is otherwise admissible under these rules:

(b)(1) evidence of specific instances of a victim's sexual behavior, if offered to prove that someone other than the defendant was the source of semen, injury, or other physical evidence;

(b)(2) evidence of specific instances of a victim's sexual behavior with respect to the person accused of the sexual misconduct, if offered by the defendant to prove consent or if offered by the prosecutor; or

(b)(3) evidence whose exclusion would violate the defendant's constitutional rights.

(c) Procedure to Determine Admissibility.

(c)(1) **Motion.** If a party intends to offer evidence under Rule 412(b), the party must:

(c)(1)(A) file a motion that specifically describes the evidence and states the purpose for which it is to be offered;

(c)(1)(B) do so at least 14 days before trial unless the court, for good cause, sets a different time; and

(c)(1)(C) serve the motion on all parties.

(c)(2) **Notice to the Victim.** The prosecutor shall timely notify the victim or, when appropriate, the victim's guardian or representative.

(c)(3) **Hearing.** Before admitting evidence under this rule, the court must conduct an in camera hearing and give the victim and parties a right to attend and be heard. Unless the court orders otherwise, the motion, related materials, and the record of the hearing are classified as protected.

(d) **Definition of "Victim."** In this rule, "victim" includes an alleged victim.

Effective May 1, 2017

- 47 **2016 Advisory Committee Note.** The 2016 amendment changes the classification of records
48 described in subparagraph (c)(3) from sealed to protected. See [CJA Rule 4-202.02](#).

Tab 3

Rule 409. Payment of Medical and Similar Expenses; Expressions of Apology; Medical Candor Process.

(a) Evidence of furnishing, promising to pay, or offering to pay medical, hospital, or similar expenses resulting from an injury is not admissible to prove liability for the injury.

(b) Evidence of unsworn statements, affirmations, gestures, or conduct made to a patient or a person associated with the patient by a defendant that expresses the following is not admissible in a malpractice action against a health care provider or an employee of a health care provider to prove liability for an injury:

(b)(1) apology, sympathy, commiseration, condolence, compassion, or general sense of benevolence; or

(b)(2) a description of the sequence of events relating to the unanticipated outcome of medical care or the significance of events.

(c) Evidence of any communication, information, material, or conduct created for or during a medical candor process under Utah Code Title 78B, Chapter 3, Part 4a, Utah Medical Candor Act, is not admissible in a malpractice action against a health care provider or an employee of a health care provider to prove liability for an injury, including:

(c)(1) any findings or conclusions of an investigation under Utah Code section 78B-3-451 that are shared with a patient or a representative of a patient; or

(c)(2) any offer of compensation made to the patient or a representative of a patient during or as part of the medical candor process.

(d) The terms defined in Utah Code section 78B-3-450 apply to paragraph (c).

Effective May 4, 2022

2011 Advisory Committee Note. The language of section (a) of this rule has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make class 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. The language of section (b), promulgated by the Utah Legislature in 2011 (HJR 38), is unchanged.

Original Advisory Committee Note. There was no comparable rule under Utah Rules of Evidence (1971) but former Rules 52 and 53 seemed to encompass the same restrictions. Utah Code §§§ 78-27-29, 78-27-30 and 31-1-15 (1953) are superseded by this rule.

Legislative Note. In 2010 the Utah Legislature amended Rule 409 by a two-thirds vote in both houses adding paragraph (b) and making related changes. In 2011 the Legislature further amended the rule by a two-thirds vote in both houses to make it follow more closely Utah Code § 78B-3-422.

The intent and purpose of amending the rule with paragraph (b) is to encourage expressions of apology, empathy, and condolence and the disclosure of facts and circumstances related to unanticipated outcomes in the provision of health care in an effort to facilitate the timely and satisfactory resolution of patient concerns arising from unanticipated outcomes in the provision of health care. Patient records are not statements made to patients, and therefore are not inadmissible under this rule.

Tab 4

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) after the patient's death, in any proceeding in which any party relies upon the condition as an element of the claim or defense;

(d)(2) Necessary to a Criminal Case. 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; ~~A party claiming an exception under this paragraph exception has the burden of establishing with extrinsic evidence, to a [preponderance of the evidence /reasonable likelihood], that the communication the [accusation] [communicationthe com]~~

~~(d)(2)(A) contains a recantation or material inconsistency;~~

~~(d)(2)(B) shows that the accusation was the product of suggestion or undue influence;~~

~~(d)(2)(C) relates to the reliability of the method or means by which the communication was disclosed; or~~

~~(d)(2)(D) is otherwise necessary to protect a criminal defendant's constitutional rights.~~

(d)(3) 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; ~~or.~~

(d)(4) 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 any Exception in a Criminal Proceeding. The following provisions apply only in criminal cases and only if a party is claiming an exception under paragraphs (d)(1) or (d)(2). ~~A party claiming an exception under paragraph (d)(2) must satisfy paragraphs (e)(1) through (e)(4). A party claiming any other exception must satisfy paragraphs (e)(2) through (e)(4).~~

~~(e)(1) In addition to satisfying the requirements of Utah Rule of Criminal Procedure 14(b), the party claiming an exception under (d)(2) has the burden of establishing with extrinsic evidence, to a reasonable likelihood, that the communication~~

~~(e)(1)(A) contains a recantation or material inconsistency;~~

~~(e)(1)(B) was the product of suggestion or undue influence;~~

~~(e)(1)(C) relates to the reliability of the method or means by which the communication was disclosed; or~~

~~(e)(1)(D) is otherwise necessary to protect a criminal defendant's constitutional rights.~~

(e)(12) If the party claiming any exception ~~under this rule~~ makes the ~~showing~~-required showing, the court shall conduct an in-camera review of the communications and shall release to the parties any communication to which the exception applies.

~~(e)(23) Alf the party claiming the exception makes the required showing and the court has not released all communications that were subject to the in-camera review, upon motion of a party based on changed circumstances, the court shall conduct further in-camera review of the communications to re-examine applicability of an exception and to release any additional communication to which the exception applies. court has an ongoing duty to conduct an in-camera review of the communications to re-examine their materiality in light of how the criminal proceeding has progressed. In re-examining the communications, the court shall determine whether the privilege continues to apply and if so whether an exception applies. This duty arises only upon the request of a party.~~

(e)(34) All communications submitted to the court for in-camera review and which are not otherwise released under an exception, ~~will~~ shall be sealed and made part of the record. ~~preserved to be made available to the appellate court in the event of an appeal.~~

(f) Reasonable Orders and Procedures. The court may make reasonable orders regarding the procedure to be followed when a party claims an exception.

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. Therefore, the amendments contained in subsections (d)(2) and (e) are intended to protect the defendant's constitutional rights while maintaining the important privacy and policy considerations underlying the privilege. The amendments do not limit the availability of this rule's other exceptions in criminal proceedings. Communications released to the parties may qualify as private records and be subject to Rules 4-202.02 and 4-202.03 of the Utah Rules of Judicial Administration.

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 1, 2022