



## Utah Supreme Court Rules of Evidence Committee

### Meeting Agenda

*Chris Hogle, Chair*

Location: WebEx Meeting:  
<https://utcourts.webex.com/meet/brysonk>

Date: November 8, 2022

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

<b>Action:</b> Welcome and approve October 11 <sup>th</sup> , 2022 Minutes	Tab 1	Chris Hogle
<b>Discussion:</b> Report on URE Rule 506 and URAP Rule 11 and review to approve	Tab 2	Sarah Carlquist
<b>Discussion:</b> Update on Juvenile Rules Applicability to URE		Judge Leavitt
<b>Discussion:</b> Acknowledgment and send off to John Nielsen for service on Committee		Chris Hogle

<https://www.utcourts.gov/utc/rules-evidence/>

#### **Meeting Schedule:**

December 13, 2022

January 10, 2023

February 21, 2023

April 11, 2023

June 13, 2023

October 10, 2023

November 14, 2023

**Rule Status:**

URE 106 - Under consideration by Supreme Court

URE 404 - Awaiting advice from Supreme Court

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**

**October 11th, 2022**

**5:00 p.m.-7:00 p.m.**

**Via Webex**

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

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

Chris Hogle welcomed everyone to the meeting. After a few minor changes to the minutes from April, Mr. Hogle moved to approve the minutes. Adam Crayk second the motion. The motion was approved.

**2. Report on Rule 506 and review to approve**

Sarah Carlquist reported on Rule 506 noting that part d(2) was cleaned up during the last meeting and was approved. Ms. Carlquist highlighted a change and indicated that the amendment was intended to address the concerns the Supreme Court raised in *State v. Bell*. This language was included in an advisory note rather than the body of the rule.

The group then provided input on the new language in Rule 506(e)(3). There was a discussion

regarding the right to intervene as a limited-purpose party when sealed records are at issue. The group balanced the need for explicit language supporting the right to be heard versus whether the rule was sufficiently clear as is. The discussion centered around whether anything beyond the first sentence of the rule was needed.

Judge Michael Leavitt moved to approve the committee note and hold off until someone can talk to the Appellate Rules Committee about the additional language in the rest of Rule 506(e)(3), before simply deleting the rest of the language in the rule.

Judge Richard McKelvie seconded the motion.

Mr. Hogle agreed. Judge David Williams agreed the language should stay, at least until someone reaches out to the Appellate Committee.

Mr. Hogle formally moved to table it until the next meeting pending a report from Ms. Carlquist on what the Appellate Committee thinks about it.

Ms. Carlquist Seconded.

No one opposed.

The motion carried.

### **3. Update on Juvenile Court Proceedings**

Judge Leavitt said he spoke with a presiding judge in the Fourth District about an amendment to Rule 412. Judge Leavitt has put together a five-judge team work to help gain input on relevant issues. Much of what Judge Leavitt has been focusing on centers around whether the Rules of Criminal Procedure should apply to juvenile court proceedings, as there is currently no guidance.

Judge Leavitt had no further updates but will present on the Juvenile Committee's findings at the next meeting.

### **4. 2023 Committee Meeting Schedule**

The meeting schedule for next year was laid out in the agenda. The schedule follows the same format as previous years, with meetings occurring on the second Tuesday of the Month. Mr. Hogle noted that the meeting on February 14th would fall on Valentine's Day. Mr. Hogle then asked the group for input on the schedule.

Dallas Young suggested changing the February 14th day. Nicole Salazar-Hall agreed. The group

agreed to move the February meeting to February 21st.

**5. Law Student Rule Comment Review and Additional Matters Coming up in near Future**

Mr. Hogle noted that the Supreme Court adopted Rules 412 and 504 and congratulated the group for their efforts. Additionally, there are still some other rules under consideration.

Bryson King indicated that the Green Phase Working Group has a working draft of a report which will provide recommendations on how the Courts should be operating. The report from the Green Phase Working Group and the AOC may also have suggestions for this group and potential Rules of Evidence to evaluate.

Ms. Salazar-Hall also mentioned the legislative session coming up.

**Adjourn:**

**Tony Graf motioned to adjourn. Judge Leavitt seconded. Judge Williams Third.**

With no further items for discussion, the meeting was adjourned. The next meeting will be on November 8th, at 5:00 pm, via Webex video conferencing.

## Tab 2



Bryson King &lt;brysonk@utcourts.gov&gt;

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## URE 506 and URAP 11 Update

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Sarah Carlquist &lt;SCarlquist@sllda.com&gt;

Thu, Nov 3, 2022 at 2:15 PM

To: Chris Hogle &lt;CRHogle@hollandhart.com&gt;, Nicole Salazar-Hall &lt;NSalazar-Hall@parsonsbehle.com&gt;

Cc: Bryson King &lt;brysonk@utcourts.gov&gt;

Hi All,

I just wanted to report back that the Appellate Rules Committee met today and have formed a subcommittee to amend rule 11 of the Utah Rules of Appellate Procedure. As you may recall, rule 11 deals with the record on appeal. The Appellate Rules Committee agrees that the issue of how to deal with sealed and/or privileged records on appeal should be handled by them. So I think we are free to ditch the proposed language I had added to rule 506 stating, "If an appeal is taken, the sealed records will be transmitted to the appellate court as part of the record on appeal. However, the sealed records will be made available to the parties on appeal only upon a motion showing that the sealed records are necessary to the appeal."

Attached is the most recent version and starting point for the proposed amendment to rule 11. I understand that the Appellate Rules folks think that the privileged records should be made available to the *attorneys* not the parties---so there would be no giving privileged or sealed records to the defendant, just his or her attorney. So expect that language change. But based on the discussions we've had, I think we'd all agree that giving access to the attorney and not the defendant is appropriate. And the appellate rules folks are also exploring putting the proposed language in its own subparagraph. I would prefer that but I don't think it's my place to tell them how they should structure their rule. Mostly, I am just content that they agree it's something that needs to be addressed and they're in the best position to address it.

I think the only remaining issue now is one of timing. Do we need to wait and roll our amendments out with the appellate rules committee when they roll out amendments to rule 11? I don't really have an opinion one way or the other. I can see that waiting will avoid any gaps in how a record containing privileged materials should be handled on appeal. Part of me doubts that there would be much movement or litigation on this even if we were ahead of the appellate rules folks. But another part of me thinks that our other substantive amendments could, possibly, spur more motions for privileged records and having a gap in what to do with the record would be a real mess.

I will be prepared to update the whole committee at our meeting next week. I just wanted to give you a preview and provide Bryson with something for our meeting materials and agenda. Please let me know if you need anything else or have questions.

Best,

Sarah

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**Sarah Carlquist**

Appellate Attorney



**Rule 11. The record on appeal.**

(a) **Composition of the record on appeal.** The record on appeal consists of the documents and exhibits filed in or considered by the trial court, including the presentence report in criminal matters, and the transcript of proceedings, if any. Privileged papers in a criminal case that are sealed by court order will be made available to the parties on appeal only upon a motion showing that the sealed records are necessary to the appeal. (b) **Preparing, paginating, and indexing the record.**

(1) Preparing the record. On the appellate court's request, the trial court clerk will prepare the record in the following order:

- (A) all original documents in chronological order;
- (B) all published depositions in chronological order;
- (C) all transcripts prepared for appeal in chronological order;
- (D) a list of all exhibits offered in the proceeding; and
- (E) in criminal cases, the presentence investigation report.

(2) Pagination.

- (A) Using Bates numbering, the entire record must be paginated.
- (B) If the appellate court requests a supplemental record, the same procedures as in (b)(2)(A) apply, continuing Bates numbering from the last page number of the original record.

(3) Index. A chronological index of the record must accompany the record on appeal. The index must identify the date of filing and starting page of the document, deposition, or transcript.

(4) Examining the record. Appellate court clerks will establish rules and procedures for parties to check out the record after pagination.

(c) **The transcript of proceedings; duty of appellant to order; notice to appellee if partial transcript is ordered.**

(1) Request for transcript; time for filing. Within 14 days after filing the notice of appeal, or within 30 days of the notice of appeal where an indigent appellant has a statutory or constitutional right to counsel, the appellant must order the transcript(s) online at [www.utcourts.gov](http://www.utcourts.gov), specifying the entire proceeding or parts of the proceeding to be transcribed that are not already on file. The appellant must serve on the appellee a designation of those parts of the proceeding to be transcribed. If no such parts of the proceedings are to be requested, within the same period the appellant must file a certificate to that effect with the appellate court clerk and serve a copy on the appellee.

(2) Transcript required of all evidence regarding challenged finding or conclusion. If the appellant intends to argue on appeal that a finding or conclusion is unsupported by or is contrary to the evidence, the appellant must include in the record a transcript of all evidence relevant to such finding or conclusion. Neither the court nor the appellee is obligated to correct appellant's deficiencies in providing the relevant portions of the transcript.

(3) Statement of issues; cross-designation by appellee. If the appellant does not order the entire transcript, the appellee may, within 14 days after the appellant serves the designation or certificate described in paragraph (e)(1), order the transcript(s) in accordance with (e)(1), and serve on the appellant a designation of additional parts to be included.

(d) **Agreed statement as the record on appeal.** In lieu of the record on appeal as defined in paragraph (a) of this rule, the parties may prepare and sign a statement of the case, showing how the issues presented by the appeal arose and were decided in the trial court and setting forth only so many of the facts averred and proved or sought to be proved as are essential to a decision of the issues presented. If the court deems the statement accurate, it, together with such additions as the trial court may consider necessary fully

to present the issues raised by the appeal, will be approved by the trial court. The trial court clerk will transmit the statement to the appellate court clerk within the time prescribed by Rule 12(b)(2). The trial court clerk will transmit the record to the appellate court clerk on the trial court's approval of the statement.

**(e) Statement of evidence or proceedings when no report was made or when transcript is unavailable.** If no report of the evidence or proceedings at a hearing or trial was made, or if a transcript is unavailable, or if the appellant is impecunious and unable to afford a transcript in a civil case, the appellant may prepare a statement of the evidence or proceedings from the best available means, including recollection. The statement must be served on the appellee, who may serve objections or propose amendments within 14 days after service. The statement and any objections or proposed amendments must be submitted to the trial court for resolution, and the trial court clerk will conform the record to the trial court's resolution.

**(f) Supplementing or modifying the record.**

(1) If any dispute arises as to whether the record is complete and accurate, the dispute may be submitted to and resolved by the trial court. The trial court will ensure that the record accurately reflects the proceedings before the trial court, including by entering any necessary findings to resolve the dispute.

(2) If anything material to either party is omitted from or misstated in the record by error of the trial court or court personnel, by accident, or because the appellant did not order a transcript of proceedings that the appellee needs to respond to issues raised in the appellant's brief, the omission or misstatement may be corrected and a supplemental record may be created and forwarded:

(A) on stipulation of the parties;

(B) by the trial court before or after the record has been forwarded; or

(C) by the appellate court on a motion from a party.

79 (3) The moving party, or the court if it is acting on its own initiative, must serve on  
80 the parties a statement of the proposed changes. Within 14 days after service, any  
81 party may serve objections to the proposed changes.

82 *Effective November 1, 2022*



275 E. 200 S.

Salt Lake City, UT 84111

Ph.(801)532-5444

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