



Utah Supreme Court Rules of Evidence Committee

Meeting Agenda

Chris Hogle, Chair

Location: WebEx Meeting:
<https://utcourts.webex.com/utcourts/j.php?MTID=md86f16492bfefe19389fa7af18ae97da>

Date: June 14, 2022

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

Action: Welcome and approve April 12, 2022 minutes	Tab 1	Chris Hogle
Discussion: Report on formation of subcommittee to discuss juvenile interface with URE.	Tab 2	Judge Michael Leavitt
Action: Discussion and motion on whether to vacate committee's vote to approve Rule 412 for comment.		Judge Michael Leavitt
Discussion: Feedback from Supreme Court Conference presentation on Rule 506 and review of Subcommittee Meeting.	Tab 3	Sarah Carlquist
Action: Discuss HB277's effect on Rule 506 and whether to adopt language to include provisions for juveniles.	Tab 4	Bryson King
Queue: Ongoing Project: Law Student Rule Comment Review		

Meeting Schedule:

October 11, 2022

November 8, 2022

Rule Status:

URE 106 - Under consideration by Supreme Court

URE 404 - Awaiting advice from Supreme Court

URE 412 - Approved as final (eff. 5/1/22) and under consideration by Supreme Court

URE 504 - Approved as final (eff. 5/1/22)

URE 506 - On remand from Supreme Court for Committee discussion

URE 507.1 - Awaiting DoH guidelines

Tab 1

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

MEETING MINUTES

DRAFT

April 12th, 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 Ed Havas Hon. Linda Jones Jennifer Parrish Nicole Salazar-Hall Hon. Vernice Trease Hon. Teresa Welch Hon. David Williams Hon. Richard McKelvie John Nielsen Matthew Hansen Hon. Michael Leavitt Jacqueline Carlton	Minhvan Brimhall Adam Alba Melinda Bowen Dallas Young Deborah Bulkeley Teneille Brown		Keisa Williams Bryson King Angelica Juarez

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

Chris Hogle welcomed everyone to the meeting and allowed Nicole Salazar-Hall to run the remainder of the meeting due to his need to attend to a client-related matter. Keisa Williams introduced Bryson King, who will be joining the group and taking over Ms. Williams' role. Ms. Salazar-Hall asked for any corrections to the February 8, 2022 meeting minutes. ***Upon no changes, it was moved that the minutes be approved, and the motion was seconded and adopted by unanimous vote.***

2. URE 412: Back from Public Comment

Ms. Salazar-Hall indicated that the public comments on URE 412 were all positive. Ms. Salazar-Hall motioned to recommend the rule as amended to the Supreme Court. John Nielson and Jennifer Parrish seconded. The Motion carried.

Ms. Salazar-Hall asked Judge Michael Leavitt to clarify on how this rule applies to juvenile court delinquency proceedings. Judge Leavitt emphasized there are many rules of evidence that could use clarification on how the rules apply (if at all) to juvenile court proceedings. Judge Leavitt suggesting forming a sub-committee to review the application of the rules in the juvenile court system. Mr. Hogle agreed this would be a good idea.

Judge Linda Jones suggested this committee can include individuals in the juvenile court rules committee. Mr. King agreed to communicate this message to the juvenile rules committee. Ms. Salazar-Hall asked Mr. King to add this to the next meeting's agenda.

3. URE 404/S.J.R.2: Did not pass

Ms. Salazar-Hall updated the committee on URE 404. The Legislature adopted no amendment to the rule during its last session. The rule and the URE 404's subcommittee's presentation is under consideration by the Supreme Court. Ms. Salazar-Hall suggested letting the rule sit with the Supreme Court until further notice. ***After some discussion, Mr. Nielson moved the Committee to sit patiently and wait. Ms. Carlquist seconded the motion. Upon no objection, the motion passed unanimously.***

4. URE 409/ H.J.R. 13: Passed, eff. Mat 4, 2022

Ms. Salazar-Hall updated the committee on URE 409 and asked the committee if there are any proposed changes to the rule as amended by the Legislature. Edward Havas strongly encouraged the committee to not recommend any changes at this point and the committee members concurred.

5. URE 506

Ms. Carlquist provided an update to the committee on behalf of the URE 506 subcommittee. A new exception was created as section (d)(2) of the rule. Judge Jones was commended for her hard work restructuring the rule. Judge Leavitt stated he would like to change his vote on the standard by which the (d)(2) exception must be proved to the preponderance of the evidence standard.

Mr. Hogle asked a question about the word "communication" in (d)(2)(C). Ms. Carlquist responded—she clarified that communication in this instance is being used as an umbrella term. Mr. Hogle suggested changing the word "communications" to "statements." Judge Linda Jones clarified that a Judge has to make an in-camera review for the items in (d)(1) and (d)(2). Ms. Carlquist suggested using the term "information" in lieu of "communication." Matt Hansen cautioned against making this rule too broad because it will make it impossible for a Judge to make this work. Ms. Carlquist disagreed and expressed it is in line with the language of the rule. Mr. Hogle expressed concern that this information is reliable. Mr. Hansen clarified this information is not information that the prosecution has or is relying on.

Judge Teresa Welch asked whether the standard is consistent with controlling case law and recalled Judge Leavitt stating that case law is more consistent with the preponderance of the evidence standard. Ms. Carlquist clarified that the standard has been reasonable certainty (*State v. Blake*). The Supreme Court's opinion in *State v. Bell* indicated that that this standard might be too stringent, but it did not ultimately decide on this issue. Judge Leavitt clarified that civil cases equate reasonable certainty to preponderance of the evidence standard. He explained that as a Judge this standard is easier to articulate and apply. Judge David Williams agreed that preponderance of the evidence is easier to articulate and apply. Judge Jones clarified that when Bell was decided, subsection (d)(2) did not exist.

After further discussion and questions about the newest revisions, Ms. Salazar-Hall called for a new vote from the committee. The results of the new vote were as follows: 10 in favor of a preponderance of the evidence standard, and 2 in favor of reasonable likelihood standard.

Mr. Neilson and Ms. Carlquist volunteered to write the majority and minority reports, respectively.

Ms. Salazar-Hall motioned to send what we have to the Supreme Court for further review. Tony Garf and Mr. Nielson seconded. The motion carried.

Adjourn:

With no further items for discussion, Ms. Salazar-Hall moved to adjourn the meeting Ms. Carlquist seconded, Judge Richard Mckelvie third. The next meeting will be June 14, 2022, at 5:15 pm, via Webex video conferencing.

Tab 2

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

2
3 **(a) Prohibited Uses.** The following evidence is not admissible in a criminal
4 proceeding involving alleged sexual misconduct:

5
6 **(a)(1) evidence offered** to prove that a victim engaged in other sexual behavior; or

7
8 **(a)(2) evidence offered** to prove a victim's sexual predisposition.

9
10 **(b) Exceptions.** The court may admit the following evidence if the evidence is
11 otherwise admissible under these rules:

12
13 **(b)(1)** evidence of specific instances of a victim's sexual behavior, if offered to prove
14 that someone other than the defendant was the source of semen, injury, or other
15 physical evidence;

16
17 **(b)(2)** evidence of specific instances of a victim's sexual behavior with respect to
18 the person accused of the sexual misconduct, if offered by the defendant to prove
19 consent or if offered by the prosecutor; or

20
21 **(b)(3)** evidence whose exclusion would violate the defendant's constitutional
22 rights.

23
24 **(c) Procedure to Determine Admissibility.**

25
26 **(c)(1) Motion.** If a party intends to offer evidence under [Rule 412\(b\)](#), the party
27 must:

28
29 **(c)(1)(A)** file a motion that specifically describes the evidence and states the
30 purpose for which it is to be offered;

31
32 **(c)(1)(B)** do so at least 14 days before trial unless the court, for good cause, sets a
33 different time; and

34
35 **(c)(1)(C)** serve the motion on all parties.

36
37 **(c)(2) Notice to the Victim.** The prosecutor shall timely notify the victim or, when
38 appropriate, the victim's guardian or representative.

39
40 **(c)(3) Hearing.** Before admitting evidence under this rule, the court must conduct
41 an incamera hearing and give the victim and parties a right to attend and be heard.

42 Unless the court orders otherwise, the motion, related materials, and the record of
43 the hearing are classified as protected.

44

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

46

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39 camera hearing and give the victim and parties a right to attend and be heard. Unless
40 the court orders otherwise, the motion, related materials, and the record of the hearing
41 are classified as protected.
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43 (d) **Definition of "Victim."** In this rule, "victim" includes an alleged victim.
44

45 *Effective May 1, 20~~22~~17*
46

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](#).

1 **Rule 101. Scope; Definitions.**

2

3 **(a) Scope.** These rules apply to proceedings in Utah courts. The specific courts and
4 proceedings to which the rules apply, along with exceptions, are set out in Rule
5 1101.

6

7 **(b) Definitions.** In these rules:

8

9 **(b)(1)** “civil case” means a civil action or proceeding; including juvenile court non-
10 delinquency proceedings;

11

12 **(b)(2)** “criminal case” includes a criminal proceeding; and a juvenile court
13 delinquency proceeding;

14

15 **(b)(3)** “public office” includes a public agency;

16

17 **(b)(4)** “record” includes a memorandum, report, or data compilation;

18

19 **(b)(5)** a reference to any kind of written material or any other medium includes
20 electronically stored information.

21

1 **Rule 1101. Applicability of Rules.**

2
3 (a) **Proceedings Generally.** These rules apply to all actions and proceedings in the
4 courts of this state except as otherwise provided in subsections (c) and (d). They
5 apply generally to civil actions and proceedings, criminal cases and contempt
6 proceedings except those in which the court may act summarily, and all juvenile
7 court proceedings unless stated otherwise in the Utah Rules of Juvenile Procedure.

8
9 (b) **Rule of Privilege.** The rule with respect to privileges applies at all stages of all
10 actions, cases and proceedings.

11
12 (c) **Rules Inapplicable.** The rules (other than with respect to privileges) do not
13 apply in the following situations:

14
15 (c)(1) **Preliminary Questions of Fact.** The determination of questions of fact
16 preliminary to admissibility of evidence when the issue is to be determined by the
17 court under URE 104.

18
19 (c)(2) **Grand Jury.** Proceedings before grand juries.

20
21 (c)(3) **Revoking Probation.** Proceedings for revoking probation, unless the court
22 for good cause otherwise orders.

23
24 (c)(4) **Miscellaneous Proceedings.** Proceedings for extradition or rendition;
25 sentencing; issuance of warrants for arrest, criminal summonses, and search
26 warrants; and proceedings with respect to release on bail or otherwise.

27
28 (d) **Reliable Hearsay in Criminal Preliminary Examinations.** In a criminal
29 preliminary examination, reliable hearsay shall be admissible as provided under
30 URE 1102.

31

Tab 3

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

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

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

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

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

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

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

22 **(b)(3)** information transmitted among a patient, a physician or mental health
23 therapist, and other persons who are participating in the diagnosis or treatment
24 under the direction of the physician or mental health therapist. Such other persons
25 include guardians or members of the patient's family who are present to further the
26 interest of the patient because they are reasonably necessary for the transmission of
27 the communications, or participation in the diagnosis and treatment under the
28 direction of the physician or mental health therapist.

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

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

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

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

39 **(d)(1)(B)** after the patient's death, in any proceedings in which any party relies
40 upon the condition as an element of the claim or defense;

41 **(d)(2) Necessary to a Criminal Case.** If it appears from the evidence in the case, or
42 from another showing of extrinsic evidence by a party, that the preponderance of
43 the evidence shows the communication is necessary to a fair determination of guilt
44 or innocence and: ~~A party claiming an exception under this paragraph has the~~
45 ~~burden of establishing with extrinsic evidence, to a preponderance of the evidence,~~
46 ~~that the communication the com~~

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47 _____
48 ~~**(d)(2)(A)** contains a recantation or material inconsistency;~~

49 _____
50 ~~**(d)(2)(B)** shows that the accusation was the product of suggestion or~~
51 ~~undue influence;~~

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

55 _____
56 ~~**(d)(2)(D)** is otherwise necessary to protect a criminal defendant's~~
57 ~~constitutional rights.~~

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58
59 ~~**(d)(2)(3) Hospitalization for Mental Illness.**~~ For communications relevant to an
60 issue in proceedings to hospitalize the patient for mental illness, if the mental health
61 therapist in the course of diagnosis or treatment has determined that the patient is
62 in need of hospitalization; and

63 ~~**(d)(3)(4) Court Ordered Examination.**~~ For communications made in the course of,
64 and pertinent to the purpose of, a court-ordered examination of the physical,
65 mental, or emotional condition of a patient, whether a party or witness, unless the
66 court in ordering the examination specifies otherwise.

67 ~~**(e) Effect of Claiming any Exception in a Criminal Proceeding.**~~ The following
68 ~~provisions apply only in criminal cases and only if a party is claiming an exception~~
69 ~~under paragraphs (d)(1) or (d)(2).~~

70 _____

71 (e)(1) If the party claiming any exception makes the required showing, the
72 court shall conduct an in-camera review of the communications and shall
73 release to the parties any communication to which the exception applies.

74
75 (e)(2) If the party claiming the exception makes the required showing and
76 the court has not released all communications that were subject to the in-
77 camera review, upon motion of a party based on changed circumstances, the
78 court shall conduct further in-camera review of the communications to re-
79 examine applicability of an exception and to release any additional
80 communication to which the exception applies.

81
82 (e)(3) All communications submitted to the court for in-camera review and
83 which are not otherwise released under an exception shall be sealed and
84 made part of the record.

85
86 (f) Reasonable Orders and Procedures. The court may make reasonable orders
87 regarding the procedure to be followed when a party claims an exception.

88 -
89 2021 Advisory Committee Note. The language of this rule has been amended in
90 light of the Utah Supreme Court's decision in *State v. Bell*, 2020 UT 38, 469 P.3d 929.
91 There, the Supreme Court noted "that Mr. Bell raises important constitutional and
92 policy concerns regarding a criminal defendant's access to records that may contain
93 exculpatory evidence." *Id.* ¶ 1. Therefore, the amendments contained in subsections
94 (d)(2) and (e) are intended to protect the defendant's constitutional rights while
95 maintaining the important privacy and policy considerations underlying the
96 privilege. The amendments do not limit the availability of this rule's other
97 exceptions in criminal proceedings. Communications released to the parties may
98 qualify as private records and be subject to Rules 4-202.02 and 4-202.03 of the Utah
99 Rules of Judicial Administration.

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

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

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

112 (1) Rule 506 specifically applies to psychotherapists and licensed psychologists, it
113 being the opinion of the Committee that full disclosure of information by a patient in
114 those settings is as critical as and as much to be encouraged as in the "physician"
115 patient setting. The Utah Supreme Court requested that Rule 506 further apply to
116 licensed clinical social workers. To meet this request, the Committee included such
117 individuals within the definition of psychotherapists. Under Utah Code § 58-35-2(5),
118 the practice of clinical social work "means the application of an established body of
119 knowledge and professional skills in the practice of psychotherapy. . . ." Section 58-
120 35-6 provides that "[n]o person may engage in the practice of clinical social work
121 unless that person: (1) is licensed under this chapter as a certified social worker,"
122 has the requisite experience, and has passed an examination. Section 58-35-8(4)
123 refers to licenses and certificates for "clinical social worker[s]." As a result of
124 including clinical social workers, Rule 506 is intended to supplant Utah Code § 58-
125 35-10 in total for all social workers.

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

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

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

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

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

155 The patient is entitled not only to refuse to disclose the confidential communication,
156 but also to prevent disclosure by the physician or psychotherapist or others who
157 were properly involved or others who overheard, without the knowledge of the
158 patient, the confidential communication. Problems of waiver are dealt with by Rule
159 507.

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

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

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

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

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

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

181

Tab 4

JUVENILE COMPETENCY AMENDMENTS

2022 GENERAL SESSION

STATE OF UTAH

Chief Sponsor: Brian S. King

Senate Sponsor: Michael K. McKell

LONG TITLE

General Description:

This bill amends provisions related to juvenile competency.

Highlighted Provisions:

This bill:

- ▶ defines terms in relation to juvenile competency;
- ▶ amends provisions regarding the admissibility of statements by a minor made in a competency evaluation or in the course of attainment; and
- ▶ makes technical and conforming changes.

Money Appropriated in this Bill:

None

Other Special Clauses:

None

Utah Code Sections Affected:

AMENDS:

80-6-401, as renumbered and amended by Laws of Utah 2021, Chapter 261

80-6-402, as renumbered and amended by Laws of Utah 2021, Chapter 261

80-6-403, as renumbered and amended by Laws of Utah 2021, Chapter 261

Be it enacted by the Legislature of the state of Utah:

Section 1. Section **80-6-401** is amended to read:

80-6-401. Definitions -- Competency to proceed.

(1) As used in this part:

- 30 (a) "Competency" or "competent to proceed" means that a minor has:
- 31 (i) a present ability to consult with counsel with a reasonable degree of rational
- 32 understanding; and
- 33 (ii) a rational as well as factual understanding of the proceedings.
- 34 (b) "Competency evaluation" means an evaluation conducted by a forensic evaluator to
- 35 determine if a minor is competent to stand for trial or adjudication for pending charges.
- 36 (c) "Forensic evaluator" means the same as that term is defined in Section [77-15-2](#).
- 37 (d) "Not competent to proceed" means an individual is not competent to stand for trial
- 38 or adjudication for pending charges.

39 ~~[(1)]~~ (2) If a petition is filed under Section [80-6-305](#), or a criminal information is filed
40 under Section [80-6-503](#), in the juvenile court, a written motion may be filed alleging
41 reasonable grounds to believe the minor is not competent to proceed.

42 ~~[(2)]~~ (3) The written motion shall contain:

43 (a) a certificate that it is filed in good faith and on reasonable grounds to believe the
44 minor is not competent to proceed due to:

- 45 (i) a mental illness;
- 46 (ii) an intellectual disability or a related condition; or
- 47 (iii) developmental immaturity;
- 48 (b) a recital of the facts, observations, and conversations with the minor that have
49 formed the basis for the motion; and

50 (c) if filed by defense counsel, the motion shall contain information that can be
51 revealed without invading the lawyer-client privilege.

52 ~~[(3)]~~ (4) The motion may be:

- 53 (a) based upon knowledge or information and belief; and
- 54 (b) filed by:
 - 55 (i) the minor alleged not competent to proceed;
 - 56 (ii) any person acting on the minor's behalf;
 - 57 (iii) the prosecuting attorney;

- 58 (iv) the attorney guardian ad litem; or
- 59 (v) any person having custody or supervision over the minor.
- 60 [~~4~~] (5) (a) The juvenile court may raise the issue of a minor's competency at any time.
- 61 (b) If raised by the juvenile court, counsel for each party shall be permitted to address
- 62 the issue of competency.
- 63 (c) The juvenile court shall state the basis for the finding that there are reasonable
- 64 grounds to believe the minor is not competent to proceed.

65 Section 2. Section **80-6-402** is amended to read:

66 **80-6-402. Procedure -- Standard.**

67 (1) When a written motion is filed in accordance with Section **80-6-401** raising the

68 issue of a minor's competency to proceed, or when the juvenile court raises the issue of a

69 minor's competency to proceed, the juvenile court shall stay all proceedings under this chapter.

70 (2) (a) If a motion for inquiry is opposed by either party, the juvenile court shall, before

71 granting or denying the motion, hold a limited hearing solely for the purpose of determining the

72 sufficiency of the motion.

73 (b) If the juvenile court finds that the allegations of incompetency raise a bona fide

74 doubt as to the minor's competency to proceed, the juvenile court shall:

- 75 (i) enter an order for an evaluation of the minor's competency to proceed; and
- 76 (ii) set a date for a hearing on the issue of the minor's competency.

77 (3) After the granting of a motion, and before a full competency hearing, the juvenile

78 court may order the department to evaluate the minor and to report to the juvenile court

79 concerning the minor's mental condition.

80 (4) The minor shall be evaluated by a forensic evaluator who:

81 (a) has experience in juvenile forensic evaluations and juvenile brain development;

82 (b) if it becomes apparent that the minor is not competent due to an intellectual

83 disability or related condition, has experience in intellectual disability or related conditions;

84 and

85 (c) is not involved in the current treatment of the minor.

86 (5) The petitioner or other party, as directed by the juvenile court, shall provide all
87 information and materials relevant to a determination of the minor's competency to the
88 department within seven days of the juvenile court's order, including:

- 89 (a) the motion;
- 90 (b) the arrest or incident reports pertaining to the charged offense;
- 91 (c) the minor's known delinquency history information;
- 92 (d) the minor's probation record relevant to competency;
- 93 (e) known prior mental health evaluations and treatments; and
- 94 (f) consistent with 20 U.S.C. Sec. 1232g (b)(1)(E)(ii)(I), records pertaining to the
95 minor's education.

96 (6) (a) The minor's parent or guardian, the prosecuting attorney, the defense attorney,
97 and the attorney guardian ad litem, shall cooperate, by executing releases of information when
98 necessary, in providing the relevant information and materials to the forensic evaluator,
99 including:

- 100 (i) medical records;
- 101 (ii) prior mental evaluations; or
- 102 (iii) records of diagnosis or treatment of substance abuse disorders.

103 (b) The minor shall cooperate, by executing a release of information when necessary,
104 in providing the relevant information and materials to the forensic evaluator regarding records
105 of diagnosis or treatment of a substance abuse disorder.

106 (7) (a) In conducting the evaluation and in the report determining if a minor is
107 competent to proceed, the forensic evaluator shall inform the juvenile court of the forensic
108 evaluator's opinion whether:

109 (i) the minor has a present ability to consult with counsel with a reasonable degree of
110 rational understanding; and

111 (ii) the minor has a rational as well as factual understanding of the proceedings.

112 (b) In evaluating the minor, the forensic evaluator shall consider the minor's present
113 ability to:

114 (i) understand the charges or allegations against the minor;
115 (ii) communicate facts, events, and states of mind;
116 (iii) understand the range of possible penalties associated with the allegations against
117 the minor;

118 (iv) engage in reasoned choice of legal strategies and options;
119 (v) understand the adversarial nature of the proceedings against the minor;
120 (vi) manifest behavior sufficient to allow the juvenile court to proceed;
121 (vii) testify relevantly; and
122 (viii) any other factor determined to be relevant to the forensic evaluator.

123 (8) (a) The forensic evaluator shall provide an initial report to the juvenile court, the
124 prosecuting and defense attorneys, and the attorney guardian ad litem, if applicable, within 30
125 days of the receipt of the juvenile court's order.

126 (b) If the forensic evaluator informs the juvenile court that additional time is needed,
127 the juvenile court may grant, taking into consideration the custody status of the minor, up to an
128 additional 15 days to provide the report to the juvenile court and counsel.

129 (c) The forensic evaluator must provide the report within 45 days from the receipt of
130 the juvenile court's order unless, for good cause shown, the juvenile court authorizes an
131 additional period of time to complete the evaluation and provide the report.

132 (d) The report shall inform the juvenile court of the forensic evaluator's opinion
133 concerning the minor's competency.

134 (9) If the forensic evaluator's opinion is that the minor is not competent to proceed, the
135 report shall indicate:

136 (a) the nature of the minor's:
137 (i) mental illness;
138 (ii) intellectual disability or related condition; or
139 (iii) developmental immaturity;

140 (b) the relationship of the minor's mental illness, intellectual disability, related
141 condition, or developmental immaturity to the minor's incompetence;

142 (c) whether there is a substantial likelihood that the minor may attain competency in
143 the foreseeable future;

144 (d) the amount of time estimated for the minor to achieve competency if the minor
145 undergoes competency attainment treatment, including medication;

146 (e) the sources of information used by the forensic evaluator; and

147 (f) the basis for clinical findings and opinions.

148 (10) ~~[Any]~~ Regardless of whether a minor consents to a competency evaluation, any
149 statement made by the minor in the course of [any] the competency evaluation, [whether the
150 evaluation is with or without the consent of the minor,] any testimony by the forensic evaluator
151 based upon any statement made by the minor in the competency evaluation, and any other fruits
152 of the statement made by the minor in the competency evaluation:

153 (a) may not be admitted in evidence against the minor in a proceeding under this
154 chapter ~~[except on an issue respecting the mental condition on which the minor has introduced~~
155 ~~evidence]~~, except the statement may be admitted on an issue respecting the mental condition on
156 which the minor has introduced evidence; and

157 (b) may be admitted where relevant to a determination of the minor's competency.

158 (11) Before evaluating the minor for a competency evaluation, a forensic evaluator
159 shall specifically advise the minor, ~~[and, if reasonably available, the parents or guardian,]~~ and
160 the minor's parent or guardian if reasonably available, of the limits of confidentiality as
161 provided under Subsection (10).

162 (12) When the report is received, the juvenile court shall set a date for a competency
163 hearing that shall be held in not less than five and not more than 15 days, unless the juvenile
164 court enlarges the time for good cause.

165 (13) (a) A minor shall be presumed competent unless the juvenile court, by a
166 preponderance of the evidence, finds the minor not competent to proceed.

167 (b) The burden of proof is upon the proponent of incompetency to proceed.

168 (14) (a) Following the hearing, the juvenile court shall determine by a preponderance
169 of evidence whether the minor is:

170 (i) competent to proceed;
171 (ii) not competent to proceed with a substantial probability that the minor may attain
172 competency in the foreseeable future; or

173 (iii) not competent to proceed without a substantial probability that the minor may
174 attain competency in the foreseeable future.

175 (b) If the juvenile court enters a finding described in Subsection (14)(a)(i), the juvenile
176 court shall proceed with the proceedings in the minor's case.

177 (c) If the juvenile court enters a finding described in Subsection (14)(a)(ii), the juvenile
178 court shall proceed in accordance with Section 80-6-403.

179 (d) (i) If the juvenile court enters a finding described in Subsection (14)(a)(iii), the
180 juvenile court shall terminate the competency proceeding, dismiss the charges against the
181 minor without prejudice, and release the minor from any custody order related to the pending
182 proceeding, unless the prosecutor informs the court that commitment proceedings will be
183 initiated in accordance with:

184 (A) Title 62A, Chapter 5, Part 3, Admission to an Intermediate Care Facility for People
185 with an Intellectual Disability;

186 (B) if the minor is 18 years old or older, Title 62A, Chapter 15, Part 6, Utah State
187 Hospital and Other Mental Health Facilities; or

188 (C) if the minor is a child, Title 62A, Chapter 15, Part 7, Commitment of Persons
189 Under Age 18 to Division of Substance Abuse and Mental Health.

190 (ii) The commitment proceedings described in Subsection (14)(d)(i) shall be initiated
191 within seven days after the day on which the juvenile court enters the order under Subsection
192 (14)(a), unless the court enlarges the time for good cause shown.

193 (iii) The juvenile court may order the minor to remain in custody until the commitment
194 proceedings have been concluded.

195 (15) If the juvenile court finds the minor not competent to proceed, the juvenile court's
196 order shall contain findings addressing each of the factors in Subsection (7)(b).

197 Section 3. Section 80-6-403 is amended to read:

198 **80-6-403. Disposition on finding of not competent to proceed -- Subsequent**
199 **hearings -- Notice to prosecuting attorneys.**

200 (1) If the juvenile court determines that the minor is not competent to proceed, and
201 there is a substantial likelihood that the minor may attain competency in the foreseeable future,
202 the juvenile court shall notify the department of the finding and allow the department 30 days
203 to develop an attainment plan for the minor.

204 (2) The attainment plan shall include:

205 (a) any services or treatment the minor has been or is currently receiving that are
206 necessary to attain competency;

207 (b) any additional services or treatment the minor may require to attain competency;

208 (c) an assessment of the parent, custodian, or guardian's ability to access or provide any
209 recommended treatment or services;

210 (d) any special conditions or supervision that may be necessary for the safety of the
211 minor or others during the attainment period; and

212 (e) the likelihood that the minor will attain competency and the amount of time likely
213 required for the minor to attain competency.

214 (3) The department shall provide the attainment plan to the juvenile court, the
215 prosecuting attorney, the defense attorney, and the attorney guardian ad litem at least three days
216 before the competency disposition hearing.

217 (4) (a) During the attainment period, the minor shall remain in the least restrictive
218 appropriate setting.

219 (b) A finding of not competent to proceed does not grant authority for a juvenile court
220 to place a minor in the custody of a division of the department, or create eligibility for services
221 from the Division of Services for People With Disabilities.

222 (c) If the juvenile court orders the minor to be held in detention during the attainment
223 period, the juvenile court shall make the following findings on the record:

224 (i) the placement is the least restrictive appropriate setting;

225 (ii) the placement is in the best interest of the minor;

226 (iii) the minor will have access to the services and treatment required by the attainment
227 plan in the placement; and

228 (iv) the placement is necessary for the safety of the minor or others.

229 (d) A juvenile court shall terminate an order of detention related to the pending
230 proceeding for a minor who is not competent to proceed in that matter if:

231 (i) the most severe allegation against the minor if committed by an adult is a class B
232 misdemeanor;

233 (ii) more than 60 days have passed after the day on which the juvenile court
234 adjudicated the minor not competent to proceed; and

235 (iii) the minor has not attained competency.

236 (5) (a) At any time that the minor becomes competent to proceed during the attainment
237 period, the department shall notify the juvenile court, the prosecuting attorney, the defense
238 attorney, and the attorney guardian ad litem.

239 (b) The juvenile court shall hold a hearing with 15 business days of notice from the
240 department described in Subsection (5)(a).

241 (6) (a) If at any time during the attainment period the juvenile court finds that there is
242 not a substantial probability that the minor will attain competency in the foreseeable future, the
243 juvenile court shall terminate the competency proceeding, dismiss the petition or information
244 without prejudice, and release the minor from any custody order related to the pending
245 proceeding, unless the prosecuting attorney or any other individual informs the juvenile court
246 that commitment proceedings will be initiated in accordance with:

247 (i) Title 62A, Chapter 5, Part 3, Admission to an Intermediate Care Facility for People
248 with an Intellectual Disability;

249 (ii) if the minor is 18 years old or older, Title 62A, Chapter 15, Part 6, Utah State
250 Hospital and Other Mental Health Facilities; or

251 (iii) if the minor is a child, Title 62A, Chapter 15, Part 7, Commitment of Persons
252 Under Age 18 to Division of Substance Abuse and Mental Health.

253 (b) The prosecuting attorney shall initiate the proceedings described in Subsection

254 (6)(a) within seven days after the juvenile court's order, unless the juvenile court enlarges the
255 time for good cause shown.

256 (7) During the attainment period, the juvenile court may order a hearing or rehearing at
257 anytime on the juvenile court's own motion or upon recommendation of any interested party or
258 the department.

259 (8) (a) Within three months of the juvenile court's approval of the attainment plan, the
260 department shall provide a report on the minor's progress towards competence.

261 (b) The report described in Subsection (8)(a) shall address the minor's:

262 (i) compliance with the attainment plan;

263 (ii) progress towards competency based on the issues identified in the original
264 competency evaluation; and

265 (iii) current mental illness, intellectual disability or related condition, or developmental
266 immaturity, and need for treatment, if any, and whether there is substantial likelihood of the
267 minor attaining competency within six months.

268 (9) (a) Within 30 days of receipt of the report, the juvenile court shall hold a hearing to
269 determine the minor's current status.

270 (b) At the hearing, the burden of proving the minor is competent is on the proponent of
271 competency.

272 (c) The juvenile court shall determine by a preponderance of the evidence whether the
273 minor is competent to proceed.

274 (10) If the minor has not attained competency after the initial three month attainment
275 period but is showing reasonable progress towards attainment of competency, the juvenile
276 court may extend the attainment period up to an additional three months.

277 (11) The department shall provide an updated juvenile competency evaluation at the
278 conclusion of the six month attainment period to advise the juvenile court on the minor's
279 current competency status.

280 (12) If the minor does not attain competency within six months after the juvenile court
281 initially finds the minor not competent to proceed, the court shall terminate the competency

282 proceedings and dismiss the petition or information filed without prejudice, unless good cause
283 is shown that there is a substantial likelihood the minor will attain competency within one year
284 from the initial finding of not competent to proceed.

285 (13) In the event a minor has an unauthorized leave lasting more than 24 hours, the
286 attainment period shall toll until the minor returns.

287 (14) (a) Regardless of whether a minor consents to attainment, any statement made by
288 the minor in the course of attainment, any testimony by the forensic evaluator based upon any
289 statement made by the minor in the course of attainment, and any other fruits of a statement
290 made by the minor in the course of attainment:

291 (i) may not be admitted in evidence against the minor in a proceeding under this
292 chapter, except the statement may be admitted on an issue respecting the mental condition on
293 which the minor has introduced evidence; and

294 (ii) may be admitted where relevant to a determination of the minor's competency.

295 (b) Before evaluating the minor during the attainment period, a forensic evaluator shall
296 specifically advise the minor, and the minor's parent or guardian if reasonably available, of the
297 limits of confidentiality provided in Subsection (14)(a).